73454-7

73454-7

No. 73454-7-I

(King County Superior Court No. 15-2-04698-5)

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

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

Petitioners/Appellants,

v.

DEPARTMENT OF HEALTH OF THE STATE OF WASHINGTON,

Respondent.

UNIVERSITY OF WASHINGTON MEDICAL CENTER,

Intervenor.

E

APPELLANTS' REPLY BRIEF

Peter S. Ehrlichman, WSBA 6591
Shawn Larsen-Bright, WSBA 37066
Dorsey & Whitney LLP
701 Fifth Ave., Suite 6100
Seattle, WA 98104-7043

Stephen Pentz, WSBA 14089
3213 West Wheeler St., #45
Seattle, WA 98199

Attorneys for Petitioners/Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulations

Other Authorities

I. INTRODUCTION

The basic premises of this appeal are undisputed. The Department and UWMC concede that UWMC's Application fails the legal standards always applied by the Department to determine whether to grant a CON for adult acute care hospital beds. In other words, application of the criteria the Department has used in every other case requires that the Application be *denied* – just as the Department's own CON analyst and financial expert both rightly concluded. The Department and UWMC also concede that UWMC was given a CON because the Department decided to accord "special treatment" to UWMC, allowing its fellow state agency to proceed with its desired, but unneeded project. Stated bluntly, the Department ignored the governing standards and instead exempted UWMC, by administrative decree, from the rules that apply to all other participants in the system. The Department's decision was error.

The Department and UWMC unsuccessfully try to portray the Department's actions as consistent with applicable law, arguing that the "alternative" analysis used here ("Criterion Two") is simply one of two approaches the Department has for determining need (the numeric bed need Methodology being the other). This argument lacks merit. Before this case, there was *only one* approach for assessing need: the Methodology. There has *never* been a single instance, in the 35 years of the CON Program, in which the Department has analyzed need – let alone issued a CON – using Criterion Two. The Department has *always* used the Methodology. This consistent practice is grounded in Washington

law, which – by its plain language and as interpreted by the Department for decades – requires focus on whether the *community* (the population to be served) has need for a proposed project, regardless of the desires or interests of any one institution. Community need is precisely what the Methodology calculates, and here it indisputably shows no need for UWMC's project. The Department's decision nonetheless to issue the CON because of UWMC's claimed *institutional* "needs," principally its inflated claims of overcrowding at its facility, is contrary to law.

The arguments made by the Department and UWMC that this first-time analysis is somehow justified – because UWMC is "special" – are unavailing. The fact that UWMC is *one of several* premier medical institutions in the state does not provide a legal basis for exempting it from the rules that apply to everyone else. The arguments offered to justify the Department's erroneous application of the other review criteria (financial feasibility, cost containment, and structure and process of care) fare no better. Again, the rules that have always been applied before demonstrate beyond doubt that the Application should have been denied.

The Department's unprecedented decision to "make an exception" for UWMC is contrary to law, inconsistent with its own interpretation of the CON review criteria, contrary to its own longstanding policies and practices, arbitrary and capricious, and lacking in substantial evidence. It is also unfair and inequitable, and deleterious to the CON process itself, as it undermines the predictability, consistency, and transparency that have been central to the system for decades. The decision should be reversed.

II. ARGUMENT

A. Criterion Two Is Not A Basis For Finding Need

The Department has confirmed that there is no need for UWMC's project under the Methodology. Department Brief, 12. Thus, the standards that have always been applied require denial of the Application. It was error for the Department to issue the CON based upon Criterion Two, on which it has "never before relied." *Id.*, 15-16.

1. Criterion Two Is Inconsistent With Applicable Law.

By law, the need criterion assesses "[t]he need that the population served or to be served" has for the proposed services (here, new acute care beds in the North King Planning Area). RCW 70.38.115(2)(a); *see also* WAC 246-310-210(1). Historically, the Department has always used the Methodology because it specifically calculates this need in an objective way that is "predictable, transparent, and consistent."[1] The Methodology keeps the focus on community interests and avoids improper consideration of the interests of particular institutions, consistent with the Department's uniform interpretation of the governing law. As the Department previously held, the analysis of need "is not a determination whether the [applicant] meets the requirements but whether the proposed additional beds are needed in the [applicable] service area."[2]

The use of Criterion Two was contrary to CON law, as consistently

---

[1] *In re CON Decision by Dep't of Health re: Valley Med. Ctr. et al.'s Application for Acute Care Beds in Sw. King Cty. ("In re Valley")* (AR2362-439), Final Order (2012), Finding of Fact 1.14, footnote 8 (AR2375).

