

Supreme Court No. 87574-0

**IN THE 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, 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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**JOINT SUPPLEMENTAL BRIEF OF PETITIONERS**

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## TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION.....	1
II. ISSUES.....	1
III. STATEMENT OF THE CASE.....	2
A.    The CN Laws Were Designed to Control Healthcare Costs by Implementing Established Health Planning Criteria and Promoting Greater Utilization of Existing Healthcare Services.....	2
B.    Certificate of Need Laws and Procedure. ....	2
C.    The Department Applies an Established Regulatory Hospice Health Planning Methodology Developed by Industry Experts to Forecast Future Demand. ....	5
D.    In 2008, the Court of Appeals Upheld the Department’s Interpretation and Application of the Hospice Health Planning Forecast Methodology (“Odyssey I”).....	6
E.    Odyssey’s Subsequent 2006 and 2007 Applications and Appeals (“Odyssey II”).....	6
F.    Odyssey Filed a Federal Lawsuit for Money Damages Against the Department. ....	8
G.    In 2009, the Department Settled the Federal Lawsuit by Agreeing to Grant a CN to Odyssey for King County.....	10
H.    The Department issued a Notice of Proposed Settlement, Claiming a “Special Circumstance.” .....	11

## TABLE OF CONTENTS

	<u>Page</u>
IV. AUTHORITY .....	16
A. The Standard of Review for Summary Decisions Made in Advance of an Adjudicative Proceeding Applies.....	16
B. The Department Correctly Evaluated and Denied Odyssey’s 2006 CN Application for King County Consistent With Well-Established CN Laws and Longstanding Departmental Policy.....	17
C. The Trial Court Appropriately Remanded the Case. ....	20
1. The Trial Court Correctly Determined that Under RCW 70.38.115(10)(c), the Legislature did not Intend to Allow the Department to Disregard Established CN Laws and did not intend to Eliminate the Rights of Existing Providers under RCW 70.38.115(10)(b).....	21
2. The Trial Court Properly Determined that the Department’s Complete Departure from Its Previous Position on the 2009 Methodology for a Period of Over Two Years for the Sole Purpose of Settling a Federal Lawsuit Was Arbitrary and Capricious.....	23
3. The Trial Court Correctly Remanded to Have Issues of Fact and Law on the Four CN Criteria Resolved in an Adjudicative Proceeding. ....	30
4. Petitioners’ Due Process Rights Were Violated. ....	34
V. CONCLUSION.....	36
VI. APPENDICES .....	39

## TABLE OF AUTHORITIES

Page

### Washington Cases

<i>Children's Hosp. v. Dep't of Health,</i> 95 Wn. App. 858, 975 P.2d 567 (1999).....	20, 29
<i>Dep't of Ecology v. Campbell &amp; Gwinn, LLC,</i> 146 Wn.2d 1, 43 P.3d 4 (2002).....	25
<i>Kaiser Aluminum &amp; Chem. Corp. v. Pollution Control Hearings Bd.,</i> 33 Wn. App. 352, 654 P.2d 723 (1982).....	23
<i>King County Pub. Hosp. Dist. No. 2 v. Dep't of Health,</i> 167 Wn. App. 740, 275 P.3d 1141 (2012).....	15, 16, 21, 25, 26, 27, 35
<i>Neilson v. Vashon Island School Dist. No. 402,</i> 87 Wn.2d 955, 558 P.2d 167 (1976).....	18
<i>Parker v. United Airlines,</i> 32 Wn. App. 722, 649 P.2d 181 (1982).....	34
<i>Postema v. Pollution Control Hearings Bd.,</i> 142 Wn.2d 68, 11 P.3d 726 (2000).....	16
<i>Ritter v. Bd. of Comm'rs,</i> 96 Wn.2d 503, 637 P.2d 940 (1981).....	29

**TABLE OF AUTHORITIES**

	<u>Page</u>
<i>Samson v. City of Bainbridge Island</i> , 149 Wn. App. 33, 202 P.3d 334 (2009).....	29
<i>St. Joseph Hosp. &amp; Health Care Ctr. v. Department of Health</i> , 125 Wn.2d 733, 887 P.2d 891 (1995).....	2, 3, 4, 22, 35
<i>Verizon NW., Inc. v. Employment Sec. Dep't</i> , 164 Wn.2d 909, 194 P.3d 255 (2008).....	16, 17
<i>W. Ports Transp., Inc. v. Emp. Sec.</i> , 110 Wn. App. 440, 41 P.3d 510 (2002).....	20
<i>Wynn v. Earin</i> , 163 Wn.2d 361, 181 P.3d 806 (2008).....	22

**Washington Statutes**

Ch. 34.05 RCW.....	3, 4
RCW 34.05.410 .....	4, 35
RCW 34.05.514 .....	4
RCW 34.05.570(1)(b).....	20
RCW 34.05.570(3).....	16
RCW 34.05.574(1).....	5

## TABLE OF AUTHORITIES

	<u>Page</u>
Ch. 70.38 RCW .....	2, 21, 27, 29
RCW 70.38.015 .....	4, 20, 26, 27, 29
RCW 70.38.025(6).....	3
RCW 70.38.105(4)(a) .....	3
RCW 70.38.115(10)(a) .....	3, 4, 35
RCW 70.38.115(10)(b) .....	2, 3, 21, 25, 34, 36
RCW 70.38.115(10)(c) .....	11, 12, 16, 21, 22, 25, 26
RCW 70.38.115(8).....	27

### Washington Regulations

Ch. 246-10 WAC .....	4
WAC 246-10-119.....	4, 34
Ch. 246-310 WAC .....	2
WAC 246-310-090.....	3
WAC 246-310-160(1).....	27
WAC 246-310-180.....	3, 4, 6
WAC 246-310-210.....	3
WAC 246-310-220.....	3

**TABLE OF AUTHORITIES**

	<u>Page</u>
WAC 246-310-230.....	3
WAC 246-310-240.....	3
WAC 246-310-270(7).....	5
WAC 246-310-290.....	3, 5, 6, 15, 31, 34, 36
WAC 246-310-290(1)(b)(i) .....	31
WAC 246-310-290(1)(c)(ii).....	31
WAC 246-310-290(7).....	5
WAC 246-310-490.....	3, 30
WAC 246-310-610.....	4

**State Legislation**

1979 Wash. 1st Ex. Sess., ch. 161, § 1.....	2
ESHB 1926 .....	31

**TABLE OF AUTHORITIES**

**Page**

**Federal Court Cases**

*Califano v. Sanders*,  
430 U.S. 99, 97 S. Ct. 980, 51 L. Ed. 2d 192 (1977)..... 16

