NO. 36919-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

THE CAMPAIGN TO MAKE HEALTH CARE WORK and its members; WASHINGTON COMMUNITY ACTION NETWORK (WASHINGTON CAN!); SERVICE EMPLOYEES INTERNATIONAL UNION 1199 NORTHWEST; SOCIETY OF PROFESSIONAL ENGINEERING EMPLOYEES IN AEROSPACE, INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS LOCAL 2001; and UNITED FOOD COMMERCIAL WORKERS LOCAL 21,

Appellants,

v.

WASHINGTON STATE DEPARTMENT OF HEALTH,

Respondent.

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DIVISION II
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BY

AMENDED RESPONSE BRIEF OF RESPONDENT,
WASHINGTON STATE DEPARTMENT OF HEALTH

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I. INTRODUCTION

The Campaign To Make Health Care Work (Campaign) challenges the Department of Health's (Department) approval of a Certificate of Need to Providence Everett Medical Center (Providence) to add 106 beds to its existing hospital. The sole issue on appeal is whether the Campaign has standing under RCW 34.05.530 to contest the approval.

The Campaign claims standing as representatives of certain Providence patients and third-party payors. The Department acknowledges that patients and third party payors may be able to demonstrate standing to contest a Certificate of Need decision. However, the Campaign does not have standing because it cannot show "injury-in-fact" arising from the Department's approval of the 106 additional beds.

In approving the application, the Department conducted the required evaluation on the impact of the project on costs and charges and whether alternatives to the project exist. The Campaign offers no evidence that costs and charges will be unreasonable. Nor does the Campaign propose any alternatives to adding the new beds, which they do not deny are needed to serve the community. Moreover, the Campaign requests relief – imposition of a ceiling on Providence's charges to patients – that neither the Department nor the court can provide.

This Court should affirm the superior court's decision that the Campaign lacks standing to contest the Department's approval of Providence's Certificate of Need application.

II. ISSUES

1. Under RCW 34.05.530, is the burden of demonstrating injury-in-fact on the party asserting standing to challenge the Department's Certificate of Need decision?

2. Did the Campaign satisfy its burden of demonstrating injury-in-fact by merely alleging, contrary to evidence in the record, that the Department failed to evaluate alternatives to the bed addition and the impact of the bed addition on costs and charges, as required by RCW 70.38.115(2)(b)-(c)

3. Did the Campaign satisfy its burden of demonstrating injury-in-fact by merely asserting that the Department should have conditioned approval of the Certificate of Need on Providence offering charity care, even though the evidence shows that Providence has historically offered a high level of charity care?

5. Did the Campaign satisfy its burden of demonstrating injury–in-fact by alleging that the Department should have conditioned the Certificate of Need on Providence's acceptance of ceilings on patient

charges, even though the Department has no authority to regulate rates that hospitals charge their patients?

III. STATEMENT OF CASE

A. Certificate Of Need Law Overview

Under RCW 70.38 and WAC 246-310, an entity proposing to establish certain health care facilities or services must first obtain a Certificate of Need from the Department. RCW 70.38.105(3). This appeal is of the Department's decision to grant Intervenor Providence a Certificate of Need to add 106 beds to its existing 362-bed hospital.[1]

Based on RCW 70.38.115(2), the Department examines four criteria in deciding whether to approve a Certificate of Need application: Need (WAC 246-310-210); Financial Feasibility (WAC 246-310-220); Structure and Process of Care (WAC 246-310-230); and Cost Containment (WAC 246-310-240). The Department requires the applicant to submit certain information related to these four criteria. WAC 246-310-090(1). The Department reviews the application for completeness, and may request additional information from the applicant. WAC 246-310-090(2).

The Department then gives public notice of the application, and if requested, conducts a public hearing on the merits of the application.

[1] One of the facilities requiring Certificate of Need review is a hospital bed expansion. RCW 70.38.020(1)(c).

WAC 246-310-170 and 246-310-180. The applicant and affected persons may submit rebuttal to the public comment. WAC 246-310-160(1)(a). Based on the collected information, the Department makes a decision on whether the applicant's project should be approved as meeting the four Certificate of Need criteria. WAC 246-310-200.

B. History Of Litigation

In April 2006, Providence applied for a Certificate of Need to add 166 beds to its existing 362-bed hospital in Everett.[2] AR 750; Appendix at 2. Beginning in August 2006, the Department accepted public comment on the application, and held a public hearing in September 2006. Id. In December 2006, the Department issued an evaluation that examined the four criteria and approved Providence's application for 106 beds (60 fewer than the number requested). AR 749-768. Appendix at 1-20. The Department issued Providence a Certificate of Need. AR 748.