[2] *In re CON Decision on Providence Sacred Heart Med. Ctr. & Children's Hosp. Proposal to Add 152 Acute Care Beds to Spokane Cty. ("In re Sacred Heart")*, Final Order (2011) (AR2441-99), Finding of Fact No. 132 (AR2465-66).

interpreted, because it is *not* based on community needs. The Department describes Criterion Two as an "institution-based" need analysis. Department Brief, 13. But the law does not allow "institution-based" need; it allows the grant of a CON *only* where there is *community* need. The Department's claim that the "threshold question under Criterion 2 is whether the applicant hospital needs more beds," despite the availability of beds in the planning area, is *directly contradictory* to all of its prior holdings. Department Brief, 18. They held that the need analysis does *not* consider "whether the individual facility needs more beds" and instead only "looks to the need for additional acute care beds in the service area."[3]

The Department argues that it is now interpreting the law to allow consideration of Criterion Two and that its view should receive deference. But no "deference" is due. This Court's review of issues of law is de novo, including interpretation of agency regulations.[4] Although deference may be accorded to an agency interpretation within the agency's special knowledge or expertise, that is not the case here. The statute's plain language speaks to population needs, not institutional needs, and there is no special "expertise" being applied in interpreting this plain language. Moreover, the Department's purported new "interpretation" should not receive substantial deference because it is inexplicably contrary to its own

---

[3] *Id.*

[4] *Kadlec Reg'l Med. Ctr. v. Dep't of Health*, 177 Wn. App. 171, 178, 310 P.3d 876 (2013).

prior interpretation, under which institutional factors were not considered.[5] The Department claims that Criterion Two "has always been available to any hospital attempting to demonstrate need," and that applicants always could have used Criterion Two. Department Brief, 16. But these claims are not only contrary to its own prior reasoning, but also plainly belied by the fact that it cannot come up with a single prior instance where Criterion Two has ever been used – by any provider or by the Department itself.[6]

2. Criterion Two Is Not A Standard That Can Be Relied Upon By The Department.

WAC 246-310-200(2) permits the Department to consider certain existing standards, such as "[s]tandards developed by professional organizations in Washington state." The Department argues that its unprecedented use of Criterion Two should be affirmed because Criterion Two is a "standard" it is allowed to consider. This argument is baseless.

To begin with, whether or not Criterion Two could be considered a "standard," its application here was contrary to law and improper, as set forth above. In any event, Criterion Two cannot plausibly be considered a "standard" the Department may use to determine need. It is nothing more

---

[5] *Cf. Alphonsus v. Holder*, 705 F.3d 1031, 1044-47 (9th Cir. 2013) (stating that unexplained agency inconsistency is considered arbitrary and capricious action).

[6] The four non-Washington cases cited by the Department and UWMC to suggest that the application of Criterion Two was not legal error are unpersuasive. *See* Department Brief, 13-14 (citing cases); UWMC Brief 13-14 (same). None of the cases has ever been cited in Washington before, and all concern fact specific state regulatory structures different from Washington's. Moreover, the basic holding in these cases is merely that the state agencies there could not ignore requirements of those states' statutes or health plans in assessing need. They are inapposite to the issue here of whether the Department can take action inconsistent with its uniform prior decisions, legal interpretation, and application of the governing statute over its 35-year history.

than never-before-used language contained in a document, the State Health Plan, that has been defunct and without legal effect for 25 years. Criterion Two was never used when the Plan was in existence and has not been used since. Allowing the Department to make decisions based on decades-old stray language it attempts to resurrect – rather than current, existing standards from knowledgeable bodies, as intended – is not a rational interpretation of the regulation and would lead to absurd results.

The Department and UWMC contend that Petitioners are being inconsistent in arguing that Criterion Two cannot be considered, because the Methodology also appears in the Plan. There is no inconsistency. The numeric Methodology *predated* the Plan. AR2297. There is a dramatic difference between the Department's consistent use of the Methodology for decades – *before, during, and after the Plan was in effect* – and its unprecedented reliance here on a so-called "criterion" that has *never* been used. The Department asserts that Petitioners do "not contest that the Plan remains a reliable planning tool," but that is untrue. Department Brief, 15. The Plan is defunct and irrelevant, as Petitioners have noted repeatedly. It is the *Methodology* that remains a reliable planning tool, not the Plan. *Cf.* AR4724 (Department explaining that although the Plan has been sunset, the "*methodology* remains a reliable tool") (emphasis added).[7] The fact that Criterion Two is found in the

[7] *See also In re Valley*, Finding of Fact 1.13 (AR2375) ("Even though the State Health Plan was terminated, both the Program and applicants rely on the *bed need methodology* . . . .") (emphasis added).

Plan, which exists as a historical curiosity, does not justify its use. It has no legal existence and provides no basis for Department decisions.

