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STATE OF WASHINGTON
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Case No. 37157-0-II

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

MULTICARE HEALTH SYSTEM,

Petitioner,

v.

STATE OF WASHINGTON DEPARTMENT OF HEALTH,

Respondent.

FRANCISCAN HEALTH SYSTEM'S RESPONSE BRIEF

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ORIGINAL

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A. INTRODUCTION

Franciscan Health System ("Franciscan") respectfully requests that this Court affirm the rulings of the Thurston County Superior Court and the Department of Health (the "Department"), which correctly determined that (1) Franciscan's application for an administrative appeal (an adjudicative proceeding within the Department) was timely filed and (2) MultiCare's planned ambulatory surgery facility ("ASF," "ambulatory surgical center," or "ASC")[1] in Gig Harbor, Washington required a Certificate of Need because MultiCare does not meet the "group practice" exemption, which would allow it to avoid Certificate of Need review.

This case arose because the Department denied MultiCare's application for a Certificate of Need to operate an ASC in Gig Harbor. The Certificate of Need Program[2] determined that no need existed in Gig Harbor for additional ambulatory operating rooms. This determination of no need was affirmed by a health law judge, who issued the Department's final order on the matter, and MultiCare chose not to appeal it further.

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[1] The regulatory definition identifies these facilities as "ambulatory surgical facilities," which include ambulatory surgery centers. The parties use these terms interchangeably in this case. WAC 246-310-010.

[2] The Certificate of Need Program (sometimes referred to herein as the "Program") is the office within the Department that initially determines whether a project requires a Certificate of Need, evaluates Certificate of Need applications, and makes the initial determinations on these questions. If the Program's decision is administratively appealed, as it was in the present case, a health law judge, who is a judicial officer within the Department, issues the Department's final decision. *DaVita, Inc. v. Wash. St. Dep't of Health*, 137 Wn. App. 174, 181, 151 P.3d 1095 (2007). Although the Program is within the Department, it is sometimes necessary to distinguish between the Program's decisions and the Department's final decision.

Therefore, issues regarding whether MultiCare's facility is needed are not before this Court.

After the Department determined that no need existed for MultiCare's proposed ASC, MultiCare took a different approach and requested a "determination of non-reviewability," or "DNR,"[3] which is a determination by the Department that a new project does not require a Certificate of Need. The Department's decision to deny MultiCare a DNR (in other words, to determine that MultiCare's proposed ASC requires a Certificate of Need) is the subject of the present case.

The first set of issues before this Court involves whether Franciscan's appeal was timely taken from a June 6, 2006 letter determination by the Program, which initially granted MultiCare a DNR. Franciscan appealed this DNR. MultiCare contested the timing of the appeal, but the health law judge determined that the June 6, 2006 letter was the Program's final decision on MultiCare's DNR, and that Franciscan's appeal of that letter was timely. The health law judge made this ruling based on factual findings, which were uncontested below and which MultiCare has not appealed. These findings are therefore verities for the purposes of this Court's review. In any event, substantial evidence supports the finding that the June 6, 2006 letter was the Program's final decision. The Department's interpretation of its own rules on the

[3] The administrative record sometimes refers to this as a "determination of reviewability" or "DOR," but both acronyms refer to the Department's determination that a facility is not subject to Certificate of Need review.

timeliness of applications for adjudicative proceedings is entitled to deference. Franciscan requests that this Court affirm the Thurston County Superior Court's and the Department's rulings that Franciscan's administrative appeal was timely.

The second set of issues before this Court involves whether MultiCare's proposed ASC requires a Certificate of Need to operate (and is therefore not entitled to a DNR). The Department correctly determined, and the Thurston County Superior Court affirmed, that MultiCare's proposed ASC requires a Certificate of Need. The history of the current regulations indicates that the regulatory intent was to require hospitals, like MultiCare, to obtain a Certificate of Need to operate stand-alone ASCs so as to not give them an advantage over non-hospital developers of stand-alone ASCs. Furthermore, the Department's use of outside guidance to determine the meaning of terms undefined within the Certificate of Need regulation, such as group practice" and "private physicians," is reasonable. Federal regulations interpreting the "Stark law" are a useful source of guidance when defining those terms. MultiCare is a healthcare organization, which has as its primary purpose owning and operating hospitals and is therefore not a "group practice" of "private physicians."

For these reasons, Franciscan respectfully requests that this Court also affirm the Department's ruling that MultiCare is not entitled to a DNR and that its proposed ASC requires a Certificate of Need.

B. ISSUES

1. Was the Department correct to determine that Franciscan's administrative appeal was timely because, based on the uncontested facts, the Department's June 6, 2006 letter was the Department's final decision on whether MultiCare's proposed ASC was subject to certificate of need review?

2. Was the Department correct to determine that Franciscan's administrative appeal was timely filed under either the 20-day or the 28-day deadline?

3. Was the Department correct to determine that MultiCare was required to obtain a Certificate of Need to build and operate its proposed ASC in Gig Harbor because the ASC would be owned and operated by MultiCare does not fit into the group practice exemption?

C. STATEMENT OF THE CASE

1. Regulatory Background: The Department of Health's Certificate of Need Program.

In 1979, the Legislature enacted the State Health Planning and Resources Development Act, chapter 70.38 RCW, which created the Certificate of Need ("Certificate of Need") Program to oversee health care planning "in a planned, orderly fashion, consistent with identified priorities and without unnecessary duplication or fragmentation." RCW 70.38.015(2) (1989). Health care providers seeking to establish or expand certain health care facilities and services, including ASCs, are required to

obtain a Certificate of Need, which is a non-exclusive license to operate. RCW 70.38.105; *St. Joseph Hosp. and Health Care Ctr. v. Dep't of Health*, 125 Wn.2d 733, 735, 887 P.2d 891 (1995).

ASCs are defined as "any free-standing entity, including an ambulatory surgery center, that operates primarily for the purpose of performing surgical procedures to treat patients not requiring hospitalization." WAC 246-310-010. Not all operating rooms separate from a hospital, however, require a Certificate of Need to operate. The definition of ASCs excludes operating rooms that are "in the offices of private physicians or dentists" in which "the privilege of using such facility is not extended to physicians or dentists outside the individual or group practice." WAC 246-310-010.

This exclusion of private operating rooms from the definition of ASCs is known as the "group practice" exemption. Operating rooms that fall within this exemption are not reviewed by the Certificate of Need Program and do not require a Certificate of Need to operate. Those who believe that this exemption applies to their proposed surgical facility must obtain a "determination of non-reviewability" ("DNR") from the Certificate of Need Program. WAC 246-310-050.

The method of identifying whether a proposed surgical facility meets the group practice exemption, and whether MultiCare's proposed ASC meets the group practice exemption, are the central issues in the present case. The terms "individual or group practice" or "private

physicians" are not defined within the regulation. However, as is explained below in greater detail, the purpose of the current regulatory definition for ASCs was to require hospitals obtain a Certificate of Need to operate a surgical facility that is separate from a hospital campus. Furthermore, the Certificate of Need Program has historically used the definition of "group practice" as that term is defined for purposes of federal regulations, known as the "Stark law," for guidance in the Certificate of Need context. That definition of "group practice" contains the following requirement:

> The group practice must consist of a single legal entity **operating primarily for the purpose of being a physician group practice** in any organizational form recognized by the State in which the group practice achieves its legal status, including, but not limited to, a partnership, professional corporation, limited liability company, foundation, not-for-profit corporation, faculty practice plan, or similar association.

42 CFR 411.352(a) (emphasis added). AR 662-64 (EXHIBIT A hereto).

2. Factual Background Regarding the Timeliness of Franciscan's Administrative Appeal

MultiCare has not specifically appealed any of the Department's factual findings regarding the time line of Franciscan's administrative appeal. These facts are now verities on appeal.[4] However, a complete recitation of the underlying history is crucial to understanding any mixed

[4] *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42, 59 P.3d 611 (2002).

issues of law and fact regarding the timeliness of Franciscan's application for an adjudicative proceeding.

a. MultiCare Pursued a Determination of Non-reviewability ("DNR") After Its Certificate of Need Application Was Denied.

On May 17, 2005, MultiCare submitted an application for a Certificate of Need to establish a new ASC in Gig Harbor. AR 31. The Certificate of Need Program recognized Franciscan as an affected party in this review process and Franciscan submitted public comments. AR 31. Following a review process, the Certificate of Need Program denied MultiCare's application. AR 28-42.[5]

After the Certificate of Need Program determined that no need existed for MultiCare's proposed facility, MultiCare attempted to have its proposed Gig Harbor ASC qualify for an exemption from Certificate of Need review as a "group practice" surgical facility. MultiCare met with Janis Sigman, Manager of the Department's Certificate of Need Program, to discuss this potential in November of 2005. Eventually MultiCare applied for a DNR for its proposed Gig Harbor ASC on December 15,

[5] In another proceeding, MultiCare appealed this determination of no need within the Department by requesting an adjudicative proceeding before a Health Law Judge. After an adjudicative hearing in November 2007, the health law judge upheld the determination of no need. MultiCare elected not to further appeal this determination. The decision that no need exists for MultiCare's proposed facility in Gig Harbor stands, and issues relating to whether or not MultiCare's proposed facility is needed are not before this Court.

2005. AR 43-84. Franciscan was not given any notice of MultiCare's application for a DNR.

b. Franciscan Learned of MultiCare's Attempt to Get a DNR and Timely Responded to the Certificate of Need Program.

Franciscan only learned of MultiCare's request for a DNR after the fact and had to request a copy of it from the Certificate of Need Program. *See* AR 634 (Decl. of Jody Carona). On January 19, 2006, Franciscan submitted a letter to the Program setting forth its questions and concerns relating to MultiCare's request for a DNR. AR 85-87 (attached hereto as EXHIBIT B.) Specifically, Franciscan raised issues regarding whether MultiCare qualified as a "group practice" and how MultiCare planned to enroll its proposed Gig Harbor ASC into the Medicare program. *Id.* On January 20, 2006, Franciscan learned for the first time that the Program had already issued a letter on January 12, 2006, which purported to grant MultiCare a DNR for its proposed Gig Harbor ASC. AR 23-25 (attached hereto as EXHIBIT C). Significantly, the Department did not provide Franciscan with any notice or a copy of this January 12, 2006 letter until Franciscan requested it. AR 109 (EXHIBIT P).

c. The Certificate of Need Program Assured Franciscan that Franciscan's Challenge to MultiCare's DNR Application Was Preserved and Was Being Considered.

The uncontested facts demonstrate that during the period of late January 2006 through early June 2006 (1) Franciscan raised material concerns about MultiCare's eligibility for a DNR; (2) the Program assured Franciscan that it was considering its concerns; and (3) the Program responded to Franciscan's concerns by requesting additional information from MultiCare. The Program informed MultiCare that the January 12, 2006 letter was not operable. The Program's decision on MultiCare's DNR was not final until its June 6, 2006 reconsidered decision on MultiCare's DNR, which Franciscan did not receive until June 12, 2006.

On Friday, January 27, 2006, about a week after Franciscan first learned of the Program's January 12, 2006 letter to MultiCare, Jody Carona, Franciscan's health planning consultant, spoke with Bart Eggen, the Executive Manager of the Certificate of Need Program. Ms. Carona reiterated Franciscan's concerns regarding the Program's apparent approval of the DNR and the Program's intentions concerning the Franciscan's January 19, 2006 letter. Mr. Eggen indicated to Ms. Carona that he had not yet seen Franciscan's letter. Ms. Carona explained to Mr. Eggen that Franciscan had raised serious questions as to MultiCare's ability to secure a DNR and inquired as to what the Program would do

now that it had apparently approved MultiCare's request for a DNR before even considering Franciscan's letter.

Mr. Eggen assured Ms. Carona that the Program would consider Franciscan's letter and that MultiCare's DNR could always be altered as circumstances required. Mr. Eggen also told Ms. Carona that any DNR issued by the Program is not "cast in concrete" and can be pulled if circumstances change. This conversation between Mr. Eggen and Ms. Carona was documented in an e-mail sent by Ms. Carona to Laure Nichols of Franciscan and to Franciscan's counsel, Donald W. Black. AR 634-35, 638 (attached hereto as EXHIBIT D). In reliance on this conversation with Mr. Eggen, Franciscan did not immediately file a request for adjudicative proceeding related to MultiCare's DNR.

After Franciscan had not heard back from Mr. Eggen or anyone else at the Certificate of Need Program, Ms. Carona again contacted Mr. Eggen on March 7, 2006 to discuss the status of this matter and the Program's response to Franciscan's January 19, 2006 letter. That conversation is documented in an e-mail dated March 7, 2006 sent by Jody Carona to Laure Nichols and Don Black. AR 635, 637 (attached hereto as EXHIBIT D.) In that conversation, Mr. Eggen indicated that the Franciscan letter raised some interesting questions and that "the Program intends to do more work on this issue." *Id.* Mr. Eggen further indicated that this was not the Program's top priority and that they were not concerned about a several month delay in issuing a revised letter. *Id.*

Significantly, Mr. Eggen also specifically told Ms. Carona that no harm would come to either MultiCare or Franciscan during those few months of delay. *Id.* Again, Franciscan relied on Mr. Eggen's representations regarding the Program's planned future actions on this matter and did not immediately file a request for adjudicative proceeding related to MultiCare's DNR. *See id.*

After additional time had passed without word from the Program, Franciscan sent a second letter to the Program dated March 31, 2006. AR 89-90 (attached hereto as EXHIBIT E.) In this letter, Franciscan reiterated the issues that it raised in its January 19, 2006 letter, and also informed the Department about information Franciscan had received concerning MultiCare employing physicians on a part-time basis for the purpose of allowing such physicians to use its Gig Harbor ASC as "employees."

On Friday, April 14, 2006, Laure Nichols of Franciscan received a telephone call from Janis Sigman of the Certificate of Need Program. Ms. Sigman advised Ms. Nichols that the Certificate of Need Program had received Franciscan's letters and had just heard back from MultiCare. She advised Ms. Nichols that she would review all of the materials and files and respond by the end of the following week. This conversation was documented in an e-mail sent by Laure Nichols to Jody Carona and Franciscan's counsel on April 14, 2006. As with the two prior conversations with Mr. Eggen, Franciscan specifically relied upon the representations of Ms. Sigman in determining there was no need to

immediately file a request for adjudicative proceeding related to MultiCare's DNR.

Around this same time period, Franciscan learned that the Program had forwarded questions to MultiCare related to the DNR for its proposed Gig Harbor ASC. On May 11, 2006, the Program provided Franciscan with a copy of the Program's questions to MultiCare dated April 28, 2006 and MultiCare's response to these questions dated May 3, 2006. AR 92 (April 28 email, attached hereto as EXHIBIT F); AR 94-95 (May 3, 2006 response from MultiCare, attached hereto as EXHIBIT G). On the same day, the Program also provided Franciscan with a copy of the Program's additional questions to MultiCare dated May 9, 2006. AR 97 (attached hereto as EXHIBIT H).

On Friday, May 19, 2006, counsel for the Program sent an e-mail to Franciscan's counsel and requested Franciscan's comments on a copy of a letter dated May 17, 2006 from MultiCare's then-counsel. The subject of MultiCare's May 17 letter was the Program's May 9, 2006 request for additional information. AR 99-102 (May 17 letter, attached hereto as EXHIBIT I); AR 630 (May 19 e-mail, attached hereto as EXHIBIT J) Franciscan's counsel replied back to the Program's counsel on Monday, May 22, 2006 stating that Franciscan was reviewing the new information from MultiCare and would provide the Program with its comments as soon as possible. AR 631 (attached hereto as EXHIBIT K).

On May 23, 2006, Franciscan provided comments to the Program related to MultiCare's May 17, 2006 responses to the Program. AR 104 (attached hereto as EXHIBIT N). On May 25, 2006, the Program's counsel telephoned Franciscan's counsel to discuss why Franciscan believed MultiCare was not a "group practice." AR 627 (attached hereto as EXHIBIT M). Based on this conversation, Franciscan continued to believe that the Certificate of Need Program was still considering the merits of MultiCare's DNR request and that it was not necessary or appropriate to immediately file a request for adjudicative proceeding related to the DNR issue.

On May 26, 2006, the Certificate of Need Program gave further indication that it had not yet rendered its final decision on MultiCare's DNR during a telephonic status conference held in the related adjudicative proceeding (for MultiCare's appeal of the denial of its Certificate of Need application for the Gig Harbor ASC, Department docket number 05-11-C-2043CN). The participants of the status conference were the Program's counsel, MultiCare's counsel, Franciscan's counsel and the health law judge, the Honorable Zimmie Caner. AR 627 (attached hereto as EXHIBIT M). During this status conference, the Program's counsel informed all of the participants of the status of MultiCare's DNR application and explained that the Program was considering the recent information from MultiCare and that the Program would render a decision on the DNR in the following week.

On June 12, 2006, Franciscan received a copy of a letter sent by the Program to MultiCare dated June 6, 2006. AR 20-21 (attached hereto as EXHIBIT O). This letter set forth what was to be the Program's final decision in this matter, although it did not address all of the issues raised by Franciscan. The letter provided in pertinent part that:

> [i]t appears that the facts on the proposed operation of the facility have materially changed, meaning that the January 12, 2006, DOR[ ] is not applicable to the project and would not support MultiCare's right to proceed without Certificate of Need approval.

AR 21.

Based on these facts, the health law judge found that the "***Program's communications with Multicare and Franciscan regarding the issues raised by Franciscan clearly indicates that Program was reconsidering its Multicare Gig Harbor DNR decision.***" AR 313 (Prehearing Order No. 4: Order Denying Motion to Dismiss) (emphasis added). MultiCare has not challenged these factual findings on appeal.

On June 20, 2006, Franciscan requested that the Program confirm in writing whether (i) the June 6, 2006 letter was the Department's final action in this matter, and whether (ii) the Department would take steps to substantively address the additional issues Franciscan raised in its January 19, 2006 and March 31, 2006 letters. AR 107-11 (attached here to EXHIBIT P).

On June 21, 2006, Franciscan received a copy of a letter addressed to the Program dated June 13, 2006 from MultiCare's counsel, in response to the Program's June 6, 2006 letter to MultiCare. AR 113-14 (attached hereto as EXHIBIT Q). In this letter, MultiCare claimed that it would agree not to use part-time employees, meeting the Program's concerns in its June 6, 2007 letter. Although MultiCare's letter addressed the Program's concern regarding part-time employees, it also confirmed that the Gig Harbor ASC would be operated as a part of MultiCare's hospital. *Id.* at AR 114.

On June 26, 2006, Franciscan sent a letter to the Program in response to MultiCare's June 13, 2006 letter to the Program. AR 117-18 (attached hereto as EXHIBIT R). Franciscan noted that MultiCare admitted that it would operate its proposed Gig Harbor ASC under its hospital license and that this fact alone was grounds to deny MultiCare's request for a DNR. However, the Program was not responsive to this concern. Because it now appeared that the Program's June 6, 2006 decision granting MultiCare a DNR was final, Franciscan appealed this decision by filing an application for an adjudicative proceeding on July 3, 2006. AR 1-6 (excluding attachments).

Based on these facts, the health law judge found that ***"[o]n June 6, 2006, after reconsideration, Program issued its final decision on Multicare's Gig Harbor DNR application. Franciscan received a copy***

of the final DNR decision on June 12, 2006." AR 313 (emphasis added).

