

TABLE OF CONTENTS

- I. INTRODUCTION..... 1
- II. STATEMENT OF THE CASE 3
 - A. Olympic Peninsula Kidney Center’s CON Application..... 3
 - B. DaVita’s CON Application 4
 - C. The Program’s Evaluation of OPKC’s and DaVita’s Applications..... 4
 - D. The Adjudicative Proceeding 6
 - E. The Health Law Judge’s Order 8
 - F. DaVita’s Petition for Judicial Review..... 11
- III. STANDARD OF REVIEW..... 11
- IV. ARGUMENT 12
 - A. The Department’s Order Was Based on Substantial Evidence 14
 - 1. The Department Properly Found that OPKC’s Application Met All Four Criteria of the CON Law While DaVita’s Did Not ... 14
 - a. Substantial Evidence Supports the Department’s Finding that OPKC’s Application Meets the Financial Feasibility Criterion in WAC 246-310-220 While DaVita’s Does Not 14
 - b. Substantial Evidence Supports the Department’s Finding that OPKC’s Application Meets the Cost Containment Criterion in WAC 246-310-240 While DaVita’s Does Not..... 21
 - (1) The Department Correctly Found that the Evidence Did Not Support the Program’s Finding that Granting a CON to DaVita Is the Superior Alternative Because it Will Promote “Patient Choice” 22
 - (2) The Department Correctly Found that the Evidence Did Not Support the Program’s Finding that Granting a CON

	to DaVita Is the Superior Alternative Because it Will Promote “Price Competition”	29
c.	Substantial Evidence Supports the Department’s Finding that OPKC’s Earlier Opening Date, Projected Lower Rates and Lower Costs Render Its Application Superior to DaVita’s... 31	
	(1) Earlier Opening Date	32
	(2) Projected Lower Rates	34
	(3) Projected Lower Costs	35
B.	DaVita’s Procedural Due Process Rights Were Not Violated .	35
C.	The Health Law Judge Followed the APA in Every Particular in the Amended Final Order	39
	1. The Health Law Judge Was Authorized to Substitute Her Own Factual and Legal Conclusions for Those Reached by the Program.	39
	2. The Health Law Judge Properly Construed the Burden of Proof Regulation in WAC 246-10-606	42
D.	The Health Law Judge Did Not Err by Exercising Discretion to Reject the Program’s Claims of “Expertise” on the Issues of Patient Choice and Competition.....	44
	1. The APA Does Not Require the Health Law Judge to Defer to the Program’s So-Called “Expertise.”	45
	2. The Evidence Shows that the Program Lacked Expertise on the Issues of Patient Choice and Price Competition	46
E.	The Health Law Judge Committed No Error With Respect to Her Evaluation of Need	48
V.	CONCLUSION	50

TABLE OF AUTHORITIES

State Cases

<i>Barry & Barry, Inc. v. Department of Motor Vehicles</i> , 81 Wn.2d 155, 500 P.2d 540 (1972).....	36
<i>City of Kent v. Beigh</i> , 145 Wn.2d 33, 32 P.2d 258 (2001)	43
<i>City of Pasco v. Department of Retirement Sys.</i> , 110 Wn. App. 582, 587, 42 P.3d 992, 995	12
<i>N.W. Steelhead v. Department of Fisheries</i> , 78 Wn. App. 778, 786, 896 P.2d 1292, 1297 (1985).....	42
<i>Port of Seattle v. Pollution Control Hearings Bd</i> , 151 Wn.2d 568, 588, 90 P.3d 659, 669	12
<i>Pub. Util. Dist. No. 1 of Pend Oreille County v. Department of Ecology</i> , 146 Wn.2d 778, 790, 51 P.3d 744, 750 (2002).....	12
<i>St. Joseph's Hospital & Health Care Center v. Department of Health</i> , 125 Wn.2d 733, 887 P.2d 891 (1995).....	30
<i>State ex rel. Standard Mining & Development Corp. v. City of Auburn</i> , 82 Wn.2d 321, 510 P.2d 647 (1973).....	36
<i>Tapper v. State of Washington, Employment Sec. Dep't.</i> , 122 Wn.2d 397, 402, 858 P.2d 494, 498 (1993).....	12, 42
<i>Thurston County v. Cooper Point Ass'n</i> , 148 Wn.2d 1, 57 P.3d 1156 (2002).....	43, 44
<i>Towle v. Washington State Dep't. of Fish & Wildlife</i> , 94 Wn. App. 196, 971 P.2d 591(1999).....	42

Rules, Statues and Codes

RCW 34.05.425	40
RCW 34.05.461	40, 45
RCW 34.05.464	40, 41
RCW 34.05.554	48
RCW 34.05.570	11
RCW 34.05.574	50

RCW 70.38.015	31
RCW 70.38.115	49
WAC 246.10.117	40, 45
WAC 246-10-606	42, 43, 44
WAC 246-310-210 - 240	14
WAC 246-310-210.....	5, 49
WAC 246-310-220.....	5, 9, 10, 14, 15, 18, 20
WAC 246-310-230.....	5
WAC 246-310-240.....	5, 10, 21, 31, 32
WAC 246-310-280.....	5, 14, 49

Articles and Treatises

42 C.F.R. 405.2138(a)(2).....	15
4 Trade Reg. Rep. (CCH) ¶13,104.....	23
Department of Justice and Federal Trade Commission, HORIZONTAL MERGER GUIDELINES, § 1.0	23

I. INTRODUCTION

In May 2005, the Washington State Department of Health (the “Department”) issued a final order by which it awarded a certificate of need (“CON”) to Olympic Peninsula Kidney Center (“OPKC”) to establish a freestanding kidney dialysis treatment facility in Poulsbo, Washington, and simultaneously denied the CON application of DaVita, Inc. (“DaVita”) for a facility, also in Poulsbo. The final order was issued at the conclusion of an adjudicative proceeding in which OPKC appealed the initial decision of the CON Program (the “Program”) to award a CON to DaVita and not to OPKC. The Department’s Health Law Judge, sitting as the designee of the Secretary of the Department, issued the order after she heard extensive testimony by the parties during a two-day hearing and after the parties comprehensively briefed the issues in their post-hearing and reconsideration memoranda.

Unhappy with the result, DaVita petitioned the Thurston County Superior Court for judicial review. DaVita made a variety of arguments, but the Superior Court denied the petition. DaVita now appeals to this Court and renews its claim that the Department’s decision to award a CON to OPKC, and not to DaVita, should be reversed. DaVita again advances a potpourri of arguments, including some additional arguments (such as the

claim that it has been denied due process) that it did not make to the Superior Court.

DaVita asserts that the Judge's findings are not supported by substantial evidence, but this argument is misplaced. The Health Law Judge's findings, which were entered only after a two-day hearing and the submission of multiple briefs, are supported by overwhelming evidence.

DaVita claims to have been denied due process because, it asserts, it had "no notice" of the issues that ultimately were of importance to the Health Law Judge. This argument is entirely without merit. The facts that determined the outcome were all introduced (many by DaVita itself) into the administrative record. DaVita's complaint is simply that the Health Law Judge found for OPKC, instead of DaVita. This not a denial of due process.

DaVita claims that the Health Law Judge erred when she reached factual and legal conclusions that differed from those of the Program. DaVita, however, misconstrues the Administrative Procedures Act ("APA") when it claims the Judge was obligated simply to apply a rubber stamp to the Program's factual and legal conclusions. The Health Law Judge considered the Program's initial decision carefully but found (based, in part, on admissions by the Program's own witnesses) that key findings were completely unsupported by any actual evidence. The Health Law

Judge was the designee of the Secretary of the Department and owed no deference to the Program's conclusions. She had broad authority under the APA to reach different conclusions from those of the Program.

As DaVita has not shown any basis under the APA for overturning the Department's decision, its request for judicial relief must be denied.

II. STATEMENT OF THE CASE

A. Olympic Peninsula Kidney Center's CON Application

OPKC is a tax-exempt Washington nonprofit corporation.

Administrative Record ("AR") 756. OPKC is a community-based organization whose board members, chosen from the local community, include dialysis patients, physicians, and others. AR 2119:20 - 2120:15. OPKC operates two dialysis centers in Kitsap County. Its main facility is in Bremerton (where it has 19 dialysis stations), and its second facility is in Port Orchard (where it has 11 stations). AR 756.