Furthermore, the use of Criterion Two violated WAC 246-310-200(2)(c), which provides that the Department "shall identify the criteria and standards it will use" and that it must do so "during the screening of a certificate of need application" (or earlier if requested). UWMC notes that it did not make such a request, but that is irrelevant. The Department is required to identify the standards that will apply to an application *before* the evaluation begins. This ensures that the ground rules are clear to applicants, interested persons, and the public, and prevents the standards from being changed to fit a particular outcome. Here, the Department concedes it did not identify Criterion Two as a standard it would apply during the screening process for this Application – nor has it ever done so for any other application. Indeed, the Program did not even analyze Criterion Two in its evaluation of the Application. Rather, it was used by the Department, for the first time ever, only in the adjudicative phase of this case. This process was contrary to the language of, and the principles embodied in, the regulations.

3. As Applied, Criterion Two Does Not Provide A Transparent And Fair Review Process.

In addition to being fully consistent with the governing law, another principal benefit of consistently using the Methodology has been the predictability and transparency it has brought to the CON review process, promoting fairness to parties as well as trust and respect in the

system.[8] As the Department previously explained:

> Any bed need methodology used should provide a predictable, transparent, and consistent process for applicants. An applicant should know what is required to apply for a CN (transparency of process), how the program will apply the process (predictability of the process), and whether the program follows the process (consistency with the past process).[9]

The Department's use of Criterion Two here is contrary to these important values. As detailed in Petitioners' Opening Brief, this CON was issued upon the unilateral direction of a senior employee, who had not reviewed any of the relevant materials, after the agency's experts had concluded rightly that the Application had to be *denied.* Then, the Presiding Officer found a way to affirm this erroneous decision through the unprecedented use of Criterion Two, which had not been considered by the Program, had never before been used, and was inconsistent with the Department's prior policies, practices, and decisions. There was nothing predictable, transparent, or consistent about this process.

Moreover, the Department's analysis shows that Criterion Two is not being used as an objective "alternative" need methodology, but is instead merely a guise for the Department to grant itself complete discretion to award a CON whenever it pleases. Indeed, the Department's purported Criterion Two analysis *does not review any* of the conditions listed in Criterion Two. Department Brief, 17-25. A "criterion" that can

---

[8] *Id.*, Finding of Fact 1.14 (AR2375) ("Both the Program and applicants have consistently followed the State Health Plan bed need methodology. The predictability afforded by the consistent use of the State Health Plan methodology argues for its continued use in measuring acute care bed need.").

[9] *Id.*, footnote 8 (AR2375).

be satisfied based upon the Department's subjective whims cannot be a proper test for approving CON applications. The Department's authority to administer the CON program is not and cannot be unbounded. The law does not allow the Department to make exceptions and change the rules as it goes along. Its use of Criterion Two to approve a CON application that all prior legal interpretations required to be denied was reversible error.

4. There Is No Basis For Applying Criterion Two Here.

The Department and UWMC argue that the Department's "special treatment" of UWMC was justified because UWMC is a premier facility that provides certain services not available in other planning area hospitals. But such reasoning *directly contradicts* the Department's legal interpretation in prior cases, where the Department has held that a hospital uniquely providing complex services is *not* proof of need.[10] Moreover, there is no legal basis for making an "exception" for any facility, premier or not. No authority, statutory or regulatory, authorizes the "special treatment" accorded to UWMC here.[11]

Furthermore, the claims about UWMC's uniqueness, which are used to justify its "special treatment," are overstated. While UWMC touts its provision of certain highly complex services, UWMC's case mix is, in fact, not "unique," and the *vast* majority of UWMC's patient days are for

---

[10] *Compare* Department Brief, 23 ("[I]t would make no sense to deny UWMC additional needed beds simply because there are unused beds at [other area hospitals].") *with In re Sacred Heart*, Finding of Fact 1.32 ("Sacred Heart provides care in [clinical] areas that other hospitals do not . . . . [T]his reason alone does not reduce the existing surplus of hospital beds in the service area for all other types of health care.") (AR2465-66).

[11] *Cf. Swedish Health Svcs. v. Dep't of Health*, 189 Wn. App. 911, 358 P.3d 1243, 1249 (2015) (Department may not use special circumstances to avoid legal requirements).

less complex services. AR4005-16, 4287-88, 4300, 4490-93. Indeed, aside from a few specialized services (like certain organ transplants), which involve only a relatively tiny number of patients, essentially all of the services provided at UWMC are duplicated elsewhere nearby. *Id.*; *see also* AR6345-47, 6352-55; RP1079-86. The Department appears to have believed that, if this CON is not issued, critically ill patients might be unable to access care they can only get from UWMC. Finding 1.8e. That belief is inaccurate and has no basis in the record. *See* RP219-20.