The health law judge concluded that:

> A reasonable prudent person objectively reviewing the uncontested communications in the case at hand would conclude that **Program's January 12, 2006 DNR letter was not its final decision**; that Program informed Franciscan it would investigate issues raised in Franciscan's January 19, 2006 letter and therefore reconsider its DNR decision. **Program's June 6, 2006 modified DNR letter was its final decision**.

AR 314 (emphasis added).

MultiCare does not challenge any of the factual findings above, but appeals the Department's conclusion that the Program's June 6, 2006 letter was its final decision on MultiCare's DNR.

3. Factual Background Regarding the Merits of the DNR Determination and the "Group Practice" Exemption

MultiCare's proposed ASC in Gig Harbor would be owned by MultiCare. AR 56. The physicians who would use MultiCare's proposed Gig Harbor ASC are employees of MultiCare. See AR 46. MultiCare's application for a DNR for its Gig Harbor ASC indicates that MultiCare Medical Association ("MMA") is the clinical practice that would use its ASC and is "a division of MultiCare Health System that oversees the employed providers of MultiCare Health System." AR 46. In other words, MMA is simply a division of MultiCare, not a separate entity. No other entity has an ownership interest in MMA. AR 46. MultiCare

indicated in its DNR application that this entity was not a "group practice." AR 46. MultiCare does not operate primarily for the purpose of being a physician group; its primary purpose is providing inpatient and outpatient hospital services at Tacoma General Hospital/Allenmore Hospital, Mary Bridge Children's Hospital, and Good Samaritan Hospital, among other locations. AR 30, 486.

MultiCare also publicized that its proposed ASC in Gig Harbor would be open to not only MMA (MultiCare employed physicians) but also members of "MultiCare Medical Group." AR 90. Franciscan had reason to believe that MultiCare planned to employ physicians part-time, solely during the periods that they would be using the Gig Harbor ASC. AR 90. Franciscan provided these and other concerns to the Certificate of Need Program, as described above. *See, e.g.*, AR 85-87; 89-90.

On October 4, 2006, counsel for Franciscan deposed Janis Sigman, the manager of the Certificate of Need Program. She testified about the standard that the Certificate of Need Program uses to determine whether MultiCare's proposed Gig Harbor ASC project met the "group practice" exception (which would entitle it to a DNR), allowing it to avoid a determination of need by the Certificate of Need Program. She testified in pertinent part as follows:

> Q. And, in the definition of an ambulatory surgery facility or what we are colloquially referring to as an ambulatory surgery center, is the term "group practice" itself defined?

A. No.

Q. Is it defined in the Certificate of Need statute?

A. No.

Q. **Is it correct that the [Certificate of Need] program has referred to the definition of a group practice found in the Medicare Stark law in past instances relating to determinations of non-reviewability for ambulatory surgery centers?**

A. **We have looked to that for guidance, the definition as guidance**, but we recognize that that was a specific purpose and that we don't have a definition specifically in the rule, so we look kind of to the concepts that are in that particular statute or in that Stark stuff.

Q. I believe you said, "Or in that Stark stuff," is that correct?

A. Yes. A real technical term there.

Q. That's fine.

Is it correct that you have referred parties that are making inquiries regarding submitting determinations for non-reviewability related to ambulatory surgery centers, that you have referred them to the Medicare Stark law definition of a group practice for guidance?

A. In the same context that we have indicated that we have – that **we use that as guidance for making that determination.**

We also have provided them with a – kind of an acceptable – an example of an acceptable/nonacceptable type of ASC. And I believe that's materials that can be found on our website.

Q. Is there any other specific guidance on what is or is not a group practice that the program looks to in rendering determinations of non-reviewability?

A. Not really.

. . .

Q. **So besides the Stark law and past determinations that the program has issued, are there – anything else that you look to for guidance or that you offer to applicants for guidance in determining what a group practice is?**

A. I'm thinking. **Not that I recall.**

. . .

Q. In fact, **is it correct that you relied and actually cited the Stark law definition of a group practice in your June 6th, 2006 letter?**

A. **I believe I did cite that in my June 6th letter.**

. . .

Q. My question was that in your letter, you referred to and relied on some information provided by MultiCare in May of 2006.

A. Correct.

Q. And is it correct that based on this information that MultiCare provided, that in your June 6th letter, **you found that the determination of reviewability was not applicable to the project and would not support the right to proceed without a Certificate of Need?**

A. **That would be correct** if they were going forward with the way that the

> information in the May 17th letter would indicate.

AR 653-60 (Sigman Deposition, pp. 9, ll. 22-25; p. 10; p.11, ll. 1-10, 22-25; p.12, ll. 1-2; p. 13, ll. 14-17; p. 14, ll. 7-18 (emphasis added), attached hereto as EXHIBIT S).

On cross motions for summary judgment, the health law judge ruled that Franciscan's application for adjudicative proceeding was timely and denied MultiCare's application for a DNR for its proposed Gig Harbor ASC.

D. ARGUMENT AND AUTHORITY

1. Standard of Review

Health law judges are the final decision makers for the Department in Certificate of Need matters. *DaVita, Inc. v. Wash. St. Dep't of Health*, 137 Wn. App. 174, 181, 151 P.3d 1095 (2007). A health law judge need not give any special deference to the decision of Certificate of Need Program analysts. *DaVita, Inc.*, 137 Wn. App. at 183. On judicial review, courts review the health law judge's decisions, not those of the Certificate of Need Program, under the standards of RCW 34.05.570. *DaVita, Inc.*, 137 Wn. App. at 181.

The party challenging an agency's decision bears the burden of proving the invalidity of the Department's decision. RCW 34.05.570(1)(a), (3)(d). The interpretation of an agency rule is a question of law that the court reviews under the error of law standard. *King County*

v. Central Puget Sound Growth Management Hearings Bd., 142 Wn.2d 543, 555, 14 P.3d 133 (2000). Under the error of law standard, courts may substitute their judgment for the Department's; however, courts "give substantial weight to an agency's determination when the subject matter involves the agency's particular area of expertise." *Musselman v. Dep't of Social and Health Services*, 132 Wn. App. 841, 846, 134 P.3d 248 (2006); *see also DaVita, Inc.*, 137 Wn. App. at 181. Courts afford great deference to an agency when it involves an interpretation of an agency rule within its specialized knowledge and expertise. *Haynes v. Yount*, 87 Wn.2d 280, 289, 552 P.2d 1038 (1976) (citing *Udall v. Tallman*, 380 U.S. 1, 16, 85 S. Ct. 792, 801, 13 L.Ed.2d 616 (1965)).

MultiCare has not challenged the Department's factual findings. However, the Department's factual determinations are reviewed for lack of substantial supporting evidence in the record, and are overturned only if they are "clearly erroneous." RCW 34.05.570(3)(e); *DaVita, Inc.*, 137 Wn. App. at 181. Furthermore, because the health law judge has "discretion to apply the agency's expertise," the fact that the Department, through the health law judge, disregarded the Certificate of Need Program's initial decision is only error if doing so "rises to the level of an arbitrary agency action" under RCW 34.05.570(3)(i). *DaVita, Inc.*, 137 Wn. App. at 184.

2. Franciscan's Application for an Adjudicative Proceeding was Timely.

Franciscan's application for an adjudicative proceeding was timely, and the Department's ruling in this regard should be affirmed. Substantial uncontroverted evidence supports the Department's ruling that the Program's June 6, 2006 letter was the Program's final decision, and MultiCare does not challenge that evidence here. Unchallenged findings of fact are verities on appeal. *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42, 59 P.3d 611 (2002). Instead, MultiCare simply argues that the January 12, 2006 letter was the Program's final decision and ignores all of the events that occurred after that date, which led to the Program's June 6, 2006 letter, upon which the Department based its decision.

a. The Program's June 6, 2006 Letter Was Its Final Decision on MultiCare's DNR.

The record of communication between Franciscan, the Program and MultiCare between January 12, 2006 and June 6, 2006 is substantial evidence that the Program's decision on MultiCare's DNR was not final until June 6, 2006 or after. Franciscan was not even apprised of the Certificate of Need Program's January 12, 2006 letter until after Franciscan raised serious concerns about the accuracy of MultiCare's representations regarding facts relevant to MultiCare's DNR. The Certificate of Need Program took some of Franciscan's concerns seriously and required a response from MultiCare. MultiCare responded. Based on

this response, the Certificate of Need Program expressly stated in its June 6, 2006 letter that MultiCare could not rely on the January 12, 2006 letter as the final word on the DNR, and that no DNR would be valid unless MultiCare met the terms that the Certificate of Need Program required. MultiCare eventually agreed to meet the terms of the Certificate of Need Program, and the June 6, 2006 letter became the Program's final decision on this matter.

Between January 20, 2006 and June 6, 2006, the Certificate of Need Program repeatedly assured Franciscan that Franciscan's concerns regarding the DNR were under consideration. At no time prior to June 6, 2006 was there any reason for Franciscan to believe that it needed to immediately file a request for an adjudicative proceeding related to the DNR issue. Even if one ignores the Certificate of Need Program's assurances to Franciscan, the written communication between the Certificate of Need Program and MultiCare alone supports the conclusion that the Certificate of Need Program's decision to grant MultiCare a DNR was still under consideration until June 2006. On May 10, 2006, the Certificate of Need Program's counsel wrote the following to MultiCare's counsel stating that not only was the January 12, 2007 letter inoperable, but that MultiCare would have to file a new DNR application because it had omitted material information:

> When the Program issued its DOR,[6] it was not aware of MMG[7] or that part-time physicians would be using the ASC. This was material information that could impact our decision. Accordingly, in our opinion, the January 12 DOR does not relate to MultiCare's project as described in your May 3 letter, and therefore **MultiCare cannot rely on the DOR in going forward without a Certificate of Need**.
>
> Of course, **MultiCare may request a new DOR** based on detailed corrected information about who will use the ASC, who will be eligible to use the ASC, and under what agreements. Participation of part-time MMG physicians may raise additional legal issues for the Program to consider in deciding whether we believe that the ASC is Certificate of Need-exempt under the definition in WAC 246-310-010.

AR 97 (EXHIBIT H hereto) (emphasis added).

The June 6, 2006 letter from Janis Sigman, the Certificate of Need Program's manager, to MultiCare confirmed that the January 12, 2006 letter was inoperable:

> Accordingly, it appears that the **facts on the proposed operation of the facility have materially changed**, meaning that the January 12, 2006, DOR is not applicable to the project **and would not support MultiCare's right to proceed without Certificate of Need approval**.

AR 20-21 (EXHIBIT O hereto).

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[6] The Certificate of Need Program uses "DOR" as an alternative acronym for a Determination of [non] Reviewability.

[7] MMG is "MultiCare Medical Group."

Incredibly, MultiCare now argues that it had the right to rely on the January 12, 2006 decision as final and proceed with its project without risk that the DNR would be reversed on adjudicative review, even after the Program expressly told MultiCare that it could not do so. MultiCare simply ignores the facts contrary to its theory that the January 12, 2006 letter was the Program's final word on MultiCare's DNR application and argues that nothing after that date has any meaning. If that were true, there would be no need for the Program to repeatedly advise MultiCare that it could not rely on the January 12, 2006 letter in moving forward without Certificate of Need approval and to reference the need for MultiCare to apply for a new DNR.

The Program clearly reconsidered its January 12, 2006 determination based on information it received from Franciscan. Reconsideration of a Program decision is allowed under WAC 246-310-560. Grounds on which the Program grants reconsideration include, but are not limited to "[s]ignificant relevant information not previously considered" which "could not have been presented before the Department made its decision" and "[i]nformation on significant changes in factor or circumstances relied upon by" the Program. WAC 246-310-560(2)(b). A party requesting reconsideration does not forfeit his or her rights to a later appeal of the reconsideration decision. WAC 246-310-560(7).

Here, Franciscan provided new information to the Program *before* it learned of the January 12, 2006 letter, so Franciscan should not be

penalized for not submitting the information before the January 12, 2006 letter. The Program properly took Franciscan's letter as a written request for reconsideration under these circumstances, and told MultiCare that it could not rely on the January 12, 2006 letter. MultiCare argues that there is no specific provision for reconsideration of a DNR in the regulations, but no rule exists that prevents Department from applying the general reconsideration rule, WAC 246-310-560, to its DNR determinations when the Program learns new information. This new information did, in fact, change the Program's decision on MultiCare's DNR, even though the Program did not agree with all of Franciscan's concerns. Franciscan filed a timely appeal of the June 6, 2006 reconsidered DNR decision by filing an application for an adjudicative proceeding by July 3, within 20 days of receiving the reconsidered decision on June 12, 2006. Ultimately, as explained above, the Department, through the health law judge's final order, did agree with Franciscan's remaining concerns and denied MultiCare's DNR.

Franciscan did not simply manufacture a new decision date by writing letters to the Program. It is nonsensical to argue that Franciscan somehow intended to artificially extend the deadline by writing letters to the Certificate of Need Program, when Franciscan did not even know of the January 12, 2006 letter until after it had notified the Certificate of Need Program of its concerns. If Franciscan had any indication that the Certificate of Need Program was not responsive to its concerns, it would

have understood the January 12, 2006 letter to be final, and would have filed an application for adjudicative proceeding soon after. However, Franciscan received every indication from the Certificate of Need Program that at least some of Franciscan's concerns were being considered. An adjudicative proceeding before June 6, 2006 would therefore have been premature.

b. MultiCare's Remaining Arguments on the Timing of Franciscan's Application for Adjudicative Proceeding are Without Merit.

Because Franciscan's application for adjudicative proceeding was timely, the Court need not reach MultiCare's arguments that the Department's health law judge somehow did not have the jurisdiction to deny MultiCare's DNR. MultiCare bases this argument on the contention that an application for an adjudicative proceeding must be made timely under the applicable rules, or the health law judge does not have jurisdiction over the adjudicative proceeding. However the Department has the authority to make findings on whether an application is timely under the Department's own rules. Here, the Department based its determination that Franciscan's application for adjudicative proceeding was timely on the substantial facts before it, as described in detail above, which MultiCare has not challenged on appeal. The Department had the jurisdiction and discretion to make the factual findings regarding the

timing of Franciscan's application for adjudicative proceeding, and correctly did so.

MultiCare's argument regarding whether a 20-day or 28-day deadline applies can be disregarded because Franciscan met the 20-day deadline. The uncontested facts indicate that Franciscan received the Program's final decision on Monday, June 12, 2006. MultiCare argues that "service" under the applicable rules occurs when a document is deposited in the U.S. Mail and that the June 6, 2006 letter was deposited in the mail to *MultiCare* on June 6, 2006. However, there is no evidence that Franciscan was ever served with the June 6, 2006 letter under this definition of service. The date that the June 6, 2006 letter was deposited in the mail to *MultiCare* is not evidence of service on Franciscan.

The only undisputed certainty is that Franciscan *received* the June 6, 2006 letter on June 12, 2006. Twenty days after June 12 was Sunday, July 2, 2006. Franciscan filed its application for an adjudicative proceeding on Monday, July 3, 2006. When a deadline falls on a Saturday, Sunday or legal holiday, the deadline rolls over to the next day that is not a Saturday, Sunday or legal holiday. CR 6(a). Therefore, Franciscan's appeal was timely under either a 20-day or 28-day deadline, as the Department determined.

In any event, Franciscan met the 28-day deadline found in WAC 2460310-610, which is the rule that sets for the deadline for appealing a Program decision by applying for an adjudicative proceeding. This

deadline applies specifically to Certificate of Need applicants, but has also been used for interested and affected parties since the Supreme Court recognized their right to an adjudicative proceeding. *St. Joseph Hosp.*, 125 Wn.2d 733. When no specific deadline applies, courts look to an analogous deadline. *Cf. Cary v. Mason County*, 132 Wn. App. 495, 501, 132 P.3d 157 (2006) (regarding deadline for filing declaratory judgment actions). Appealing Certificate of Need decisions is analogous to appealing DNR decisions, so this deadline is appropriate. Even if the 20-day deadline were somehow also analogous, "when there is more than one analogous appeal period, 'the longer of two . . . periods should be applied.'" *Cary*, 132 Wn. App. at 501 (quoting *Brutsche v. City of Kent*, 78 Wn. App. 370, 377, 898 P.2d 319 (1995)). Therefore, if there is any doubt as to whether to apply the 28-day or the 20-day deadline, the 28-day deadline is appropriate because it is the longer of the two.

In summary, unchallenged substantial evidence exists to support the Department's determination that (1) the Program's reconsidered June 6, 2006 decision was the final determination on MultiCare's DNR and (2) that Franciscan's application for adjudicative proceeding was timely under either the 20-day or 28-day limitation set forth in WAC 246-310-610(2) or the 20-day limitation in WAC 246-10-203(1)(a)(iii).

3. The Department Correctly Ruled that MultiCare Does Not Meet the Requirements of the Group Practice Exemption as a Matter of Law.

The Department correctly determined that MultiCare's proposed ASC in Gig Harbor does not meet the definition of "group practice," and is therefore subject to Certificate of Need review. The intent of the regulatory definition of "ambulatory surgical facilities" was to require hospitals that developed free-standing ASCs to obtain Certificates of Need for them. The Department also appropriately recognized that the Stark law provides useful guidance to the Certificate of Need Program when determining whether a proposed ASC is entitled to the "group practice" exemption from Certificate of Need review. The Department's Final Order should therefore be affirmed.

a. The History of the Department's Rule-Making Process Supports Requiring Hospitals to Obtain Certificates of Need for Stand-alone ASCs.

An agency may interpret its own rule through adjudication (as opposed to rule making), unless that agency abuses its discretion. *Budget Rent a Car Corp. v. Washington State Dept. of Licensing*, 100 Wn. App. 381, 386-87, 997 P.2d 420 (2000). An "agency's interpretation of the regulations it administers should be upheld if it reflects a plausible construction of the language" and "is not contrary to the legislative intent." *Seatoma v. Dep't of Social and Health Services*, 82 Wn. App.

495, 919 P.2d 602 (1996). Courts are to "give great deference to an agency's interpretation of its own properly promulgated regulations, 'absent a compelling indication' that the agency's regulatory interpretation conflicts with legislative intent or is in excess of the agency's authority." *Silverstreak, Inc. v. Washington State Dept. of Labor and Industries*, 159 Wn.2d 868, 154 P.3d 891 (2007) (quoting *Marquis v. City of Spokane*, 130 Wn.2d 97, 111, 922 P.2d 43 (1996)).

Here, the Department's formulation of the "group practice" exemption is entitled to deference. The group practice exemption (while not technically an exemption) comes from the second sentence of the definition of an ambulatory surgical facility promulgated by the Department:

> "Ambulatory surgical facility" means any free-standing entity, including an ambulatory surgery center that operates primarily for the purpose of performing surgical procedures to treat patients not requiring hospitalization. **This term does not include a facility in the offices of private physicians or dentists, whether for individual or group practice, if the privilege of using such facility is not extended to physicians or dentists outside the individual or group practice.**

WAC 246-310-010 (emphasis added).

This exemption requires interpretation because the terms "private physicians" and "group practice" are not defined in the relevant Certificate of Need rules. Although MultiCare argues that the meanings of these terms are plain on their face, they are subject to more than one meaning.

The legislative intent specifically supports the Department's interpretation of its own rule. In 1996, the Program specifically addressed the issue of ambulatory surgery facilities and when such facilities would be required to obtain a Certificate of Need. *See* Department report on proposed changes to chapter 246-310 WAC. AR 669-71 (EXHIBIT U hereto). Under the rules in effect up until then, the Certificate of Need Program interpreted the definition of "ambulatory surgery facility" to exclude ambulatory surgery facilities that were licensed outpatient departments of a hospital and that were located outside the hospital (i.e., "free-standing facilities"). As a result, free-standing ASCs, which were owned and operated by hospitals as licensed outpatient departments, were exempt from Certificate of Need review.

