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Supreme Court No. \_\_\_\_\_ BY RONALD R. CARPENTER

Court of Appeals No. 66304-6-I \_\_\_\_\_ CLERK

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**SUPREME COURT OF THE STATE OF WASHINGTON**

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KING COUNTY PUBLIC HOSPITAL DISTRICT NO. 2, d/b/a EVERGREEN HEALTHCARE, a Washington public hospital district, SWEDISH HEALTH SERVICES, d/b/a SWEDISH VISITING NURSE SERVICES, a Washington non-profit corporation, PROVIDENCE HOSPICE AND HOME CARE OF SNOHOMISH COUNTY, a Washington non-profit corporation, and HOSPICE OF SEATTLE, a Washington non-profit corporation,

Petitioners,

v.

WASHINGTON STATE DEPARTMENT OF HEALTH, a Washington governmental agency, SECRETARY MARY SELECKY, Secretary of Washington's Department of Health in her official and individual capacity, ODYSSEY HEALTHCARE OPERATING B, LP, a Delaware corporation, and ODYSSEY HEALTHCARE, INC., a Delaware corporation,

Respondents.

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**ODYSSEY'S ANSWER TO PETITION FOR REVIEW**

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## **I. IDENTITY OF RESPONDENT**

Respondent Odyssey Healthcare Operating B, LP and Odyssey Healthcare, Inc. (“Odyssey”) is a hospice care agency that applied for a Certificate of Need (“CN”) to open hospice agencies providing palliative care to dying residents in King, Pierce and Snohomish counties.

## **II. THE COURT OF APPEALS’ DECISION**

This case involves a settlement pursuant to RCW 70.38.115(10)(c). This statute authorizes the Department of Health (“the Department”) to settle adjudicative proceedings challenging the denial of a CN license “prior to the conclusion of the adjudicative proceeding” so long as the Department gives the CN applicant’s competitors notice and “an opportunity to comment, in advance, on the proposed settlement.”

Here, the Department proposed settling an adjudicative proceeding at the same time it settled a federal civil rights action brought by Odyssey. Both actions challenged the Department’s denial of Odyssey’s CN applications to open hospice agencies in three counties. As part of the settlement, Odyssey agreed to dismiss its appeal of the denial of CN applications for two counties in return for the Department considering issuance of a CN for King County.

As required by RCW 70.38.115(10)(c), the Department notified petitioners King County Public Hospital District No. 2, Swedish Health

Services, Providence Hospice and Home Care of Snohomish County, and Hospice of Seattle (“the competitors”) of the proposed settlement and the opportunity to submit written evidence and argument opposing the settlement. After considering the competitors’ evidence and argument, the Department decided Odyssey’s CN application met the criteria for issuance of a CN in King County. The Department then requested a Health Law Judge (“HLJ”) to approve the proposed settlement. After giving the competitors a second opportunity to submit written evidence and argument opposing the settlement, the HLJ independently determined Odyssey’s application met all CN criteria and approved the settlement.

The competitors sought judicial review of the HLJ’s order approving the settlement, arguing in part that the HLJ erred by considering updated data showing need for another hospice agency in King County. The trial court reversed the HLJ’s order, reversed the related federal court settlement in part, remanded the previously settled administrative case for a full hearing on the merits, and limited the evidence the HLJ has discretion to consider at the remand hearing. The trial court ruled the Department may not settle a CN case by modifying its initial decision denying a CN.

The Court of Appeals reversed the trial court and affirmed the HLJ’s order approving the settlement. *King County Public Hosp. Dist.*

*No. 2 v. Dept. of Health*, \_\_\_ Wn. App. \_\_\_, 275 P.3d 1141 (2012). The Court of Appeals concluded the Department has discretion in the context of a settlement to consider updated evidence showing there was need for another hospice agency, and substantial evidence supported the HLJ's findings that all four regulatory requirements were met for issuing a CN. *Id.*, at \_\_\_, 275 P.3d at 1146-51.

### III. COUNTER-STATEMENT OF ISSUES

A. Should the petition for discretionary review be denied because the Court of Appeals' decision is not in conflict with *Univ. of Wash. Med. Center v. Dept. of Health*, 164 Wn.2d 95, 104, 187 P.3d 243 (2008) ("*UWMC*")? The *UWMC* court held "[i]t was within the sound discretion of the health law judge to admit, or not admit, evidence that came into existence after the close of the public comment period." 164 Wn.2d at 104 (emphasis added). Here, the Court of Appeals held the Department and HLJ had discretion, in the context of a settlement, to consider evidence that came into existence after the close of the public comment period. *King County Public Hosp. Dist. No. 2*, \_\_\_ Wn. App. at \_\_\_, 275 P.3d at 1146-47. There is no conflict between these decisions.