B. The Record Does Not Support A Finding Of Community Need For The Project Even Under Criterion Two

1. The Department's Analysis Does Not Show Need.

In its Brief, the Department did not analyze *any* of the Criterion Two conditions. *See* Department Brief, 17-25. Instead, it merely cited Criterion Two and then offered a general discussion of factors it contends support the granting of a CON. *Id.* But those factors do not prove *need.*

The Department contends that UWMC offers a broader range of services and serves a wider geographic area than other hospitals in the planning area; is affiliated with a medical school; and provides substantial services to underserved populations. But these institutional factors are essentially meaningless in the context of the *need* assessment because they have nothing to do with whether the community has need for the proposed project (79 more beds in an area already being fully served). The factors cited by the Department would be satisfied whether UWMC wanted 79 beds or 790, an absurd result that shows the cited factors have nothing to do with "need." Moreover, these institutional facts, such as that UWMC

is affiliated with a medical school, will essentially always be satisfied by UWMC. This only serves to highlight what is really happening here: the Department is effectively exempting UWMC, by administrative fiat, from the CON rules that apply to every other provider.[12]

The only factor discussed by the Department that even arguably concerns "need" is the claim that UWMC is near its maximum effective capacity.[13] Essentially the entire Department "need" analysis thus comes down to whether it believes UWMC could use more beds. Yet, again, whether a particular institution could use more beds is *not* a legal basis for granting a CON and offers no proof of whether there is *community need* for more beds – particularly where, as here, there is already a large surplus of beds in the planning area.[14] The Department essentially decided to give UWMC more beds because it wants more beds. But that is not the law.

---

[12] Under the CON statute, the fact that UWMC is affiliated with a medical school does not exempt it from the CON requirements, including need. The Department and UWMC note that the Department may consider the impact of a CON application on the training of doctors and, in some circumstances, the special needs of medical schools, but there is no evidence that this Application will have any impact on training or on any special need of the medical school. UWMC Brief, 12. UWMC, which already has 450 licensed beds, has never contended – nor could it – that denial of the 79-bed CON will somehow harm the medical school or its ability to provide training opportunities or services.

[13] Petitioners dispute UWMC's claims of overcrowding, which are speculative, inflated, and unsupported. Opening Brief, 32. Petitioners also note that UWMC continues to make the *false* assertion that its patient days "have grown by at least 3.7% every year since 2009 and will continue to grow in the future." UWMC Brief, 18. The improperly excluded 2012 CHARS data proves that UWMC's growth in 2012 and historically was vastly smaller than it asserted. *See* AR2710, 2739. The use of such false assertions has been a recurring problem. Instead of accurately describing the evidence in the record, the Department and UWMC have repeatedly made misleading assertions about what purportedly happened in 2012 and 2013 based on *projections*, not facts, even when they know the projections were wrong. *See* AR3395-3406 (Petitioners' Motion to Strike Improper and Inaccurate Assertions Regarding Post-2011 Events).

[14] *See In re Sacred Heart*, Finding of Fact 1.32 (AR2465-66).

The Department's institution-based analysis is legal error.

2. UWMC's Analysis Does Not Show Need.

Unlike the Department, UWMC does attempt to argue that two Criterion Two conditions were satisfied.[15] First, it argues that the project would significantly improve the accessibility or acceptability of services for underserved groups. But there is *no evidence* that the project would have this effect. The project is a general bed expansion and does not relate to underserved populations. UWMC notes that it provides some charity care and a high level of services to Medicaid patients, and then argues that such care "would be compromised without adequate bed capacity." UWMC Brief, 24. But this contention has nothing to do with the project under consideration. It certainly does not show that *the project* would *improve* accessibility, let alone do so *significantly.* Interpreted in the way UWMC and the Department have interpreted it, this condition is meaningless. Every major hospital provides services to underserved groups that would be "compromised without adequate bed capacity." It would lead to an absurd reading of the statute to reach a finding of "need" based on a factor always satisfied by all major hospitals.

Next, UWMC argues that, when compared to neighboring and comparable institutions, it has staff with greater training or skill, a wider range of important services, and evidence of better results. In support,

---

[15] UWMC does not attempt to defend the Presiding Officer's additional "finding" that neighboring and comparable institutions had "higher costs, less efficient operations, or lower productivity." The Program admitted at the hearing that UWMC had not provided any evidence on this issue (RP894-95) and UWMC makes no argument otherwise. Because the error of this finding is conceded, it will not be addressed further.

UWMC offers a laundry list of general accolades and assertions about the quality of its services, which it contends distinguish it from the other hospitals in the planning area. UWMC's argument should be rejected.