On August 1, 2003, OPKC filed a CON application with the Program seeking approval to construct a 12-station dialysis facility in Poulsbo. AR 753. The facility is intended primarily to serve patients in north Kitsap and Jefferson Counties, who currently must travel long distances, three times each week, for dialysis treatment. *Id.* at 757, 893. OPKC proposed to develop its Poulsbo facility in an existing commercial office complex and estimated it would take approximately five months

from the date it received a CON to get its facility up and running. During the public comment period various dialysis patients, a prominent insurer, and several local institutions submitted letters strongly supporting OPKC's application. *Id.* at 892, 895, 963-72.

B. DaVita's CON Application

Four days after OPKC submitted its CON application, DaVita, a publicly held, for-profit corporation that has facilities elsewhere in Washington, filed a CON seeking permission to establish a 13-station dialysis facility in Poulsbo. AR 1166. DaVita's application, like that of OPKC, identified north Kitsap and Jefferson Counties as the primary area to be served by the new facility. DaVita's proposed site required new construction. *Id.* at 1566-67. As a result, DaVita estimated it would need at least 15 months following final CON approval to open its facility. *Id.* at 1178. Nobody submitted any statements in support of the DaVita application during the public comment period.

C. The Program's Evaluation of OPKC's and DaVita's Applications

The Program determined that OPKC's and DaVita's applications should undergo "comparative review," and a single analyst, Randall Huyck, reviewed them together. AR 1559. The Program issued its

written assessment of the two applications on May 21, 2004 (the “Evaluation”). *Id.* at 9-28.

An applicant seeking approval for a kidney disease treatment center must meet the criteria (including the applicable sub-criteria) established in WAC 246-310-210 (need); WAC 246-310-220 (financial feasibility); WAC 246-310-230 (structure and process of care); and WAC 246-310-240 (cost containment). *See* WAC 246-310-280(1). The Program found that both proposals met the first three criteria. The fourth criterion requires a finding that the proposed project will foster cost containment. This requires, among other things, that “superior alternatives in terms of cost, efficiency or effectiveness are not available or practicable.” WAC 246-310-240(1). The Program decided that DaVita’s proposal was superior because it offered patient “choice” and would create “price competition.” AR 338. The Program also asserted that OPKC had failed to demonstrate a “provision for charity care” and that this too weighed in favor of awarding the CON to DaVita. *Id.* at 28.

Based on these factors – “patient choice,” “price competition” and the alleged lack of a provision for charity care by OPKC – the Program approved DaVita’s application and denied OPKC’s. AR 28, 2033-34. Though DaVita had requested 13 dialysis stations, the Program found that DaVita established a need for only 10 stations. In May 2004, the

Department issued a CON to DaVita for the development of a 10-station dialysis facility in Poulsbo. *Id.* at 1784.

D. The Adjudicative Proceeding

OPKC appealed the Program's initial decision and requested an adjudicative proceeding. AR 1-7. The Department assigned Health Law Judge Zimmie Caner as the presiding officer, *id.* at 34-38, and a two-day hearing was held in early October 2004. At the hearing, the Program conceded that in the absence of a competing application from DaVita, it most likely would have approved OPKC's application. *Id.* at 1893:22 - 1894:6; *see id.* at 2034:9-12. Thus, judged on its own merits, even in the Program's view, OPKC's application satisfied all four criteria that must be met before a CON is issued.

Faced with two applications it considered to be in compliance with the CON criteria, the Program developed what its director called "tiebreakers," AR 1894:5-6; hence the reliance on patient choice, price competition and lack of charity care. Testimony at the hearing quickly revealed that the Program erred when it claimed that OPKC had failed to provide for charity care in its application. AR 2033:19 - 2034:4; 2037-38; *see also id.* at 2033:19 - 2034:4; 2037:15 - 2038:8. As a result, the Program abandoned that argument and instead relied only on the notion

that the DaVita application was superior because it provided “patient choice” or “price competition.” *Id.* at 2037:15 – 2038:8; 2032-33.

The Program analyst admitted at the hearing, however, that there was no evidence in the record that establishing a DaVita facility in Poulsbo, which is more than 30 minutes’ driving time from OPKC’s facility in Bremerton, would give any meaningful number of patients in the target areas of North Kitsap and Jefferson Counties a “choice.” AR 2060:3-10, 2061:1-10, 2063:11-16. These patients live too far from Bremerton to consider going there once a facility opens in Poulsbo. The Program analyst also conceded that there was no evidence in the record that any patients in North Kitsap and Jefferson Counties wanted this choice. *Id.* at 2061. To the contrary, the evidence showed that patients who expressed themselves wanted the CON for a Poulsbo facility to be awarded to OPKC. The Program analyst admitted he was aware of no evidence to support the notion that awarding a CON to DaVita for the Poulsbo facility would create price competition with OPKC’s facilities located to the south in Bremerton and Port Orchard. *Id.* at 2071, 2074.

Jeff Lehman, OPKC’s executive director, testified that OPKC would open a facility in Poulsbo almost a year before DaVita, AR 2131-32, 2212, that OPKC’s commercial rate structure is lower than DaVita’s, *id.* at 2140-44, 2213, and that OPKC enjoys substantial support in the

Kitsap community. *Id.* at 2134-35. (All of these facts were in the administrative record long before the hearing took place.) OPKC's administrator, Robert Swartz, also testified regarding OPKC's letters of support, *id.* at 2224-25, as well as the lengthy travel time that a number of patients from Poulsbo and beyond must endure to dialyze at OPKC's facility in Bremerton. *Id.* at 2230-31. DaVita's counsel and the Program's counsel cross-examined the witnesses aggressively. *Id.* at 2179-85; 2190-2210; 2232-33. DaVita called just one witness, a consultant, who presented very brief testimony. *Id.* at 2236-41. The parties submitted post-hearing memoranda in lieu of closing arguments.

E. The Health Law Judge's Order

On February 28, 2005, Health Law Judge Caner issued Findings of Fact, Conclusions of Law and a Final Order in which she concluded that the Program's initial decision was flawed in a number of respects and was not reasonable in light of substantial evidence in the record that OPKC's application, not DaVita's, was the superior and more effective of the two. *Id.* at 351. Judge Caner approved OPKC's CON application for a facility in Poulsbo and denied DaVita's application.

DaVita and the Program petitioned the Health Law Judge to reconsider the Final Order and filed briefs that repeated the same arguments made in their post-hearing briefs. On May 26, 2005, Judge

Caner issued Amended Findings of Fact, Conclusions of Law, and Final Order (the “Amended Final Order”), in which she rejected the motion for reconsideration while making minor clarifications to the Final Order. AR 722-46. As Judge Caner is vested with final decision-making authority of the Department, this is the Department’s final order in the matter.

The Health Law Judge (and, hence, the Department) determined that substantial evidence in the record established that OPKC’s application met the four CON criteria while DaVita’s did not. With respect to the *financial feasibility* criteria, the Department found as follows:

- DaVita did not disclose the commercial rates on which it predicated the revenue projections it included in its pro forma financial projections. The financial feasibility criteria require that an applicant demonstrate that its project probably will not have an unreasonable impact on charges. WAC 246-310-220(2). In the absence of information about DaVita’s rates it is difficult to establish whether DaVita’s project would meet this criterion. DaVita argued that its rates would be set by competition and so there was no need to disclose its rates. This claim, however, renders it impossible to know whether the revenues DaVita projected in its pro forma (which were based on an undisclosed rate structure) would exceed its expenses –

as required by WAC 246-310-220(1). Consequently, DaVita's project may not meet the financial feasibility criteria. AR 742 (CL 2.13).

With respect to the *cost containment* criteria, the Department found as follows:

- The cost containment criteria require that the Department find that superior alternatives in terms of cost, efficiency or effectiveness are not available. WAC 246-310-240(1). The Program concluded that approving DaVita's application would stimulate "price competition" and "patient choice" for patients in north Kitsap and Jefferson Counties. The Department found that the evidence did not support these conclusions. AR 728 (FF 1.16), 729-31 (FF 1.19, 1.20, 1.21). As a result, the Program erred in finding that DaVita's application was the superior alternative based on these criteria.
- OPKC projected significantly lower commercial rates, lower expenses, and a significantly earlier opening date than DaVita. Consequently, the Department found OPKC's application provided the superior alternative. AR 744 (CL 2.19).