B. Should the petition for discretionary review be denied because the Court of Appeals' decision is not in conflict with *Odyssey v. Dept. of Health*, 145 Wn. App. 131, 185 P.3d 652 (2008)? The *Odyssey* court

concluded the regulatory formula for calculating need for hospice agencies was ambiguous and deferred to an HLJ's ruling denying previous CN applications by Odyssey. Here, the Court of Appeals deferred to an HLJ's ruling that need later appeared under the regulatory formula and affirmed a settlement. *King County Public Hosp. Dist. No. 2*, \_\_\_ Wn. App. at \_\_\_, 275 P.3d at 1149-50. No conflict exists between these decisions.

C. Should the petition for discretionary review be denied because there is no significant question of constitutional law at issue? In a footnote to their appellate brief, one of the competitors claimed they were entitled to a full trial on the merits rather than two opportunities to submit written evidence and argument. The Court of Appeals declined to address this claim because it was only raised in a footnote and the Court did "not consider this de minimis briefing to constitute a due process challenge." *King County Public Hosp. Dist. No. 2*, \_\_\_ Wn. App. at \_\_\_, 275 P.3d at 1146 n. 8. No significant question of constitutional law is at issue.

D. Should the petition for discretionary review be denied because there is no issue of substantial public interest requiring Supreme Court review? Although Odyssey argued the Court of Appeals' decision affirming a settlement is of general public interest sufficient to justify publication pursuant to RAP 12.3(e), the issues are not so substantial that Supreme Court review is necessary pursuant to RAP 13.4(b)(4).

#### IV. COUNTER-STATEMENT OF THE CASE

##### A. Overview of Regulatory Framework

Under Washington law, certain health care services, including hospice care, can be offered only by holders of a CN. *See* chap. 70.38 RCW; chap. 246-310 WAC. The overriding purpose of the CN law is the “promotion and maintenance of access to health care services for all citizens.” *Overlake Hosp. Assn. v. Dept. of Health*, 170 Wn.2d 43, 55, 239 P.3d 1095 (2010). Of secondary significance is “controlling the costs of medical care” by limiting competition. *Id.*

In deciding whether to grant a CN application, the Department considers four factors: (1) need; (2) financial feasibility; (3) structure and process (quality) of care; and (4) cost containment. WAC 246-310-210 through -240. Procedurally, after receiving a CN application, the Department must notify interested parties (including competitors) an application has been filed, take public comment on the application and, if requested, hold a public hearing. RCW 70.38.115(9); WAC 246-310-160 and -180. If the CN application is denied, the applicant may seek administrative review before an HLJ and, after exhausting that remedy, judicial review of the HLJ’s ruling. RCW 70.38.115(10)(a); WAC 246-310-610(1). The adjudicative proceeding and judicial review are governed by RCW 70.38.115(10) and chapter 34.05 RCW. *Id.*

RCW 70.38.115(10) has three subsections. RCW 70.38.115(10)(a) provides that an applicant denied a CN has the right to an adjudicative proceeding. RCW 70.38.115(10)(b) states that a competitor who provides services similar to the services provided by the applicant, is located within the applicant's health service area, and testified or submitted evidence at a public hearing "shall be provided an opportunity to present oral or written testimony and argument" at an applicant's adjudicative proceeding challenging the denial of a CN. RCW 70.38.115(10)(b) (emphasis added). RCW 70.38.115(10)(c) then addresses the procedure for settling an applicant's adjudicative proceeding challenging the denial of a CN, stating in its entirety as follows:

If the department desires to settle with the applicant prior to the conclusion of the adjudicative proceeding, the department shall so inform the health care facility or health maintenance organization and afford them an opportunity to comment, in advance, on the proposed settlement.

RCW 70.38.115(10)(c). *See also* WAC 246-310-610(4)(c) (in accord).

### **B. Brief History of Odyssey's Exclusion from Providing Hospice Care in Washington**

Odyssey has sought to provide hospice care to terminally ill people in Washington for over eight years. In October 2003, Odyssey applied for CNs to establish hospice agencies to serve the residents of King, Pierce, and Snohomish Counties. *King County Public Hosp. Dist. No. 2*, \_\_\_ Wn.