As an initial matter, it is inconsistent for UWMC to argue that the Methodology cannot be applied because the population to be served is broader than the planning area, but that there is "need" because it can distinguish itself from the two hospitals in the planning area.[16] UWMC attempts this maneuver because there are many other hospitals, including several located quite near to UWMC, that provide the kind of high complexity and quality services touted by UWMC. AR4005-16.

Moreover, UWMC's general accolades and its description of its services do not prove that UWMC has staff with "greater training or skill," a "wider range of important services," or "evidence of better results" than neighboring and comparable institutions. Notably, neither the Presiding Officer nor the Review Officer made any such findings. UWMC offered no meaningful comparative data about other facilities at the hearing and instead just presented cherry-picked (and often inaccurate) statements about itself. UWMC primarily argues that it satisfies the "wider range of important services" condition because the other planning area hospitals, UW/Northwest and Swedish/Ballard, are allegedly "community" hospitals that do not provide all of the same services as UWMC. It is true that there

[16] *Compare* UWMC Brief, 11 footnote 6 (asserting that a need analysis "focusing solely on the North King planning area is an inappropriately narrow way to analyze UWMC's project") *with* UWMC Brief, 12-13, 33 (arguing that need is shown because the other two hospitals in the planning area do not offer the same services offered at UWMC).

are a few highly specialized services, affecting a small number of patients, that are provided at UWMC but not at UW/Northwest or Swedish/Ballard, but that does not remotely show *community need for 79 more beds*. The truth is that virtually all of the services at UWMC are duplicated elsewhere. AR4287, 6321-30, 6345-46, 6354; RP1079-86. The vast majority of UWMC's services are provided in other planning area hospitals and other complex services are provided in other local facilities. *Id.* UWMC cannot prove that it provides a "wider range of important services" necessitating approval of its project when there is nearly complete overlap between the services it offers and those offered at other nearby institutions. *Id.* This is not a situation where, for instance, there is only one major hospital in a rural or outlying area and so patients with complex care needs could be left without care options in the absence of a bed expansion. Patients in Seattle have many excellent options for care and will continue to have many excellent options when the Application is properly denied. UWMC has not proven need even under Criterion Two.

C. The Record Does Not Support The Conclusion That UWMC Met The Financial Feasibility And Cost Containment Criteria

1. The Application Fails The Required Criteria Because There Is No Need.

As discussed in Petitioners' Opening Brief, the project fails the cost containment and financial feasibility criteria for the simple reason that there is no numeric need for more beds. There has never been an acute care bed CON application that has been found to satisfy these criteria in the absence of numeric need. RP817-20, 831-32, 834-35, 838. UWMC

and the Department do not argue otherwise or explain why the rule should be broken here. The decision should be reversed on this basis alone.

2. These Criteria Fail As A Result Of The Application's $34,000,000 Omission Regarding Capital Costs.

These facts are undisputed: (1) before filing the Application, UWMC made a $34,000,000 capital expenditure to "shell-in" the three floors of the Montlake Tower in which the 79 new acute care beds would be located, and (2) UWMC failed to include the $34,000,000 in the capital cost it reported in its Application. *See* Findings 1.17, 1.18. The true total capital cost of UWMC's project is $104,771,363, *not* $70,771,363, as claimed by UWMC in its Application. AR3550, 3795.

The Department and UWMC attempt to excuse the omission by arguing, first, that the missing $34,000,000 is merely a "disclosure" issue, and, second, that it can be "accounted for" retroactively. Department Brief, 28-30; UWMC Brief, 38-41. However, these arguments miss the central point: the Department was required by law to *evaluate* whether the project is financially feasible and will foster cost containment *based upon the true capital cost of UMWC's project*. It never did so.

The $34,000,000 omission – a material understatement of *32%* of the project's capital cost, which more than *doubles* the stated construction cost – is not simply a "disclosure" issue. Nor is it a mistake that can be resolved by "accounting for" the omission retroactively. The omission rendered all of the financial documentation submitted by UWMC (both capital cost and operating cost data) incomplete, inaccurate, and invalid.

The record establishes that the Department never, at any stage of the proceeding, fulfilled its legal duty to evaluate, based upon the true capital cost, whether UWMC's project is financially feasible and will foster cost containment. No such analysis is possible now. The Department's failure to fulfill its duty constitutes a clear error of law and it should be reversed.

a. That UWMC Separately "Disclosed" The Omitted $34,000,000 Is Not Relevant.

The Department and UWMC argue that UWMC's $34,000,000 omission is irrelevant because it "disclosed" the amount either (1) in previous dealings with the Department, or (2) after the Application was submitted. However, "disclosure" is not the issue. The real test under the law is whether the Department *evaluated* the $34,000,000 in determining whether UWMC's project satisfies the financial feasibility and cost containment criteria. The record indisputably shows that it did not.