*Citizens to Preserve Overton Park, Inc. v. Volpe*,  
401 U.S. 402, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971)..... 16

*Mullane v. Central Hanover Bank & Trust Co.*,  
339 U.S. 306 (1950)..... 34

**Federal Statutes**

15 U.S.C. § 1..... 8

42 U.S.C. § 1983..... 8

**United States Constitution**

Article I, § 8, cl. 3 ..... 8

## TABLE OF AUTHORITIES

### Page

### Administrative Record (AR)

AR 1001 .....	13, 16
AR 1008 .....	13, 16
AR 1018-28.....	14, 15
AR 1021 .....	30
AR 1069 .....	8, 18
AR 1073 .....	9, 24, 30
AR 1074.....	8, 9, 10, 18
AR 1074-75.....	8, 18
AR 1081-88.....	8, 17
AR 1085 .....	8, 18
AR 1086.....	8, 9, 10, 18, 24
AR 1091 .....	10
AR 1091-92.....	10
AR 1092.....	10
AR 11 .....	7, 30
AR 1101-02.....	3
AR 1102-03.....	15, 30, 34

## TABLE OF AUTHORITIES

	<u>Page</u>
AR 1102-58.....	12, 13
AR 1104-1108.....	13
AR 1115-16.....	13
AR 1116-21.....	13
AR 1-118.....	7
AR 1123-24.....	13
AR 1124-25.....	13
AR 1125-26.....	13
AR 1128.....	13
AR 1138.....	13
AR 11-38.....	6, 7
AR 11-38.....	15
AR 1179-1527.....	14
AR 1191-92.....	31
AR 1194.....	31
AR 1260.....	26
AR 1262-76.....	25
AR 1282.....	18
AR 1342.....	7

## TABLE OF AUTHORITIES

	<u>Page</u>
AR 1347 .....	31
AR 1383 .....	6, 33
AR 1387 .....	13
AR 1425-49.....	6, 12, 13, 33
AR 1434-43.....	13
AR 1528-1681.....	14, 15
AR 153 .....	7
AR 158 .....	7
AR 16 .....	5, 23
AR 165-70.....	7
AR 1682-1699.....	14, 15
AR 1687 .....	32
AR 1721-24.....	14, 15
AR 177-78.....	7
AR 183-84.....	7
AR 2:16-17.....	6
AR 200-248.....	8
AR 24-27.....	32
AR 25 .....	32

**TABLE OF AUTHORITIES**

	<u>Page</u>
AR 251 .....	8
AR 252-55.....	8
AR 253-54.....	8, 12
AR 257-78.....	8
AR 279-80.....	10
AR 28 .....	33
AR 29 .....	33
AR 297-99.....	12
AR 298.....	12, 24
AR 348-51.....	12
AR 353.....	11
AR 355-60.....	11
AR 385-404.....	6
AR 42:16-17.....	6
AR 476.....	13
AR 478.....	13
AR 515-17.....	12
AR 81:16-17.....	6

**TABLE OF AUTHORITIES**

**Page**

**Appendices**

Appendix A..... 1, 21

Appendix B..... 1

Appendix C..... 9, 11, 15, 16, 35

Appendix D..... 22

Appendix E..... 30

Appendix F..... 7

## I. INTRODUCTION

The threshold question is whether the Department of Health (the “Department”) may disregard well-established certificate of need (“CN”) laws and longstanding departmental policy for the purpose of agency action settling separate federal litigation. Consistent with the decision entered by King County Superior Court Judge Mary I. Yu (Appendix A and B), Petitioners ask that the Court find (1) that the Department cannot disregard established Washington CN laws and longstanding policies to settle a federal lawsuit; (2) that the Department’s decision to grant a CN to Odyssey under a so-called “special circumstance” *based upon its 2009 methodology long after the record was closed on a 2006 CN application* was arbitrary and capricious; and (3) that summary adoption of the settlement agreement by the Health Law Judge (“HLJ”) that Odyssey had met all four of the CN criteria, without any analysis or substantiation in the record and without conducting an adjudication on the merits, was likewise arbitrary and capricious and an error of law.

## II. ISSUES

A. Did the Department engage in arbitrary and capricious decision making when it approved Odyssey’s 2006 CN application for King County in exchange for dismissal of the federal lawsuit?

B. Did the Department engage in arbitrary and capricious decision-making and commit an error of law and when it relied upon data collected *more than two years* after the submission of Odyssey’s 2006 CN application and *more than a year and a half* after the record had closed on the evaluation of Odyssey’s 2006 CN application?

C. Did the Department engage in arbitrary and capricious decision making and violate longstanding policy by awarding a CN to Odyssey even though there had been no analysis to determine that Odyssey's CN application met all four of the CN regulatory criteria?

D. Did the Department violate Evergreen and Providence's procedural due process rights when it refused to provide an adjudicative hearing on the merits as required under RCW 70.38.115(10)(b) and as permitted under longstanding departmental policy?

### III. STATEMENT OF THE CASE

**A. The CN Laws Were Designed to Control Healthcare Costs by Implementing Established Health Planning Criteria and Promoting Greater Utilization of Existing Healthcare Services.**

The CN laws (Ch. 70.38 RCW) and regulations (Ch. 246-310 WAC) govern the Department's role of administering the orderly planning of healthcare services. The legislature enacted Ch. 70.38 RCW in response to a Congressional mandate for states to adopt health planning procedures to, *inter alia*, prevent "unnecessary duplication and fragmentation" of healthcare services. 1979 Wash. 1st Ex. Sess., ch. 161, § 1. The primary objective of CN regulation is to control health care costs by limiting the introduction of new healthcare providers, ensuring better utilization of existing institutional health services and major medical equipment. *St. Joseph Hosp. & Health Care Ctr. v. Department of Health*, 125 Wn.2d 733, 735-36 & 741, 887 P.2d 891 (1995).

**B. Certificate of Need Laws and Procedure.**

Ch. 70.38 RCW requires certain healthcare providers to obtain a CN from the Department before establishing a new health facility or

service. One type of “health care facility” requiring a CN is a hospice agency. RCW 70.38.105(4)(a) and RCW 70.38.025(6).