During the 1996 rule making process, however, the Department found that allowing a hospital to establish a free-standing ASC without Certificate of Need review put non-hospital licensed ASCs at a competitive disadvantage. AR 669-71 (EXHIBIT U). The definition of ambulatory surgery facility was changed to its current definition. The Department specifically intended that the current "ambulatory surgical facility" definition would require hospitals who desired to create a free-standing[8] ASC to obtain a Certificate of Need. AR 669-71 (EXHIBIT U). Therefore, the history of WAC 246-310-010 clearly demonstrates that the

[8] The definitional change did not affect the Certificate of Need exemption for ASC facilities that are located physically within a hospital campus.

Department intended that free-standing ASCs that are operated under a hospital license are subject to Certificate of Need review.

The Program's DNR request form confirms this interpretation of the "group practice" exemption because it specifically states that ASCs licensed under a hospital's license are "ambulatory surgical facilities" that are subject to Certificate of Need review. AR 673-78 at 675. MultiCare admits that its proposed Gig Harbor ASC will be operated under its hospital license. Freestanding ASCs owned by hospitals are simply not intended to be exempt from Certificate of Need review. A hospital organization, such as MultiCare, should not be allowed to avoid Certificate of Need review by mischaracterizing itself as a physician group practice.

The Department's final order in this matter should be affirmed because it confirms this intent. MultiCare's misleading "plain language" argument is wrong because the terms "group practice" and "private physicians" are undefined and subject to more than one meaning. If MultiCare were allowed to avoid Certificate of Need review for its proposed ASC in Gig Harbor, it would flout the regulatory purpose of the rule.

b. The Department Correctly Recognized the Stark Law Definition of "Group Practice" as Guidance.

The Department reasonably recognized the Stark law definition of "group practice" as guidance for the Certificate of Need Program. Courts

regularly look to federal regulations for guidance when a term is undefined in state regulation. *See, e.g., Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 299, 996 P.2d 582 (2000) (looking to the federal Department of Labor definitions of for terms undefined in the state Minimum Wage Act); *Miller v. Farmer Bros. Co.*, 136 Wn. App 650, 657, 150 P.3d 598 (2007) (looking to federal guidance on state law definitions, although not bound by federal authority).

The federal Stark law definition of "group practice" used and publicized by the Program contains the following:

> The group practice must consist of a **single legal entity operating primarily for the purpose of being a physician group practice** in any organizational form recognized by the State in which the group practice achieves its legal status, including, but not limited to, a partnership, professional corporation, limited liability company, foundation, not-for-profit corporation, faculty practice plan, or similar association.

42 CFR 411.352(a) (emphasis added). AR 662 (EXHIBIT A hereto).

Physicians who are employed by a hospital, or part of an entity that is part of a health service corporation that includes a hospital, do not meet this definition of a group practice. This understanding is further supported by comments from the Center for Medicare and Medicaid Services (CMS) to the Stark rules, which make clear that a hospital employing physicians is not a group practice:

> We want to iterate, however, that **an entity that has a substantial purpose other than operating a physician group practice,**

> **such as operating a hospital**, will not qualify. Thus, hospitals that employ two or more physicians are not physician "group practices" for purposes of [the Stark Law] . . . .

69 FR 16054, at 16077 (emphasis added); AR 667 (EXHIBIT T hereto).

The Program unquestionably used the Stark law definition of a group practice in this case as guidance. In fact, the Program specifically cited the Stark law definition in its June 6, 2006 letter to MultiCare. AR 20 (EXHIBIT O hereto). Furthermore, Janis Sigman testified in her deposition that the Certificate of Need Program uses the Stark law definition of "group practice" in determining whether an ASC is subject to Certificate of Need review. AR 656 (Sigman Deposition, p. 10, ll. 5 – p. 11, ll. 20, (EXHIBIT S hereto)). The Certificate of Need Program acknowledged that the Stark law is a significant source of guidance on how the term "group practice" should be applied. *Id.*

In her deposition, Ms. Sigman confirmed that the Certificate of Need Program looks to "the Stark law for guidance." *Id.* She also mentioned "some overlying principles," which come from the Stark law. *Id.* For example, the Certificate of Need Program looks at "whether substantially all of the patient care is provided through members of that group." *Id.* The issue of the range of care is a specific element of the definition of a group practice in the Stark Law:

> (c) Range of care. Each physician who is a member of the group, as defined in §411.351, must furnish substantially the full range of patient care services that the physician routinely furnishes, including

> medical care, consultation, diagnosis, and treatment, though the joint use of shared office space, facilities, equipment, and personnel.

AR 663 (EXHIBIT A hereto).

In sum, the standards found in the Stark law are the only standards articulated or publicized by the Program for how to determine whether an applicant meets the group practice exemption from Certificate of Need review. Without these standards, the Program's decisions would be without a rationale and therefore arbitrary and capricious. *See Rios v. Dep't of Labor & Indus.*, 145 Wn.2d 483, 501, 39 P.3d 961 (2002) ("[A]gency action is arbitrary and capricious if it is willful and unreasoning and taken without regard to the attending facts or circumstances").

MultiCare argues that DNRs were granted to hospital-owned ASCs in the past, citing DNR decisions for Virginia Mason and Kennewick Hospital. However, these examples are not determinative. First, there is insufficient evidence in the record of the present matter regarding those applications to determine whether they are analogous to the present set of facts. There is also no evidence in the record regarding the standards the Certificate of Need Program used in granting DNRs in those cases. Second, if, for the sake of argument, those decisions are contrary to the Department's decision here, it may be because those DNRs were not appealed to a health law judge. Accordingly, they have no value as precedent in the current matter. Health law judges are the final decision

makers for the Department in Certificate of Need matters and need not give any special deference to the decisions of Certificate of Need Program analysts. *DaVita, Inc.*, 137 Wn. App. at 181-83. The Department, through its health law judge, is entitled to interpret its rules on adjudication, as it has done here. Therefore, regardless of what the Certificate of Need Program has or has not done in the past, the Department's standards are now clear.

c. The MultiCare-owned Physician Group Does Not Meet the Definition of "Group Practice" and MultiCare's Physicians Are Not "Private Physicians."

The "group practice" exemption from Certificate of Need Review does not apply to MultiCare's proposed Gig Harbor ASC, based on facts supplied by MultiCare itself. First, MMA is merely a division of MultiCare. MultiCare is not a group practice. The only legal entity at issue is MultiCare, a Washington non-profit corporation. Both MMA and Tacoma General/Allenmore Hospital are merely divisions of MultiCare and not separate legal entities. The Gig Harbor ASC would be operated by MultiCare, and the doctors who would use the ASC would be MultiCare employees. MultiCare does not operate primarily for the purpose of being a physician group; its primary purpose is the provision of inpatient and outpatient hospital services. Therefore, MultiCare and MMA do not qualify for the "group practice" exemption because it is not a group practice.

Second, nowhere in MultiCare's materials does it warrant that it will operate and enroll the Gig Harbor ASC as a free standing ASC under the Medicare Program. In fact, MultiCare confirms that the opposite is true. In MultiCare's June 13, 2006 letter, MultiCare confirms that the Gig Harbor ASC will be operated under MultiCare's Medicare provider number in billing for services. AR 113-15 at 114 (EXHIBIT Q hereto). Based on this statement, it is clear that MultiCare does not intend to enroll the Gig Harbor ASC as a separate ASC with the Medicare program. In other words, MultiCare will operate the Gig Harbor ASC as a licensed outpatient department of MultiCare's hospital. This is significant because it confirms that the ASC will be a part of MultiCare's hospital organization, not a "group practice." As explained above, one of the express regulatory purposes of the DNR regulations is to prevent hospitals, such as MultiCare, from avoiding Certificate of Need review and thereby having an advantage over other developers of stand-alone ASCs.

Finally, it stretches common sense too far to argue that doctors who are employed by a large corporation, which has as its primary purpose to operate hospitals, are in private practice. The Department was correct to interpret "private physicians" within the Certificate of Need regulatory context to mean those physicians who practice either on their own, or as employees of an entity whose primary purpose is the provision of professional physician services. No definition of the term "private" in

this context includes physicians who are employees of large corporations, which have as their primary purpose to own and operate hospitals. *See* 69 FR 16054, at 16077. AR 677 (EXHIBIT T).

In sum, MultiCare simply is not a "group practice," and is not entitled to an exemption from Certificate of Need review for its proposed Gig Harbor ASC.

E. CONCLUSION

The Department's and Thurston County Superior Court's decisions should be affirmed. In view of all of the facts, there is no question that Franciscan's application for adjudicative proceeding was timely. The Department correctly ruled that MultiCare's proposed ASC in Gig Harbor is not eligible for a DNR as a matter of law.

DATED this 5th day of May, 2008.

OGDEN MURPHY WALLACE, P.L.L.C.

By: _____

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that I caused to be served a copy of Franciscan Health System's Response Brief upon:

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DATED: May 5th, 2008.

Marie V. Stanescu

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STATE OF WASHINGTON
BY
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EXHIBIT A

Specialty hospital means a subsection (d) hospital (as defined in section 1886(d)(1)(B)) that is primarily or exclusively engaged in the care and treatment of one of the following: Patients with a cardiac condition; patients with an orthopedic condition; patients receiving a surgical procedure; or any other specialized category of services that the Secretary designates as inconsistent with the purpose of permitting physician ownership and investment interests in a hospital. A "specialty hospital" does not include any hospital—

(1) Determined by the Secretary to be in operation before or under development as of November 18, 2003;

(2) For which the number of physician investors at any time on or after such date is no greater than the number of such investors as of such date;

(3) For which the type of categories described above is no different at any time on or after such date than the type of such categories as of such date;

(4) For which any increase in the number of beds occurs only in the facilities on the main campus of the hospital and does not exceed 50 percent of the number of beds in the hospital as of November 18, 2003, or 5 beds, whichever is greater; and

(5) that meets such other requirements as the Secretary may specify.

Transaction means an instance or process of two or more persons or entities doing business. An isolated transaction means one involving a single payment between two or more persons or entities or a transaction that involves integrally related installment payments provided that—

(1) The total aggregate payment is fixed before the first payment is made and does not take into account, directly or indirectly, the volume or value of referrals or other business generated by the referring physician; and

(2) The payments are immediately negotiable or are guaranteed by a third party, secured by a negotiable promissory note, or subject to a similar mechanism to assure payment even in the event of default by the purchaser or obligated party. § 411.352 Group practice.

[69 FR 16126, March 26, 2004, as amended at 70 FR 4525, Jan. 28, 2005]

411.352 Group practice.

For purposes of this subpart, a group practice is a physician practice that meets the following conditions:

(a) *Single legal entity.* The group practice must consist of a single legal entity operating primarily for the purpose of being a physician group practice in any organizational form recognized by the State in which the group practice achieves its legal status, including, but not limited to, a partnership, professional corporation, limited liability company, foundation, not-for-profit corporation, faculty practice plan, or similar association. The single legal entity may be organized by any party or parties, including, but not limited to, physicians, health care facilities, or other persons or entities (including, but not limited to, physicians individually incorporated as professional corporations). The single legal entity may be organized or owned (in whole or in part) by another medical practice, provided that the other medical practice is not an operating physician practice (and regardless of whether the medical practice meets the conditions for a group practice under this section). For purposes of this subpart, a single legal entity does not include informal affiliations of physicians formed substantially to share profits from referrals, or separate group practices under common ownership or control through a physician practice management company, hospital, health system, or other entity or organization. A group practice that is otherwise a single legal entity may itself own subsidiary entities. A group practice operating in more than one State will be considered to be a single legal entity notwithstanding that it is composed of multiple legal entities, provided that—

(1) The States in which the group practice is operating are contiguous (although each State need not be contiguous to every other State);

(2) The legal entities are absolutely identical as to ownership, governance, and operation; and

(3) Organization of the group practice into multiple entities is necessary to comply with jurisdictional licensing laws of the States in which the group practice operates.

(b) *Physicians.* The group practice must have at least two physicians who are members of the group (whether employees or direct or indirect owners), as defined in §411.351.

(c) *Range of care.* Each physician who is a member of the group, as defined in §411.351, must furnish substantially the full range of patient care services that the physician routinely furnishes, including medical care, consultation, diagnosis, and treatment, through the joint use of shared office space, facilities, equipment, and personnel.

(d) *Services furnished by group practice members.* (1) Except as otherwise provided in paragraphs (d)(3), (d)(4), (d)(5), and (d)(6) of this section, substantially all of the patient care services of the physicians who are members of the group (that is, at least 75 percent of the total patient care services of the group practice members) must be furnished through the group and billed under a billing number assigned to the group, and the amounts received must be treated as receipts of the group. "Patient care services" must be measured by one of the following:

(i) The total time each member spends on patient care services documented by any reasonable means (including, but not limited to, time cards, appointment schedules, or personal diaries). (For example, if a physician practices 40 hours a week and spends 30 hours a week on patient care services for a group practice, the physician has spent 75 percent of his or her time providing patient care services for the group.)

(ii) Any alternative measure that is reasonable, fixed in advance of the performance of the services being measured, uniformly applied over time, verifiable, and documented.

(2) The data used to calculate compliance with this "substantially all test" and related supportive documentation must be made available to the Secretary upon request.

(3) The "substantially all test" set forth in paragraph (d)(1) of this section does not apply to any group practice that is located solely in an HPSA, as defined in §411.351.

(4) For a group practice located outside of an HPSA (as defined in §411.351), any time spent by a group practice member providing services in an HPSA should not be used to calculate whether the group practice has met the "substantially all test," regardless of whether the member's time in the HPSA is spent in a group practice, clinic, or office setting.

(5) During the "start up" period (not to exceed 12 months) that begins on the date of the initial formation of a new group practice, a group practice must make a reasonable, good faith effort to ensure that the group practice complies with the "substantially all" test requirement set forth in paragraph (d)(1) of this section as soon as practicable, but no later than 12 months from the date of the initial formation of the group practice. This paragraph (d)(5) does not apply when an existing group practice admits a new member or reorganizes.

(6)(i) If the addition to an existing group practice of a new member who would be considered to have relocated his or her practice under §411.457(e)(2) would result in the existing group practice not meeting the "substantially all" test set forth in paragraph (d)(1) of this section, the group practice will have 12 months following the addition of the new member to come back into full compliance, provided that—

(A) For the 12-month period the group practice is fully compliant with the "substantially all" test if the new member is not counted as a member of the group for purposes of §411.352; and

(B) The new member's employment with, or ownership interest in, the group practice is documented in writing no later than the beginning of his or her new employment, ownership, or investment.

(ii) This paragraph (d)(6) does not apply when an existing group practice reorganizes or admits a new member who is not relocating his or her practice.

(e) *Distribution of expenses and income.* The overhead expenses of, and income from, the practice must be distributed according to methods that are determined before the receipt of payment for the services giving rise to the overhead expense or producing the income. Nothing in this section prevents a group practice from adjusting its compensation methodology prospectively,

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subject to restrictions on the distribution of revenue from DHS under §411.352(i).

(f) *Unified business.* (1) The group practice must be a unified business having at least the following features:

(i) Centralized decision-making by a body representative of the group practice that maintains effective control over the group's assets and liabilities (including, but not limited to, budgets, compensation, and salaries); and

(ii) Consolidated billing, accounting, and financial reporting.

(2) Location and specialty-based compensation practices are permitted with respect to revenues derived from services that are not DHS and may be permitted with respect to revenues derived from DHS under §411.352(i).

(g) *Volume or value of referrals.* No physician who is a member of the group practice directly or indirectly receives compensation based on the volume or value of referrals by the physician, except as provided in §411.352(i).

(h) *Physician-patient encounters.* Members of the group must personally conduct no less than 75 percent of the physician-patient encounters of the group practice.

(i) *Special rule for productivity bonuses and profit shares.* (1) A physician in a group practice may be paid a share of overall profits of the group, or a productivity bonus based on services that he or she has personally performed (including services "incident to" those personally performed services as defined in §411.351), provided that the share or bonus is not determined in any manner that is directly related to the volume or value of referrals of DHS by the physician.

(2) Overall profits means the group's entire profits derived from DHS payable by Medicare or Medicaid or the profits derived from DHS payable by Medicare or Medicaid of any component of the group practice that consists of at least five physicians. Overall profits should be divided in a reasonable and verifiable manner that is not directly related to the volume or value of the physician's referrals of DHS. The share of overall profits will be deemed *not* to relate directly to the volume or value of referrals if *one* of the following conditions is met:

(i) The group's profits are divided per capita (for example, per member of the group or per physician in the group).

(ii) Revenues derived from DHS are distributed based on the distribution of the group practice's revenues attributed to services that are not DHS payable by any Federal health care program or private payer.

(iii) Revenues derived from DHS constitute less than 5 percent of the group practice's total revenues, and the allocated portion of those revenues to each physician in the group practice constitutes 5 percent or less of his or her total compensation from the group.

(3) A productivity bonus should be calculated in a reasonable and verifiable manner that is not directly related to the volume or value of the physician's referrals of DHS. A productivity bonus will be deemed not to relate directly to the volume or value of referrals of DHS if one of the following conditions is met:

(i) The bonus is based on the physician's total patient encounters or relative value units (RVUs). (The methodology for establishing RVUs is set forth in §414.22 of this chapter.)

(ii) The bonus is based on the allocation of the physician's compensation attributable to services that are not DHS payable by any Federal health care program or private payer.

(iii) Revenues derived from DHS are less than 5 percent of the group practice's total revenues, and the allocated portion of those revenues to each physician in the group practice constitutes 5 percent or less of his or her total compensation from the group practice.

(4) Supporting documentation verifying the method used to calculate the profit share or productivity bonus under paragraphs (i)(2) and (i)(3) of this section, and the resulting amount of compensation, must be made available to the Secretary upon request.

§411.353 Prohibition on certain referrals by physicians and limitations on billing.

(a) *Prohibition on referrals.* Except as provided in this subpart, a physician who has a direct or indirect financial relationship with an entity, or who has

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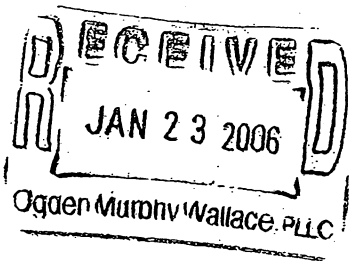
EXHIBIT B

Franciscan Health System



January 19, 2006

Janis Sigman, Manager
Certificate of Need Program
Department of Health
Post Office Box 47852
Olympia, WA 98504-7852

Re: MultiCare Day Surgery of Gig Harbor - Ambulatory Surgical Center Determination of Non-Reviewability Exemption Request dated December 15, 2005

Dear Ms. Sigman:

I am writing on behalf of Franciscan Health System-West ("FHS") in regards to MultiCare Health System's ("MultiCare") request for a Determination of Non-Reviewability (the "Request") for its ambulatory surgery center (or ASC) to be known as "MultiCare Day Surgery of Gig Harbor" ("MultiCare Gig Harbor ASC"). Having reviewed MultiCare's Request, FHS has comments and concerns regarding that Request and that FHS believes the Certificate of Need Program ("CN Program") should address in responding to the Request.

Our concerns can be placed in two categories: (1) whether the so-called "group practice exemption" for ambulatory surgery facilities (or ambulatory surgery centers) applies to hospital entities that directly employ physicians; and (2) necessary information for analyzing the Request that is not contained in the Request. We will address our concerns in that order.