Based on these findings, the Department reversed the Program's initial decision to issue a CON to DaVita and ordered that the Program

issue a CON to OPKC instead. *Id.* at 368. The Program issued a CON to OPKC on June 3, 2005.

F. DaVita’s Petition for Judicial Review

On June 27, 2005, DaVita petitioned the Thurston County Superior Court for judicial review of the Amended Final Order under Washington’s Administrative Procedures Act (“APA”). Clerk’s Papers (“CP”) at 4-50. OPKC intervened as a party respondent by stipulation of the parties. CP at 53-55. On November 18, 2005, after hearing oral argument, Judge Tabor upheld the Department’s decision. An order to this effect was entered on December 7, 2005. CP at 237-39. DaVita then brought this appeal.

III. STANDARD OF REVIEW

The APA places the burden of demonstrating the invalidity of agency action on the party asserting the invalidity. RCW 34.05.570(1)(a). This burden is substantial: a court may overturn an agency’s final order only if the court finds that one of nine grounds set forth in the APA has been met. RCW 34.05.570(3).

A reviewing court must accord an agency’s final order substantial deference. Findings that are supported by “evidence that is substantial when viewed in light of the whole record” cannot be overturned. RCW 34.05.570(3)(e). A court “should overturn an agency’s factual findings only if they are clearly erroneous . . . [and the court is] definitely

and firmly convinced that a mistake has been made.” *Port of Seattle v. Pollution Control Hearings Bd*, 151 Wn.2d 568, 588, 90 P.3d 659, 669 (2004) (internal quotations and citations omitted). Moreover, a court must “give substantial weight to an agency’s interpretation of the law it administers.” *City of Pasco v. Department of Retirement Sys.*, 110 Wn. App. 582, 587, 42 P.3d 992, 995 (2002); *see also Pub. Util. Dist. No. 1 of Pend Oreille County v. Department of Ecology*, 146 Wn.2d 778, 790, 51 P.3d 744, 750 (2002).

On this appeal the Court of Appeals sits in the same position as the Superior Court and applies the standards of the APA directly to the record before the agency. *Tapper v. State of Washington, Employment Sec. Dep’t.*, 122 Wn.2d 397, 402, 858 P.2d 494, 498 (1993). As DaVita recognized earlier in these proceedings, the Health Law Judge’s order is the “Department’s final word on the matters addressed, [and is] itself entitled to ‘deference’ and ‘great weight’ on review.” AR 389.

IV. ARGUMENT

DaVita asserts that the Department (through the Health Law Judge) based its decision on “three totally new factors that were not addressed in the applications and not argued at the hearing, and three other new factors that were not addressed in the applications but were argued by OPKC at the hearing.” DaVita’s Opening Brief (“DaVita Br.”) at 12.

DaVita asserts that the Department's reliance on these factors came as a complete surprise to it and, as a result, its "constitutional right to a fair hearing was lost." *Id.* at 14-21. Separately, DaVita claims that these same "factors" lack a substantial factual basis because "much of the 'evidence' upon which the HLJ based her findings was not even in the CON Program's review of the record or introduced into evidence at the hearing." *Id.* at 26.

In the discussion below we take these two arguments in reverse order and show first, in Section IV.A., that the Department relied on substantial evidence submitted by the parties (including DaVita), at every step of the way. In Section IV.B., we show that DaVita cannot claim that its procedural rights were violated.

In Section IV.C., we address DaVita's incorrect argument that the Health Law Judge, though sitting as the designee of the Secretary of the Department of Health, with the authority to substitute her own conclusions for those of the Program, should have done no more than apply a rubber stamp to the Program's flawed decision.

In Section IV.D., we show that DaVita's insistence that the Health Law Judge must defer to the Program's "expertise" is wrong, both as a matter of law and because the Program admitted it had no expertise (or even knowledge) about the subjects at issue.

In Section IV.E., we show that DaVita’s argument that it would better satisfy the need for more stations has been waived and is wrong.

A. The Department’s Order Was Based on Substantial Evidence

1. The Department Properly Found that OPKC’s Application Met All Four Criteria of the CON Law While DaVita’s Did Not

To be awarded a CON for a kidney disease treatment center an applicant must show that it meets the four criteria for need, financial feasibility, structure and process of care, and cost containment. WAC 246-310-280(1); WAC 246-310-210 – 240. The Department (through the Health Law Judge) correctly concluded that OPKC’s application met all four criteria but that DaVita’s did not as it fell short on both the financial feasibility and cost containment prongs. In the discussion that follows we show that the Department’s findings in these two critical areas – financial feasibility and cost containment – are supported by substantial evidence.

a. Substantial Evidence Supports the Department’s Finding that OPKC’s Application Meets the Financial Feasibility Criterion in WAC 246-310-220 While DaVita’s Does Not

The Program found that both OPKC’s and DaVita’s applications met the financial feasibility criteria contained in WAC 246-310-220. AR 19. The Department disagreed, finding that while OPKC’s application

met all financial feasibility criteria, DaVita's did not. The Department's findings are amply supported by the evidence in the record.

To satisfy the financial feasibility criterion an applicant must show (among other things) that the "costs of the project ... will probably not result in an unreasonable impact on ... charges" for dialysis services. WAC 246-310-220(2). Charges to patients covered by the Medicare and Medicaid programs are the same for all providers as they are fixed by government fiat. AR 2123:18-19; 2124:2-3. Rates charged to patients covered by commercial insurance, however, are set by the provider and can vary. OPKC disclosed its commercial charges but DaVita did not. AR 729-30 (FF 1.19); *id.* at 278; 998; 2115:15-21; 2088:21-23.¹

Instead of disclosing its rates, DaVita attacked OPKC's efforts to deduce what DaVita's undisclosed rates were. AR 230-32. OPKC took the revenues DaVita projected for its services, made reasonable assumptions as to payor mix, and then calculated what DaVita's commercial charges would have to be in order to produce the revenues shown in DaVita's pro forma projections. *Id.* at 956, 959, 973-75, 988,

¹ DaVita's counsel attempted to justify DaVita's failure to provide DaVita's charges by suggesting at the hearing that its rates are trade secrets or commercially sensitive information. AR 2105:3-9. As the Department found, *see id.* at 730 (CL 1.19, n.4), this is not so. DaVita, as a Medicare-certified dialysis provider, must inform all patients at its facilities of its charges, "including any charges for services not covered under" Medicare. 42 C.F.R. 405.2138(a)(2). Presumably DaVita complies with this requirement. Its rates are not trade secrets and could have been submitted at the hearing.

996-97. This analysis revealed that DaVita's commercial charges would be significantly **higher** than OPKC's. AR 956-57, 2142-43. The result was not surprising because DaVita projected operating revenues per treatment that were substantially higher than OPKC's operating revenues per treatment. *Id.* at 19, 20. Since Medicare and Medicaid revenues per patient are the same for DaVita and OPKC, DaVita's higher revenues per patient must be attributable to higher commercial charges. The Program's analyst recognized this logic when he testified at the hearing and "**admitted** that DaVita's operating revenues per treatment compared to Olympic indicate that their charges might be greater than Olympic's charges." *Id.* at 729 (FF 1.19) (emphasis added); *see* AR 2088:16-20.

DaVita claimed that OPKC "lacked the information needed to accurately estimate DaVita's average commercial rates," AR 231, n.14, but DaVita never took the one, obvious step it could have taken to set the record straight if it truly believed OPKC's calculations were wrong: It never submitted its own commercial rates. Accordingly, the Program had no basis on which to find (as it did, nonetheless, *id.* at 332) that DaVita's proposal would not have an unreasonable impact on charges. By contrast, the Department's findings, *id.* at 729 (FF 1.19), and its conclusion, *id.* at 742 (CL 2.13), that it is impossible to "accurately conclude whether

DaVita's project will have an 'unreasonable impact on costs and charges for health services'" are amply supported by the evidence.