The Campaign filed in Thurston County Superior Court a Petition for Judicial Review, contesting the Department's decision to approve the Providence Certificate of Need application. CP 59-72. The superior court dismissed the Petition, finding that the Campaign lacked standing to

[2] The scope and critical importance of the bed expansion to the health care for residents of the Snohomish County area are well-described in the Providence brief. The Department concurs with Providence's assessment.

contest the Department's approval. CP 385-395. The Campaign filed a Notice of Appeal.

IV. ARGUMENT

A. The Campaign Has The Burden To Establish Standing

The issue in this appeal is the Campaign's standing to contest the Department's decision to approve Providence's Certificate of Need application to add 106 beds to its existing hospital in Everett. As the party asserting standing, the Campaign bears the burden of establishing standing. Lujan v. Defenders of Wildlife, 504 U.S. 555, 561, 112 S. Ct. 2130, 2136, 119 L. Ed 2d 351 (1992); Allan v. University of Washington, 92 Wn. App. 31, 35, 959 P.2d 1184 (1998)

B. There Is A Three-Part Test For Establishing Standing

RCW 34.05.530 states that a "person"[3] "aggrieved or adversely affected" by an agency action has standing to obtain judicial review of the action. The statute further states:

> [A] person is aggrieved or adversely affected only when all three of the following conditions are met:
>
> (1) The agency action has prejudiced or is likely to prejudice that person;
>
> (2) That person's asserted interest are among that the agency was required to consider when it engaged in the agency action challenged[4];

[3] The Department does not contest that the Campaign is a "person" within the meaning of the statute.

(3) A judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the agency action.

As discussed below, the Campaign cannot meet the first and third tests, and therefore lacks standing to contest the Department's decision to approve Providence's Certificate of Need application.[5]

C. The Campaign Cannot Show Injury-In-Fact, And Therefore The Campaign Should Be Denied Standing Under RCW 34.05.530(1) and (3)

Under RCW 34.05.530(1) and (3), a party seeking standing must demonstrate "injury-in-fact" resulting from the agency action. Seattle Buildings and Construction Trades Council v. The Apprenticeship and Training Council, 129 Wn.2d 787, 794, 920 P.2d 581 (1996). A "speculative" injury is not sufficient. Allan, 92 Wn. App. at 38. Injury-in-fact is established when a health-care entity challenges a Department

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[4] The Campaign and other Appellants, who purportedly representing Providence patients and third-party payors, meet this test, since the Department is required to consider their interests when it determines a Certificate of Need application.

[5] In moving for dismissal of the Petition For Judicial Review for failure to exhaust administrative remedies under RCW 34.05, the Department in superior court took the position that the Campaign could have "requested" an adjudicative proceeding to contest the approval. The superior court denied the motion. Based on that motion, the Campaign infers that the Department at the superior court did not object to standing. Campaign Brief at 9. That inference is incorrect. Had the Department's motion been granted, the Department's Health Law Judge would have first determined the Campaign's standing to contest the decision. A ruling adverse to the Campaign would have been subject to a Petition for Judicial Review. As indicated it its superior court brief (Appendix at 21), the Department, in moving to dismiss for failure to exhaust administrative remedies, never conceded that the Campaign had standing. The Department took no position on standing at the superior court in the belief that a Health Law Judge should first decide the issue.

decision to award a Certificate of Need to a competitor, since the entity is economically harmed when a competing provider is allowed to enter the marketplace. St. Joseph Hospital v. Department of Health, 125 Wn.2d 733, 739, 887 P.2d 891 (1995). Likewise, consumers and third-party payors may be able to achieve standing by showing injury-in-fact resulting from a Department Certificate of Need decision. However, in this particular case, the Campaign has failed to demonstrate injury-in-fact and therefore lacks standing.

1. The Campaign Cannot Show Injury-In-Fact Resulting From The Department's Alleged Failure To Evaluate Cost/Charges And Alternatives

In reviewing a Certificate of Need application, the Department must evaluate many factors, including:

> [T]he availability of less costly or more effective alternative methods of providing these services; ...
>
> [T]he probable impact of the proposal on the cost and charges for providing the health services in the community to be served...

RCW 70.38.115(2)(b)-(c). WAC 246-310-220(2) further requires the Department to evaluate whether approval of an application would "unreasonably" impact cost and charges. This rule recognizes that new facilities should not be disapproved simply because they will increase

costs/charges. Instead, disapproval can occur only if the increased costs/charges will be unreasonable.