1. Does the Group Practice Exemption apply to hospital entities that directly employ physicians?

FHS believes that it is not appropriate to apply the group practice exemption to hospital entities that directly employ physicians. The group practice exemption (while not technically an exemption) comes from the second sentence of the definition of an ambulatory surgical facility:

> 'Ambulatory surgical facility' means any free-standing entity, including an ambulatory surgery center that operates primarily for the purpose of performing surgical procedures to treat patients not requiring hospitalization. This term does not include a facility in the offices of private physicians or dentists, whether for individual or group practice, if the privilege of using such facility is not extended to physicians or dentists outside the individual or group practice.

WAC 246-310-010 (emphasis added).

FHS believes that this exemption does not apply to this Request because (i) MultiCare's MultiCare Medical Associates division ("MMA") is not a group practice; and (ii) MultiCare's employed physicians in MMA are not private physicians.

Neither of the terms "group practice" nor "private physicians" is defined in WAC 246-310-010. However, both common sense and the CN Program's past practice show that MMA is not a "group practice" and its employed physicians are not "private physicians." It is our understanding that in past instances where it was necessary for the CN Program to apply the term "group practice" from this definition, it has used the definition found in the Stark Law regulations at 42 CFR 411.352. That definition contains the following requirement:

> The group practice must consist of a single legal entity operating primarily for the purpose of being a physician group practice in any organizational form recognized by the State in which the group practice achieves its legal status, including, but not limited to, a partnership, professional corporation, limited liability company, foundation, not-for-profit corporation, faculty practice plan, or similar association.

42 CFR 411.352(a) (emphasis added). Here, the only legal entity is MultiCare, which is a Washington non-profit corporation. Both MMA and Tacoma General/Allenmore Hospital ("TGAH") are merely divisions of MultiCare and not separate legal entities. Further, MultiCare does not operate primarily for the purpose of being a physician group. Rather, MultiCare's primary purpose is the provision of inpatient and outpatient hospital services. This understanding of the Stark "group practice" definition is further supported by the Center for Medicare and Medicaid Services (CMS) comments to the Stark rules:

> We want to iterate, however, that an entity that has a substantial purpose other than operating a physician group practice, such as operating a hospital, will not qualify. Thus, hospitals that employ two or more physicians are not physician "group practices" for purposes of [the Stark Law] . . . .

69 FR 16054, at 16077. CMS has made it clear that a hospital employing physicians is not a group practice. Therefore, MultiCare and MMA should not qualify for the group practice exemption because it is not a group practice.

Common sense and the CN Program's own Determination of Non-Reviewability form also support this reasoning. First, physician employees of a major hospital entity are not "private" or "private practice" physicians in the common meaning of those terms. Private physicians, or private practice physicians, are physicians who operate their practices privately, as physicians, separately and apart from a larger, non-physician healthcare entity. The "group practice exemption" was intended to assist these private practice physicians by exempting them from CN requirements for ambulatory surgery facilities for their own patients in their own offices. This exemption was never meant to apply to hospitals for the benefit of their employed physicians. In fact, the CN Program form states that "[an ambulatory surgery facility] includes an ASC that is licensed under a hospital's license but located outside of the hospital's main facility." This makes it clear that hospital ASCs are not intended to be exempt from CN review. A hospital should not be allowed to avoid CN review by mischaracterizing itself as a physician group practice.

2. Even if MultiCare and MMA do qualify for the group practice exemption, the Request does not contain all the information necessary for the CN Program to analyze the Request.

Two important pieces of information are omitted from MultiCare's Request. First, no where in the Request materials does MultiCare warrant that the privilege of using the MultiCare Gig Harbor ASC is limited to MMA employed physicians. In fact, the Management Agreement included in the Request states:

> "The surgeons performing surgery at [the MultiCare Gig Harbor ASC] shall be contracted with MMA (see Exhibit A) and shall be members of the medical staff at TGAH. Surgeons who are credentialed and privileged to perform outpatient surgical procedures at TGAH shall be credentialed and privileged to perform the identical procedures at [the MultiCare Gig Harbor ASC]."

See page 2, Section I. H. of the Management Agreement (emphasis added). The underlined language can be read to allow any surgeon with medical staff privileges at a MultiCare facility to perform similar surgeries at the MultiCare Gig Harbor ASC. If that is correct, that is not in conformance with the group practice exemption. If you determine to proceed with analyzing the Request, the CN Program should require MultiCare to warrant that the use of the MultiCare Gig Harbor ASC is limited solely to employed MMA physicians.

Second, no where in the Request materials does MultiCare warrant that it will operate and enroll the MultiCare Gig Harbor ASC as free standing ASC under the Medicare Program. If it does not, MultiCare would need to operate the MultiCare Gig Harbor ASC as part of its hospital, as a licensed outpatient department, in order to bill Medicare. In that case, CN review should again be required because the CN Program's Determination of Non-Reviewability request form specifically states that ASC's licensed under a hospital's license are "ambulatory surgical facilities" that are subject to CN review. Therefore, if you determine to proceed with analyzing the Request, the CN Program should request that MultiCare provide information as to how it intends to enroll in the Medicare program so that the Program can ensure that the MultiCare Gig Harbor ASC will not be operated as a licensed outpatient department of MultiCare.

We appreciate your time and attention in reviewing our comments and concerns. Please feel free to contact me with any questions.

Sincerely,

Laure Nichols

Laure Caillouette Nichols
Senior Vice President
Strategic Planning and Business Development

LCN/db

EXHIBIT C

STATE OF WASHINGTON
DEPARTMENT OF HEALTH

January 12, 2006

John R. Long, Strategy Executive
MultiCare Health System
315 Martin Luther King Jr. Way
Post Office Box 5299
Tacoma, Washington 98415

Dear Mr. Long:

Thank you for your Ambulatory Surgical Center Determination of Non-Reviewability (DOR) Application and documentation received in the Certificate of Need office on December 15, 2005. Below are the facts relied upon by the Certificate of Need Program in reaching its conclusion regarding your interest in establishing an Ambulatory Surgical Center (ASC) associated with a division of MultiCare Health System known as MultiCare Medical Associates. The ASC would be known as MultiCare Day Surgery of Gig Harbor.

FACTS

- MultiCare Medical Associates is a division of MultiCare Health System that oversees the employed providers of MultiCare Health System.
- MultiCare Medical Associates proposes to establish an ASC at 4709 Point Fosdick Drive Northwest, in the city of Gig Harbor, within Pierce County.
- Currently, there are 53 physicians associated with MultiCare Medical Associates practice [see listing attached to this letter].
- No other party has an ownership in the MultiCare Medical Associates.
- The ASC will be located in the same building as the Gig Harbor based physicians at 4709 Point Fosdick Drive Northwest, in the city of Gig Harbor, within Pierce County.
- The ASC will not be structured as a separate legal entity from the MultiCare Medical Associates practice.
- No other physician outside of the practice would have access to the proposed ASC. (Future owners or employees of the MultiCare Medical Associates practice will be allowed access to the ASC.)
- Procedures to be performed at the ASC are anesthesiology/pain management, ENT, general surgery (adult and pediatric), neurosurgery, OB/GYN, orthopedic (adult and pediatric) gastroenterology (adult and pediatric), podiatry, urology, and vascular surgery..
- Management of the ASC will be provided by Tacoma General/Allenmore Hospital, a division of MultiCare Health System under a management agreement [agreement provided with DOR request].

- Billing for the ASC is provided by Tacoma General/Allenmore Hospital under the management agreement.

ANALYSIS

- Revised Code of Washington (RCW) 70.38.105(4) identifies the types of projects subject to prior Certificate of Need review and approval. Subsection (a) identifies that the construction, development, or other establishment of a new health care facility is subject to CON review.
- RCW 70.38.025(6) defines "health care facility" as *hospices, hospice care centers, hospitals, psychiatric hospitals, nursing homes, kidney disease treatment centers, ambulatory surgical facilities, and home health agencies, and includes such facilities when owned and operated by a political subdivision or instrumentality of the state and such other facilities as required by federal law and implementing regulations, but does not include any health facility or institution conducted by and for those who rely exclusively upon treatment by prayer or spiritual means in accordance with the creed or tenets of any well-recognized church or religious denomination, or any health facility or institution operated for the exclusive care of members of a convent as defined in RCW 84.36.800 or rectory, monastery, or other institution operated for the care of members of the clergy. In addition, the term does not include any nonprofit hospital: (a) Which is operated exclusively to provide health care services for children; (b) which does not charge fees for such services; and (c) if not contrary to federal law as necessary to the receipt of federal funds by the state.*
- Washington Administrative Code (WAC 246-310-010) defines "ambulatory surgical facility" as *any free-standing entity, including an ambulatory surgery center, that operates primarily for the purpose of performing surgical procedures to treat patients not requiring hospitalization. This term does not include a facility in the offices of private physicians or dentists, whether for individual or group practice, if the privilege of using such facility is not extended to physicians or dentists outside the individual or group practice.*

CONCLUSION

Based on the above factual information provided on behalf of MultiCare Medical Associates, the Certificate of Need Program concludes that the establishment of the ASC associated with the MultiCare Medical Associates practice does not meet the definition of an ASC under the Certificate of Need provisions of Washington Administrative Code (WAC) 246-310-010. Therefore, the proposed ASC is not subject to Certificate of Need review.

Please note: This determination is not transferable and is based on the facts submitted in the exemption application. Prior Certificate of Need review and approval may be required under the provisions of WAC 246-310-020 if changes occur in the facts as presented in the DOR application. Prior Certificate of Need review and approval may be required under the provisions of WAC 246-310-020 if any of the following changes occur:

1) should MultiCare Medical Associates later decide to extend the privilege of using the ASC to physicians not part of the group practice; OR
2) should MultiCare Medical Associates decide to expand the scope of services at the ASC to include services subject to Certificate of Need review under the provisions of WAC 246-310-020; OR

3) should MultiCare Medical Associates decide to organize the ASC as a separate legal entity from the group practice; OR
4) should any entity, other than MultiCare Medical Associates hold the Medicare certification; OR
5) should the ASC cease operations or relinquish its Medicare certification and then choose to resume services as an ASC; OR
6) should the practice and or ASC be purchased or leased.

This Determination of Non-Reviewability does not constitute approval under any other local, federal, or state statute, or implementing rules and regulations. Examples where additional approval may be necessary include, but are not limited to, construction plan approval through the Construction Review Section of the Department of Health, facility licensing/certification through the Department of Social and Health Services or Department of Health, and other federal or local jurisdiction permits.

Please call me at (360) 236-2957 if you have any further questions as you proceed with establishment of the ASC.

Sincerely,

Karen Nidermayer

Karen Nidermayer, Analyst
Certificate of Need Program
Office of Certification and Enforcement

cc: Office of Health Care Survey

EXHIBIT D

The Honorable Zimmie Caner, Health Law Judge

FILED
OCT 0 9 2006
Adjudicative Clerk Office

STATE OF WASHINGTON
DEPARTMENT OF HEALTH
ADJUDICATIVE SERVICE UNIT

In Re: Determination of Non-Reviewability Decision by DEPARTMENT OF HEALTH re: MULTICARE HEALTH SYSTEM'S GIG HARBOR ASC FRANCISCAN HEALTH SYSTEM, a Washington non-profit corporation, Petitioner	No. 06-07-C-2001CN DECLARATION OF JODY CARONA IN OPPOSITION TO MULTICARE'S MOTION TO DISMISS AND IN SUPPORT OF FRANCISCAN HEALTH SYSTEM'S MOTION FOR SUMMARY JUDGMENT

I, Jody Carona, am competent to be a witness herein and make this declaration based on personal knowledge and review of documents:

1. I am a health planning consultant residing in Seattle, Washington. I am the principal of Health Facilities Planning & Development located in Seattle, Washington ("HFPD"). I have experience developing and managing certificate of need ("CN") applications. Over the past 22 years, I estimate that I have consulted and managed more than 300 to 350 certificate of need applications in Washington State.

2. I have acted as the consultant for the Franciscan Health System ("FHS") related to its past Certificate of Need ("CN") application for a joint venture ambulatory surgery center ("ASC") in Gig Harbor, Washington, as well as on its response to MultiCare Health System's ("MultiCare") application for an ASC CN in Gig Harbor and subsequent request for a determination of non-reviewability for an ASC in Gig Harbor.

COPY

OGDEN MURPHY WALLACE, P.L.L.C.
1601 Fifth Avenue, Suite 2100
Seattle, Washington 98101-1686
Tel: 206.447.7000/Fax: 206.447.0215

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3. In late December of 2005 or early January 2006, both I and FHS learned of MultiCare's submission of a Request for Determination of Non-Reviewability related to an ASC in Gig Harbor. FHS and I immediately began conferencing over preparing a letter to the Department of Health ("Department") Certificate of Need Program ("Program") voicing our concerns related to MultiCare's request. The FHS letter was finalized and sent on January 19, 2006. *See* Exhibit D to FHS's Opposition to MultiCare's Motion for Summary Decision of Dismissal and Cross-Motion for Summary Judgment. On January 20, 2006 my office learned that the Program had already issued a response to MultiCare's Request for Determination of Non-Reviewability that approved MultiCare's request. *See* Exhibit E to FHS's Opposition to MultiCare's Motion for Summary Decision of Dismissal and Cross-Motion for Summary Judgment.

4. On Friday, January 27, 2006 I had a conversation with Bart Eggen of the Program regarding the Program's approval of the Request for Determination of Non-Reviewability and the letter that FHS had sent on January 19, 2006. Mr. Eggen indicated to me that he had not yet seen the letter. I explained to Mr. Eggen that FHS had raised questions as to MultiCare's ability to secure a Determination of Non-Reviewability and inquired as to what the Program would do now that they had already responded back approving MultiCare's request. Mr. Eggen told me that the Program would consider the FHS letter and that MultiCare's Determination of Non-Reviewability could always be altered as circumstances required. Mr. Eggen told me that any Determination of Non-Reviewability issued by the Program is not "cast in concrete" and can be pulled if circumstances change. I documented this conversation with Mr. Eggen in an e-mail I

/ / /

OGDEN MURPHY WALLACE, P.L.L.C.
1601 Fifth Avenue, Suite 2100
Seattle, Washington 98101-1686
Tel: 206.447.7000/Fax: 206.447.0215

sent to Laure Nichols at FHS and to FHS's counsel, Don Black. A true and correct copy of this e-mail is attached as Exhibit A hereto.

5. In reliance on my conversation with Mr. Eggen, FHS elected not to immediately file a Request for Adjudicative Proceeding related to the MultiCare Determination of Non-Reviewability.

6. When I had not heard back from Mr. Eggen, I again contacted Mr. Eggen to discuss the status of this matter and any response the Program had to the issues raised by FHS in their January 19th letter. I spoke with Mr. Eggen on March 7, 2006. That conversation is documented in an e-mail I sent to Laure Nichols at FHS and FHS's counsel, Don Black. A true and correct copy of this e-mail is attached hereto as Exhibit B. In that conversation Mr. Eggen indicated that the FHS letter raised some interesting questions and that "the Program intends to do more work on this issue." Mr. Eggen further indicated that this was not their top priority and that they were not concerned about a several month delay in issuing a revised letter. Mr. Eggen also specifically told me that no harm would come to either MultiCare or FHS during those few months of delay. Again, both I and FHS relied on Mr. Eggen's representations regarding the Program's future actions on this matter in determining the appropriate course of action by FHS.

7. When we had still not heard back from the Program by the end of March, FHS elected to send a second letter to the Program with additional information which was dated March 31, 2006. *See* Exhibit F to FHS's Opposition to MultiCare's Motion for summary Dismissal and Cross-Motion for Summary Judgment.

I declare under penalty of perjury under the laws of the state of Washington that the foregoing declaration is true and correct.

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OGDEN MURPHY WALLACE, P.L.L.C.
1601 Fifth Avenue, Suite 2100
Seattle, Washington 98101-1686
Tel: 206.447.7000/Fax: 206.447.0215

DATED this 4th day of October, 2006 in Seattle, Washington.

Jody Carona

OGDEN MURPHY WALLACE, P.L.L.C.
1601 Fifth Avenue, Suite 2100
Seattle, Washington 98101-1686
Tel: 206.447.7000/Fax: 206.447.0215

Don W. Black

From: HealthFac@aol.com
Sent: Tuesday, March 07, 2006 2:07 PM
To: laurenichols@fhshealth.org
Cc: Don W. Black
Subject: MultiCare ASC

Hi Laure: I spoke with Bart Eggen today about the FHS letter. He indicated that the letter raised some interesting questions, and that "DOH intends to do more work on the issue". He further indicated that this is not their top priority, as they are not concerned about a several month delay in issuing a revised letter (in that no harm will come to either MultiCare or FHS during those few months).

Let me know if you have any questions.

Jody

Jody Carona
Health Facilities Planning and Development
120 1st Avenue West
Suite 100
Seattle, WA 98119
(206) 441-0971
(206) 441-4823 (fax)

Don W. Black

From: HealthFac@aol.com

Sent: Monday, January 30, 2006 4:48 AM

To: laurenichols@fhshealth.org

Cc: Don W. Black

Subject: MultiCare ASC

Good morning-I had a good conrersation with Bart Eggen on Friday regarding the letter FHS sent in on the MultiCare ASC determination. He had not seen the letter. However, I explained to him that we had raised questions as to their ability to secure a non-determinatin reviewability and wanted to know what DOH was going to do now that they had already sent their letter back to MultiCare.

He said that they will consider our letter and that DNR can always be altered as circumstances require. In otherwords, any DNR issued by DOH is not "cast in concrete", and can be pulled if circumstances change. I did not push him for a meeting. I think the best thing to do is call him again toward the end of this week, and get his initial impression of the FHS letter. We can make a decision re: next steps from there. Any other thoughts or concerns??

Jody

Jody Carona
Health Facilities Planning and Development
120 1st Avenue West
Suite 100
Seattle, WA 98119
(206) 441-0971
(206) 441-4823 (f)

EXHIBIT E

CATHOLIC HEALTH INITIATIVES

Franciscan Health System

March 31, 2006

Bart Eggen, Executive Manager
Certificate of Need Program

Janis Sigman, Manager
Certificate of Need Program

Department of Health
Post Office Box 47852
Olympia, WA 98504-7852

Re: MultiCare Day Surgery of Gig Harbor - Ambulatory Surgical Center
Determination of Non-Reviewability dated January 12, 2006

Dear Mr. Eggen and Ms. Sigman:

I am writing on behalf of Franciscan Health System-West ("FHS") to follow-up on our earlier letter dated January 19, 2006 (the "Letter," a copy of which is enclosed with this letter for your ease of reference). In the Letter, FHS raised questions related to MultiCare Health System's ("MultiCare") request for a Determination of Non-Reviewability for its ambulatory surgery center (or ASC) to be known as "MultiCare Day Surgery of Gig Harbor" ("MultiCare Gig Harbor ASC"). At the time we wrote and sent the Letter we did not know that the Certificate of Need Program (the "Program") had already issued a letter dated January 12, 2006 granting MultiCare a Determination of Non-Reviewability ("DNR") for the MultiCare Gig Harbor ASC.

In subsequent conversations between Mr. Eggen and our consultant Jody Carona, Mr. Eggen indicated that the Program had received the Letter and would consider the issues FHS raised even though the Program had already issued the DNR. Over two months have now passed since FHS provided the Program with the Letter and we have not heard a response back from the Program. In the interim, MultiCare is moving ahead at a rapid

pace to open its MultiCare Gig Harbor ASC (see page 3 of the attached newsletter from MultiCare).