First, UWMC argues that the total cost of the Montlake Tower project was disclosed in connection with a determination of CON non-reviewability issued by the Program in 2008. However, this argument omits a crucial detail: the determination applied only to *Phase 1* of the Tower project. It did not address Phase 2, which included the $34,000,000 expenditure. The determination also specifically states: "Should any project increase the licensed bed capacity of University of Washington Medical Center, prior certificate of need review and approval is required." This is exactly what UWMC is attempting to obtain with its Application.

Second, the Department and UWMC argue that "disclosure" of the total cost of the Tower project was made in 2010 in a separate CON application to expand UWMC's neonatal intensive care unit ("NICU") and relocate it to the Tower. However, UWMC's NICU application did not involve either the entire capital cost of the Tower or the $34,000,000. UWMC's stated capital cost for the NICU relocation was just $5,173,868, and that amount was the only expenditure reviewed or approved by the Department. AR5219-47, 5249; RP1251. In short, neither the 2008 nor the 2010 interactions between UWMC and the Department involved the Department's evaluation of the $34,000,000 at issue here.

Additionally, the Department and UWMC argue that, although the $34,000,000 was omitted from the Application, the cost was "disclosed" in subsequent responses to the Program's application screening questions. But the incontrovertible fact is that the Department relied upon the incorrect lower capital expenditure figure contained in the Application when performing its evaluation – even though its analysis came *after* UWMC's screening question responses. The Department cannot point to any evaluation or analysis that used the true total capital expenditure figure because none was ever performed. RP823-24. Whether or not a "disclosure" of the $34,000,000 took place, the Department erred in never evaluating the project's conformance with the financial feasibility and cost containment criteria based upon the true capital cost of the project.

b. UWMC's Omission Cannot Be Rectified Or Rehabilitated After The Fact.

The Department and UWMC attempt to excuse the $34,000,000 omission by arguing that it can be "accounted for" after the fact, even though the requisite financial analysis was never done originally. This effort is unavailing. The record is clear that the Department did not, and on this record could not, perform the kind of financial analysis necessary under the law. Neither the Presiding Officer nor the Review Officer conducted any financial analysis, nor could this Court appropriately engage in the new fact-finding being urged.

Furthermore, the existing record cannot support any after-the-fact evaluation of the omitted $34,000,000. The Department and UWMC selectively cite testimony of Ric Ordos, the Department's financial expert, and Helen Shawcroft, a UWMC Senior Administrator. However, their testimony as a whole shows (1) the Department never evaluated the requisite criteria using the actual capital cost of the project, and (2) no such evaluation can be performed on the current record.

Ordos is the Department employee responsible for analyzing whether CON applications satisfy the financial feasibility and cost containment criteria. RP816-820. He prepared an analysis of whether UWMC's Application satisfies those criteria. AR4765-69. He admits that, in conducting his analysis, he relied upon the inaccurate $70,771,363 capital expenditure figure reported in the Application. RP823-824; AR4766, 69. He did not evaluate the $34,000,000. *Id.*

Ordos was asked if he could identify where in UWMC's financial statements the omitted $34,000,000 might be reflected. He testified: "No, I can't. I can tell you where it would be if it -- in normal accounting practice, but to actually point to it specifically, *it is not possible*." RP864-865 (emphasis added). He also testified that he did not know whether the $34,000,000 was included in the property, plant, and equipment line item or the depreciation and amortization line item. RP865-866. Looking at the face of UWMC's projected financial statements, he could not tell whether or not the $34,000,000 capital expenditure was included. RP866.

Likewise, Shawcroft, a UWMC witness, testified that she could not identify the annual depreciation related to the $34,000,000 unless she could review "significant backup" documentation. RP421; *see also* RP418 ("I would have to see the backup."); RP419 ("I would need to see the backup documentation."). That documentation is not in the record.

Attempting to "account for" the missing $34,000,000 retroactively is not possible on this record, and does not and cannot correct the error of law committed by the Department in failing to evaluate the required criteria based upon the true capital cost of the project.

c. There Is No Support For The Argument That Pre-Application Capital Expenditures Do Not Need To Be Analyzed By The Department.

In its Final Order, the Department asserted that, because the $34,000,000 "was paid in full prior to the CN application," "it was an existing asset of UWMC regardless of whether the CN was granted or

not." Final Order, 10.[17] The Department reasoned that, because UWMC had already spent the funds pre-filing, it had no duty to report them in its Application financials or have them evaluated. The Department did not cite any authority in the Final Order in support of this astonishing position and has not come up with any since. In fact, it is contrary to the governing law.[18] It also violates the basic duties and fundamental principles of good faith and transparency that underlie the CON review process.