The Campaign alleges that, in approving the application, the Department failed to evaluate the RCW 70.38.115(2)(b)-(c) criteria. However, as explained below, the Department did evaluate these two criteria, and decided to approve the Providence application for 106 beds.

The Department required Providence under RCW 70.38.115(2)(b) to examine alternatives to the bed-expansion project. AR 47-49. In its evaluation, the Department agreed with Providence that no viable alternatives exist. AR 677; Appendix at 19. The Campaign does not propose an alternative to bed expansion, and even indicated that it does not oppose an "appropriate expansion." AR 832. In fact, the Campaign does not contest the Department's specific finding of a need for 106 additional beds at Providence by 2015 under the State Health Plan Methodology.[6] Considering the need for the new beds, there simply is no

[6] The 12-step State Health Plan Methodology (Methodology) is the Department's lynchpin analytical tool for determining the need for new hospital beds. AR 752-759; Appendix at 4-11. The Methodology examines the need for beds in a "planning area." Providence's planning area under the Methodology is Central Snohomish County, which includes the cities of Everett, Lake Stevens, Marysville, and Mukilteo. The Methodology examines "use rates" and population trends in the planning area. With 362 beds, Providence is the planning area's only hospital, and the Methodology shows a gradually increasing "need" for new hospital beds that reaches 106 by 2015. Significantly, the Campaign does not contest the validity of the Methodology, or the "need" result calculated by the Department. The State Health Plan Methodology prescribes planning for new hospital beds seven years into the future. AR at 758;

alternative to building them, a fact pointed out by Providence in its application. AR 47.

In addition, in the application, Providence under RCW 70.38.115(2)(c) supplied information on projected costs of the expanded hospital starting in 2010. The Department determined that these costs – identified in the "Operating Revenue Per Patient" line of Table 8 – are "similar to Washington averages" for hospitals. AR at 764. Appendix at 16. The Campaign offers no evidence to dispute the Department's determination.

Furthermore, it its application, Providence projected future hospital costs with and without the expansion. With the expansion, costs are expected to rise for four years, and then actually fall due to efficiencies of operating a larger hospital. AR 852-53, 858. The Campaign does not dispute the reasonableness of Providence's projections. These projections indicate that the bed expansion will not unreasonably impact costs/charges.

Additionally, the Department further determined that Providence's projection of $58 million construction costs for adding the 106 beds was in line with other projects reviewed by the Department. AR at 767-68;

Appendix at 10. Thus, the Department properly used 2015 as the target year for gauging the need for additional beds at Providence.

Appendix at 19-20. The Campaign offers no evidence to dispute the Department's determination.

Considering this information, the Department concluded under WAC 246-310-220(2) that approval of the project would not unreasonably impact costs/charges. AR 763; Appendix at 16. The Campaign offers no alternative method for evaluating whether Providence's expansion project will unreasonably impact cost/charges.[7]

Finally, the Certificate of Need law aims to control costs by assuring that existing facilities are highly-utilized before new facilities are built. St. Joseph Hospital, 125 Wn.2d at 736. The theory is that overall costs are lessened if the health-care system does not contain excess capacity. In this case, the Campaign's interest in lower costs was protected when the Department approved only 106 of the 166 new beds requested by Providence. The reduction trimmed the cost of the project from $72 million to $59 million. AR 638-39.[8]

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[7] RCW 70.38.115(2)(b)-(c), as stated above, require the Department to generally evaluate alternatives and costs/charges. The Department did so. If the Campaign believes some specific type of analysis should be required of the Department, the Campaign may seek adoption of a new statute or rule.

[8] The Campaign alleges that the Department's analysis of the Providence application fails to comply with the recommendations made in the State of Washington Joint Legislative Audit and Review Committee. Campaign Brief at 1-3. The Department, as explained above, believes that its analysis did comply with the statutory criteria, and did not contravene the Committee's recommendations. In any event, the issue in this case is not whether the analysis complies with the recommendations, but whether the Campaign has demonstrated standing to contest the Department's decision to approve the application.