App. at \_\_\_, 275 P.3d at 1142 n. 1. Those applications were denied. *Id.*

Odyssey appealed the denial of its 2003 CN applications, and the competitors intervened. *Odyssey*, 145 Wn. App. at 136. The Court of Appeals deferred to the Department and affirmed denial of the CN applications, but stated in a footnote:

Odyssey's contention that the WAC 246-310-290(7) methodology [for calculating need] contains significant flaws is not without merit. But because the methodology is ambiguous, we must defer to the interpretation of the Department as the agency responsible for the methodology's administration and enforcement. . . . The judicial appeal process is not the appropriate venue for addressing Odyssey's arguments about the inherent defects in WAC 246-310-290(7)'s methodology. Instead, Odyssey should raise its concerns through administrative rulemaking avenues.

*Odyssey*, 145 Wn. App. at 145 n. 6.

As directed by the Court of Appeals, Odyssey filed a petition for rulemaking, but the Department denied the petition. *King County Public Hosp. Dist. No. 2*, \_\_\_ Wn. App. at \_\_\_, 275 P.3d at 1142 n. 1.

In October 2006, while Odyssey's appeal of its first applications was pending, Odyssey filed a second group of CN applications for King, Pierce and Snohomish Counties. *Id.* at 1142. The Department again found no need for additional hospice agencies and denied Odyssey's 2006 applications. *Id.* at 1142-43. Odyssey requested adjudicative proceedings appealing the denial of its second group of CN applications. *Id.*

While Odyssey's administrative appeal of the 2006 applications was pending, Odyssey filed a federal lawsuit against the Department seeking damages and injunctive relief for commerce clause and anti-trust violations. *Id.* at 1143. After Odyssey moved for summary judgment in federal court, the Department initiated settlement discussions to resolve the federal lawsuit and the pending adjudicative proceedings. *Id.*

### **C. Settlement between Odyssey and the Department**

The Department and Odyssey entered into a proposed settlement resolving the federal case and potentially resolving Odyssey's administrative appeal of the three denied 2006 CN applications. *Id.* The settlement was contained in two documents; one for each proceeding. *Id.*

#### **1. Settlement of Odyssey's Federal Civil Rights Action**

The settlement in the federal case required the Department and Odyssey to propose settlement of the adjudicative proceeding. *Id.* The proposed settlement of the adjudicative proceeding required the Department to approve Odyssey's King County CN application if, after considering written evidence and arguments from competitors, the Department decided the CN should have been issued. *Id.* The federal settlement agreement also required Odyssey to promptly dismiss its federal lawsuit; required the Department to initiate rulemaking by May 2010 to amend its hospice rules and allow Odyssey to participate on the

rulemaking committee; and required the Department to pay Odyssey \$10,000 in damages. *Id.* at 1143 n. 3. Finally, the federal settlement provided that if the Department did not forward the proposed settlement to the HLJ, or the HLJ did not approve the settlement of the adjudicative proceeding, and the CN for King County was not issued, Odyssey could re-file its federal action but damages would commence anew with the re-filing. *Id.* at 1143 n. 4. As agreed, Odyssey promptly dismissed its federal lawsuit two days after the federal settlement was signed on September 25, 2009. *See id.*

## **2. Settlement of Odyssey's Adjudicative Proceeding**

The proposed settlement of the adjudicative proceeding referenced the Department's 2008 methodology for calculating need (*see* WAC 246-310-290(7)), which showed a need for two additional providers in King County based on updated data, and indicated the Department was considering granting Odyssey's King County application. *Id.* at 1143 n. 5. The proposal stated the Department would provide the competitors with advance notice and opportunity to comment on the proposed settlement as required by RCW 70.38.115(10)(c). *Id.* at 1143. Following review of those comments, the Department would decide whether to deny the King County application or, if approved, present the settlement for independent HLJ review and final approval. *Id.* If the HLJ approved the proposed

settlement, Odyssey would agree to dismiss its appeals of the denied Snohomish and Pierce County CN applications. *Id.*

#### **D. Procedural History of the Settlement**

Following notice and opportunity to comment, the competitors submitted written evidence and argument opposing the proposed settlement, including use of the 2008 need methodology. *Id.* at 1144. After reviewing the competitors' comments, the Department decided all regulatory criteria for approving the King County application were met and moved for HLJ approval of the proposed settlement. *Id.*

The competitors moved to intervene in the adjudicative proceeding before the HLJ. *Id.* The HLJ granted their motions, but limited intervention to submission of written evidence and legal argument on the proposed settlement, concluding the plain language of RCW 70.38.115(10)(c) requires nothing more. *Id.*