After OPKC demonstrated that the rates DaVita used to construct its pro forma analysis, while undisclosed by DaVita, necessarily had to be higher than OPKC's rates, DaVita responded by arguing that it didn't matter much what rates it had used to construct the pro forma because if it were to open a facility in Poulsbo its actual rates would be determined by "negotiation and competition." AR 1733. But this amounts to an admission that the revenue projections in its application are not reliable and are overstated. The Program analyst admitted this at the hearing:

Q. Of course if DaVita really had to lower its rates substantially, which it claims is going to occur, then the revenue projections that are contained in your balances may overstate your revenue [sic – should be revenue]; is that right?

A. It's possible.

Id. at 2090:15-20.

This however, leads to another problem. If DaVita's application overstates revenue by some unknown amount, then it is *impossible* to determine whether DaVita's revenues will be sufficient to cover its costs. A separate sub-criterion within the financial feasibility criteria requires that an applicant demonstrate that the "immediate and long-range capital

and operating costs of the project can be met.” WAC 246-310-220(1).

The Program analyst belatedly recognized the problem caused by DaVita’s shifting arguments:

Q. It’s possible if the [revenue] is overstated in the evaluation and were to be correctly stated at whatever this competitive level is, that would then no longer meet the financial feasibility criteria, that’s a possibility; isn’t it?

A. It is possible.

AR 2090:21-2091:1. The Department’s Amended Final Order recognizes this dilemma. “DaVita claims it will offer competitive fees with Olympic, but that may render its proposal financially unfeasible under WAC 246-310-220.” AR 742 (CL 2.13); *id.* at 729-30 (FF 1.19). This conclusion is fully supported by the facts and is not erroneous.

Finally, the Department found that DaVita’s pro forma financial statement considerably understated the rental expenses associated with its project. AR 733-34 (FF 1.24, 1.25, 1.26). OPKC raised this issue with the Program in its analysis and comparison of the two proposals. *Id.* at 957. The Program, however, ignored the issue entirely in its Evaluation.

As Mr. Lehman explained at the hearing, DaVita's pro forma operating statement (AR 1254)² states that rent will be \$116,667 in year 1, decreasing to \$90,125 in year 2. AR 2147-48. The letter of intent that DaVita submitted as proof of adequate site control, however, specifies that DaVita will lease 5,600 square feet at an initial cost of \$ 27.30 per square foot. *Id.* at 1597-98; *see also id.* at 2148-49. Thus, DaVita's total rent will be \$152,880 in year 1 (5,600 x \$27.30). Accordingly, the amount DaVita sets forth as its rent in the pro forma operating statement is 31% lower than the actual figure based on the lease itself. In year 2, the pro forma rent figure is understated by at least 70%. Moreover, the lease provides that the rent may be adjusted upwards to account for increases in the CPI. The calculations in the pro forma do not account for such increases and so the understatement of rent in the pro forma may be even greater than this. *See id.* at 1598.³

The Program did not address this discrepancy anywhere in its Evaluation, despite the fact that it was brought to its attention before the

² The testimony refers to page 500 of the Program's Record, which has been renumbered as page 1254 of the Administrative Record. For ease of reference, all citations in this brief are to the Administrative Record. The Program's record ran from 1 through 1084 and is found at AR 752 to AR 1844.

³ Before the hearing, DaVita's only response to the criticism that it had understated its rental expense was to assert, without more, that its pro forma statements contained no errors. AR 1734. At the hearing, DaVita's counsel implied that the pro forma rent figure might include amounts associated with depreciation. *Id.* at 2186:4-24. If this were true (and there is no evidence that it is), the depreciation should be deducted, which would mean that the amount of rent set forth in the pro forma would be reduced even further and the understatement of the rent in the pro forma would increase.

Evaluation was written. DaVita's error was significant because it increased DaVita's operating expenses, and thus made it even more likely that the project's revenues do not cover its expenses, as required by WAC 246-310-220(1).

* * *

DaVita failed to supply information on its commercial rates to show that approval of its project would "probably not result in an unreasonable impact on ... charges" for dialysis services, as required by WAC 246-310-220(2). DaVita's effort to belittle the importance of this failure led it to make an argument – that rates would be set by competitive forces – which, if true, necessarily would mean that the revenues stated in DaVita's pro forma are unreliable and overstated. This leads, inescapably, to the conclusion that DaVita's revenues may not cover its expenses, as required by WAC 246-310-220(1). Furthermore, the potential shortfall is exacerbated by DaVita's failure to properly state the amount of its rent in its pro forma projections.

The Department's conclusion that the Program "could not accurately conclude" whether DaVita's project met the financial feasibility criteria, AR 742 (CL 2.13), is supported by substantial evidence.

b. Substantial Evidence Supports the Department's Finding that OPKC's Application Meets the Cost Containment Criterion in WAC 246-310-240 While DaVita's Does Not

Before the Department can issue a CON it must find that a proposed project will foster cost containment. WAC 246-310-240. This requires, among other things, that the Department find that "superior alternatives in terms of cost, efficiency or effectiveness are not available or practicable." WAC 246-310-240(1).

The Program admitted that in the absence of a competing application from DaVita, it most likely would have found that OPKC's application complied with all four CON criteria, including cost containment, AR 1983:21- 1984:6, *id.* at 2034:9-12. Ultimately, however, the Program found that OPKC did not meet the cost containment criterion because (in the Program's view) permitting DaVita to open a facility in Poulsbo would provide for "patient choice" and this, in turn, would foster "price competition," thereby making the DaVita application "superior" in terms of "cost, efficiency or effectiveness." *Id.* at 27-28.

The Department considered the evidence of record and came to the opposite conclusion. It found that "DaVita's proposal may not satisfy the cost containment criteria and Olympic's does." AR 731 (FF 1.21). This finding is supported by substantial evidence.

(1) The Department Correctly Found that the Evidence Did Not Support the Program's Finding that Granting a CON to DaVita Is the Superior Alternative Because it Will Promote "Patient Choice"

The Program found that DaVita's application was superior to that of OPKC because a DaVita facility in Poulsbo would give patients a choice of dialyzing either at that facility or at one of the OPKC facilities in Bremerton or Port Orchard. It was the Program's view, and it is now apparently DaVita's as well, that so long as two providers are located somewhere in the same service area those providers, *ipso facto*, will provide all patients in the entire area with a "choice" – no matter how far apart the providers might be. AR 272; *see also id.* at 1902:24 - 1903:7.

The Department disagreed with the Program. The Department understood that if patients live closer to Poulsbo than Bremerton then, depending on the distances involved, once a facility is built in Poulsbo many of those patients will go there, regardless of whether, in the abstract, they might prefer the Bremerton facility because it is operated by OPKC rather than DaVita. Kidney dialysis patients must dialyze three times a week, every week of their lives, and each session takes about four hours. *Id.* at 2121:2-8. It is very important to these patients to shorten their commutes if at all possible. *Id.* at 963-72. Before a finding can be made

that a patient has a choice between two centers the question that must be answered, as the Department recognized, is “whether the facilities are close enough to realistically create patient choice/competition.” *Id.* at 727-28 (FF 1.14); 737 (CL 2.1).

Without an answer to this question it is impossible to conclude whether two centers in different locations provide meaningful alternatives for dialysis patients.⁴ The Program, however, failed to ask the question, let alone answer it. In fact, the Program did not realize the relevance of this question until its witnesses testified at the hearing. *Id.* at 2068:11-15. At that point, however, the Program’s witnesses admitted they had no idea what the answer was. *Id.* at 2068:16-19; 2072:8-12; 1898:6-10; 1901:9-16. Nonetheless, in the Evaluation the Program had concluded that a center in Bremerton would provide a reasonable alternative to one in Poulsbo for patients living in North Kitsap and Jefferson Counties. DaVita now asks that this Court reach the same unfounded conclusion.

Because there was no evidence in the record to support the notion that “a significant number of patients would have a realistic choice” between two facilities in Poulsbo and Bremerton, the Department properly found that the Program’s “patient choice theory is too speculative.” AR

⁴ A choice, after all, only exists between alternatives that are reasonably substitutable. *See generally* Department of Justice and Federal Trade Commission, HORIZONTAL MERGER GUIDELINES, § 1.0 (market definition), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶13,104, also available at www.ftc.gov/bc/docs/horizmer.htm.