A party interested in establishing a hospice agency must file a CN application. WAC 246-310-090. The Department then conducts a public hearing for receiving input from the community and existing providers. WAC 246-310-180. The Department evaluates the following four regulatory criteria to determine whether to grant or deny a CN application: (1) Need under WAC 246-310-210 and WAC 246-310-290; (2) Financial Feasibility under WAC 246-310-220; (3) Structure and Process of Care under WAC 246-310-230; and (4) Cost Containment under WAC 246-310-240. After the evaluation, the Department must issue written findings and conclusions on each of the four criteria to support its decision to approve or deny. WAC 246-310-490.<sup>1</sup>

If the Department denies the CN application, the applicant has the right to an adjudicative proceeding under Ch. 34.05 RCW. RCW 70.38.115(10)(a). If the Department grants the CN application, an existing provider has the right to request an adjudicative proceeding to challenge the merits. *See* RCW 70.38.115(10)(b)(iii); *St. Joseph Hosp.*, 125 Wn.2d at 744; and as permitted under longstanding policy of the Department.<sup>2</sup>

Under Washington’s CN laws, existing providers like Evergreen

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<sup>1</sup> The Department *never* issued findings and conclusions when it reversed its position and granted Odyssey’s 2006 CN application as part of its settlement of the federal lawsuit. Instead, it issued a two page Notice of Proposed Settlement (AR 1101-02), summarily granting Odyssey’s 2006 CN application for King County under the guise of a “special circumstance” in exchange for the dismissal.

<sup>2</sup> Neither the Department nor Odyssey can refute the fact that both Evergreen and Providence would have been able to appeal the Department’s decision in an adjudicative proceeding had the Department granted Odyssey’s CN application from the outset.

and Providence have a statutory right to present “oral or written testimony and argument” in all CN-related adjudicative proceedings. RCW 70.38.115(10)(a) & (b)(iii). The right of existing providers to seek review of errors of law and fact was recognized by this Court in *St. Joseph Hosp.*, 125 Wn.2d at 742-44. CN adjudicative proceedings are governed by RCW 34.05.410 – .494. *See* RCW 70.38.115(10)(a) & (b).

CN review is designed to allow providers like Evergreen and Providence and the public to have meaningful participation in all aspects of the CN decision-making process, ensuring that each applicant meets the CN regulatory requirements. *See, e.g.*, RCW 70.38.015 (“[i]nvolvement in health planning from both consumers and providers throughout the state should be encouraged”); WAC 246-310-180 (right of providers and the public to request and participate in a public hearing); WAC 246-10-119 (right of providers to intervene in an adjudicative proceeding); WAC 246-310-610 (right of existing providers to present oral and written testimony and argument); and *St. Joseph Hosp.*, 125 Wn.2d at 742 (holding that providers have standing to request review of the Department’s CN decisions to correct errors of law and fact). Participation by the public and providers is a critical element of the review process.

A Health Law Judge (“HLJ”) conducts the adjudicative proceeding under Ch. 34.05 RCW and Ch. 246-10 WAC and issues a final order deciding whether the Department properly approved or denied the application. Following the issuance of that final order, the applicant or existing provider may file a petition for judicial review in superior court. RCW 34.05.514. The court upon judicial review then decides to affirm,

reverse, or remand the Department's decision, under the standards set forth in the APA. RCW 34.05.574(1).

**C. The Department Applies an Established Regulatory Hospice Health Planning Methodology Developed by Industry Experts to Forecast Future Demand.**

The hospice need methodology is a health planning forecasting analysis developed by industry experts. In 2003, the Department adopted WAC 246-310-290, a forecasting methodology used by the Department for assessing the need for a new hospice agency in a specific county.

Prior to the adoption, the Department established the Hospice Methodology Advisory Committee (the "Committee") to make recommendations. The Department selected 12 individuals with extensive hospice backgrounds to serve as members of the Committee after consultation with the Washington State Hospice Organization and the Home Care Association of Washington. The Department adopted the Committee's recommendations in WAC 246-310-290.

The need methodology in WAC 246-310-290(7) is designed to forecast whether a surplus or shortage of hospice services exist in a given county. It uses historical hospice utilization data and trends it forward. AR 16. If the shortage is sufficient for the establishment of a new hospice agency, the "Need" element of WAC 246-310-270(7) is found to be met. The applicant, however, also has the burden of demonstrating that its proposal also meets all of the other CN regulatory criteria.

**D. In 2008, the Court of Appeals Upheld the Department's Interpretation and Application of the Hospice Health Planning Forecast Methodology ("Odyssey I").**

In October 2003, Odyssey filed three CN applications to establish new hospice agencies in King, Snohomish, and Pierce Counties. The Department denied them because, *inter alia*, the hospice need regulatory methodology under WAC 246-310-290 demonstrated a surplus of hospice agencies in the respective counties. In October 2008, the Court of Appeals affirmed the Department's decision, holding that the Department correctly interpreted and applied the forecasting methodology using the historical utilization data gathered by the Department. *Odyssey Healthcare Operating B, LP*, 145 Wn. App. at 146 ("Odyssey I").

**E. Odyssey's Subsequent 2006 and 2007 Applications and Appeals ("Odyssey II").**

In October 2006, during the pendency of Odyssey I, Odyssey filed another set of CN applications to establish new hospice agencies in Pierce, King, and Snohomish Counties. AR 2:16-17, 42:16-17; 81:16-17. Odyssey's 2006 King County application is at AR 385-404. A public hearing was held under WAC 246-310-180, and the public testimony was *overwhelmingly against Odyssey's proposal* both in terms of Odyssey being a competent provider of hospice services and in terms of Odyssey not meeting the established criteria for CN approval. AR 1383, 1425-49. Many different types of professionals (nurses, doctors, patients) testified to the adequate supply and quality of the services in the area. *Id.*

In August 2007, the Department again denied Odyssey's applications. AR 11-38. *Applying the same methodology upheld in*

*Odyssey I*, the Department determined that the applications were “not consistent with the Certificate of Need review criteria ... Need ... Financial Feasibility ... Structure and Process of Care . . . [and] Cost Containment ...” AR 11. The Department’s August 2007 evaluation of need is hereinafter referred to as the “2007 Methodology.”<sup>3</sup> The Department’s analyst had extensive experience and noted that the historical utilization data used for the forecast was even more complete and accurate than the data provided by *Odyssey*. AR 11-38.

In September 2007, *Odyssey* filed three applications for adjudicative proceedings, again arguing that the Department had misinterpreted and misapplied the need methodology (as in *Odyssey I*). AR 1-118. In October and November 2007, the HLJ granted Evergreen’s request to intervene. AR 153, 158. The King, Snohomish, and Pierce County proceedings were then consolidated and stayed until resolution of *Odyssey I*. AR 165-70, 177-78, 183-84.

In June 2008, in the course of its evaluation of a 2007 hospice CN application, the Department performed the “2008 Methodology” for King County. AR 1342. *The 2008 Methodology also showed no need for additional hospice agencies in King County through 2012. Id.* The Department used 2004-2006 historical use data for this health planning projection. *Id.*

In February 2009, shortly after the issuance of *Odyssey I*, *Odyssey*

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<sup>3</sup> For clarification, a summary for each of the different need methodologies analyzed by the Department by year and the applicable historical utilization rates applied in each forecast is provided in Appendix F.

requested a stay in order to file a federal lawsuit for money damages against the Department. AR 251. Odyssey also asserted that it believed there would be sufficient need for a CN application to be filed in “October 2009” and that it might choose to apply for that CN rather than continuing to appeal. AR 253-54. At that time (February 2009), Providence also petitioned to intervene. AR 200-248.