After considering the competitors', the Department's and Odyssey's written evidence and arguments regarding the proposed settlement, the HLJ independently concluded Odyssey's 2006 CN application for King County met all four regulatory criteria for issuance of a CN, approved the settlement, and granted Odyssey a CN to open a hospice agency in King County. *Id.*

The competitors sought judicial review of the HLJ's final order

approving issuance of a CN to Odyssey. *Id.* The trial court reversed the HLJ's order and remanded the case for a hearing with oral testimony, in addition to the written evidence and arguments previously submitted, and prohibited the HLJ on remand from exercising discretion to consider the more recent 2008 methodology showing need. *Id.* at 1144-45. The trial court construed RCW 70.38.115(10)(c) as clearly prohibiting the Department from settling a CN applicant's challenge to the denial of a CN by modifying its initial decision denying the CN. *Id.*

Odyssey appealed the trial court's rulings. *Id.* at 1145. The Court of Appeals reversed the trial court and affirmed the HLJ's ruling approving the settlement. *Id.* at 1149-50. The Court of Appeals applied *UWMC* to hold that the Department and the HLJ had discretion to consider the 2008 need methodology, particularly in the context of a settlement, and did not act arbitrarily and capriciously by doing so. *Id.* at 1147. Additionally, the Court of Appeals held there was substantial evidence in the record to support the Department's and the HLJ's conclusion that Odyssey's CN application met the regulatory criteria for financial feasibility, structure and process (quality) of care, and cost containment. *Id.* at 1147-49. The Court of Appeals also held there was substantial evidence to support the Department's and the HLJ's determinations that the need criterion was met. *Id.* at 1149.

The Court of Appeals noted one of the competitors argued in a footnote that, “although the court need not reach the constitutional issue,” the Department violated procedural due process by not providing notice and opportunity for comment before settling Odyssey’s federal lawsuit (which was not an adjudicative proceeding governed by RCW 70.38.115(10)(c), nor was any competitor a party to the federal case). *Id.* at 1146 n. 8. The Court of Appeals declined to consider this “de minimis briefing” as a genuine constitutional challenge. *Id.*

## V. ARGUMENT

The competitors’ petition for discretionary Supreme Court review should be denied because none of the four grounds in RAP 13.4(b) for accepting review are met.

### **A. The Court of Appeals’ Decision Does Not Conflict with the Supreme Court’s Decision in *UWMC***

The evidentiary standards applicable in adjudicative proceedings should be more deferential when reviewing settlements under RCW 70.38.115(10)(c) because settlements are favored under the law. *See, e.g.*, RCW 34.05.060 (“informal settlement ... is strongly encouraged”); *Pickett v. Holland American Line-Westours, Inc.* 145 Wn.2d 178, 189-90, 35 P.3d 351 (2001) (“voluntary conciliation and settlement are the preferred means of dispute resolution”). Yet, even if the same evidentiary standards apply

to proposed settlements as apply in contested adjudicative proceedings, the Court of Appeals decision is consistent with *UWMC* (which did not involve a settlement).

In *UWMC*, an intervening competitor challenged an HLJ's evidentiary ruling during an adjudicative proceeding barring admission of evidence that did not exist until after the CN public comment period ended. *UWMC*, 164 Wn.2d at 100-02. The court held "[i]t was within the sound discretion of the health law judge to admit, or not admit, evidence that came into existence after the close of the public comment period." *Id.* at 104 (emphasis added).

The *UWMC* court reasoned that "[n]othing in the rules or the statutes specifically addresses the appropriate record before the health law judge. Instead, the law leaves that question to the department by rule or to the health law judge by rulings guided by the Rules of Evidence." *Id.* at 103 (citing RCW 34.05.452 and 70.38.115). Further, "[t]he law gives considerable discretion to administrative law judges to determine the scope of admissible evidence." *Id.* at 104. In light of this "considerable discretion," the *UWMC* court held the HLJ had discretion to either admit, or not admit, later acquired evidence regarding need for an additional facility, and it was not an abuse of discretion to rule either way.

The *UWMC* court's citation to RCW 34.05.452 supports the Court

of Appeals' analysis. RCW 34.05.452 gives broad discretion to presiding officers to exclude evidence based on constitutional or statutory grounds, evidentiary privilege, or because the evidence is irrelevant, immaterial, or unduly repetitious. However, the general rule in adjudicative proceedings is "[e]vidence, including hearsay evidence, is admissible if in the judgment of the presiding officer it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs." RCW 34.05.452(1).