742 (CL 2.14). Though the Department could have stopped there, it went on and performed the analysis that the Program failed to undertake. The Department found that a travel time of 20 minutes is reasonable in this case, based on the distance between the two centers, the frequency with which patients must obtain dialysis, the Department's decisions in previous cases, and the fact that half the patients do not drive but must rely on public transportation. *Id.* at 727-28 (FF 1.14). Because Bremerton is a 31-minute drive from Poulsbo, this finding provided further support for the conclusion that it was unreasonable for the Program to suppose that patients in the target area for the new Poulsbo facility would have a reasonable "choice" between dialysis facilities in the two cities.

The Department's findings are supported by substantial evidence and its conclusions are neither arbitrary nor capricious. Consider:

1. Both DaVita and OPKC recognized that the target area to be served by a new facility in Poulsbo is North Kitsap and East Jefferson Counties. AR 13, 1167. The Program recognized this as well. *Id.* at 14; 17; 1991:23 - 1992:7.

2. It is a substantial burden, as DaVita acknowledged in its application, for residents of this target area to travel to Bremerton for dialysis: The "North Kitsap County area from Poulsbo north is beyond reasonable 30-minute travel time access to the two existing OPKC

facilities [in Bremerton and Port Orchard],” and “Jefferson County is beyond 45-minute travel time to OPKC facilities.” *Id.* at 1167.

3. The undisputed evidence of record supports DaVita’s original view. It is simply unrealistic to expect, once a facility is located in Poulsbo, that patients who live in North Kitsap or Jefferson Counties will travel past it to dialyze in Bremerton – the distance is simply too great to make that a meaningful alternative. One patient living in Jefferson County wrote that he currently drives 80 miles round trip to OPKC’s facility in Bremerton and “would benefit greatly” if he could go to Poulsbo for dialysis. *Id.* at 1648. Though this patient supported granting the CON for a Poulsbo facility to OPKC, it is not realistic to suppose that if DaVita were to open a facility in Poulsbo he would bypass that center, and the “great benefit” of dialyzing in Poulsbo, and continue on to Bremerton so as to receive his services from OPKC. This patient has no realistic “choice.” He will dialyze at any facility built in Poulsbo, even a DaVita facility, rather than travel to Bremerton, though he would prefer to dialyze at an OPKC location. *See also id.* at 1646-47 (letter from another patient in Jefferson County stating that having a facility in Poulsbo would “reduce the mental strain a great deal as the worst part of the trip is between Poulsbo and Bremerton”).

4. Though Bremerton and Poulsbo are at least a 31-minute drive apart, for most patients it takes more time, sometimes much more, to make the trip. The drive may take longer depending on traffic conditions, road construction and the weather. But most importantly, only about half of OPKC’s kidney dialysis patients drive. *Id.* at 2230-31; 15. The remainder rely on public transportation or access vans to get to their dialysis centers, and back home again. *Id.* Thus, the time saved by traveling to Poulsbo instead of Bremerton is likely to be significantly greater than three hours each week. *Id.* at 2230:16 – 2231:2.

5. OPKC identified 35 patients who were dialyzing either in Bremerton or South Kitsap, and who live closer to Poulsbo than Bremerton (or Port Orchard), who would benefit from transferring to OPKC’s proposed facility in Poulsbo. AR 759; *see also id.* at 2134, 2158. Not surprisingly, most of these patients expressed a desire to transfer to Poulsbo. *Id.* at 2222:12-20; 2225:10 - 2226:4. By transferring to OPKC-Poulsbo, these patients would have the convenience of dialyzing much closer to their homes, and would avoid extended round-trip travel three times a week. Continuity of care also would be preserved as these patients would continue to be served by current OPKC physicians and staff. For a significant number of patients the reduction in “drive time” would amount to more than 30 minutes each way. *Id.* at 759 (identifying by zip code

patients who reside physically closer to Poulsbo than Bremerton); *see also id.* at 1882 (driving distances); 2222, 2229.

DaVita responded to this evidence at the hearing by suggesting that these patients, though they live in North Kitsap or Jefferson Counties, might actually work in Bremerton and thus would prefer to dialyze there. *Id.* at 2158:814-22. The uncontested evidence showed, however, that only five of the 35 patients were employed and none of them worked in Bremerton. Of the five who did work, three worked *north* of Poulsbo and two were employed in Silverdale. *Id.* at 2229:13 - 2230:7.

DaVita now comes full circle, claiming it does not understand the relevance of determining where these patients work, given that they are “Bremerton patients.” DaVita Br. at 34. But though these patients currently obtain dialysis in the Bremerton facility, they do not live in Bremerton and only two work in the vicinity. The entire point of the exercise was to show that the concept that there might be patients who lived in North Kitsap and Jefferson Counties, who would benefit substantially from a center in Poulsbo because they could shorten their travel time, was not a hypothetical construct but a reality.

6. DaVita argues that there may be many patients living between Bremerton and Poulsbo, and equidistant from the two cities, who truly would have a choice between an OPKC facility in Bremerton and a

DaVita facility in Poulsbo. DaVita Br. at 28, 30. As both DaVita and OPKC recognized in their applications, however, the primary purpose of locating a dialysis facility in Poulsbo is to serve the population in North Kitsap and Jefferson Counties, not people who live in and around the Bremerton area. The argument also is at odds with what DaVita wrote in its CON application, where it highlighted the “continued high growth rate for the Poulsbo incorporated area,” AR 1182, and the “dramatic growth in the Jefferson County [kidney disease] prevalence rate,” *id.* at 1186, before arguing that the “geographic dispersion of residents within Kitsap and adjoining counties call[s] for developing smaller dialysis facilities closer to where people live.” *Id.* at 1196.

* * *

The idea that approving DaVita’s application instead of OPKC’s gives patients a “choice” suffers from another flaw: it completely ignores the uncontroverted evidence in the record that patients and payers supported **OPKC’s** application. AR 962-73; *id.* at 2060:3-10. There is absolutely **no** evidence that dialysis patients who live in North Kitsap or Jefferson County believe that a DaVita facility in Poulsbo will provide them with a “choice” between DaVita and OPKC. *Id.* at 2061:1-5.

(2) The Department Correctly Found that the Evidence Did Not Support the Program’s Finding that Granting a CON to DaVita Is the Superior Alternative Because it Will Promote “Price Competition”

The Department found that there was no evidence to support the notion that price competition would erupt between OPKC in Bremerton and DaVita if DaVita were granted the CON to operate in Poulsbo. AR 730-31 (FF 1.20-1.21). This finding is amply supported by the record.

For competition to work, a commercial insurer⁵ must be willing to use the existence of one facility to leverage a better rate from another. AR 2071:12-17. This cannot happen unless the two providers are reasonable substitutes for a substantial number of patients. *Supra*, n.4. But the Program made no findings on this score. AR 1901:17- 1902:12. In fact, as the Department found, the Program had no evidence of any sort – no data, studies or interviews of insurers – to support the Program’s conclusion that approving DaVita’s application would hasten price competition. AR 730-31 (FF 1.20).

The Department’s finding is supported by the admissions in the record. The Program analyst testified he was aware of *no* evidence to support the notion that awarding the CON to DaVita would create price

⁵ Competition is of no relevance to either the Medicare or Medicaid programs as those fees are set by the government and cannot be negotiated. *See* 2070:21-2071:11.

competition with OPKC. *Id.* at 2074:5-11. He acknowledged, furthermore, that “in retrospect” it might have been a good idea to obtain some evidence of price competition before relying on it to prefer DaVita’s application over OPKC’s. AR 2115:16-21. But he did not do that.

* * *

The Department also found that before price competition can be considered “alone” as basis on which to prefer one application over another it must undergo the “scrutiny of a public rule making procedure under the APA.” AR 743-44 (CL 2.17). The reason is straightforward.

The CON statute creates a health planning structure built on regulation of entry. Such regulation is the antithesis of competition. As the Washington Supreme Court recognized in *St. Joseph’s Hosp. & Health Care Ctr. v. Department of Health*, when the Legislature enacted the CON program it did so in a deliberate effort to displace competition:

While the Legislature clearly wanted to control health care costs to the public, ***equally clear is its intention to accomplish that control by limiting competition*** within the health care industry. The U.S. 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.