All of the concerns raised by FHS in the Letter remain open and valid points. In fact, the issue as to whether MultiCare qualifies as a "group practice" is further clouded by the disclosure in the enclosed MultiCare newsletter that the MultiCare Gig Harbor ASC is open to members of the "MultiCare Medical Group and MultiCare Medical Associates." Nowhere in the information provided by MultiCare in support of its request for a DNR is there any reference to the MultiCare Medical Group. The materials submitted only refer to MultiCare Medical Associates, and even those materials do not describe in any sufficient detail how that division of MultiCare qualifies as a group practice. Adding a potential second medical group into the mix clearly demonstrates that this is not a group practice that qualifies for an exemption to certificate of need review for an ambulatory surgery facility.

Additionally, FHS has reason to believe that MultiCare may be employing physicians on a part-time basis for the sole purpose of allowing those physicians to use the MultiCare Gig Harbor ASC. These physicians are being employed solely during those periods of time that they are actually using the MultiCare Gig Harbor ASC. Any such employment solely for the periods of time that such a physician is using the MultiCare Gig Harbor ASC would clearly be an improper circumvention of the certificate of need laws and possibly of the Medicare Stark Law (42 U.S.C. 1395nn).

As we stated in the earlier Letter, MultiCare should not be allowed to avoid certificate of need review by mischaracterizing itself as a physician group practice. MultiCare's own public representations regarding the MultiCare Gig Harbor ASC validate the concerns raised in the Letter and call into question the legitimacy of the MultiCare Gig Harbor ASC qualifying for an exception to certificate of need review.

FHS understands the extreme work load that the Program is currently facing, however, a response to our concerns is necessary as soon as possible. Thank you for your prompt attention to this matter.

Sincerely,

Laure Nichols

Laure Nichols

Enclosures.

cc: Richard McCartan, Assistant Attorney General
Don Black
Jody Carona

{DWB629140.DOC,1/14037.049007/}

EXHIBIT F

-----Original Message-----
From: McCartan, Richard (ATG)
Sent: Friday, April 28, 2006 4:13 PM
To: 'tgrimm@thgrimmlaw.com'
Cc: Sigman, Janis (DOH); Eggen, Bart (DOH)
Subject: Multicare ASC

Tom:

We have questions based on Laure Nichols' March 31 letter.

We looked at the Multicare Sound Woman Spring 2006 publication, and noticed that surgeries at the ASC will be performed by "Multicare Medical Group (MMG)" as well as by "Multicare Medical Associates (MMA) physician members". In our January 12, 2006 DOR, we found the ASC was not subject to review based on our understanding that all surgeries would be performed by MMA. We were not and are not aware of MMG using the ASC. Nor are we even aware of what MMG is.

We request information concerning MMG, as it may affect our DOR.

We would also like you to respond to Ms. Nichol's statement that FHS has reason to believe that Multicare maybe employing physicians on a part time basis for the sole purpose of allowing those physicians to use the ASC. In our view, if this was happening, the ASC would no longer qualify as a CN exempt facility. We believe that in order to qualify as an exempt facility, members of the group practice must provide a full range of services through the group practice.

We request a reply as soon as possible.

EXHIBIT G

THOMAS H. GRIMM, P.S.

ATTORNEYS AT LAW

Thomas H. Grimm
E-Mail Address:
tgrimm@thgrimmlaw.com
Mobile: (206) 612-2195

Admitted in WA and CA

970 FIFTH AVENUE NW, SUITE 3
ISSAQUAH, WASHINGTON 98027
Direct Line: (425) 557-4422
Fax: (425) 391-0241

May 3, 2006

Richard A. McCartan, AAG
Office of the Attorney General
P.O. Box 40100
Olympia, WA 98504-0100

Re: Gig Harbor Day Surgery

Dear Rich:

Thank you for your questions about MultiCare Medical Group (MMG) and MultiCare Medical Associates (MMA).

All physicians employed by MultiCare Health System with a clinical practice, whether full time or part-time, are part of MMA, which is wholly owned by MultiCare Health System. MMA was formed in 2005 to bring into one group different specialties of approximately 250 MultiCare-employed physicians, e.g., primary care, specialist, faculty, residents. Until 2005 MMG used to be a separate group of primary care physicians but now is a subgroup of MMA. All physicians in MMA are employed by MultiCare Health System, a Washington nonprofit charity with 501(c)(3) status under the Internal Revenue Code. The vast majority of MMA physicians have been and will continue to be full-time employees. Your understanding is correct that all surgeries performed at MultiCare's Gig Harbor Day Surgery Center will be performed by MMA physicians.

MMA is an integrated medical group practice. MMA negotiates charges/reimbursements that apply uniformly to all MultiCare employed physicians. All MMA physicians bill under a single provider number of their nonprofit employer. MMA physicians use a common and unique-to-MultiCare electronic medical record. Employment as an MMA physician includes:

- Reference checking;
- Interviews and a vote of the interviewing panel;
- Credentialing for insurance coverage;
- Office space provided by MMA;

- Review of clinical quality electronically and manually (chart review) by MMA peers;
- Coordination of outpatient and inpatient peer review;
- Participation in a formal outpatient complaint process connected to a MMA referral panel;
- Clinical supervision by a medical director;
- Establishment of performance goals (outcomes) for participation in a financial Quality Bonus;
- Review of coding accuracy by coding experts;
- Heightened participation in the MultiCare Health System Corporate Compliance and Internal Audit process;
- Common compensation, benefits, and welfare plans determined by a board consisting of community members who volunteer their time (are not paid);
- An annual review that includes assessment of clinical quality, patient satisfaction (through Picker contract), business optimization, and staff 360 degree reviews;
- Quarterly meetings of MMA providers to ensure enculturation, and more.

MultiCare does employ and has been employing physicians on a part-time basis for reasons unrelated to the Gig Harbor Day Surgery. In order to provide a full range of specialties and physician disciplines for MultiCare patients, some physicians must be hired on a part-time basis. This structure and approach provides each community we serve with enhanced access to quality services for all residents, including the medically indigent and those eligible for Medicaid and Medicare. It also enables our physician members to incorporate all their patient interactions into one medical record which allows collection of data to facilitate improvements in the quality of care. This structure also allows for implementation of evidence-based medicine that promotes the optimal use of existing health resources and provides a basis to improve the health of the overall community. We believe that providing accessible, quality healthcare to all the residents in the communities we serve is fundamental to our mission as a health care provider.

MultiCare appreciates the opportunity to respond to the Department's questions, and, if you have additional questions, please do not hesitate to contact me.

Very truly yours,

THOMAS H. GRIMM, P.S.

Thomas H. Grimm

Cc: John Long
Erik Rasmussen
Richard Petrich

EXHIBIT H

McCartan, Richard (ATG)

From: McCartan, Richard (ATG)
Sent: Wednesday, May 10, 2006 8:45 AM
To: 'tgrimm@thgrimmlaw.com'
Subject: FW: Multicare ASC

-----Original Message-----
From: McCartan, Richard (ATG)
Sent: Tuesday, May 09, 2006 5:57 PM
To: 'tgrimm@thegrimmlaw.com'
Cc: Sigman, Janis (DOH); Nidermayer, Karen (DOH); Eggen, Bart (DOH)
Subject: FW: Multicare ASC

Tom:

I am sending this by informal e-mail in light of the urgency of the May 11 status conference. The Department will follow-up with something more formal.

Subject to any additional input to clarify Multicare's position, below are the Program's thoughts on your May 3 letter.

On January 12, the Program issued a DOR that Gig Harbor Day Surgery ASC would be exempt from CN review. The Program issued its DOR on Multicare's explicit representation that 53 named physicians in the MMA group practice would use the ASC. The Program understood that these physicians were full-time Multicare employees.

Your May 3 letter indicates something very different. It states that an undisclosed number of additional part-time physicians will use the ASC. You state that these physicians are part of MMG, a "subgroup of MMA."

When the Program issued its DOR, it was not aware of MMG or that part-time physicians would be using the ASC. This was material information that could impact our decision. Accordingly, in our opinion, the January 12 DOR does not relate to Multicare's project as described in your May 3 letter, and therefore Multicare cannot rely on the DOR in going forward without a CN.

Of course, Multicare may request a new DOR based on detailed corrected information about who will use the ASC, who will be eligible to use the ASC, and under what agreements. Participation of part-time MMG physicians may raise additional legal issues for the Program to consider in deciding whether we believe that the ASC is CN-exempt under the definition in WAC 246-310-010.

I will be in my office on Wednesday to discuss this matter with you.

-----Original Message-----
From: McCartan, Richard (ATG)
Sent: Tuesday, May 02, 2006 11:31 AM
To: 'tgrimm@thgrimmlaw.com'
Cc: Sigman, Janis (DOH)
Subject: FW: Multicare ASC

EXHIBIT I

THOMAS H. GRIMM, P.S.

ATTORNEYS AT LAW

Thomas H. Grimm
E-Mail Address:
tgrimm@thgrimmlaw.com
Mobile: (206) 612-2195

Admitted in WA and CA

970 FIFTH AVENUE NW, SUITE 3
ISSAQUAH, WASHINGTON 98027
Direct Line: (425) 557-4422
Fax: (425) 391-0241

May 17, 2006

Richard A. McCartan, AAG
Office of the Attorney General
P.O. Box 40100
Olympia, WA 98504-0100

Re: MultiCare Gig Harbor Surgery Termination of Non-reviewability

Dear Rich:

I have researched and found answers to the questions that you asked me in the middle of last week. They are as follows:

1) Are the 53 employees listed in the application fulltime MultiCare employees?

Answer: Yes. They are the 53 surgeons found in the Appendix to the Application for the Determination of Non-reviewability. All have an indicated "one," which indicates that they are 100% of their time.

2) How does a doctor become a MultiCare employee?

Answer: MultiCare's physician hiring practices are deliberate and do not allow casual participation at MultiCare facilities. These are described below.

a. Filled Positions and Relocation:

From January 1, 2006 through May 10, MultiCare's Provider Services and Recruitment Department filled 32 provider jobs. Of these 32 jobs, 23 are new MMA-employed provider hires, 6 are internal transfers, one is a temporary (locums) position, and two are community practice assistance recruitments. Of the MMA new hires, 9 are mid-level providers (PA or ARNP) and 13 are physicians. All positions were sourced by MultiCare's in-house Provider Services Department without the use of an outside recruitment agency with the

exception of the temporary locums (physician temporaries) position and one community recruitment assistance position. Eighteen providers are full time equivalents 8 are part time and 6 are on call. Seven of the new providers are relocating to the Tacoma area from outside of the Seattle/Tacoma area.

b. Searches in Progress:

MultiCare currently has 42 employee provider openings in various specialties and one community assistance recruitment. Of these 42 employee provider openings, 23 are for physicians and 19 are for Physician Assistants and/or Advanced Registered Nurse Practitioners. MultiCare's Provider Services Department is conducting these searches.

c. MMA Recruitment Process:

MultiCare's provider recruitment program supports MHS' efforts to recruit MMA employees.

The MHS Medical Staff Development Plan identifies community need by year. Each year the Medical Staff Development Plan is reviewed and updated. Prior to the implementation of a search for a new position, a business plan and a proforma is developed and reviewed by both the Performance Review Team and by the physician leadership of MultiCare Medical Associates (MMA). Community need is addressed as well as how the new position ties into the business and mission of MultiCare. Position openings created due to a provider leaving MultiCare are also evaluated to determine whether the positions should be re-filled.

Once reviews are completed and approved, the implementation for a search is authorized by the Vice President, MultiCare Medical Associates (VP/MMA) via direct communication to the Director, Provider Services and Recruitment. The Director records the practice opportunity in the recruitment database and assigns the search to the appropriate provider recruiter. The recruiter interviews the stakeholders in the practice and creates a practice opportunity profile, advertisements, sourcing strategy plan, compensation parameters, etc. If issues are encountered during the opportunity development phase which could negatively impact the ability of the practice to fill the position, a "Recruitment Kick Off' meeting is held with all stakeholders to resolve the issues. Once issues are resolved, the sourcing strategies are implemented and the opportunity is opened. Candidate(s) are identified and their training and work experience is screened against pre-established criteria for the position. If a candidate passes the initial screen, the recruiter interviews the candidate and prepares a written candidate profile which is submitted, along with the candidate's C.V. to the lead provider of the search team. If the lead physician finds the

candidate to be a potential match for the position, the recruiter initiates background verification of the candidate by an outside agency, checks references, and prepares a pre-application for malpractice insurance to verify the candidates insurability. Once the candidate passes these screens, the site visit is scheduled. Interviews with the provider's spouse, for those providers who may be relocating to the area, is conducted and plans made to include the candidate's spouse or significant other's interest in the site visit schedule.

During the site visit, the candidate completes a series of interviews, including an interview with a physician panel comprised of MMA members who are skilled in behavioral interview processes. The decision to hire is based on the recommendations of the practice group which is recruiting the candidate and the MMA physician interview panel to the MMA administration. The MMA administrative team makes the final decision to offer a position to the candidate. An offer letter is then sent to the provider and, upon acceptance of the offer, the candidate is required to pass a drug screening examination. When the drug screen is completed and is negative, a contract is generated and sent to the candidate. Contract negotiations are handled by the Vice President, MMA, or his designee, along with consultation with Provider Compensation and MHS Legal Services.

Once an offer is accepted, the Provider Services employment processes are begun. The medical staff application processes for MHS hospitals, as well as other hospitals in the area where the provider will admit patients, is completed and submitted. Washington State Medical Licensure application assistance is given to providers relocating from outside of the State of Washington. Provider number applications are completed and submitted to private insurers and government plans and the final malpractice insurance application is processed. An applications coordinator tracks the progress of credentialing and malpractice applications and assist in expediting processes so the provider is ready to start practice upon commencement of the contracted start date.

When a signed employment contract is received from the new provider, a checklist is sent out to the system announcing the provider's name, specialty and practice location. A Practice Start Up Visit is then scheduled. The purpose of this visit is to final the details related to the provider's employment and specific practice set up. In situations where the provider is relocating from outside of the MHS referral area, the provider meets with a realtor to begin house hunting. Recruitment staff then work with the provider and other family members to ensure a smooth relocation process.

New provider orientation is scheduled for the first Monday of the provider's contracted start date and extends to two or more days, depending on the provider's specialty and practice location and electronic medical record

requirements. At the end of 90 days, and annually thereafter, the provider's performance is evaluated.

3) Can a doctor sign up to be just an employee to gain access to MultiCare's Gig Harbor surgery?

Answer:

No. The answer to No. 2 should make it clear that there is a rigorous process that a potential candidate must go through. There is no casual employment or access to any of the MultiCare facilities, including the proposed surgery.

4) Do the MultiCare doctors have employment agreements?

Answer:

Yes, the form is included in the appendices to the application. The Employment Agreement form is the standard form used for all MultiCare physicians.

As I told you last week, part-time status has nothing to do with the surgery but is a continuation of the recruitment of physicians to fill needs of MultiCare patients. Some of the physicians will not be full-time employees, even if MultiCare might wish it to be so. Finally, the MMA physicians make no distinction between part-time and full-time group members, and recruitment is the same for both.

I trust that these answers will suffice. The Department made the correct determination in January, and it should remain with that decision.

Very truly yours,

THOMAS H. GRIMM, P.S.

Thomas H. Grimm

cc: Erik Rasmussen, Esq.
Rich Petrich

EXHIBIT J

Don W. Black

From: McCartan, Richard (ATG) [RichardM@ATG.WA.GOV]
Sent: Friday, May 19, 2006 12:56 PM
To: Don W. Black
Subject: FW: MultiCare Gig Harbor Surgery Termination of Non-reviewability

Here's Multicare's latest response.

Do you have any comments?

-----Original Message-----
From: McCartan, Richard (ATG)
Sent: Wednesday, May 17, 2006 4:12 PM
To: Sigman, Janis (DOH)
Subject: FW: MultiCare Gig Harbor Surgery Termination of Non-reviewability

-----Original Message-----
From: Linda Hamlet [mailto:lhamlet@thgrimmlaw.com]
Sent: Wednesday, May 17, 2006 4:01 PM
To: McCartan, Richard (ATG)
Cc: Richard Petrich; Erik Rasmussen
Subject: MultiCare Gig Harbor Surgery Termination of Non-reviewability

Please see attached.

Linda Hamlet
Secretary to Thomas H. Grimm
970 Fifth Avenue NW, Ste. 3
Issaquah, WA 98027

V: 425-557-4414
F: 425-391-0241

EXHIBIT K

Don W. Black

From: Don W. Black
Sent: Monday, May 22, 2006 8:36 AM
To: 'McCartan, Richard (ATG)'
Subject: RE: MultiCare Gig Harbor Surgery Termination of Non-reviewability

Richard:

I have reviewed this and I have some questions into my client. I'll let you know when I hear back.

Thanks.

Don

Donald W. Black
Ogden Murphy Wallace, PLLC
1601 5th Avenue, Suite 2100
Seattle, WA 98101
206.447.7000, fax 206.447.0215
dblack@omwlaw.com

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From: McCartan, Richard (ATG) [mailto:RichardM@ATG.WA.GOV]
Sent: Friday, May 19, 2006 12:56 PM
To: Don W. Black
Subject: FW: MultiCare Gig Harbor Surgery Termination of Non-reviewability

Here's Multicare's latest response.

Do you have any comments?

-----Original Message-----
From: McCartan, Richard (ATG)
Sent: Wednesday, May 17, 2006 4:12 PM
To: Sigman, Janis (DOH)
Subject: FW: MultiCare Gig Harbor Surgery Termination of Non-reviewability

-----Original Message-----
From: Linda Hamlet [mailto:lhamlet@thgrimmlaw.com]
Sent: Wednesday, May 17, 2006 4:01 PM
To: McCartan, Richard (ATG)
Cc: Richard Petrich; Erik Rasmussen
Subject: MultiCare Gig Harbor Surgery Termination of Non-reviewability

Please see attached.

EXHIBIT L

Don W. Black

From: Nichols, Laure (Tacoma) [LaureNichols@fhshealth.org]

Sent: Friday, April 14, 2006 3:39 PM

To: carona, jody; Don W. Black

Subject: update from DOH re FHS letter re MulitCare Gig Harbor ASC

Hi I was just called by Janice Sigmond from DOH and she said she had our letter and had just heard back from Multicare and will review all the files and get back to us by the end of next week hopefully. thanks Laure

Laure Caillouette Nichols
Senior Vice President
Strategic Planning and Business Development
Franciscan Health System
1717 South J Street
Tacoma, WA 98405
P: (253) 426-6700
F: (253) 426-6880 (fax)
E: laurenichols@fhshealth.org

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EXHIBIT M

The Honorable Zimmie Caner, Health Law Judge

FILED

OCT 0 9 2006

Adjudicative Clerk Office

STATE OF WASHINGTON
DEPARTMENT OF HEALTH
ADJUDICATIVE SERVICE UNIT

In Re: Determination of Non-Reviewability Decision by DEPARTMENT OF HEALTH re: MULTICARE HEALTH SYSTEM'S GIG HARBOR ASC FRANCISCAN HEALTH SYSTEM, a Washington non-profit corporation, Petitioner	No. 06-07-C-2001CN SECOND DECLARATION OF DONALD W. BLACK IN OPPOSITION TO MULTICARE'S MOTION TO DISMISS AND IN SUPPORT OF FRANCISCAN HEALTH SYSTEM'S MOTION FOR SUMMARY JUDGMENT

I, Donald W. Black, am competent to be a witness herein and make this declaration based on personal knowledge and review of documents:

1. I am the attorney of record representing Franciscan Health System ("FHS") in this matter. I assisted FHS and its consultant, Jody Carona, in preparation of all of the FHS correspondence to the Certificate of Need Program ("Program") related to MultiCare Health System's ("MultiCare") Request for Determination of Non-Reviewability related to an ambulatory surgery center ("ASC") in Gig Harbor.