In March 2009, the HLJ granted Odyssey’s request for a stay until September 2009. AR 252-55. Providence’s intervention request was also stayed pending Odyssey’s decision as to which action it would take. *Id.*

**F. Odyssey Filed a Federal Lawsuit for Money Damages Against the Department.**

In April 2009, Odyssey filed a money damages lawsuit in federal court alleging violations of the Sherman Act under 15 U.S.C. § 1, the Commerce Clause of the United States Constitution under Article I, § 8, cl. 3, and liability under 42 U.S.C. § 1983. AR 257-78. Odyssey sought substantial money damages against the Department. *Id.*

In June 2009, the Department filed an answer in federal court, in which it *denied Odyssey’s contention that its 2006 CN applications were improperly evaluated.* AR 1081-88. The Department *denied* Odyssey’s contention that, “[t]his projection, based on faulty Methodology and data, incorrectly resulted in Odyssey being denied its [2006] CN application.” AR 1069, 1085. The Department *admitted* that it “advised Odyssey that it could only consider Odyssey’s October 2006 CN application under the 2007 Methodology and therefore the 2007 Methodology’s projection of need in 2009, 2010, and 2011 applied.” AR 1074-75, 1086.

In addition, in its answer, the Department *admitted* Odyssey’s contention that it refused Odyssey’s request for a CN in King County, stating that “even though the 2009 Methodology showed a projected need in King County . . . , the Department would not consider the 2009 Methodology in Odyssey’s appeal of its denied October 2006 applications.”<sup>4</sup> AR 1074, 1086. The Department also *admitted* Odyssey’s contention that its “2008 Methodology” also showed no need through 2011.<sup>5</sup> AR 1073, 1086.

Prior to this appeal, the Department had consistently admitted that the 2009 Methodology could not be used for purposes of Odyssey’s 2006 CN applications. The admissions above are consistent with its position in federal court prior to settlement with Odyssey. For example, in February 2009, in discussions about whether the Department could use the “2009 Methodology” to evaluate Odyssey’s 2006 CN application for King County, the Department’s counsel stated, “As you know, *we always look at the facts that existed during review. So, we can’t approve your application based on a Methodology run long after the record closed.* In such cases, applicants must reapply.” See Appendix C (Decl. Fitzgerald, dated August 31, 2010, at Ex. N) (emphasis and bold added).<sup>6</sup>

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<sup>4</sup> The “2009 Methodology” is described below. The Court of Appeals mistakenly referred to this as the “2008 Methodology” in its opinion. *King County Pub. Hosp. Dist. No. 2 v. Dep’t of Health*, 167 Wn. App. 740, 744, 275 P.3d 1141 (2012).

<sup>5</sup> The Department ran the hospice need methodology for King County in 2007, 2008, and 2009. Both the “2007 Methodology” (applicable to Odyssey’s 2006 application) and “2008 Methodology” *demonstrated a surplus of hospice agencies.*

<sup>6</sup> On September 23, 2010, the trial court granted petitioners’ request to supplement the agency record. Sub No. 72. Copies of the supplemented records are attached as Appendix C, (Decl. Fitzgerald, dated August 31, 2010, at Exhibits K, L, M, and N).

**G. In 2009, the Department Settled the Federal Lawsuit by Agreeing to Grant a CN to Odyssey for King County.**

In September 2009, Odyssey informed the HLJ that it had engaged in settlement negotiations with the Department “on both the federal and administrative proceedings.” It requested and received another continuance until November 2009. AR 279-80. However, none of the Petitioners were ever advised of the negotiations despite the fact that Evergreen had been granted full intervention and Providence had filed for intervention (but which decision had been stayed at Odyssey’s request).

On September 25, 2009, the Department and Odyssey agreed to settle the federal lawsuit by granting Odyssey’s 2006 CN application for King County in exchange for the dismissal. AR 1091-92. The Department claimed its decision was justified based upon the need methodology it ran in 2009 (the “2009 Methodology”), which was based upon the use data it had collected *in December 2008*. *Id.* According to the Department, the 2009 Methodology purported to “now” show new need in King County. *Id.* This is the same 2009 Methodology the Department said *could not be used* just three months earlier (June 2009) in its answer to the federal lawsuit. AR 1074, 1086.

The federal settlement stated, “[t]he parties *will enter* into the attached Settlement and Stipulation in the pending adjudicative proceeding before the Department of Health.” AR 1091. The federal settlement contained a “*bad faith*” provision to force the Department to submit the proposed settlement to the HLJ for approval. AR 1092.

In an attempt to provide a *post-hoc* rationale for its decision, the Department stated that it “conducted a survey of existing King County

providers based on services offered in 2007 . . . the data shows a current need for two additional hospice agencies in King County . . . [and] [b]ased on this data showing need, the undersigned parties propose settlement under RCW 70.38.115(10)(c) approving Odyssey’s [2006] application to establish a new hospice agency in King County . . . .” AR 353.

The stipulation indicated the Department’s need methodology for Odyssey’s 2006 CN application would be based upon use data *obtained in December 2008* (the 2009 Methodology). AR 355-60. The stipulation also *did not include any findings for the other CN criteria, which were determined to be unmet in the original evaluation* (financial feasibility, structure and process of care, and cost containment). AR 355-60.

Documents later obtained in public disclosure demonstrate that the grant of a CN to Odyssey for King County was central to and the sole basis for settlement of the federal lawsuit:

*[Odyssey’s Counsel]* As you know, the King County CN is central to Odyssey’s willingness to settle and any added risks and hurtles [sic] making that less likely to occur correspondingly make Odyssey less willing to settle.”

*[Department’s Counsel]* Frankly, the idea that we are ‘trying to avoid’ giving Odyssey its CN, ‘putting up hurdles,’ and ‘making additions’ to the agreed settlement is simply ridiculous.

Appendix C (Decl. Fitzgerald, Ex. L).