Here, reasonably prudent people would rely on updated, corrected data demonstrating that past projections of future need turned out to be inaccurate. Thus, the HLJ did not abuse his discretion.

Petitioners' claim that the Court of Appeals' decision conflicts with *UWMC* is completely baseless. The Court of Appeals ruling is consistent with the *UWMC* court's ruling that "[i]t was within the sound discretion of the health law judge to admit ... evidence that came into existence after the close of the public comment period." *Id.* at 104.

**B. The Court of Appeals' Decision Does Not Conflict with the Court of Appeals' Decision in *Odyssey***

There also is no conflict with *Odyssey v. Dept. of Health*, 145 Wn. App. 131,185 P.3d 652 (2008). *Odyssey* did not involve a settlement under RCW 70.38.115(10)(c), nor did it involve the admission of evidence

that came into existence after the close of the public comment period.

The *Odyssey* court concluded the regulatory formula for calculating numeric need in WAC 246-310-290(7) was ambiguous and deferred to an HLJ's ruling denying previous CN applications by Odyssey. *Odyssey*, 145 Wn. App. at 141-45. The court also upheld the Department's use of incomplete survey data to calculate hospice use rates because the missing data did not materially affect the outcome of the need calculation in that case. *Id.* at 145-46.

The competitors claim the Court of Appeals' decision conflicts with *Odyssey* because here the Court of Appeals affirmed use of updated data when calculating the ambiguous need methodology. Yet, the *Odyssey* court did not address use of updated data, nor did the court suggest the data to be used when calculating the need methodology is frozen in time (resulting in the same outcome year after year). The need methodology plainly requires use of updated data each time the methodology is calculated. *See* WAC 246-310-290(7). The two cases address completely different issues and involve different facts and time periods. The competitors' attempt to manufacture a conflict borders on frivolous.

### **C. No Significant Constitutional Claim Is at Issue**

Although the competitors now claim this case involves a significant question of constitutional law, the Court of Appeals declined to

address their procedural due process claim because it was only raised in a footnote and the Court did “not consider this de minimis briefing to constitute a due process challenge.” *King County Public Hosp. Dist. No. 2*, \_\_ Wn. App. at \_\_, 275 P.3d at 1146 n. 8. “Constitutional arguments should not be addressed when they have not been adequately briefed.” *City of Spokane v. Taxpayers of City of Spokane*, 111 Wn.2d 91, 96, 758 P.2d 480 (1988).

The competitors fail to cite any authority suggesting that intervening competitors opposing a settlement have a constitutional right to a full evidentiary hearing with oral testimony, in addition to receiving two opportunities to submit written evidence and argument. This failure is fatal because courts “will not address constitutional issues ‘without benefit of citation to appropriate supporting authority.’” *Tunstall v. Bergeson*, 141 Wn.2d 201, 224, 5 P.3d 691 (2000) (quoting case).

The competitors can not prove beyond a reasonable doubt that RCW 70.38.115(10)(c) or the HLJ’s order approving the settlement are unconstitutional. *Cf. Island County v. State*, 135 Wn.2d 141, 146-47, 955 P.2d 377 (1998) (unconstitutionality must be proven beyond a reasonable doubt through citation to authority and convincing argument). In adjudicative proceedings (as distinguished from settlements), competitors may be limited to submitting only “written testimony and argument.”

RCW 70.38.115(10)(b). HLJs have authority to resolve adjudicative proceedings on motions for summary judgment, or through “brief adjudicative proceedings” limited to written evidence and argument. RCW 34.05.437; RCW 34.05.482 - .494; WAC 246-10-403; WAC 246-10-501 through -503. Courts routinely resolve cases under CR 56 based solely on written evidence and argument without violating due process, even though a trial on the merits with oral testimony is circumvented. Approval of settlements based on written evidence and argument, but without a full trial, similarly comports with due process.