2. Attached to this Declaration as Exhibit C is a true and correct copy of an e-mail dated April 14, 2006 from Laure Nichols, FHS Senior Vice President for Strategic Planning and

000626

COPY

OGDEN MURPHY WALLACE, P.L.L.C.
1601 Fifth Avenue, Suite 2100
Seattle, Washington 98101-1686
Tel: 206.447.7000/Fax: 206.447.0215

Business Development relating to a telephone conversation she had with Janis Sigman of the Program on that same date, as it was received in my office.

3. On Friday, May 19, 2006, counsel for the Program, Richard McCartan, sent me an e-mail requesting my client's comments on MultiCare's most recent submission of information to the Program. A true and correct copy of that e-mail is attached hereto as Exhibit A.

4. I replied back to Mr. McCartan on Monday, May 22nd stating that I was reviewing this with my client and would have our comments back to him. A true and correct copy of this e-mail is attached hereto as Exhibit B. In a status conference between Mr. McCartan, Thomas Grimm, counsel for MultiCare, myself and the Honorable Judge Zimmie Caner in the related Certificate of Need proceeding for MultiCare's appeal of the denial of its Certificate of Need Application for an ASC in Gig Harbor, Mr. McCartan told all of the participants in that conference that the Program was considering the recent information from MultiCare on how it applied to the Determination of Non-Reviewability and that the Program would render a decision in the following week. That status conference in case number 05-11-C-2043CN took place on May 26, 2006.

5. On Thursday, May 25, 2006, Mr. McCartan telephoned me and asked me to discuss with him why FHS believed that MultiCare was not a group. Based on this conversation I had reason to believe that the Program was still considering whether or not MultiCare met the requirements for the "group practice" exception and was entitled to a Determination of Non-Reviewability for an ASC in Gig Harbor.

6. In my experience as serving as attorney of record for numerous clients on matters related to ASCs, the Program has consistently looked to the definition of "group practice" found

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000627

in the Medicare Stark Law in defining a group and has specifically advised parties applying for determinations of non-reviewability related to ASCs, to look to at the Medicare Stark Law in defining a "group practice."

7. Attached as EXHIBIT E to FHS's Opposition to MultiCare's Motion for Summary Decision of Dismissal and Cross-Motion for Summary Judgment, filed herewith, is a true and correct copy of a January 20, 2006 e-mail from L. Aoyama at Health Facilities Planning and Development, as it was received by my office.

8. Attached as EXHIBIT M to FHS's Opposition to MultiCare's Motion for Summary Decision of Dismissal and Cross-Motion for Summary Judgment, filed herewith, is a true and correct copy of the full transcript of the October 4, 2006 telephonic deposition of Janis Sigman, as it was received by my office.

9. Attached as EXHIBIT N to FHS's Opposition to MultiCare's Motion for Summary Decision of Dismissal and Cross-Motion for Summary Judgment, filed herewith, is a true and correct copy of 42 CFR 411.352.

10. Attached as EXHIBIT O to FHS's Opposition to MultiCare's Motion for Summary Decision of Dismissal and Cross-Motion for Summary Judgment, filed herewith, is a true and correct copy of an excerpt from 69 FR 16054, at 16077, the Centers for Medicare and Medicaid Services comments to the final Stark rules.

11. Attached as EXHIBIT P to FHS's Opposition to MultiCare's Motion for Summary Decision of Dismissal and Cross-Motion for Summary Judgment, filed herewith, is a true and correct copy of an except from a Department of Health report on proposed changes to WAC 246-310, as it was received by my office from Janis Sigman.

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OGDEN MURPHY WALLACE, P.L.L.C.
1601 Fifth Avenue, Suite 2100
Seattle, Washington 98101-1686
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12. Attached as EXHIBIT Q to FHS's Opposition to MultiCare's Motion for Summary Decision of Dismissal and Cross-Motion for Summary Judgment, filed herewith, is a true and correct copy of the Department of Health's Ambulatory Surgical Center Determination of Non-Reviewability Exemption Request form, as it was received by my office.

I declare under penalty of perjury under the laws of the state of Washington that the foregoing declaration is true and correct.

DATED this 9th day of October, 2006 in Seattle, Washington.

Donald W. Black
WSBA # 25272

000629

OGDEN MURPHY WALLACE, P.L.L.C.
1601 Fifth Avenue, Suite 2100
Seattle, Washington 98101-1686
Tel: 206.447.7000/Fax: 206.447.0215

EXHIBIT N

Don W. Black

From: Don W. Black
Sent: Tuesday, May 23, 2006 10:59 AM
To: 'McCartan, Richard (ATG)'
Cc: 'Nichols, Laure (Tacoma)'
Subject: RE: MultiCare Gig Harbor Surgery Termination of Non-reviewability

Richard:

Here are my client's comments.

1. It order to confirm the MultiCare's assertions, I would request that the Department review the employment agreements and employment/productivity records for all of surgeons using or who plan to use the MultiCare Gig Harbor ASC.

2. Even with MultiCare's additional information regarding MMA, MMA is still not a "group" as defined by the Stark law. (For a complete analysis of this issue, please see Laure Nichols January letter to the CN Program.) It is our understanding that the CN Program looks to the Stark law for defining what a group is for purposes of the CN laws and regulations. We have not seen the CN Program's analysis of whether it believes that MMA meets the definition of a group? If the CN Program is not using the Stark Law definition of a group, then what definition of a group is it using?

3. MultiCare, to our knowledge, has not addressed the issue of how MultiCare's Gig Harbor ASC is enrolled in Medicare. In other words, is the MultiCare Gig Harbor ASC enrolled with Medicare as a free standing ASC and paid under ASC rates? If not, and the MultiCare Gig Harbor ASC is billing as a licensed outpatient department of the hospital, then a CN is required per the CN Program's own policies and procedures. We would like to know whether this issue has been addressed.

Thanks Richard. Please let me know if you have any comments or questions.

Very Truly Yours,

Don

Donald W. Black
Ogden Murphy Wallace, PLLC
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From: McCartan, Richard (ATG) [mailto:RichardM@ATG.WA.GOV]
Sent: Friday, May 19, 2006 12:56 PM
To: Don W. Black
Subject: FW: MultiCare Gig Harbor Surgery Termination of Non-reviewability

Here's Multicare's latest response.

Do you have any comments?

-----Original Message-----
From: McCartan, Richard (ATG)
Sent: Wednesday, May 17, 2006 4:12 PM
To: Sigman, Janis (DOH)
Subject: FW: MultiCare Gig Harbor Surgery Termination of Non-reviewability

-----Original Message-----
From: Linda Hamlet [mailto:lhamlet@thgrimmlaw.com]
Sent: Wednesday, May 17, 2006 4:01 PM
To: McCartan, Richard (ATG)
Cc: Richard Petrich; Erik Rasmussen
Subject: MultiCare Gig Harbor Surgery Termination of Non-reviewability

Please see attached.

Linda Hamlet
Secretary to Thomas H. Grimm
970 Fifth Avenue NW, Ste. 3
Issaquah, WA 98027

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F: 425-391-0241

EXHIBIT O

STATE OF WASHINGTON
DEPARTMENT OF HEALTH

WORKING COPY

RECEIVED
JUN 07 2006
Attorney General's Office
Agriculture & Health Division

June 6, 2006

John R. Long, Strategy Executive
MultiCare Health System
315 Martin Luther King Jr. Way
Post Office Box 5299
Tacoma, Washington 98415

Dear Mr. Long:

On January 12, 2006, the Department of Health issued a Determination of Non-Reviewability (DOR) for the MultiCare Day Surgery Center of Gig Harbor. The department found the proposed Ambulatory Surgery Center (ASC) was exempt from the Certificate of Need (CN) law as a "group practice" under the ASC definition in WAC 246-310-010. The DOR stated as follows:

> *This determination is... based on facts submitted in the exemption application. Prior Certificate of Need review and approval may be required under the provisions of WAC 246-310-020 if changes occur in the facts as presented in the DOR application.*

Your application stated that "*there are 53 physicians associated with MultiCare Medical Associates practice.*" In Attachment B, you listed them by name and indicated that they all were employed "100 %" by MultiCare. The CN law does not define "group practice" and so the department looks to other sources for a definition. The federal Stark rule, 42 CFR 411.352(c), requires:

> *Each physician who is a member of the group must furnish substantially the full-range of patient care services that the physician routinely furnishes, including medical care, consultation, diagnosis, and treatment, through the joint use of shared office space, facilities, equipment, and personnel.*

This concept of full participation by members is entirely consistent with the common understanding of what constitutes a group practice. Thus, your representation that physicians using the ASC were full-time MultiCare employees was essential to the department's conclusion that the proposed facility was exempt from the CN law.

Following issuance of the DOR, the department received information from a third party that the facility would be used the physicians who not listed in the application. In a May 17, 2006 letter to the department, MultiCare's attorney confirmed that additional part-time MultiCare physicians would use the facility. The department has no information on these physicians or to what extent they would participate in the full-range of services offered by the group practice.

Accordingly, it appears that the facts on the proposed operation of the facility have materially changed, meaning that the January 12, 2006, DOR is not applicable to the project and would not support MultiCare's right to proceed without CN approval.

Please feel free to contact me if you would like to discuss the matter.

Sincerely,

Janis Sigman, Manager
Certificate of Need Program
Office of Certification and Technical Support

cc: Richard McCartan, AAG
Office of Health Care Survey
Tom Grimm, Attorney for MultiCare

EXHIBIT P

OGDEN MURPHY WALLACE
P.L.L.C.
ATTORNEYS AT LAW

Donald W. Black
dblack@omwlaw.com

June 20, 2006

VIA OVERNIGHT COURIER

Janis R. Sigman, Manager
Certificate of Need Program
Department of Health
Facilities and Services Licensing
310 Israel Road S.E.
Tumwater, WA 98501-5447

Re: MultiCare Day Surgery of Gig Harbor - Ambulatory Surgery Center Determination of Non-Reviewability

Dear Ms. Sigman:

I am writing on behalf of my client, Franciscan Health System ("FHS"). Specifically, we are writing in regard to the Department of Health's ("Department") Certificate of Need Program's ("Program") issuance of a Determination of Non-Reviewability related to MultiCare's Ambulatory Surgery Center in Gig Harbor (the "MGH ASC"). As you are aware, FHS has substantial concerns related to the Program's issuance of its Determination of Non-Reviewability ("DNR") related to the MGH ASC. The issues of concern to FHS were first documented in FHS's January 19, 2006 letter to the Program. As of the date of this letter, FHS believes that those issues have not been addressed by the Program or MultiCare in any material way.

FHS's issues can be summarized as follows:

1. There is no evidence that MMA, MMG or both are a "group practice." As documented by FHS, MMA/MMG does not meet the definition of a group practice as set forth in the Stark Law. *See* 42 CFR 411.352. The Program has stated that it looks to the Stark Law for the definition of a group practice in past determinations of non-reviewability for ambulatory surgery centers and certificate of need evaluations for ambulatory surgery centers. In this case, the Program is now stating that the Stark Law definition is not the definition of a group practice for purposes of Washington's CN laws and regulations. However, the Program is unwilling and/or unable to define what a "group practice" is for purposes of RCW 70.38 WAC 246-310.

2. Neither MultiCare nor the Program have addressed how the MGH ASC is or will be enrolled in the Medicare Program. If the MGH ASC is not required to enroll as a separate free standing ASC in the Medicare Program and is instead allowed to bill Medicare as a licensed hospital outpatient department under MultiCare's hospital license, a CN for that facility is clearly required per the Program's own policies, procedures and past practice. To the best of our knowledge, this issue has not yet been addressed.

A history of the DNR process in this matter is necessary to understand why FHS believes that these issues have not yet been addressed by the Program or MultiCare.

HISTORY OF DNR PROCESS

Prior to applying for the DNR, MultiCare applied for a Certificate of Need ("CN") to establish a new ASC in Gig Harbor on May 17, 2005. Following the review process for that application and in which FHS participated as an interested and affected party, the Program denied MultiCare's Application for a Certificate of Need for an ASC in Gig Harbor in an evaluation dated November 1, 2005. MultiCare then filed a Request for an Adjudicative Proceeding related to the denial of its CN application on November 22, 2005. FHS intervened in that adjudicative proceeding pursuant to a stipulation and agreed order filed on December 27, 2005 with the Department's Adjudicative Services Unit.

In the interim, MultiCare applied for a DNR for its proposed MGH ASC on December 15, 2005. FHS was not given notice of this application for the DNR but obtained a copy of it after requesting the same from Program personnel. FHS then submitted a letter to the Program on January 19, 2006 setting forth its questions and concerns relating to MultiCare's DNR Request. (FHS's January 19, 2006 letter is attached as Exhibit A.) At or around the same time, FHS learned through conversations with Program personnel that the Program had already issued a letter granting MultiCare a DNR for the MGH ASC. That letter granting the DNR was dated January 12, 2006. (The Program's January 12, 2006 letter is attached as Exhibit B.) Again, the Program did not provide FHS notice or a copy of its letter until FHS requested it.

On January 30, 2006, FHS's consultant, Jody Carona, spoke with Bart Eggen regarding the DNR and FHS's concerns as expressed in its January 19, 2006 letter. Mr. Eggen stated that the Program would consider FHS's letter and readdress the DNR as appropriate. More than a month later on March 7, 2006 Ms. Carona again spoke with Mr. Eggen. Mr. Eggen stated that FHS's letter raised interesting issues and the Program intended to do more work on the issue.

Having not heard anything formally from the program, FHS sent a second letter to the Program on March 31, 2006. (FHS's March 31, 2006 letter is attached as Exhibit C.) In that letter, FHS provided additional information about the MultiCare Medical Group ("MMG"), MultiCare Medical Associates ("MMA") and the possibility of part-time physicians being employed by MMA/MMG to use the MGH ASC.

On April 14, 2006, Janis Sigman called Laure Nichols of FHS and informed her that the Program had received FHS's March 31, 2006 letter and would review the files and get back to FHS by the end of the next week (*i.e.*, April 21, 2006). Then on May 2, 2006, Richard McCartan, Assistant Attorney General for the Program, informed me that the Program had forwarded two additional questions to MultiCare related to the DNR and the MGH ASC. On May 11, 2006, there was a status conference in MultiCare's separate appeal of the Program's denial of MultiCare's CN application for the MGH ASC. During that status conference, Richard McCartan agreed to forward to me the Program's request for additional information that it had made to MultiCare. Additionally, MultiCare's counsel, Tom Grimm, committed to responding to those requests for information to the Program by May 12, 2006. Later on May 11, 2006, Mr. McCartan faxed to me the Program's questions to MultiCare dated April 28, 2006 as well as MultiCare's response dated May 3, 2006 and additional questions from the Program to MultiCare dated May 9, 2006. (The Program's April 28, 2006 letter is attached as Exhibit D. MultiCare's May 3, 2006 responses are attached as Exhibit E. The Program's May 9, 2006 additional questions are attached as Exhibit F.)

On May 19, 2006, Richard McCartan forwarded a letter dated May 17, 2006 from MultiCare's counsel, Tom Grimm, related to the Program's May 9, 2006 request for additional information and asked whether FHS had any additional comments on MultiCare's responses. (MultiCare's May 17, 2006 letter is attached as Exhibit G.) Following consultation with my client, I emailed Mr. McCartan, FHS's comments on MultiCare's May 17, 2006 letter on May 23, 2006. (FHS's May 23, 2006 comments are attached as Exhibit H.) Mr. McCartan then followed up in a telephone conversation with me on May 25, 2006 regarding these same issues.

No additional update was provided to FHS until June 12, 2006 during another status conference in the related MultiCare adjudicative proceeding of its CN denial for MGH ASC. During that status conference Mr. McCartan disclosed that the Program had sent MultiCare yet another letter dated June 6, 2006 related to the DNR. FHS was not sent a copy of that letter at the same time it was sent to MultiCare. Following the status conference, Mr. McCartan, Mr. Grimm and I had an additional conversation regarding issues related to the DNR. Mr. McCartan promised to provide me a copy of the June 6, 2006 letter and Mr. Grimm stated that MultiCare would be responding to the June 6th letter in the very near future. Later that day, Mr. McCartan did, indeed, fax me a copy of the June 6, 2006 letter. (The Program's June 6, 2006 letter is attached as Exhibit I.) As of the drafting of this letter, neither I nor FHS have received any further correspondence from MultiCare related to the DNR issue.

Mr. McCartan has stated that the final position of the Program related to this matter is that if MultiCare uses part-time physicians in the MGH ASC who were not listed in the application materials for the DNR, then the facts related to the DNR would have materially changed and the DNR would not be applicable to the project or support MultiCare's right to proceed without a CN. In the alternative, Mr. McCartan stated that if MultiCare agreed to restrict the use of the MGH ASC to the physicians described in the DNR application materials and who participate fully in MMA or MMG, the DNR would remain valid.

NEXT STEPS

Despite the extended period of time following FHS initially raising its issues on January 19, 2006, neither the Program nor MultiCare have addressed those issues in any material way. To restate, FHS's issues are as follows:

1. There is no evidence that MMA, MMG or both are a "group practice." As documented by FHS, MMA/MMG does not meet the definition of a group practice as set forth in the Stark Law. *See* 42 CFR 411.352. The Program has stated that it looks to the Stark Law for the definition of a group practice in past determinations of non-reviewability for ambulatory surgery centers and certificate of need evaluations for ambulatory surgery centers. In this case, the Program is now stating that the Stark Law definition is not the definition of a group practice for purposes of Washington's CN laws and regulations. However, the Program is unwilling and/or unable to define what a "group practice" is for purposes of RCW 70.38 WAC 246-310.

2. Neither MultiCare nor the Program have addressed how the MGH ASC is or will be enrolled in the Medicare Program. If the MGH ASC is not required to enroll as a separate free standing ASC in the Medicare Program and is instead allowed to bill Medicare as a licensed hospital outpatient department under MultiCare's hospital license, a CN for that facility is clearly required per the Program's own policies, procedures and past practice. To the best of our knowledge, this issue has not yet been addressed.

The arguments and analysis related to those issues are included in FHS's correspondence cited in this letter (and are attached as Exhibits); therefore, there is no need to restate those arguments and analysis here. However, it should be pointed out that the simple fact that MultiCare initially applied for a CN for the MGH ASC is evidence in and of itself that the MGH ASC is properly subject to CN review notwithstanding MultiCare's after the fact rationalization that MGH ASC qualifies as a "group practice."

Based on FHS's understanding of the facts and procedural status in this matter as set forth above, FHS considers the Program's June 6, 2006 letter to John Long of MultiCare as the Program's final action on this matter. Given that the Program has now taken a final action and FHS's issues have not been substantively addressed in any manner, FHS is forced to file an Adjudicative Proceeding regarding the granting of the DNR to MultiCare in order to preserve its rights and protect its interests. Concurrent with the filing of a request for adjudicative proceeding, FHS will also file a petition for judicial review in Pierce County Superior Court. Again, these steps are necessary for FHS to protect its interests and preserve its rights related to the Program's mistaken determination that the MGH ASC is not subject to CN review. FHS will take these actions by June 26, 2006 unless the Program is able to communicate in writing that (i) the June 6,

2006 letter is **not** the Program's final action in this matter, and (ii) the Program will take steps to substantively address FHS's issues as articulated in this letter and its January 19, 2006 letter.