125 Wn.2d 733, 741, 887 P.2d 891, 896 (emphasis added). The Department correctly concluded that the “CON regulations are therefore designed in part to control rapidly rising health care cost by *limiting competition* within the health care industry.” AR 736-37 (CL 2.1) (emphasis added).⁶

If the Program wished to flout the legislative “judgment that competition ha[s] a tendency to drive health care costs up rather than down,” it had to engage in a rule making process. *See* AR 194-195. It did not do so. For this additional reason the Program’s finding that DaVita’s application was “superior” under WAC 246-310-240(1) was erroneous. AR 171-74, 195, 336-37, 346.

c. Substantial Evidence Supports the Department’s Finding that OPKC’s Earlier Opening Date, Projected Lower Rates and Lower Costs Render Its Application Superior to DaVita’s

The Department determined that OPKC, not DaVita, should be awarded a CON for a Poulsbo facility because OPKC’s projected earlier opening date, lower rates and lower costs render its application superior to

⁶ In a footnote the Department explained why competition in health care, unlike in other sectors of the economy, may drive costs up and not down. AR 737 n.11. DaVita can be expected to argue in reply (if its past briefing is any guide to the future) that the declaration of policy in RCW 70.38.015(4) means that price competition is now to be promoted through the CON process. We have responded fully to this argument elsewhere. AR 172:21-174:6.

DaVita's under the cost containment criterion. AR 731 (FF 1.21), 734 (FF 1.26). These findings are supported by substantial evidence.

(1) Earlier Opening Date

OPKC proposed to open its Poulsbo facility *almost a year* before DaVita proposed to open its facility. AR 1178, 1641. DaVita acknowledged in its application that “North Kitsap County and Jefferson County need an additional facility *immediately*,” and that patients from the North Kitsap and Jefferson County area face a “*very severe hardship*” because they have to travel far to dialyze and may have to do so at very inconvenient times. *Id.* at 1196, 1180 (emphasis added).⁷ The Department concluded that “[b]ecause there was an immediate need for additional dialysis stations and a facility in the Poulsbo area, the time factor should have been taken into consideration” and “the time savings [realized by OPKC’s application] justify using opening time as a tie-breaking factor to determine which of the competing qualified applications is the “superior alternative” in terms of ‘efficiency’ and ‘effectiveness’ under WAC 246-310-240.” *Id.* at 744-45.

DaVita argues that this analysis is wrong because the “CON Program does not use the facility’s opening date as a CON-deciding

⁷ The Program also conceded that “there is no question that some patients in Poulsbo and north of Poulsbo would prefer that a facility open in Poulsbo *as soon as possible*.” AR 430 (emphasis added).

factor.” DaVita Br. at 38. As the Program recognized earlier, however, WAC 246-310-240(1) “does not attempt to itemize any specific factors that may be considered in making” the determination of which is the “superior” alternative. AR 268. “Instead, the rule allows consideration of whatever factors may be relevant given the nature of the application.” *Id.* 268-69. The Program director herself testified that an applicant’s opening date can be used as a tiebreaker. AR 1939.

DaVita also claims that “there was no evidence that OPKC would actually have opened its facility earlier than DaVita.” DaVita Br. at 38. This assertion completely ignores Mr. Lehman’s testimony at the hearing and the other evidence in the record concerning OPKC’s anticipated opening date. AR 2131-32, 2212. The Department listened to the witnesses, evaluated the evidence, and specifically found that OPKC’s “estimated time to open is credible.” AR 735 (FF 1.28).

DaVita attempts to downplay the substantial difference in the anticipated opening dates for the two applicants by arguing that “estimated opening dates are unenforceable” and that OPKC’s estimated start date “became moot by the time administrative hearing was held.” DaVita Br at 37-38. This argument does not address the uncontroverted fact that OPKC proposed a project that would open almost a full year before DaVita’s. On that basis it was a “superior” alternative. The fact that the Program erred,

and initially granted a CON to DaVita, necessitating time-consuming litigation, hardly renders that error harmless. Nor does the fact that applicants have a window of time in which to complete the project mean that OPKC's earlier projected opening doesn't matter. OPKC provided that date in good faith, and the Department found it was credible. Because of this, and the immediate need for more dialysis stations in the North Kitsap area, OPKC's proposal clearly was (and is) the superior alternative.

(2) Projected Lower Rates

The Department concluded that a factor favoring approval of OPKC's application over DaVita's is that OPKC's projected commercial rates are lower than DaVita's projected commercial rates. AR 731 (FF 1.21). DaVita attacks this as unsupported by substantial evidence but we have shown already that the uncontroverted evidence establishes that (1) DaVita refused to supply information on its commercial rates, and (2) OPKC's projected commercial rates are lower than those used by DaVita in preparing its pro forma financial statement.

DaVita counters that the Program does not consider an applicant's commercial rates as part of the application process, DaVita Br. at 35, but that is not so. In fact, in prior CON decisions the Program has specifically analyzed an applicant's commercial charges and compared those charges with other providers in the area. AR 602, 607.

(3) Projected Lower Costs

The Department found OPKC's application is superior to DaVita's because DaVita projected higher operating expenses. AR 742 (CL 2.13). DaVita argues that Department erred in undertaking such a comparison, but it offers no legal basis for its argument. DaVita Br. at 10, 12.⁸ To the contrary, the regulations state clearly that the Department is to determine whether an applicant's proposal is the "superior alternative[], in terms of *cost . . .*" *Id.* As the Department found, OPKC's application is superior on this criterion.

Consequently, the Department's finding that OPKC's application was the superior alternative was supported by substantial evidence.

B. DaVita's Procedural Due Process Rights Were Not Violated

DaVita argues that it was deprived of its Constitutional right to procedural due process in this case. DaVita makes this claim despite participating fully in the two-day hearing at which it presented evidence and cross-examined witnesses. DaVita, moreover, has not pointed to any finding in the Department's final order that is not supported by evidence in the record. Moreover, the thorough review of the evidence, undertaken

⁸ DaVita complains that the Department engaged in a "simplistic examination of projected total costs to determine which applicant's projected costs were lower" DaVita Br. at 12. But DaVita's operating costs *per treatment* are higher than OPKC's as well. Compare Tables IV and V in the Evaluation. AR 19-20.

above, shows that in every instance the evidence supporting the Department's findings was substantial.

DaVita's real claim (argued for the first time in this appeal) appears to be that it had "no notice whatsoever" of six "brand new" factors that the Department relied on to prefer OPKC's application to DaVita's. DaVita Br. at 14, 17. Precise agency standards are not always appropriate in administrative actions, as the relevant factors that should inform the administrative decision differ from case to case. *State ex rel. Standard Mining & Dev. Corp. v. City of Auburn*, 82 Wn.2d 321, 330-31, 510 P.2d 647 (1973) (citing *Barry & Barry, Inc. v. Dep't of Motor Vehicles*, 81 Wn.2d 155, 500 P.2d 540 (1972)). It is sufficient to satisfy due process if the applicant has notice of the general requirements and the opportunity for a hearing with a right of appeal. *Standard Mining*, 82 Wn.2d at 331. Nonetheless, DaVita had notice of the factors on which the Department based its decision and had a full opportunity to litigate each of these.

1. DaVita argues that the Department's comparison of the applicants' operating costs was a "totally new factor[]" that was "not addressed in the applications and not argued in the hearing." DaVita Br. at 12. To the contrary, well before the administrative record before the Program closed, DaVita understood that operating costs could be an issue. In December 2003, OPKC criticized DaVita's application materials for

understating its costs. AR 947, 951, 957. DaVita acknowledged its operating costs were at issue when it argued in its rebuttal materials that it made no errors in its pro forma. AR 1048.

2. DaVita's allegation that consideration of patient commute times also was a "totally new factor[]," DaVita Br. at 12, similarly is off the mark. DaVita urged, on the very first page of its application, that a facility be located in Poulsbo precisely because North Kitsap and Jefferson County residents must endure long commutes to obtain dialysis. AR 1167. The issue was addressed in all the briefs and there was significant testimony at the hearing about travel times. *See, e.g.*, AR 2230-32.

DaVita's related assertion that the Department adopted "a rigid 20-minute drive time standard" misrepresents the Health Law Judge's decision. DaVita Br. at 10. Judge Caner exercised her reasoned judgment and found that *in this case* it is unreasonable to expect patients living in and around Poulsbo and beyond to travel to Bremerton for dialysis when a facility is available in Poulsbo.