**H. The Department issued a Notice of Proposed Settlement, Claiming a “Special Circumstance.”**

On September 29, 2009, the Department issued a Notice of Proposed Settlement to Evergreen, Providence, Swedish Health Services d/b/a Swedish Visiting Nurse Services (“Swedish”), and Franciscan

Health Systems (“Franciscan”) and invited comments. AR 297-99; 348-51; 515-17. The proposed settlement stated, “[b]ased on this [December 2008 use] data showing need, the undersigned parties propose settlement under RCW 70.38.115(10)(c) approving Odyssey’s [2006] application to establish a new hospice agency in King County . . . .”). AR 298. The Department stated that “the proposed settlement of the adjudicative proceeding is part of the settlement between the parties *resolving the federal lawsuit.*” AR 298 (italics added). The Department based its decision on a “special circumstance,” which it described as follows:

***In 2008***, the Program conducted its survey of existing King County providers for 2007 use data. Applying the hospice need methodology to this data showed a current need for two additional hospice agencies. Due to a ***special circumstance***, the Program will consider this new data in deciding whether to approve Odyssey’s [2006] King County application. ***The special circumstance is that this new need data was not available to Odyssey by the deadline for applications in 2008.***<sup>7</sup>

AR 298 (internal footnote omitted, emphasis and bold added).

Evergreen, Providence, Swedish, and Franciscan submitted comments on the so-called “special circumstance.” AR 1102-58; 1425-49. The comments included the fact that the Department had not complied with the CN laws or with its own longstanding policies regarding evidence

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<sup>7</sup> Odyssey did not file a CN application in 2007, 2008, or 2009. As the Department admitted in answering Odyssey’s federal lawsuit, the historical utilization data collected by the Department in “December 2008” is inapplicable to Odyssey’s 2006 CN application. As with other CN applicants, Odyssey could have applied for a CN based on any need the methodology showed in later years, *but it elected not to do so*. In fact, in February 2009, Odyssey told the HLJ that it believed there would be sufficient need for a CN application to be filed in “October 2009” and that it might choose to apply for that CN rather than continuing to appeal. AR 253-54. Odyssey, however, chose not to submit a CN application.

to be used for CN applications. AR 1102-58; 1425-49.

Evergreen and Providence informed the Department that it had properly evaluated Odyssey's 2006 CN application in August 2007 using the same methodology upheld by the court in Odyssey I and that a deviation now would require rulemaking. AR 1115-16; 1125-26; 1128. They also informed the Department that it could not use data obtained over two years after Odyssey's submission of its 2006 CN applications and a year and a half after the record had closed – such data, regardless of its accuracy, is contrary to longstanding departmental policy and irrelevant to a 2006 CN application. AR 1116-21; 1123-24; 1128.

Evergreen and Providence also informed the Department that it had failed to include some approved hospice providers in its 2009 Methodology and artificially extended the forecast horizon applicable for the need methodology. AR 1104-1108; 1124-25. On October 20, 2009, the Department approved Kline Galland's proposal to establish a CN hospice agency in King County. AR 476, 478, 1138. The Department ignored Kline Galland in its 2009 Methodology. Likewise, as Providence explained, the Department also failed to include Providence ElderPlace in its 2009 Methodology. AR 1387. Finally, Evergreen and Providence informed that Department that it had failed to reevaluate *all the other* CN criteria that the Department found unmet (financial feasibility, structure and process of care, and cost containment). AR 1434-43.

In October 2009, the HLJ granted the petitions of Providence, Swedish, and Franciscan to intervene, *but only for the limited purpose of commenting on the proposed settlement*. AR 1001, 1008. He expressly

declined to allow intervention for a hearing on the merits. *Id.* According to the HLJ, the only thing he was deciding was settlement; the merits of Odyssey's application were not before him and, therefore, intervention was not appropriate on those grounds. *Id.*

On October 30, 2009, in a *summary proceeding* before the scheduled adjudicative hearing, the Department submitted its proposed settlement to the HLJ. AR 1018-28. Both the Department and Odyssey asked the HLJ to approve their federal settlement and to reject the existing providers' request for a hearing on the merits. On November 10, 2009, Evergreen, Providence, Swedish, and Franciscan submitted responses opposing the Department's request to have the HLJ approve the settlement. AR 1179-1527. They provided the legal basis for rejecting the Department's settlement of the federal lawsuit, reiterating the authority establishing that the settlement contravenes well-established Washington CN laws and longstanding departmental policy. *See id.*

On November 18, 2009, Odyssey and the Department submitted arguments in support of their settlement proposal. AR 1528-1681; 1682-1699. On November 30, 2009, Evergreen, Providence, Swedish, and Franciscan filed a joint reply brief in opposition to the federal settlement. AR 1700-09. On December 8, 2009, without oral argument or an adjudicative hearing, the HLJ entered the Department's proposed order granting Odyssey's 2006 CN application for King County and denying the existing providers' request for an adjudicative proceeding. AR 1721-24.

In its decision, the Court of Appeals made a material factual error, stating that, "[the HLJ] also conducted a hearing prior to its determination

to approve the proposed settlement.” *King County Pub. Hosp. Dist. No. 2 v. Dep’t of Health*, 167 Wn. App. 740, 748 n.7, 275 P.3d 1141 (2012). The HLJ never conducted a hearing on the merits, but instead addressed the settlement in a summary proceeding before Odyssey’s scheduled adjudicative hearing. AR 1721-24. In addition, the Court of Appeals erroneously stated that the HLJ made “findings” that Odyssey’s 2006 CN application was consistent with the statutory criteria. *King County Pub. Hosp. Dist. No. 2*, 167 Wn. App. at 748 n. 7. However, the HLJ’s order is a short two-page summary ruling and contains no specific findings. AR 1102-03 & 1721-24. The Department’s briefing likewise is devoid of any written reevaluation of each of the statutory CN criteria as required under WAC 246-310-490. AR 1018-28; AR 1528-1681; 1682-1699. Although the Department has CN analysts that conduct reevaluations,<sup>8</sup> the record contains no such reevaluation of the CN criteria at issue here.

Evergreen, Providence, and Swedish sought judicial review of the Department’s final decision. Evergreen also filed for a separate request for an adjudicative proceeding to address the merits. On January 29, 2010, Evergreen, the Department, and Odyssey stipulated to dismiss the adjudicative proceeding, agreeing this case controlled and reserving the right to reinstate the adjudicative proceeding if any party argued failure to exhaust administrative remedies or if it was later determined that a separate action was required. Appendix C (Decl. Fitzgerald, at Ex. K). Contrary to Odyssey’s claim, the Department has agreed that RCW

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<sup>8</sup> See, e.g., the Department analyst’s original detailed written evaluation denying Odyssey’s CN applications. AR 11-38.

70.38.115(10)(c) does not bar judicial review of the CN decision on the merits. *See* Appendix C (Decl. Fitzgerald at Ex. M).