The Program's time and attention to this matter is greatly appreciated. If you have any questions regarding anything set forth above, please contact me at your earliest convenience.

Very truly yours,

OGDEN MURPHY WALLACE, P.L.L.C.

Donald W. Black

DWB:ctb
Enclosures
cc: Bart Eggen, Executive Manager, CN Program (Via Overnight Courier)
Richard McCartan, Esq. (Via Overnight Courier)
Thomas Grimm, Esq. (Via Overnight Courier)
Laure Nichols, FHS Senior Vice President, Planning and Business Development (Via Email w/o Exhibits; Via U.S. Mail w/Exhibits)
Joseph W. Wilczek, FHS President and CEO (Via Email w/o Exhibits; Via U.S. Mail w/Exhibits)
Jody Carona, Health Facilities Planning & Development (Via Email w/o Exhibits; Via U.S. Mail w/Exhibits)

EXHIBIT Q

THOMAS H. GRIMM, P.S.

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June 13, 2006

Janis Sigman, Manager
Office of Certification
Department of Health
PO Box 47852
Olympia, WA 98504-7852

Re: MultiCare Day Surgery Center of Gig Harbor

Dear Ms. Sigman:

This letter will respond to your letter of June 6, 2006 to John R. Long of MultiCare. As I understand the gist of it, the Department considers that its January 12, 2006 determination that the proposed surgery is exempt from the Certificate of Need laws as a group practice under WAC 246-310-010 would not apply if the facility were to also allow part-time MultiCare physicians to perform surgeries there. These would be in addition to the 53 physicians named in the application, all of whom are full-time physicians in MMA. Apparently, you have interpreted the rule found in 42 CFR 411.352(c) as precluding part-time physicians from a "group practice."

The Stark rule, quoted in your letter of June 6, does not say that part-time physicians are not to be considered as a part of a group practice. The term used in the rule to describe those in a group practice for its application are those physicians who provide "substantially the full-range of patient care services that the physician routinely furnishes...." (Emphasis added) Thus, the issue from the Stark standpoint is not whether the person is part-time or full-time, but whether the person provides the full-range of his normal patient care services as a member of the group. MMA's part-time physicians do provide such a range, and even if the Stark regulation were applicable to the state's health planning laws, the rule would not preclude part-time physicians as a part of a group.

For this reason, we conclude that you have misinterpreted a federal rule, which has no application to the health planning standards. In addition, as you note in the June 6 letter, the Department has no rule defining a group practice. RCW 34.05.375 invalidates any Department action based upon a rule not adopted in accord with the rulemaking

procedures of the APA. Unless and until the Department adopts a rule defining the term "group practice" as precluding part-time physicians, it cannot apply that principle to preclude a determination of non-reviewability.

That said, MultiCare is willing to have the DOR limited to the surgery being used only by the physicians listed in the application, and their full-time replacements and additions. While we continue to believe that the determination in the January 12, 2006 letter would allow also for part-time physician employees' use of the MultiCare Day Surgery Center of Gig Harbor, MMA will limit the surgeries to only its full time physicians identified in the application, plus their replacements and additions.

To re-affirm my response to your inquiries through Richard McCartan in my letter of March 28, 2006, the following will apply to the MMA physicians and the surgery that is a part of their practice, absent a CON or revision of the Department's June 6, 2006 position:

1. Only the full time physicians employed by MultiCare as part of MMA will use the surgical facility.

2. The surgery is owned by MultiCare Health System and will house two surgery suites, plus offices for the physicians.

3. The number of physicians will vary, based upon the number of full-time physicians employed at any given time.

4. Procedures will include the surgery types as specified in the application for exemption.

5. MultiCare will use its provider number in billing for all services.

6. MultiCare will hold the Medicare certification for the facility, as it will be included under the hospital license.

Very truly yours,

THOMAS H. GRIMM, P.S.

Thomas H. Grimm

cc: John R. Long
Erik Rasmussen, Esq.
Richard Petrich
Richard A. McCartan

EXHIBIT R

OGDEN MURPHY WALLACE
P.L.L.C.
ATTORNEYS AT LAW

Donald W. Black
dblack@omwlaw.com

June 26, 2006

VIA FACSIMILE AND U.S. MAIL

Janis R. Sigman, Manager
Certificate of Need Program
Department of Health
Facilities and Services Licensing
P.O. Box 47852
Tumwater, WA 98504-7852

Re: MultiCare Gig Harbor Day Surgery – Certificate of Need Determination of Non-Reviewability

Dear Ms. Sigman:

This letter is a follow up to my earlier letter of June 20, 2006. On June 21, 2006, I received a copy of the enclosed letter dated June 13, 2006 from Thomas Grimm on behalf of MultiCare related to its Day Surgery Center of Gig Harbor ("GHASC"). In particular, I draw your attention to point 6 immediately prior to the close of the letter which states as follows: "MultiCare will hold the Medicare certification for the facility, as it will be included under the hospital license."

This is directly the issue and concern raised by FHS in its prior correspondence with the Certificate of Need Program. It is our understanding based upon this statement that MultiCare does not intend to enroll the GHASC as a separate ambulatory surgery center with the Medicare program. In other words, the GHASC will simply be a licensed outpatient department of the hospital. Clearly and consistent with the Certificate of Need Program's past practice, the so-called "group practice exemption" does not and was not intended to apply to hospitals opening new licensed outpatient surgery rooms. In fact, the amendments to the Certificate of Need rules in 1998 codified the Certificate of Need Program's position, originally set forth in the Kennewick General Hospital ASC decision, that the opening of new licensed outpatient hospital operating rooms that were not located on the main campus of the hospital were subject to Certificate of Need review.

This admission by MultiCare is grounds by itself to deny MultiCare's request for a determination of non-reviewability as to GHASC.

Again, your and the Certificate of Need Program's time and attention to this matter is greatly appreciated. Please contact me if you have any questions regarding anything set forth herein.

Very truly yours,

OGDEN MURPHY WALLACE, P.L.L.C.

Donald W. Black

DWB/bas
Enclosure
cc: Bart Eggen, Executive Manager, CN Program (Via Facsimile and U.S. Mail)
Richard McCartan, Esq. (Via Email)
Thomas Grimm, Esq. (Via Email)
Laure Nichols, FHS Senior Vice President, Planning and Business Development (Via Email)
Joseph W. Wilczek, FHS President and CEO (Via Email)
Jody Carona, Health Facilities Planning & Development (Via Email)

EXHIBIT S

STATE OF WASHINGTON
DEPARTMENT OF HEALTH
ADJUDICATIVE SERVICE UNIT

In Re: Determination of Non-Reviewability Decision by DEPARTMENT OF HEALTH re: MULTICARE HEALTH SYSTEM'S GIG HARBOR ASC	)	No. 06-07-C2001CN
FRANCISCAN HEALTH SYSTEM, a Washington non-profit corporation, Petitioner.	)	

Telephonic Deposition Upon Examination of

JANIS SIGMAN

1:25 P.M.
October 4, 2006
1601 Fifth Avenue, Suite 2100
Seattle, Washington

REPORTED BY: Laurel A. Terry, RPR, CCR #2336

APPEARANCES

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Richard Petrich
Nancy Field

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(No exhibits marked.)

SEATTLE, WASHINGTON; WEDNESDAY, OCTOBER 4TH, 2006
1:25 P.M.
--oOo--

JANIS SIGMAN, having been first duly sworn by the Notary, deposed and testified as follows:

MR. BLACK: This is Don Black, and we're here in the matter of In Re: Determination of Non-Reviewability Decision by the Department of Health related to Multicare Health Systems Gig Harbor ASC, Franciscan Health System, Petitioner. It's docket number 06-07-C2001CN. I'm here representing the Franciscan Health System. Present with me is Jeff Dunbar of my office who's listening in. And I will let Mr. Grimm introduce himself.

MR. GRIMM: Yes. Thomas H. Grimm, Washington state bar number 3853 representing Multicare. And also listening in are Richard Petrich, P-E-T-R-I-C-H and Nancy Field from Multicare. Nancy is actually an outside consultant.

MR. BLACK: Richard, do you want to introduce yourself?

MR. McCARTAN: Yes. I'm Richard McCartan, M-C-C-A-R-T-A-N, Assistant Attorney General for the Department of Health.

EXAMINATION

BY MR. BLACK:

Q. Just a few quick ground rules, Ms. Sigman. If you don't understand a question I ask, please stop -- after I finish it, go ahead and ask me to rephrase it. I'll be happy to do so. I don't think this will take very long, but if you need a break for any reason, please just let me know and we will do that. And if there's any confusion about anything else from Richard or Mr. Grimm, just stop and we'll address it and go from there.

A. That's fine.

Q. All right. Ms. Sigman, could you please state and spell your name for the record?

A. It's Janis Sigman, J-A-N-I-S S-I-G-M-A-N.

Q. And could you please give us your business address?

A. Yes. It's 310 S.E. Israel Road, Tumwater, Washington, and I believe it's 98501.

Q. Thank you. Could you please tell us what your current position is?

A. Yes. I am the program manager for the

Certificate of Need Program, and I also have under me, the Nonprofit Hospital Acquisition Program and the Antitrust Immunity Program.
Q. And how long have you been the program manager for the Certificate of Need Program?
A. Since about 1993.
Q. Thank you.
I probably know the answer to this, but I'll go ahead and ask you anyway. What have you done today to prepare for your deposition?
A. Nothing except get the record out.
Q. And do you have the record in front of you?
A. I do.
Q. And is it the Bates stamped paginated record?
A. No, it is not.
Q. Okay. We'll just have to work through finding things together.
A. Okay.
Q. In your role as the CN program manager, do you have responsibility for approving the determinations of non-reviewability that are issued by the program?
A. They typically go out underneath my signature, yes.
Q. Did you have responsibility for the determination of non-reviewability that was sent out in

January of 2006 to Multicare related to their ASC in Gig Harbor?
A. I did not review all of the documents related to it, but I believe the determination went out under my signature.
Q. Subsequent to when it initially went out in January of 2006, did you have occasion to review all of the documents related to the Multicare request for determination of non-reviewability for the ASC in Gig Harbor?
A. I believe I did, yes.
Q. And did you have responsibility, ultimately, for the June 6th, 2006 letter related to the Multicare determination of non-reviewability for the ASC in Gig Harbor?
A. Let me find that. Just a moment. Mr. Black, is there a tab that it happens to be under in some of your materials?
Q. Ms. Sigman, what I have was provided by the Office of Professional Standards.
A. Okay.
Q. And it's Bates stamped, so, in mine, the June 6th letter --
A. Yes, I see that. Yes.
Q. You have it now?

A. Yes, I do.
Q. Okay. So were you responsible for that letter?
A. Yes, in conjunction with my attorney.
Q. Did anyone else assist you in the preparation of that letter?
A. I guess I need clarification. Are you thinking in terms of the wording of it or the substance of it?
Q. The substance.
MR. GRIMM: Jan, you're getting quite a lot of echo from the speakerphone I think you're on. Maybe if you moved it around a little bit, it might be helpful.
THE DEPONENT: Actually, I'm on a headset.
MR. GRIMM: It sounds like you're in the bottom of a barrel.
MR. McCARTAN: I'm off my speakerphone. That may have made a difference.
(Off the record regarding speakerphone.)
A. The best that I recall is that I discussed it with Richard and possibly Bart Eggen as to what we were going to do with the letter and then had Mr. Eggen and Richard review it before it was sent out.
Q. So, just to confirm, you ultimately approved the June 6th letter and sent it out?
A. Yes.
Q. Thank you.

I'm going to turn our attention now to the so-called group practice exception to the requirement to obtain a Certificate of Need for an ASC.
Can you tell us where we find that exception?
A. It is actually in the definition of an ambulatory surgery center --
MR. BLACK: I need to stop for a second because --
MR. DUNBAR: Richard, we can hear you breathing on the phone.
MR. BLACK: Let's go off the record and see if we can fix the phone issues.
(Off the record.)
Q. Back on the record.
So, my question again, just for clarification was, where do we find the group practice exception for the -- to obtaining a Certificate of Need for an ambulatory surgery center?
A. It's in the definition section of the rules, which would be under 246-310-010.
Q. Great. Thank you.
And, in the definition of an ambulatory surgery facility or what we are colloquially referring to as an ambulatory surgery center, is the term "group practice" itself defined?

A. No.
Q. Is it defined in the Certificate of Need statute?
A. No.
Q. Is it correct that the program has referred to the definition of a group practice found in the Medicare Stark law in past instances relating to determinations of non-reviewability for ambulatory surgery centers?
A. We have looked to that for guidance, the definition as guidance, but we recognize that that was a specific purpose and that we don't have a definition specifically in the rule, so we look kind of to the concepts that are in that particular statute or in that Stark stuff.
Q. I believe you said, "Or in that Stark stuff," is that correct?
A. Yes. A real technical term there.
Q. That's fine.
Is it correct that you have referred parties that are making inquiries regarding submitting determinations for non-reviewability related to ambulatory surgery centers, that you have referred them to the Medicare Stark law definition of a group practice for guidance?
A. In the same context that we have indicated that

we have -- that we use that as guidance for making that determination.
We also have provided them with a -- kind of an acceptable -- an example of an acceptable/nonacceptable type of ASC. And I believe that's materials that can be found on our website.
Q. Is there any other specific guidance on what is or is not a group practice that the program looks to in rendering determinations of non-reviewability?
A. Not really. We do look and see what we have done in the past to see -- trying to be consistent, but also try and keep the concept around, you know, the physicians need to be providing a full breadth of service where they're going to be located and that type of thing so that -- you know, to look at that types of services and issues.
Q. And, just to confirm again, in past instances, you have looked at the Stark law definition for guidance, correct?
A. We have.
Q. Just one moment.
So, besides the Stark law and past determinations that the program has issued, are there -- anything else that you look to for guidance or that you offer to applicants for guidance in determining what a

group practice is?
A. I'm thinking. Not that I recall. I mean, we do -- we have provided folks that are looking at doing a determination, copies of past ones, if they would like, to see if it's something similar to what they are looking at and how we looked at it. So we provide them copies of the determinations and the materials that were included in that. I mean, that's one way of doing it that we have done.
Q. So, turning you to this particular instance, the Multicare request for determination of non-reviewability, did you review the various correspondence that the Franciscan Health System submitted on this matter?
A. I did.
Q. And you reviewed both the materials Multicare submitted in December of 2005 as well as the materials they submitted later on in this process?
A. I believe that's my recollection.
Q. Do you recall that the Franciscan Health System asked the program to offer it what it was using as a definition for a group practice in any of those correspondence?
A. I'm sorry, I don't.
Q. You don't recall?
A. I don't recall.

Q. Do you recall whether the program ever responded in writing to any of the correspondence from the Franciscan Health System on this issue?
A. To my recollection, we did not. We were -- I was working through my AG.
Q. Do you recall whether you ever told the Franciscan Health System that you would not consider the Stark law definition of a group practice in this case?
A. Not that I recall.
Q. Do you recall whether you ever told Multicare that you would not use the Stark law definition of a group practice in this case?
A. Not that I recall.
Q. In fact, is it correct that you relied and actually cited the Stark law definition of a group practice in your June 6th, 2006 letter?
A. I believe I did cite that in my June 6th letter.
Q. Was there any other definition of a group practice that you used in your June 6th, 2006 letter?
A. No.
Q. Do you still have the June 6th letter there?
A. Yes.
Q. One moment.
In the June 6th, 2006 letter, isn't it correct that you referred to some information provided by

Multicare on or around May 2006 related to the physicians who would be using its ambulatory surgery center? And I can refer you specifically to the first paragraph on the second page of your letter.

A. I'm looking at that right at the moment. What was your question, Don?

Q. My question was that in your letter, you referred to and relied on some information provided by Multicare in May of 2006.

A. Correct.

Q. And is it correct that based on this information that Multicare provided, that in your June 6th letter, you found that the determination of reviewability was not applicable to the project and would not support the right to proceed without a CN?

A. That would be correct if they were going forward with the way that the information in the May 17th letter would indicate.

Q. Let me turn to another reference real quick.

Do you recall having a conversation with Laure Nichols of the Franciscan Health System in April of this year, 2006, related to this matter?

A. April? I don't recall off the top of my head that I did. That doesn't mean I didn't. I don't recall. April?

Q. Yes, April.

So, you can't confirm or dispute whether you called Ms. Nichols in April and told her that you had received the Franciscan materials as well as some information from Multicare and would be reviewing that and getting back to everyone hopefully within that month?

MR. GRIMM: Well, I'm going to object to leading your witness.

MR. BLACK: That's fine. You can go ahead and answer the question.

A. Off the top of my head, I don't recall.

Q. You don't recall it, but you can't confirm it or deny it, is that correct?

A. That's correct.

Q. Okay. Thank you.

Let me put you even farther back in your memory to January after the program had issued the January 12th letter and after the Franciscan Health System had sent what was dated January 19th, its letter on the application for the determination of reviewability.

A. Okay.

Q. Do you recall ever discussing with Bart Eggen the fact that he had discussed the matter with the Franciscan's consultant, Jody Carona?

A. I don't recall. He could have told me about a

conversation. It's not uncommon that he has conversations with Jody on various issues.

Q. Hold on one moment.

Ms. Sigman, I'm rapidly reaching the end of my questions. Just a few follow-up and summary questions for you.

A. Okay.

Q. Can you recall or cite us to a single instance where the program has deviated in any material way from the Stark law definition of a group practice when it has issued a determination of reviewability related to an ASC?

MR. GRIMM: I'm going to object to the question's form as being compound, vague, and calling for a legal conclusion.

MR. BLACK: So noted.

Q. If you're confused by the question, I'll reask it.

A. I guess the only -- the thing that I would say is that the materials that -- I mean, I guess the determination that we did for Multicare here, to my recollection, is like one that we did for the Kennewick ASC in their medical mall, and, in fact, was materials that we provided to Multicare prior to us even receiving the CON application.

Q. And do those materials stray from the Stark law

definition of a group practice?

A. Well --

MR. GRIMM: Objection. Calling for a legal conclusion.

MR. BLACK: You can go ahead and answer. Thank you.

MR. GRIMM: Excuse me. One more objection, that there's no foundation that she is an expert on Stark law, which is not in the purview of this agency.

MR. BLACK: So noted.

A. The only thing I can share with you is that -- again, is this determination is similar to the one that we did in Kennewick, and whether it strays from Stark law or not, I can't tell you. That was a base -- you know, one of the bases of the determination was that it was similar to the one that we did for Kennewick.

Q. And do you recall what the Kennewick determination reviewability said about group practice?

A. I believe we came to the same conclusion and that -- I mean, it was -- this one is patterned very similar if not exactly like the one that we did in Kennewick -- for Kennewick.