In sum, the Campaign fails to meet its burden of showing injury-in-fact resulting from the Department's decision to approve 106 new beds that the Campaign does not deny will be needed by patients at Providence by 2015.[9] The data reviewed by the Department indicates that the 106-bed expansion will not unreasonably impact costs/charges. In fact, given the uncontested "need" for 106 new beds at Providence to serve the medical needs of residents, consumers clearly are benefited – and not injured – by the Department's decision to grant the Providence application.[10]

2. The Campaign Cannot Show Injury-In-Fact Resulting From Alleged Procedural Errors Made By The Department In Approving The Application

The Campaign also argues that the Department committed "procedural errors" in its review of Providence's application. Citing Seattle Building and Construction Trades Council, 129 Wn.2d 794, the Campaign argues that injury-in-fact may result from an agency's

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[9] In an attempt to show injury and gain standing, the Campaign relies heavily on Jewell v. Washington Utilities and Transportation Commission, 90 Wn.2d 775, 585 P.2d 1167 (1978). In that case, the court agreed with a consumer that the UTC acted without statutory authority in allowing a telephone company to charge a customer rate that included the cost of the company's charity donation. Standing was not an issue in the case. In any event, Jewell is not on point. Here, the Campaign does not question the Department's statutory authority to approve Providence's application. Nor is a Certificate of Need case akin to a utility-rate case. As discussed above, the Department is statutorily-authorized to evaluate only whether a project will unreasonably raise costs/charges, which the Department did evaluate in this case. In approving a Certificate of Need application, the Department, unlike the UTC, does not approve charges that consumers must pay to a state-regulated entity.

[10] Ironically, the Campaign's lawsuit has delayed the start of Providence's project, adding about $3 million per month to the cost of the project, according to Providence. CP 82.

"procedural errors" in making its decision. Campaign's Brief at 40. However, in that case, the court held that the party seeking standing, in addition to showing procedural error, must show injury-in-fact. Id. As discussed above, the Campaign fails to meet that burden.

In any event, contrary to the Campaign's claim, the Department did not commit any "procedural error" in approving the Providence application. First, the Campaign argues that the Department committed procedural error by not evaluating "cost containment." Campaign's Brief at 42. However, as stated above, the Department did consider under RCW 70.38.115(2)(b)-(c) the "alternatives" to bed expansion as well as the expansion's impact on costs/charges. Thus, in reviewing Providence's application, the Department did not commit a "procedural error." To the contrary, the Department exactly followed the procedure by evaluating all applicable criteria.

Second, the Campaign had the right to comment on Providence's 166-bed Certificate of Need application prior to the Department making its decision. RCW 70.38.115(9); WAC 246-310-170 and 246-310-180. The Campaign argues that it was denied procedural rights to again comment on the application when the Department ultimately decided to approve only a 106-bed expansion rather than the 166-bed expansion proposed by Providence. Campaign's Brief at 42-43. The argument is without merit,

as no provision in RCW 70.38 or WAC 246-310 requires the Department to solicit additional public comment whenever it decides to approve a smaller project than the one proposed by the applicant.

Furthermore, the Department is authorized to approve Certificates of Need applications. RCW 70.38.105(3), 70.38.115(2). Agencies have those powers expressly granted to them or necessarily implied from statute. Tuerk v. Department of Licensing, 123 Wn.2d 120, 124, 864 P.2d 1382 (1994). Because the Department had authority to approve the 166-bed application submitted by Providence, the Department certainly had implied authority to approve a smaller addition based on its review of the evidence.

In any event, the issue in this appeal is limited to whether the Campaign has standing to object to the Department's approval of fewer than the number of beds for which Providence applied. As discussed above, the Campaign failed its burden of establishing an injury-in-fact arising from the approval of the 106 beds, and therefore lacks standing to contest the approval.

D. Reversing Approval Of Providence's Certificate of Need Would Not Provide The Campaign With The Relief It Seeks, And Therefore The Campaign Should Be Denied Standing Under RCW 34.05.530(3)

In addition to showing injury in fact, a person asserting standing also must show that "judgment in favor of that person would substantially eliminate or redress the prejudice." RCW 34.05.530(3). Given its request for relief, the Campaign cannot meet this test, and therefore lacks standing.

RCW 70.38.115(4) and WAC 246-310-500(2) allow the Department to place "conditions" on a Certificate of Need. In this case, as stated above, the Campaign does not contest the Department's finding that need exists for 106 additional hospital beds in Central Snohomish County. However, the Campaign argues that, when approving the 106 new beds, the Department should have placed three "conditions" on the Certificate of Need in order to control charges to patients. This argument should be rejected.

First, the Campaign argues that the Department "could have put in place conditions to ensure the provision of services at or below cost to low income consumers." Campaign's Brief at 40. In reviewing an application, the Department must evaluate whether the applicant will provide access to low-income persons. WAC 246-310-210(2). Providence, a non-profit

hospital, supplied information to the Department regarding its charity care policy and historic level of charity care. AR 21-22, 136-140. The Department found that Providence's comprehensive charity-care policy, and its above-average level of charity care, indicate that low-income persons would have reasonable access to the expanded Providence hospital. AR at 758; Appendix at 11. The Campaign offers no evidence to dispute the Department's finding.