#### IV. AUTHORITY

##### A. The Standard of Review for Summary Decisions Made in Advance of an Adjudicative Proceeding Applies.

The Court of Appeals used the wrong standard of review. *King County Pub. Hosp. Dist. No.*, 167 Wn. App. at 750-51. There is no dispute that the HLJ made a summary decision on a motion in advance of any adjudicative proceeding.<sup>9</sup> Although the HLJ has the right to summarily decide issues in advance of an adjudicative hearing, he or she must use the same standards as those used for summary judgment. *Verizon NW., Inc. v. Employment Sec. Dep't*, 164 Wn.2d 909, 915-16, 194 P.3d 255 (2008). On appeal, a reviewing court will “overlay the APA standard for review with the summary judgment standard.”<sup>10</sup> *Id.* at 916.

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<sup>9</sup> The Department throughout its briefing mischaracterizes the summary determination as an “adjudicative hearing.” No adjudicative hearing was held. Instead, the HLJ approved the settlement in a summary decision in advance of Odyssey’s adjudicative hearing. It was nothing more than a summary ruling on a motion without oral argument. The Department now admits that approval was by motion. *See* Appellant DOH Reply Br. at 10 n.6. In fact, the HLJ limited intervention to only “commenting” on the proposed settlement. AR 1001, 1008.

<sup>10</sup> Based upon the Department’s highly unreasoned and wildly inconsistent decision, the trial court’s ruling may also be affirmed under the APA standard of review without an overlay. Under the APA standard of review, relief may be granted if any one or all of the following apply: (1) the decision is unconstitutional; (2) the agency engaged in unlawful procedure or decision-making or failed to follow prescribed procedures; (3) the agency erroneously interpreted or applied the law; (4) the decision is not supported by substantial evidence; (5) the decision is inconsistent with a rule unless a rational basis has been established; and/or (6) the order is arbitrary and capricious. RCW 34.05.570(3); *see also Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 77, 11 P.3d 726 (2000). Contrary to how the Court of Appeals applied the standard of review, the arbitrary and capricious standard does not (and should not) mean that the review is insubstantial; to the contrary, courts must “engage in a substantial inquiry” and conduct a “thorough, probing, in-depth review.” *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971), overruled on other grounds by *Califano v. Sanders*, 430 U.S. 99, 97 S. Ct. 980, 51 L. Ed. 2d 192 (1977).

The reviewing court then “view[s] the facts in the record in the light most favorable to the nonmoving party . . . [and will affirm the decision] only where the undisputed facts entitle the moving party to judgment as a matter of law.” *Id.* On appeal, the facts are reviewed de novo and issues of law are reviewed under the error of law standard. *Id.*

**B. The Department Correctly Evaluated and Denied Odyssey’s 2006 CN Application for King County Consistent With Well-Established CN Laws and Longstanding Departmental Policy.**

The Department *has not and never has asserted any error* with its August 2007 evaluation of Odyssey’s 2006 CN application for King County. It was correct in all respects and entirely consistent with the laws governing CN review and with the Department’s evaluation of other hospice CN applications. Although the Department has not identified any errors, the Department still wants to depart from the established CN laws for the sole purpose of settling the federal lawsuit. While the Department seeks to avoid the cost of federal litigation at the expense of disregarding established CN law and policy,<sup>11</sup> its obligation and responsibility to follow Washington’s CN laws cannot be overridden by federal litigation.

As late as June 2009, the Department *admitted* in the federal court proceedings that it properly denied Odyssey’s CN applications in 2007, using appropriate 2003-2005 use data to forecast future demand. AR 1081-88. The Department *denied* Odyssey’s contention that, “[t]his projection, based on faulty Methodology and data, incorrectly resulted in

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<sup>11</sup> The Department stated that its decision to grant Odyssey’s 2006 CN application was financially motivated. CP 507 (Dep’t Br. at 3:8-9) (“The Department had no interest in expending resources defending a rule that it might amend in the near future.”).

Odyssey being denied its [2006] CN application.” AR 1069, 1085. The Department *admitted* that it “advised Odyssey that it could only consider Odyssey’s October 2006 CN application under the 2007 Methodology and therefore the 2007 Methodology’s projection of need in 2009, 2010, and 2011 applied.” AR 1074-75, 1086. The Department *admitted* that the 2009 Methodology *could not be used*. AR 1074, 1086. Statements of fact made in responsive pleadings are admissions against the party making them, and are in favor of the party’s adversary. *Neilson v. Vashon Island School Dist. No. 402*, 87 Wn.2d 955, 958, 558 P.2d 167 (1976).

The Department does not claim *any error* with the historical use data used to evaluate and deny Odyssey’s 2006 application for King County. In fact, the use data used to evaluate Odyssey’s 2006 application was *more complete* than data used in prior hospice CN reviews and the survey responses were obtained from *all providers identified by Odyssey as serving King County*. AR 1282 (the Department’s analyst stated, “[a]lthough not all hospice providers in the state responded to the program’s surveys, 7 of the 8 surveys mailed to King County providers identified by the Department were returned. In contrast, *all providers identified by the applicant [Odyssey] as serving King County* provided responses.”) (emphasis added).

The Court of Appeals opinion also does not address *Odyssey Healthcare Operating B, LP*, 145 Wn. App. at 146 (Odyssey I), which affirmed the interpretation and application of the same need methodology that the Department used to deny Odyssey’s 2006 CN application. In Odyssey I, the Court of Appeals held that the Department correctly

interpreted and applied the hospice need forecasting methodology **using 2000-2002 utilization data in the evaluation of Odyssey's 2003 CN applications**. *Odyssey Healthcare Operating B, LP*, 145 Wn. App. at 146 (“Odyssey I”). The court considered and rejected Odyssey’s contention that the historical utilization data was improper. *Id.* at 145-46.

Using the same methodology upheld in Odyssey I, the Department used 2003-2005 historical utilization data and denied Odyssey’s 2006 CN applications. There is no dispute that the Department’s application of the methodology was entirely consistent with how it had applied the same hospice need methodology to other CN applicants in the past.

However, after admitting in June 2009 that it had accurately evaluated and denied Odyssey’s 2006 CN applications (in its answer to the federal lawsuit), the Department later fully departed from the methodology upheld in Odyssey I by using data collected in December 2008 (the 2009 Methodology). This is highly inconsistent with the methodology approved in Odyssey I and applied to other hospice agency CN applications. Although the historical utilization data collected by the Department in December 2008 and applied in the 2009 Methodology may be appropriate for a 2008 or 2009 CN application, it is clearly inapplicable to Odyssey’s 2006 CN applications. As stated previously, Odyssey did not even file a CN application in 2007, 2008, or 2009.