Permitting adoption of the Department's current position as its new policy concerning capital expenditures would invite manipulation and deception. Future applicants would be encouraged to incur expenditures prior to submitting their applications because (1) they can reduce the amount of their reviewable capital costs (i.e., make their project seem less expensive than it actually is), and (2) the exclusion of pre-application expenditures will make the financial projections that are required to be submitted with an application appear more favorable than they would otherwise be if all capital costs were included.

Moreover, the entire public review and comment process, which is essential to the thoroughness and integrity of the Department's evaluation

---

[17] It is notable that neither the Department nor UWMC relies upon this assertion in the Final Order in their attempts to justify UWMC's $34,000,000 capital cost omission. This suggests that they both realize it is indefensible.

[18] The Department and UWMC do not cite the statute that governs the resolution of this issue. The law is clear. It defines a "capital expenditure" as an "expenditure . . . which, under generally accepted accounting principles, is not properly chargeable as an expense of operation or maintenance." RCW 70.38.025(2); *see also* WAC 246-310-010(10)(same). Thus, as a matter of law, all project construction costs must be included in an applicant's capital expenditure estimate because they are "not properly chargeable as an expense of operation or maintenance." Under the statutory definition, there is no question that the stated capital expenditure in the Application is simply false.

of applications, will be rendered useless if applicants are permitted to "game" the system by front-loading capital expenditures before filing their applications in an attempt to artificially reduce their reportable capital expenditures. It would prevent interested parties from knowing the full scope of costs and being able to analyze and comment on the application, which would stymie public review. The Department's disturbing new position that all capital costs do not need to be included should be rejected.

D. The Department Erred As To The Additional Review Criteria

1. The Department Committed Legal Error In Concluding That UWMC's Project Is The "Superior Alternative."

Under the cost containment criterion, the Department is required to determine that "[s]uperior alternatives, in terms of cost, efficiency, or effectiveness" to UWMC's project "are not available or practicable." WAC 246-310-240(1); *cf.* WAC 246-310-210(1) (other facilities are not available to meet need). The Department and UWMC argue generally that UWMC has shown that its project is the "superior alternative." Neither actually addresses the fundamental defect in the Department's analysis: it completely failed to evaluate whether UWMC's project is the "superior alternative" *in comparison with other available community alternatives.* Instead, the Department only evaluated whether the project was the "superior alternative" *for UWMC*, in light of its own institutional "needs."

This defect in reasoning is clear in the Presiding Officer's sole "superior alternative" finding, i.e.: "UWMC considered a variety of alternatives, including phasing in the beds at different times, phasing in internal construction at different times, but determined that any alternative

to the existing proposal would be significantly more costly and disruptive to patient care. The [CON] Program concurred with that analysis." Finding 1.29. The Review Officer adopted this "finding" without undertaking any analysis. Final Order, p. 12. In short, the Department has *never* conducted any evaluation of the availability of "superior alternatives" to UWMC's project *in the community*.

Petitioners have pointed out that there is, in fact, a "superior alternative" in the community: utilizing available beds at UWMC's sister facility, UW/Northwest. Opening Brief, 41-43. UWMC argues that UW/Northwest is not an available alternative. These arguments are unsupported by the record and unavailing, and also ignore the critical point that *the Department has never conducted any evaluation of whether UW/Northwest or other alternatives are available*. The record shows that the Department failed to fulfill its legal duty to determine that "superior alternatives, in terms of cost, efficiency, or effectiveness" are not available in the community. This failure is an error of law and requires reversal.

2. The Decision On Fragmentation Of Services Is Error.

As set forth in Petitioners' Opening Brief, the Department's decision that UWMC's project will not result in fragmentation of care is inconsistent with the governing regulation and is based on a false factual premise. Opening Brief, 43-44. The Department offers no substantive response on this issue whatsoever. UWMC merely contends weakly that not every complex service it offers is duplicated elsewhere in the community. Such reasoning is contrary to prior Department decisions and

there is no argument otherwise.[19] The Department's decision on this criterion is inconsistent with the law and unsupported by the record.

E. The Department Committed An Error Of Law By Failing To Use The Most Current Data In Reviewing The Application

In evaluating CON applications, the Department relies upon a Department-maintained database known as CHARS. The Department utilizes the most recent or "current available" CHARS data as of the date on which the Department's evaluation of an application is issued.[20] It has articulated the rationale for this standard practice as follows:

> *The Program's standard practice is to supplement the statistical information provided by applicants with newer statistical information (if available) that is obtained during the evaluation of an application.* The Program's stated reason for supplementing the statistical information is *to ensure the most up-to-date or current information is used when evaluating the application.*[21]

In its Application, UWMC used 2011 CHARS data and *estimated* 2012 data. However, *actual* full-year 2012 CHARS data became available to the Department and the public on July 9, 2013. AR5203. The Department did not issue its Evaluation until November 2013, four months later. Thus, by its "standard practice," the Department should have used 2012 CHARS data when evaluating the Application. It failed to do so.