3. DaVita's complaint that it had no idea that its commercial rates might be relevant, DaVita Br. at 12, also is demonstrably wrong. DaVita was put on notice that its high commercial rates were an issue during the CON application rebuttal process when OPKC submitted an analysis calculating DaVita's commercial rates and showing that these

were higher than OPKC's. AR 956, 988, 995-96. DaVita responded to this criticism, though it continued not to provide its rates. AR 1047-48.

4. Likewise, OPKC's significantly better opening date also was first raised during the application comment and rebuttal process. AR 958, 987; *see also id.* at 1048 (where DaVita asserted that OPKC could not demonstrate an earlier completion date).

5. Finally, DaVita had the same opportunity as OPKC to introduce evidence into the record that patients and others in the community supported its application. It failed to do so and instead made a scurrilous attack on OPKC in its post-hearing brief accusing OPKC of exerting undue pressure on patients to write letters of support. AR 222, n.6; *see also* AR 310-11. DaVita was not deprived of a meaningful opportunity to be heard on the subject of community support.⁹

The evidence in the record clearly demonstrates that DaVita had notice and a full and fair opportunity to present evidence with respect to the factors on which the Department's findings and conclusions rest.

⁹ The sixth factor of which DaVita complains is the Department's discussion of an isolation station. DaVita is correct that a mention of an isolation station can be found buried in its materials. This does not affect the validity of the Department's analysis of the other five factors and in no way undercuts the ultimate conclusion that OPKC met the criteria for issuance of a CON, while DaVita did not.

C. The Health Law Judge Followed the APA in Every Particular in the Amended Final Order

DaVita argues that the Department's decision should be reversed because the Health Law Judge "fail[ed] to understand her role, the evidentiary weight to be given testimony and the appropriate burdens of proof." DaVita Br. at 25. DaVita's argument is based on a perverse misinterpretation of the standards set forth in the WAC and the APA. Each one of its complaints boils down to the same thing: DaVita believes that once the Program issued an initial decision in its favor, the Health Law Judge was bound to rubber stamp that decision. This is not the law. As DaVita itself acknowledges, the Health Law Judge "has been delegated final decision-making authority by the Secretary." (Emphasis in original.) DaVita Br. at 24. The Health Law Judge understood this. AR 739-40. As a result, she was authorized to substitute her own factual and legal conclusions for those reached by the Program and when she did so she did not somehow misapply the burden of proof.

1. The Health Law Judge Was Authorized to Substitute Her Own Factual and Legal Conclusions for Those Reached by the Program.

DaVita alleges that Judge Caner improperly "collapsed her role as the adjudicator with that of the agency decision maker in violation of the provisions and philosophy of the APA and supporting case law." DaVita

Br. at 26. This is a bizarre argument coming, as it does, two pages *after* DaVita observes that “The Secretary of the Department, as the agency head, has delegated to the HLJs the final decision making authority in CON adjudicative Proceedings.” *Id.* at 24. The APA and the Department’s regulations authorize the Judge to take evidence and reach her own conclusions in the matter. RCW 34.05.425; RCW 34.05.461; WAC 246.10.117(2). Judge Caner did not err when she did exactly that.

Under the APA, the agency head (or designee) has broad authority when reviewing an initial *order* to reach different conclusions from those of a hearing officer. RCW 34.05.464 authorizes the reviewing officer to exercise “all the decision-making power that the reviewing officer would have had to decide and enter the final order had the reviewing officer presided over the hearing.” *Id.* DaVita correctly observes that the Program’s evaluation was an “initial decision,” DaVita Br. at 24, and thus did not attain the status of an “initial order” within the meaning of the APA. Logic and a due regard for the regulatory structure compel the conclusion that if a unit within an agency issues an “initial decision” (which does not even rise to the status of an “initial order”) the agency head (or her designee) would have at least as much authority to reverse that initial decision as she would when reviewing an initial order.

DaVita's argument does not follow this logic. Instead, DaVita makes the improbable assertion that the agency head (or designee) has *less* authority when she reviews an "initial decision" than she would have were she reviewing an "initial order." DaVita provides no basis, in the law or common sense, for this conclusion. DaVita Br. at 24-25.

DaVita's accusations to the contrary notwithstanding, both OPKC and the Health Law Judge explicitly recognized that the Program rendered only an initial decision as distinguished from an initial order. CP at 99 ("OPKC appealed the *initial decision* of the CON Program"); AR 739 (CL 2.8) ("the agency head or its designee may substitute her own conclusions for those by a Program . . . who issued an '*initial decision*'"). But this means that the Judge's authority was at least as great when reviewing the Program's decision as it would have been were she reviewing an initial agency order. And, under the APA, the agency head (or designee) has broad authority when reviewing an initial order to reach conclusions different from those of a hearing officer. The reviewing officer may exercise "all the decision-making power that the reviewing officer would have had to decide and enter the final order had the reviewing officer presided over the hearing." RCW 34.05.464. The courts have interpreted this provision to mean that an agency head (or designee) may substitute his or her own conclusions of fact and law for those made by a hearing

officer. *Tapper*, 122 Wn.2d at 404); *see also Towle v. Washington State Dep't. of Fish & Wildlife*, 94 Wn. App. 196, 206, 971 P.2d 591 (1999).

The agency head (or designee) is *not* required to demonstrate that the initial decision was unsupported by substantial evidence.¹⁰ “Rather, the relevant inquiry in such a situation is whether the [agency head’s or designee’s] substituted findings are themselves supported by substantial evidence and whether those findings in turn, support the conclusions of law.” *See N.W. Steelhead v. Department of Fisheries*, 78 Wn. App. 778, 786, 896 P.2d 1292, 1297 (1985).

Consequently, the only issue is whether the Health Law Judge’s decision, as reflected in the Amended Final Order, is supported by substantial evidence. As we have already demonstrated, it is.

2. The Health Law Judge Properly Construed the Burden of Proof Regulation in WAC 246-10-606

DaVita asserts that the Health Law Judge should not have found for OPKC unless she (or OPKC) could show the Program’s decision was unsupported by a preponderance of the evidence. DaVita Br. at 23. This argument is just another twist on DaVita’s recurring plea that, once the

¹⁰ “[T]he Legislature has made the judgment that “the final authority for agency decision-making should rest with the agency head rather than with his or her subordinates, and that such final authority includes “all the decision-making power” of the hearing officer. *Tapper*, 122 Wn.2d at 405.

Program issued an initial decision in its favor, a thumb should have been placed on DaVita's side of the scales for the remainder of the proceeding.

As the Health Law Judge wrote, WAC 246-10-606 sets forth the burden of proof that applies in an adjudicative proceeding in which a CON is at issue. AR 739 (CL 2.7). The regulation provides:

The order shall be based on the kind of evidence upon which reasonably prudent persons are accustomed to rely in the conduct of their affairs. ***In all cases involving an application for a license the burden shall be on the applicant to establish that the application meets all applicable criteria*** Except as otherwise provided by statute, the burden in all cases is a preponderance of the evidence.

WAC 246-10-606 (emphasis added). This means what it says: DaVita and OPKC, as applicants, bore the burden of showing that their applications met the CON criteria. Rather than read the regulation in this straightforward way, DaVita twists it like a pretzel and concludes that because the Program's initial decision favored DaVita, the regulation somehow imposed on OPKC the burden of showing that DaVita was not entitled to a CON. Davita Br. at 23. DaVita provides no legal authority for its claim, and there is none.

Regulations are interpreted under the well-known rules of statutory construction. *City of Kent v. Beigh*, 145 Wn.2d 33, 45, 32 P.2d 258

(2001). Courts do not look beyond the plain meaning of the words in an unambiguous regulation. *See, e.g., Thurston County v. Cooper Point Ass'n*, 148 Wn.2d 1, 12, 57 P.3d 1156 (2002). The plain language of WAC 246-10-606 requires that each applicant demonstrate, by a preponderance of the evidence, that it meets all applicable criteria. DaVita and OPKC were required to establish that their respective applications met all applicable CON criteria, including the cost containment criterion.

The Health Law Judge considered the evidence in the record and correctly applied WAC 246-10-606 to find that DaVita did *not* meet its burden in light of substantial evidence that OPKC was the superior applicant. AR 739. As OPKC carried its burden of proof, the Department properly granted the CON to OPKC.