In sum, the Department admits that it properly evaluated and denied Odyssey’s 2006 CN applications and identifies *no errors* in the 2007 evaluation. In fact, the Department appropriately obtained historical utilization data *from all those providers identified by Odyssey in its CN*

*application* as serving King County. In addition, any argument regarding partially incomplete survey results were already considered and refuted by the Court of Appeals in *Odyssey I*. See *Odyssey Healthcare*, 145 Wn. App. at 145-46. As the trial court found, the Department’s decision to settle the federal lawsuit long after the record had closed on Odyssey’s 2006 CN application for King County was arbitrary and capricious.

There is simply no principled rationale for using a 2009 Methodology for a 2006 CN application. In addition to creating substantial uncertainty for providers and undermining the legislative intent for meaningful input from both consumers and the public (RCW 70.38.015), this settlement encourages disappointed providers to delay agency and judicial review actions, as Odyssey has done here, in the blind hope that future supporting data might become available.

This Court has recognized that “the [l]egislature sought to oversee development of Washington’s health and medical resources *in a planned, orderly fashion, consistent with identified priorities and without unnecessary duplication or fragmentation.*” *Children's Hosp. v. Dep't of Health*, 95 Wn. App. 858, 865, 975 P.2d 567 (1999) (internal quotes and citation omitted). There is nothing planned or orderly about disregarding established CN law and departmental practice for the sole purpose of settling unrelated federal litigation.

### **C. The Trial Court Appropriately Remanded the Case.**

A reviewing court may, *inter alia*, affirm, reverse, or remand the agency’s decision. RCW 34.05.570(1)(b); see also *W. Ports Transp., Inc. v. Emp. Sec.*, 110 Wn. App. 440, 450, 41 P.3d 510 (2002).

**1. The Trial Court Correctly Determined that Under RCW 70.38.115(10)(c), the Legislature did not Intend to Allow the Department to Disregard Established CN Laws and did not intend to Eliminate the Rights of Existing Providers under RCW 70.38.115(10)(b).<sup>12</sup>**

The trial court correctly determined that the Legislature did not intend to “allow a ‘settlement’ to circumvent established procedures or to modify a decision of the Department *without an adjudicative hearing*, especially if the primary settlement arose from an entirely separate lawsuit and proceeding.”<sup>13</sup> Appendix A at 2 (emphasis added). In enacting the notice provision for settlement under RCW 70.38.115(10)(c), the legislature did not intend to dispense with all other statutory and regulatory criteria governing CN review and clearly did not intend to nullify all statutory rights given to affected providers for correcting errors of fact and law made by the Department. *See* RCW 70.38.115(10)(b).

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<sup>12</sup> Contrary to the inaccurate claim being made by the Department (*see, e.g.*, Dept. Reply Br. at 10 n.6), Petitioners have repeatedly requested an adjudicative proceeding on the merits. *See, e.g.*, AR 1251-53 (Evergreen’s request to the HLJ for a fair hearing to resolve the issues of disputed fact and law). The HLJ instead decided the issues in a summary proceeding before hearing. Similarly in their briefing to the trial court, the Petitioners requested the following relief, which was ordered by the trial court (this is the same relief they asked the Court of Appeals to affirm):

Therefore, this Court should reverse this agency action and remand to the HLJ to conduct the adjudicative proceeding commenced by Odyssey. On remand, the HLJ should be instructed that the 2009 Methodology cannot be used to evaluate Odyssey’s 2006 CN application for King County. The HLJ must then determine, based on the applicable law and the relevant evidence available at the time the record was open, whether or not Odyssey’s CN application satisfied the applicable CN regulatory criteria. (CP 731-32).

<sup>13</sup> In contrast, the Court of Appeals, without conducting any meaningful review of the CN laws, without considering the legislative and case law underpinnings of the statutory CN notice provision for settlements, and without evaluating the legislative intent of the CN laws, the Court of Appeals held that “chapter 70.38 RCW . . . imposes no substantive or evidentiary limitations on settlement.” *King County Pub. Hosp. Dist. No. 2*, 167 Wn. App. at 751-52. According to the Court of Appeals, “in the context of settlement,” which it characterized as the “critical fact,” the Department purportedly has unfettered discretion to wildly deviate from its “general policy . . . of not considering evidence available [long] after the review period.” *Id.* at 752.

The Department has long permitted existing providers the right to correct errors of law and fact in adjudicative proceedings. “The legislature is presumed to know the law in the area in which it is legislating.” *Wynn v. Earin*, 163 Wn.2d 361, 371, 181 P.3d 806 (2008).

Subsection (10)(c) of RCW 70.38.115 was added in July 1995, in response to *St. Joseph Hosp.*, 125 Wn.2d at 737 & 742-44, a case in which the Supreme Court found that the Department had a legal obligation to notify affected providers of the terms of a stipulated settlement that reopened the CN review process. Subsection (10)(c) codified the Court’s holding in *St. Joseph* by requiring the Department to notify affected providers of any plans to settle with an applicant prior to the conclusion of an adjudicative proceeding and to afford them an opportunity to comment in advance of any settlement. The legislature knew of the statutory and regulatory rights provided to existing providers, including those stated in subsection 10(b), and it did not eliminate any of them.

The Final Bill Report from the legislature states, “[t]he interested party must *also* be afforded an opportunity to comment in advance of any proposed settlement.” See Appendix D (Supplemental Decl. Fitzgerald, dated September 21, 2010, at Ex. A) (emphasis added). The word “also” reflects an intention to confer *additional rights* to affected providers whose interests the CN laws were designed to protect.

Nothing in the legislative history suggests an intention to nullify the existing rights of affected CN providers or to eliminate Washington’s established criteria governing CN review. See *id.* If the Legislature intended such a significant change in the law, it would have said so. See

*Kaiser Aluminum & Chem. Corp. v. Pollution Control Hearings Bd.*, 33 Wn. App. 352, 356, 654 P.2d 723 (1982).

**2. The Trial Court Properly Determined that the Department's Complete Departure from Its Previous Position on the 2009 Methodology for a Period of Over Two Years for the Sole Purpose of Settling a Federal Lawsuit Was Arbitrary and Capricious.**

The 2009 Methodology is inapplicable to the evaluation of Odyssey's 2006 CN application for King County – the Department *has never used* data collected two-years later as a basis for their health planning. In *Univ. of Washington Medical Ctr. v. Dept. of Health*, the Department stated to this Court that it could only consider facts existing around the time an applicant files a CN application. 164 Wn.2d 95, 103, 187 P.3d 243 (2008) (the Department stated that a CN decision is based upon a “snapshot of facts around the time the application is filed.”). This supports the “statutory objective of expeditious decision making” and encourages “meaningful public input on th[e] evidence.” *Univ. of Washington Medical Ctr.*, 164 Wn.2d at 104.