Second, the Campaign argues that the Department should have conditioned the Certificate of Need on Providence "absorb[ing] any excessive construction costs, rather than passing those cost on to its patients." Campaign's Brief at 39. The Campaign does not explain how the Department could possibly impose and enforce such a requirement. Nor is there any evidence that Providence will incur "excessive" construction costs. In any event, the Department's decision does check excessive costs. The Certificate of Need was conditioned on Providence spending no more than its projected $59 million on the project – an amount deemed reasonable by the Department. AR at 748; AR at 767-768, Appendix at 19-20. If it later desires to spend more than 12 percent over that amount, Providence must justify the increase and obtain an Amended Certificate of Need from the Department. WAC 246-310-570(1)(e).

Lastly, the Campaign argues that the Department should have conditioned the Certificate of Need on Providence "plac[ing] a ceiling on charges to individuals and/or third party payors." Campaign Brief at 40.[11] The Campaign's argument reflects a misunderstanding of the Department's authority. In 1973, the Legislature created the state Hospital Commission with authority to approve hospital rates. Laws of 1973, 1st Ex. Sess. ch. 5. However, in 1982 the Legislature stripped the Commission of that authority, Laws of 1982, ch. 223, and eight years later allowed the Commission to sunset out of existence. Laws of 1990, ch. 52. The Department under the Certificate of Need law (RCW 70.38 and WAC 246-310) has no authority to regulate hospital charges. In fact, no state agency has such authority. As stated above, the Department's authority is limited to evaluating only whether a proposed project would "unreasonably" impact future costs/charges. RCW 70.38.115(2)(c); WAC 246-310-220(2).

In short, the three conditions that the Campaign wants imposed on Providence's Certificate of Need are either unnecessary or beyond Department's ability to impose. Thus, the Campaign should be denied standing under RCW 34.05.530(3), as the court, in disapproving the

[11] If the Department were to impose such a requirement, Providence would become the state's only hospital operating under state regulation of charges.

Certificate of Need application, could not grant the Campaign the relief it requests.

V. CONCLUSION

Based on the foregoing, the Department respectfully requests that the Court hold that the Campaign lacks standing to contest the Department's decision to grant Providence's Certificate of Need application to add 106 beds to its existing Everett hospital.

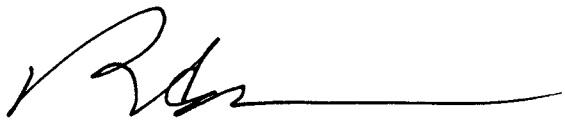
The need for the beds is uncontested. Under RCW 70.38.115(2)(b)-(c), the Department concluded that there were no alternatives to adding the new beds, and that the new beds would not unreasonably impact costs and charges. The Campaign failed its burden to show -in-injury-fact arising from the Department's decision, and therefore lacks standing under RCW 34.05.530(1) and (3) to contest the decision.

Moreover, the Campaign's requested relief is the imposition of certain conditions on Providence's Certificate of Need. The requested conditions are either unnecessary or beyond the authority of the

Department to impose on any Certificate of Need applicant. Thus, the Campaign lacks standing under RCW 34.05.530(3) to contest the decision.

RESPECTFULLY SUBMITTED this 28th day of March, 2008.

ROB MCKENNA
Attorney General



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STATE OF WASHINGTON
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COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON

THE CAMPAIGN TO MAKE HEALTH CARE WORK and its members; WASHINGTON COMMUNITY ACTION NETWORK (WASHINGTON CAN!); SERVICE EMPLOYEES INTERNATIONAL UNION 1199 NORTHWEST; SOCIETY OF PROFESSIONAL ENGINEERING EMPLOYEES IN AEROSPACE, INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS LOCAL 2001; and UNITED FOOD COMMERCIAL WORKERS LOCAL 21, Appellants, v. WASHINGTON STATE DEPARTMENT OF HEALTH, Respondent.	DECLARATION OF SERVICE APPEAL OF: THURSTON COUNTY SUPERIOR COURT NO. 07-2-00098-1

I, Jacqueline K. Conway, declare under penalty of perjury under the laws of the State of Washington that I am now and at all times herein

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mentioned a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above entitled action, and competent to be a witness herein.

On the 28th day of March, 2008, I mailed a true and correct copy, postage-prepaid via U.S. Mail, of the ***Amended Response Brief of Respondent, Washington State Department of Health*** to the parties listed below:

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