Q. Okay. You say you reached the same conclusion. What's the conclusion?

A. That the way that they were -- that the way that

it was going to be done was it was a group practice for purposes of Certificate of Needs.
Q. And for purposes of Certificate of Need, then, what's the definition of a group practice?
A. Well, I think that there are some concepts around that --
MR. McCARTAN: Excuse me, Jan. I'm going to object that that is repetitive. I think we have been through this before. You can agree or disagree. But I think this is the same line of questioning you asked at the beginning of the deposition.
MR. BLACK: Thanks, Richard. But you can go answer and answer, Janis.
A. Well, like I say, we do look for the Stark law for guidance, but there's some overlying principles that we look at. For example, whether substantially all of the patient care is provided through the members of that group. You know, are they performing a whole range of services from diagnostic through treatment and those types of things, you know, that you would normally see. Consultation, diagnosis, treatment. Is there a -- you know, does it kind of have this uniform approach to it.
So, those are some of the other things that we consider as we do that. And that's -- when we looked at, for example, that that was done for the Kennewick Medical

Mall, they did that. And we concluded that they met that concept along with that. And we made the same conclusion here.
Q. So, in other words, there's no specific definition of group practice that you used in either the Kennewick Mall or this one?
A. There's not a check-off list.
Q. But, you did in both look at the Stark law for guidance?
A. Yes.
Q. Do you know, and if you don't know, that's perfectly fine, but do you know whether the concept of a physician providing their full range of care is a concept found in the Stark law definition of a group practice?
A. I can't say positively, but if my recollection serves me correctly, it is.
MR. BLACK: Okay. Thank you. I think I don't have any further questions.
Mr. Grimm, do you have any?
MR. GRIMM: I do. Just a few.

EXAMINATION

BY MR. GRIMM:
Q. Ms. Sigman, you were asked some questions about the June 6th letter that you wrote and sent to Mr. Long.

A. Yes.
Q. You recall those?
Were you responding to the issue of the expansion of the Multicare project from full-time physicians to also include part-time physicians in that -- when you sent that letter?
A. That is my recollection, yes.
Q. And the department determined that it would not allow that expansion to occur, correct?
A. Correct.
Q. And does the Certificate of Need program have any regulatory authority under the Stark law?
A. No.
Q. In other words, does it enforce them at all?
A. No.
Q. Bear with me for just one second here.
Ms. Sigman, you're aware that Mr. McCartan has filed a memorandum yesterday on behalf of the department with regard to the summary judgment motion presently pending?
A. I understand he did that.
Q. Did you read the recitation of the facts that were found on page four of that over on five?
A. I have not read any of that. I was in another hearing.

MR. GRIMM: Okay. I think I have no further questions at this time.
MR. BLACK: Richard --
MR. GRIMM: I would like to make one final -- one comment. This deposition was on extremely short notice; three hours, and with a minimum preparation time available to me. That said, I would like to reserve comments -- or I should say and maybe continue this deposition at the request of Multicare in -- to a later date, if necessary, and to explore further.
MR. BLACK: Okay. Richard, do you have any questions?
MR. McCARTAN: I don't.
MR. BLACK: I have one follow-up question.

FURTHER EXAMINATION

BY MR. BLACK:
Q. Ms. Sigman, isn't it correct that the issue of Multicare's use of part-time physicians or plan to use part-time physicians in its Gig Harbor ASC was brought to your attention by the Franciscan Health System in its materials?
A. Yes.
MR. BLACK: Thank you. That's all I have.
MR. GRIMM: If I may ask a follow-up

question.

FURTHER EXAMINATION

BY MR. GRIMM:

Q. Ms. Sigman, you have referred to providing materials to Multicare with regard to Kennewick.

Did you provide the entire Kennewick file to Multicare?

A. I -- well, I --

Q. Either you or Ms. Nidermayer.

A. Would you please ask the question again?

Q. Yes, I will.

At the request of Multicare, did you provide a copy of the Kennewick file seeking an exemption for its surgery center on circumstances similar to those of Multicare?

A. Yes. The only thing that I -- probably was not included because I cannot find it in our facility file associated with that, and that was the May -- I believe it was the May 9th, 2002 final letter regarding that.

Q. Okay.

A. But, all of the other materials associated with that determination including the previous determination where we indicated that it was subject to review and then where they asked for reconsideration on that and provided

additional information, I believe that that information -- I mean, that information was provided to you, and I believe, Don, that that was forwarded on to you this morning, and I was able to get a copy of that and scan that.

Q. Okay. All right. And when the Multicare application came in for a determination of non-reviewability, did you determine that the structure of this -- the surgery center in Gig Harbor for Multicare was essentially the same as that in Kennewick?

A. That was the instructions that I asked Karen Nidermayer of my staff -- actually did review all of the materials and draft the determination as to -- to make sure that it was consistent.

Q. Okay. And, so, the determination of non-reviewability was based upon that consistency with the Kennewick determination, correct?

A. Yes.

MR. GRIMM: Thank you. No further questions.

MR. BLACK: This could go on a while, this ping-pong match. I have a couple of follow-up questions.

FURTHER EXAMINATION

BY MR. BLACK:

Q. Just to clarify, the first time you provided these same materials to Multicare -- excuse me, to the Franciscan Health System was earlier today, is that correct?

A. That's correct.

Q. And is there any reference in your June 6th letter or your January 12th, I believe it is, letter to the Kennewick determination of non-reviewability?

A. No. Not that I recall. I don't believe so.

MR. BLACK: That's all that I have. Thank you.

MR. GRIMM: Nothing further for me.

MR. BLACK: Thank you very much for being available today on the short notice. Tom, your not objection, but note about continuing it if necessary is duly noted and we'll go from there.

We'll adjourn, then, and go off the record. Thank you.

(Signature was reserved.)

(Concluded at 2:00 p.m.)

SIGNATURE

I declare under penalty of perjury under the laws of the State of Washington that I have read my within deposition, and the same is true and accurate, save and except for changes and/or corrections, if any, as indicated by me on the change sheet page hereof.

Signed in.....,

Washington, on the.....day of.....2006.

JANIS SIGMAN

Taken: October 4, 2006

CERTIFICATE

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

I, Laurel A. Terry, Registered Professional Reporter and an officer of the Court under my commission as a Notary Public for the State of Washington, hereby certify that the foregoing deposition upon oral examination of said witness was transcribed under my direction;

That the witness was duly sworn by me to testify truthfully; that the transcript of the deposition is a full, true, and correct transcript to the best of my ability; that I am neither attorney for, nor a relative or employee of any of the parties to the action or any attorney or counsel employed by the parties hereto, nor financially interested in its outcome.

IN WITNESS WHEREOF, I have hereunto set my hand and seal.

/S/LAUREL A. TERRY

NOTARY PUBLIC in and for the State of Washington, residing in Kent. My Commission expires October 6, 2007. CCR License No. 2336.

Laurel A. Terry, CCR, RPR

EXHIBIT T

Federal Register

Friday,
March 26, 2004

Part III

Department of Health and Human Services

Centers for Medicare & Medicaid Services

42 CFR Parts 411 and 424

Medicare Program; Physicians' Referrals to Health Care Entities With Which They Have Financial Relationships (Phase II); Interim Final Rule

revised the rule accordingly. We want to iterate, however, that an entity that has a substantial purpose other than operating a physician group practice, such as operating a hospital, will not qualify. Thus, hospitals that employ two or more physicians are not physician "group practices" for purposes of section 1877(h)(4) of the Act and are not eligible under the in-office ancillary services exception. A hospital may own or acquire a separate physician group practice that qualifies under section 1877(h)(4) of the Act and would be eligible under the in-office ancillary services exception.

Comment: One commenter asked us to clarify that a group practice can meet the definition at § 411.352 if it is owned by a medical group, as long as the medical group that owns it no longer provides medical services. Some commenters asked us to reconsider our position that the single legal entity requirement is not met if a group practice is owned by another functioning medical group.

Response: Under § 411.352(a), defunct medical groups no longer providing medical services can own or operate a medical practice that qualifies as a "group practice" for purposes of section 1877(h)(4) of the Act. In this regard, we have clarified the third sentence in § 411.352(a) to read: "The single legal entity may be organized or owned (in whole or in part) by another medical practice, provided that the other medical practice is not an operating physician practice (and regardless of whether the medical practice meets the conditions for a group practice under this section)." We stand by our determination that a group practice owned by other functioning medical groups cannot meet the single legal entity requirement; to conclude otherwise would insufficiently protect against sham group practice arrangements or physicians forming groups substantially for the purpose of profiting from DHS referrals.

Comment: Several commenters objected to our determination that, for purposes of section 1877(h)(4) of the Act, a hospital cannot form a group practice of its employed physicians without organizing them into a separate entity.

Response: As we explained in the Phase I preamble (66 FR 898–899), treating a "group" of hospital-employed physicians as a "group practice" for purposes of section 1877(h)(4) of the Act would stretch the meaning of a "group practice" too far. It would enable hospitals that employ two or more physicians to use the in-office ancillary services exception inappropriately to protect virtually all inpatient and outpatient hospital services. We do not believe that the Congress intended the in-office ancillary services exception, which focuses on services provided by physician practices, to be used to exempt hospital services from the scope of section 1877 of the Act. Under the "group practice" definition, a hospital may legally organize, own, or operate a group practice that is a separate legal entity; however, the hospital itself (or other facility or entity the primary purpose of which is something other than the operation of a physician group practice) cannot be a group practice for purposes of section 1877(h)(4) of the Act. Hospitals that employ physicians can appropriately structure their arrangements with physicians to fit in the employment exception.

Comment: Some commenters urged that a foundation-model physician practice should be allowed to qualify as a "group practice" under section 1877(h)(4) of the Act.

Response: It is our understanding that "foundation-model" physician practices exist in a variety of forms, depending on jurisdiction and other factors (including, for example, whether a particular State bars the corporate practice of medicine). Given the variety of foundation-model arrangements, it would be difficult to craft a uniform definition of a foundation-model group. Moreover, the personal services arrangements exception corresponds more closely to the contractual arrangements that typically establish foundation-model physician practices. Indeed, the legislative history reflects congressional intent to apply the personal services exception to foundations. (H.R. Conf. Report No. 103–213 at 814 (1993) ("The conferees intend that this exception would apply to payments made by a non-profit Medical Foundation under a contract with physicians to provide health care services and which conducts medical research [sic].")) Thus, as explained in Phase I (66 FR 897), foundation-model practices should use the personal service arrangements exception. We believe the modifications we are making to that exception in this Phase II will address the commenters' concerns and offer adequate protection for DHS referrals within most foundation-model group structures. This determination does not preclude particular foundations or foundation-model practices that, in fact, meet the single legal entity test from qualifying as a group practice and using the in-office ancillary services exception.

Comment: Section 1877(h)(4) of the Act requires that a "group practice" consist of "2 or more physicians." Several commenters asked that we clarify whether the "2 or more physicians" test is met if a group consists of one full-time physician and one part-time employed physician or independent contractor physician. The commenters interpreted the Phase I preamble as requiring that the second physician be a full-time, rather than part-time, employee. The commenters viewed this requirement as conflicting with § 411.352(b), which requires that the group have two physicians who are "members of the group" (as defined in § 411.351), whether as employees or direct or indirect owners. The commenters pointed out that, under the "members of the group" test, a physician with only token ownership in the group could qualify as a member of the group. Given this relatively expansive test for "members of the group," the commenters discerned no reason for the "2 or more physicians" test to require that the second physician be a full-time employee.

Response: The list of examples of acceptable group practice structures in the Phase I preamble (66 FR 897) is illustrative, not exhaustive, of the kinds of arrangements that could qualify under the group practice definition. We agree with the commenters' interpretation that the physicians counted for the "2 or more physicians" test can be part-time employed physicians. The group practice would still need to satisfy the remaining conditions of § 411.352. This interpretation is consistent with the language of § 411.352(b), and we are therefore making no textual change.

However, with respect to independent contractor physicians, we are not expanding § 411.352(b) to permit them to fulfill the "2 or more physicians" test. Independent contractors are not group practice "members" under § 411.351. A large number of commenters to the January 1998 proposed rule, as well as commenters to the Phase I rule, opposed including independent contractors in the definition of "member of the group" because of concerns about meeting certain of the statutory group practice tests (66 FR 900). Accordingly, we excluded those physicians from being group practice members, but included them in the definition of "physicians in the group practice," a resolution consistent with the comment letters and the statutory language. To count non-member physicians in the "2 or more physicians" test would effectively expand the group practice definition to groups with *no* physician members (that is, groups with 2 or more independent contractors), a result inconsistent with the statute. That expansion would

EXHIBIT U

The attached economic analysis supports the determination that the probable benefits of the rule are greater than its probable costs.

A workgroup consisting of other state agencies, programs, associations, and stakeholders assisted in the development of the rule revisions. Over the past nine months, the workgroup met to negotiate rule changes which implement the directives of the statute. We made a concerted effort to interpret the statute broadly to lessen the impact on facilities going through CON review and reduce the types of facilities and services subject to review. We also attempted to make the CON process more effective and to provide the greatest benefit to both the department and stakeholders.

There are six areas in the proposed rules that require an economic analysis.

Ambulatory Surgery Facility

Statement of the Problem: The Certificate of Need statute requires the review of ambulatory surgical facilities also known as ambulatory surgical centers (ASC). By rule, the current definition of an ambulatory surgical facility is *"a facility, not a part of a hospital, providing surgical treatment to patients not requiring inpatient care in a hospital. This term does not include a facility in the offices of private physicians or dentists, whether for individual or group practice, if the privilege of using such facility is not extended to physicians or dentists outside the individual or group practice."*

This definition has been interpreted by the Certificate of Need Program to exclude from Certificate of Need review those ambulatory surgical facilities that are both physically located within the hospital (outpatient surgery departments or day-surgery programs) and those free-standing facilities that are licensed under the hospital license. The result of this interpretation is that a hospital may establish a free-standing ambulatory surgical facility without prior Certificate of Need review. This puts the non-hospital licensed ASC, who must go through a Certificate of Need review, at a competitive disadvantage. Even though the hospital ASC must be located within a 10 mile radius of the hospital and meet the stringent hospital construction requirements, exemption from Certificate of Need confers an advantage.

Under this system, hospitals can engage in anti-competitive behavior by establishing an ASC during the review period of an independent ASC's Certificate of Need application. Department of Health review of a Certificate of Need application must take into consideration both existing facility capacity and those under-construction when determining the need for additional facilities. Thus, a hospital sponsored ASC under construction could eliminate the need for the ASC under review. The Freestanding Ambulatory Surgery Association of Washington State (FASO'S) has stated this inequality has discouraged their members from going through the Certificate of Need process because of the large expansion of resources required and the potential for their application to be denied. (The average cost to develop a Certificate of Need application is approximately $25,000.) In at least one instance, a letter of intent was submitted proposing to establish a free-standing ASC, but the application was never submitted because in the interim a hospital began construction on its own free-standing ASC.

As currently set up, there are inconsistent requirements for ambulatory surgical facilities, depending only upon who operates them. If the hospital has the only existing ASC, this inconsistency in requirements creates an environment that allows the hospital-based ASCs to charge monopolistic rates. A recent application documented that a local hospital, the only outpatient surgery provider in the area, continued to aggressively raise their rates (a cumulative price increase of over 19% over a two year period) until a local physician group practice opened three new OR's. Shortly after this, the hospital reduced its outpatient surgery rates by 25%.

Additionally, the current inconsistency in requirements may actually result in higher costs to consumers. There is evidence that free-standing ASCs are able to provide outpatient surgical services in a less costly manner than continuing to provide them in within the hospital setting. A 1994 article from *Northwest Physician* states that *"in many instances hospital-based surgery charges average nearly twice the ASC charges. Hospital out-patient surgery units may be very efficient in their direct staffing and supply expenses, but even the most efficient hospital must add over a dollar of overhead for every dollar of direct surgery cost."* Two recent Certificate of Need applications support this assertion. Both applicants were hospitals who had the choice of establishing an outpatient surgery center within the hospital or establishing a free-standing ASC licensed under the hospital. Both alternative approaches would exempt them form Certificate of Need review. Instead, each chose to establish a free-standing ASC (not licensed as part of the hospital) and go through Certificate of Need review. One of the applicants stated: *"this ambulatory surgery center will allow for surgical services to be provided to the community in a more appropriate and cost-effective manner....Free-standing outpatient settings are typically less costly than providing the same services in the hospital."*

During the workgroup meetings, the Freestanding Ambulatory Surgery Association of Washington State requested that the definition of ambulatory surgical facility be revised to read: *"any free-standing entity, including an Ambulatory Surgery Center, that operates primarily for the purpose of performing surgical procedures to treat patients not requiring hospitalization. This term does not include a facility in the offices of private physicians or dentists, whether for individual or group practice, if the privilege of using such facility is not extended to physicians or dentists outside the individual or group practice."* This change will not affect the Certificate of Need exemption for a facility that is part of a hospital providing surgical treatment for patients requiring inpatient care nor will it change the exemption for outpatient surgical facilities located within the hospital. The Washington State Hospital Association whose members would be affected by this revision in the definition supported the change.

The principle cost of these changes is that hospitals who desire to create an ASC will have to apply for a Certificate of Need. Program staff estimates that only one additional Certificate of Need application per year will result from this change in definition. This estimate is based on the fact that most hospitals already have at least one free-standing ASC. This change may however, encourage non-hospital sponsored ASCs to apply for Certificate of Need approval. Staff have no estimate of the number or likelihood of this happening. The cost of a typical

certificate of need application is about $25,000 (including Department of Health review fees.) Therefore, the annual of this change is estimated at $25,000.

The overall benefits of these changes include: 1) *"leveling the playing field"* between free-standing surgical facilities regardless of who owns and operates the facility; and 2) reduced costs to consumers by allowing lower cost services to compete fairly with higher cost services.

After comparing the benefits of more equitable competition and the potential reduced costs to consumers to an annual additional cost of $25,000, the Certificate of Need program has determined the probable benefits of the rule are greater than its probable costs.

Nursing Home Bed Banking-Alternate Use

Statement of the Problem: To encourage existing nursing home providers to move away from institutional based care and into other more desirable home and community based services (adult day health, assisted living, boarding home, etc.), the State Legislature in 1993 changed the Certificate of Need statute to allow existing nursing home licensees to bank some of their nursing home beds. To bank beds the facility must meet specific requirements. Under the 1993 statutory language, the nursing home had to either provide an alternative service (as identified in the statute) or reduce the number of beds per room to one or two. The beds can be banked for four years with the possibility of an additional four years if good cause is shown. The statute also required that the nursing home must remain in continuous operation and may not be leased or sold during the time the beds are banked. Closed, sold or leased facilities forfeit banked beds. The statute requires one year prior notice before beds can be un-banked(if no construction is required) or two year prior notice (if construction is required).

In the 1995 legislative session, this section of the statute was again modified to expand the reasons the nursing home could bank beds to include *"other services that enhance the quality of life for the residents."* Another change gave nursing homes an exemption from Certificate of Need review when the construction costs required to bring the beds back on line exceeded the minimum capital expenditure threshold. The statute now requires that the building owner of the nursing home, who has secured interest in the nursing home beds, approve the bed banking. This is only important if: the licensee who is not the owner fails to maintain the facility's license; or there is a change in the lessee or owner of the nursing home resulting in forfeiture of the banked beds.

The proposed rules accomplish four things. First they clarify which services are considered to "enhance the quality of life of the resident". We have tried to broadly interpret this vague phrase to give nursing homes some flexibility. However, the service must have a direct and immediate benefit to the residents of the nursing home. Services which are considered to accomplish this include, but are not limited to, resident activity and therapy areas, family meeting rooms, spiritual rooms, dining areas, beauty and barber shops. Examples of services that are not considered to have a direct and immediate benefit to the residents include modifications to staff offices, staff meeting rooms, laundry facilities and other staff facilities.