**D. No Issue of Substantial Public Interest Requiring Supreme Court Review Is at Stake**

Contrary to the competitors’ claim, the parties do not agree this petition for review involves an issue of substantial public interest requiring Supreme Court review. Although the Department and Odyssey argued the Court of Appeals’ decision is of general public interest sufficient to justify publication pursuant to RAP 12.3(e), the issues are not so substantial that Supreme Court review is necessary pursuant to RAP 13.4(b).<sup>1</sup>

The competitors argue that permitting settlements under RCW 70.38.115(10)(c) without forcing the parties to conduct a full hearing on the merits of a case they desire to settle will “nullify all statutory and

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<sup>1</sup> The competitors opposed publication of the Court of Appeals decision, implicitly suggesting the issues were not of general public interest under RAP 12.3(e), but now contend the issues are of substantial public interest under RAP 13.4(b).

regulatory rights given to affected providers.” *Pet. for Rev.*, p. 16. Yet, the plain language of RCW 70.38.115(10)(c) affords competitors a “right” to submit written evidence and argument opposing a proposed settlement, not a “right” to compel a full hearing on the merits of a settled case.

*St. Joseph Hosp. v. Dept. of Health*, 125 Wn.2d 733, 887 P.2d 891 (1995), is on point. *St. Joseph* claimed three procedural errors occurred when the Department settled a CN applicant’s case by issuing a CN following a remand: (1) *St. Joseph* was not notified of a CN applicant’s request for an adjudicative proceeding; (2) it was not notified of a stipulation remanding the CN application to the Department for further review; and (3) it was not afforded a hearing when its request for reconsideration was denied and the CN was issued in a settlement. *Id.* at 742. The court held: “Of these three alleged procedural problems, we find only the second violates the statutory procedures governing the issuance of a CN.” *Id.* (emphasis added). Thus, the court rejected the third argument that competitors were entitled to an adjudicative proceeding when the Department granted the applicant a CN as part of a settlement. *Id.* at 742-44.

Instead of a right to an adjudicative hearing, the *St. Joseph* court held competitors were only entitled to notice of the Department’s modification of a decision denying a CN and “an opportunity for a public

hearing” under RCW 70.38.115(9). *Id.* at 742-43, and 744 (emphasis added). A public hearing under RCW 70.38.115(9) is a non-judicial proceeding in which anyone may submit comments on a CN application during the Department’s review of the application. RCW 70.38.115(9); WAC 246-310-180. The public hearing is not an adjudicative proceeding with an HLJ, parties, witnesses, exhibits, and sworn testimony. *See id.*

By holding that competitors were only entitled to a public hearing pursuant to RCW 70.38.115(9), the *St. Joseph* court recognized competitors are not entitled to an adjudicative proceeding to undo a settlement between the Department and a CN applicant. *St. Joseph*, 125 Wn.2d at 742-44. They are limited to notice and opportunity to submit written evidence and arguments opposing the proposed settlement akin to the opportunity opponents have to comment at CN public hearings. *Id.* The *St. Joseph* court thus rejected the argument that competitors were entitled to a full adjudicative proceeding on the merits, in addition to an opportunity to submit written evidence and arguments, if the Department desires to settle an applicant’s challenge to the denial of a CN. *Id.* at 742.

Following *St. Joseph*, the 1995 Legislature amended RCW 70.38.115(10) to codify the *St. Joseph* court’s limitations on intervening competitors’ “rights” when the Department desires to settle CN proceeding. Laws of 1995, 1<sup>st</sup> sp.s. c 18 § 72. The notice and opportunity

to comment on settlements provided to competitors under RCW 70.38.115(10)(c) is consistent with the notice and opportunity to comment recognized by the *St. Joseph* court.

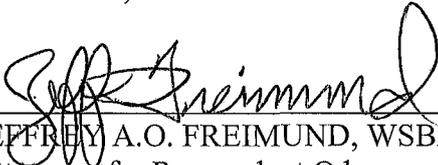
Thus, without expressly saying so, the competitors are essentially petitioning the Supreme Court to revisit an issue resolved in *St. Joseph* and subsequently codified in RCW 70.38.115(10)(c). This request does not raise an issue of substantial public interest that should be determined by the Supreme Court a second time.

## VI. CONCLUSION

Based on the foregoing reasons and the reasons set forth in the Department's Answer to Petition for Discretionary Review, Odyssey respectfully requests that the competitors' petition for discretionary Supreme Court review should be denied.

RESPECTFULLY SUBMITTED this 2<sup>nd</sup> day of July, 2012.

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\_\_\_\_\_  
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DECLARATION OF SERVICE

2012 JUL -2 P 2:44

The undersigned declares under penalty of perjury, under the laws <sup>BY DONALD R. CARPENTER</sup>

of the state of Washington, that on July 2, 2012, I served ~~Odyssey~~ <sup>ODYSSEY</sup>

Answer to Petition for Review on all parties to this action as follows:

James S. Fitzgerald	<input checked="" type="checkbox"/>	U. S. Mail
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KATHRINE SISSON