---

[19] *See In re Sacred Heart*, Finding of Fact 1.33 (AR2466).

[20] *See, e.g., Dep't Evaluation of MultiCare Health Sys. Application* (2011) (AR2256-88) pp. 8, 10 (using "the most current data available" and "the last full year of available CHARS data"); *Dep't Evaluation of Auburn Reg. Med. Ctr., MultiCare Health Sys., and Valley Med. Ctr. Applications* (2010) (AR2141-214) pp. 13, 16 (same).

[21] *In re Valley*, Finding of Fact 1.8 (AR2373) (emphasis added).

This failure was not a mere technicality. Rather, the actual 2012 CHARS data proved that many of the projections and factual assertions in UWMC's Application were simply inaccurate. To cite just one of many examples, UWMC, touting its growth, asserts in its Application that its patient discharges increased in 2012 (AR3792), when in actuality they *declined* (AR2710). *See generally* AR2707-47 (Offer of Proof).

At the hearing, the Department *admitted* that it had erred in failing to use 2012 CHARS data and joined Petitioners in requesting that the data be admitted into the record. The Department acknowledged that it did "not have a good reason for why 2012 data was not considered in this case," and that it "clearly could have considered that information and we think it should be allowed in." RP1030. However, the Presiding Officer and Review Officer refused to allow the accurate data to be admitted.

In its Brief, the Department reverses course. It now joins UWMC in contending that, because 2012 CHARS data was not available until just prior to the closing of the public comment period, the Department had the discretion to exclude the accurate data and instead rely on assertions by UWMC that are known to be wrong. The Department's new position is legally unsupported and violates its "standard practice" of using the most recent available data. Consistent with its admission at the hearing, the Department still does "not have a good reason" for this sudden change of position, but it is obviously attempting to support UWMC and avoid the implications of the true facts. The 2012 CHARS data materially damages UWMC's contentions and should have been considered.

The Department's refusal to abide by its long-standing policy and practice in its review of the Application is an error of law that should be reversed.

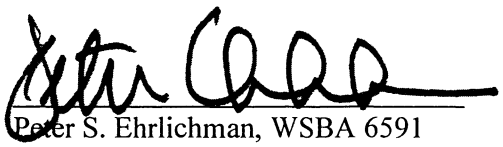
III. CONCLUSION

Agency experts conducted a year-long review, analyzed the uniformly applied criteria, and determined that UWMC's Application had to be *denied.* Yet, just before this correct decision was published, a senior administrator – who had not participated in the evaluation or reviewed *any* of the materials relating to the Application – unilaterally decided to make an exception for a fellow state agency and ordered that UWMC be given a CON. Then, on administrative review, with the normal rules requiring reversal, the agency's Presiding Officer changed the rules. He applied a "criterion" that had not been considered in the Department's evaluation and that had never been used in the 35-year history of the CON Program.

Despite the disturbing facts about the decision making in this case, the Department and UWMC argue that such facts are "irrelevant" and not "germane." Petitioners strongly disagree. The implication from these facts is clear: the Department had a desired outcome – delivering a CON to UWMC – and it bent and then broke the rules to achieve that outcome, contrary to law. This is not a process or a decision deserving of deference.

For the reasons set forth in Petitioners' Opening Brief and herein, the Department's decision was contrary to law, arbitrary and capricious, and unsupported by substantial evidence. It should be reversed.

Respectfully submitted this 21st day of December, 2015.



Peter S. Ehrlichman, WSBA 6591
Shawn Larsen-Bright, WSBA 37066
DORSEY & WHITNEY LLP
701 Fifth Ave., Suite 6100
Seattle, WA 98104-7043
-and-
Stephen Pentz, WSBA No. 14089
3213 West Wheeler St., #45
Seattle, WA 98199
Attorneys for Petitioners/Appellants

CERTIFICATE OF SERVICE

I hereby certify that on this date I caused to be served a copy of the foregoing on the following by the method indicated:

Richard A. McCartan Attorney General of Washington 7141 Cleanwater Drive SW P.O. Box 40109 Olympia, WA 98504	☐ Via Messenger ☐ Via ECF Notification ☐ Via Facsimile ☒ Via U.S. Mail ☒ Via Electronic Mail
Jeffrey Freimund Freimund Jackson & Tardif, PLLC 711 Capitol Way S., Suite 602 Olympia, WA 98501	☐ Via Messenger ☐ Via ECF Notification ☐ Via Facsimile ☒ Via U.S. Mail ☒ Via Electronic Mail

Dated this 21st day of December, 2015.

Jackie Slavik