D. The Health Law Judge Did Not Err by Exercising Discretion to Reject the Program's Claims of "Expertise" on the Issues of Patient Choice and Competition.

DaVita incorrectly argues that the Health Law Judge erred by rejecting the Program's claims of "expertise" on the issues of patient choice and competition. DaVita Br. at 24-25. To the contrary, the Judge was *not* required to defer to the "expertise" of the Program on such issues and did *not* err by exercising her discretion to reject the Program's so-called "expertise." Moreover, substantial evidence supports the Judge's

determination that the Program did not use any such expertise when it reached its initial decision.

1. The APA Does Not Require the Health Law Judge to Defer to the Program’s So-Called “Expertise.”

DaVita errs when it alleges that the APA “plainly states that deference should be afforded the regulators making pre-adjudicative decisions,” citing to RCW 34.05.461(5). DaVita Br. at 25 (emphasis in DaVita’s brief). DaVita reads words into the statute that are not there. RCW 34.05.461(5), which applies specifically to the entry of orders, provides that “where it bears on issues presented, the agency’s expertise, technical competency and specialized knowledge *may be used* in evaluation of evidence.” RCW 34.05.461(5) (emphasis added). The Department has implemented this statute in its regulations, which provide that “the department, *through its designated presiding officer*, may use its expertise and specialized knowledge to evaluate and draw inferences from the evidence presented to it.” WAC 246-10-117(2) (emphasis added). Nothing in the statute or regulations requires that the Department defer to the expertise of the Program. To the contrary, the regulations plainly state only that the “department, through its designated presiding officer” (the Health Law Judge) “may” use the Department’s expertise. There is no requirement that the Department do so.

2. The Evidence Shows that the Program Lacked Expertise on the Issues of Patient Choice and Price Competition

The evidence is clear, moreover, that the Program has no experience, expertise or knowledge on the subjects of patient choice and competition – and it did nothing to obtain any information on those matters when it evaluated OPKC’s and DaVita’s CON applications.

Mr. Huyck, the Program analyst, testified at the hearing that he has no idea whether a third-party payer could negotiate better rates (*i.e.*, create price competition) by threatening a provider that it will lose business if it doesn’t offer a better rate. AR 2071. Mr. Huyck also admitted that he was aware of *no* evidence, in the record or elsewhere, to support the notion that awarding the CON to DaVita would create price competition:

Q. At the time that you prepared this evaluation, Mr. Huyck, did you have any evidence, even outside of this record, that in situations where two dialysis providers are providing services in the same service area, price competition actually occurs?

A. No, I don’t have any third-party evidence of that.

Q. And at the time you wrote the evaluation was there any evidence, of which you’re aware within the program, the Certificate of Need program at the Department, to suggest that having two different providers of dialysis services within

the given service area, actually resulted in competition?

A. I relied on my beliefs and views articulated to me by Janis Sigman and others that this does occur.

Q. ... Did Miss Sigman tell you that she had any evidence that in fact payers do compete with each other in the provision of dialysis services, when they're located in the same service area?

A. I don't believe she cited any evidence of that.

Id. at 2074:5-2075:5.

Likewise, Ms. Sigman (the CON Program manager) admitted that neither she nor the Program has any specialized knowledge or insight into price competition between dialysis providers. *Id.* at 1901-03. Similarly, the evidence shows that the Program did not possess any specialized knowledge or expertise on patient choice. Mr. Huyck testified that it was simply his personal opinion – one that is unsupported by any facts – that a DaVita center in Poulsbo would give patients a choice. *Id.* at 2027-29. Mr. Huyck admitted he has no specialized expertise or experience in health care, *id.* at 2040:14-25, and did not speak with a single patient about the issue of patient choice. *Id.* at 2059-60. Accordingly, the Health Law Judge rejected the Program's approach of substituting the uninformed and inexpert personal conclusions of one of its analysts for actual evidence

and correctly gave no weight to the Program’s determinations concerning patient choice and competition in this case. *Id.* at 740.

E. The Health Law Judge Committed No Error With Respect to Her Evaluation of Need

DaVita alleges that Judge Caner committed “clear error” by not finding DaVita’s application superior to OPKC’s on the basis of need. DaVita Br. at 39-40. Not only has DaVita waived this argument by failing to raise it at the adjudicative hearing, but the argument lacks merit as well.

Neither the Program nor DaVita mentioned “need” as a tiebreaker in their briefing at any time through the conclusion of the administrative hearing.¹¹ DaVita made the argument for the first time when it filed its petition for judicial relief. The APA, however, limits the issues that may be raised in an appeal of an agency determination. Issues not raised before the agency may not be raised on appeal except in circumstances that are not present in this case. RCW 34.05.554. Accordingly, by failing to raise it before the Department, DaVita has waived the argument.

DaVita’s need argument must be rejected on the merits as well. DaVita alleges that the Health Law Judge erred by failing to analyze (as part of the required analysis of a project’s ability to contain costs) which of the two applicant’s facilities would better satisfy projected need.

¹¹ In its post-hearing brief the Program took the position that “patient choice alone – without considering price competition – would justify the decision to approve DaVita’s application.” AR 267.

DaVita Br. at 39-40. (DaVita does not explain how the Judge, or anyone else, would have thought to undertake this novel analysis when DaVita failed to urge the point during the adjudicative hearing.) But the cost containment criterion, which addresses which CON application is the superior alternative, *does not* require that the Judge use “need” in this fashion.¹² Need is a separate, stand-alone criteria under the CON regulations that must be met before a CON may be granted. RCW 70.38.115(2)(a), WAC 246-310-210, 280. ***The Program determined that OPKC’s application satisfied the need criteria (see AR 14, 2012), and DaVita never challenged that finding.***¹³

Nor did the Health Law Judge err by exercising her discretion to determine that factors other than need rendered OPKC’s application superior to that of DaVita’s under the cost containment criteria. The Judge clearly recognized the parties’ applications supported different numbers of stations, AR 725, but she found there was substantial evidence in the record that other factors (OPKC’s better projected opening date, lower commercial rates and lower operating costs) rendered OPKC’s application superior to DaVita’s.

¹² The Program did not use need as a tiebreaker either. The Program witnesses testified that price competition and choice, not need, were the tiebreakers they used. AR 1894.

¹³ DaVita’s need argument also ignores the fact that the need for all 12 stations will not arise until 2007, and that OPKC proposed to develop (and is developing) a facility in Poulsbo capable of housing at least 12 stations. AR 892. “Construction of stations in excess of CN approval is not inconsistent with [D]epartment rules as long as the number of operational stations does not exceed the number approved by CN at any time.” AR 17. Consequently, OPKC will have adequate time to seek approval for any additional stations that may be needed in its Poulsbo facility to meet patient need.

See, e.g., AR 740-41, 744-45. In reviewing matters within agency discretion, the Court must limit its function to assuring that the agency has exercised its discretion in accordance with law. The Court is not to exercise the discretion that the legislature has placed in the agency. RCW 34.05.574(1). DaVita must show that the Judge's determination was clearly erroneous or arbitrary and capricious. DaVita has not done so.

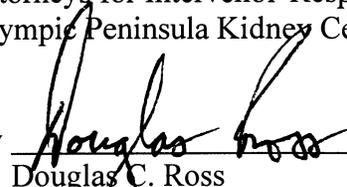
V. CONCLUSION

This Court should affirm the Superior Court's denial of DaVita's petition for judicial relief.

RESPECTFULLY SUBMITTED this 5th day of June, 2006.

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DECLARATION OF MAILING

I, Terri Ray, the undersigned, hereby declare under penalty of perjury that the following statements are true and correct:

1. I am over the age of 18 years and am not a party to the within cause.
2. I am employed by the law firm of Davis Wright Tremaine LLP. My business and mailing addresses are both 2600 Century Square, 1501 Fourth Avenue, Seattle, Washington 98101-1688.
3. I am familiar with my employer's mail collection and processing practices; specifically, that said mail is collected and deposited with the United States Postal Service on the same day it is deposited in interoffice mail, and that postage thereon is fully prepaid.
4. Following said practice, on June 5, 2006, I served a true copy of the document to which this certificate is attached by placing it in an addressed sealed envelope and depositing it in regularly maintained interoffice mail to the following:

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Terri Ray