As described in the Department's 2007 denial of Odyssey's CN for King County, the need methodology uses “historical hospice utilization” to forecast future demand. AR 16. As discussed in subsection IV.B. above, the Department correctly used 2003-2005 utilization data (the “historical utilization data”) to appropriately forecast future demand for Odyssey's 2006 CN application. The Department agrees this was appropriate. However, the use rate obtained by the Department in December 2008 (the 2009 Methodology) is not and cannot be historical utilization data for Odyssey's 2006 CN application for King County. This

is nothing but attempted *post-hoc* rationale, as the Department knew there was no principled basis for approval when consistently applied.

As discussed above, through April 2009, the Department admitted that the 2009 Methodology could not be used to evaluate Odyssey's 2006 CN application for King County. The Department even admitted that its "2008 Methodology" showed no need through 2011 (using 2004-2007 historical utilization data). AR 1073, 1086. The Department's sudden change of position in September 2009 for the sole purpose of settling a federal lawsuit was arbitrary and capricious.

Additionally, the Department's assertion of a "special circumstance" is an unfounded excuse used in an attempt to justify its decision for getting the federal litigation settled. The Department states:

In 2008, the Program conducted its survey of existing King County providers for 2007 use data. Applying the hospice need methodology<sup>2</sup> to this data showed a current need for two additional hospice agencies. Due to a *special circumstance*, the Program will consider this new data in deciding whether to approve Odyssey's King County application. ***The special circumstance is that this new need data was not available to Odyssey by the deadline for applications in 2008.***

AR 298 (footnote in original, emphasis and bold added).

Whether or not "2007 use data" was available for 2008 applicants is wholly irrelevant to Odyssey's 2006 application. The data applicable for a 2006 CN application is 2003 – 2005, not 2007. Odyssey *elected* not to file CN applications in 2007, 2008, or 2009, even though it had stated to the HLJ that it may do so. Odyssey's applications were filed in 2006. Therefore, while the Department may have intended 2007 historical use

data to be available for 2008 or 2009 applicants, it plainly could not have intended this use data to be available for 2006 applicants.<sup>14</sup> The reality is that the Department’s so-called “special circumstance” is nothing more than an unjustifiable special treatment given to Odyssey for disposing of a federal lawsuit. This is special treatment the Department has not given or claimed to have given to any of the other CN applicants.

The Court of Appeals held that “[t]he critical fact is that the Department considered this new evidence in the context of a *settlement*.” *King County Pub. Hosp. Dist. No.*, 167 Wn. App. at 751. In other words, the grant of a CN by way of settlement supposedly disposes of the need to satisfy established CN criteria and extinguishes the rights of existing providers to have an adjudicative proceeding. The Court of Appeals holding would provide the Department with unbridled authority to circumvent established CN laws through settlement, which would unequivocally undermine the “statutory objective of expeditious decision making” and encouraging “meaningful public input on th[e] evidence.” *Univ. of Washington Medical Ctr.*, 164 Wn.2d at 104.

As stated in subsection IV.C.1 above, the Notice Statute, RCW 70.38.115(10)(c), does not abrogate the rights of existing providers under RCW 70.38.115(10)(b). The Court of Appeals failed to read the statute as a whole. *Dep’t of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002) (statutes are interpreted by “considering the statute as a

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<sup>14</sup> In the 2008 Heart of Hospice decision (AR 1262-76), the Department used 2004-2006 historical utilization data to evaluate a 2007 CN application (the “2008 Methodology”). This 2008 Methodology also showed no need in King County.

whole, giving effect to *all that the legislature has said*, and by using related statutes to help identify the legislative intent embodied in the provision in question.).

Consistent with the statutory objective of expeditious decision making and the legislative intent to involve the consumers and public in the decision making process (RCW 70.38.015, WAC 246-310-180), the Department *has long taken the position* that applications for a CN must be based upon health planning data existing at or near the time of the CN evaluation. This longstanding policy is memorialized in an October 22, 2007 memorandum issued by Department Secretary Mary C. Selecky to Laura Farris, Senior Health Law Judge. AR 1260.

Secretary Selecky stated, “[allowing] evidence to be submitted . . . that did not exist at the time the program made its decision . . . is contrary to the department’s long practice of not allowing new evidence to come into the record at the adjudicative proceeding.” She reminded the HLJs that “evidence that did not exist and was not part of the record *at the time the Certificate of Need Program made its decision* should not be admitted into the adjudicative proceeding.” *Id.* (emphasis added).

Nonetheless, reading subsection (10)(c) in isolation and giving no effect to the statute as a whole, the Court of Appeals held there are “no substantive or evidentiary limitations on settlement.” *King County Pub. Hosp. Dist. No.*, 167 Wn. App. at 752. It erroneously concluded that the Department can use whatever use data it wanted regardless of whether it was available at the time of the submission of the CN application; regardless of whether it was available to the Department during the course

of its CN analysis and evaluation (or even around that time); and regardless of whether it conforms to the established regulatory hospice CN need methodology. *Id.* The Court of Appeals completely ignored Odyssey’s ability to re-apply for a CN in subsequent years to take advantage of any new data, and instead, it created a new method whereby dissatisfied applicants could obtain, wholesale, a new CN.

The Court of Appeals’ opinion materially conflicts with this Court’s decision in *Univ. of Washington Medical Ctr.*, 164 Wn.2d at 104. The issue in *Univ. of Wash. Medical Ctr.* was whether it was error for the HLJ to refuse to admit new evidence obtained more than five weeks after the public hearing. *Univ. of Washington Medical Ctr.*, 164 Wn.2d at 103. The Department argued that the decision to grant a CN is made on a “snapshot of facts around the time the application is filed.” *Id.* The Court agreed, stating:

Both the statutes and the administrative rules clearly contemplate that the decision will be made quickly; ideally, 90 days from the application's filing. RCW 70.38.115(8); WAC 246-310-160(1). Requiring the health law judge to admit evidence created long after this period of time ***would undermine the statutory objective of expeditious decision making and prevent meaningful public input on that evidence.*** A request for an adjudicative hearing does not begin the application process anew; the adjudicative proceeding is part of the entire certificate of need petition process established by chapter 70.38 RCW.

*Id.* at 104 (emphasis and bold added).<sup>15</sup>

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<sup>15</sup> Allowing public input is a critical aspect of the CN evaluation process. *See* RCW 70.38.015 (“Involvement in health planning from both consumers and providers throughout the state should be encouraged”) and WAC 246-310-180 (incorporating public hearings in the CN evaluation process). Meaningful public input cannot be achieved by incorporating evidence two-years after a CN evaluation process.

Based upon this recognition of the statutory intent of “expeditious decision making” and “meaningful public input on that evidence,” the Court held that *it was not an abuse of discretion for the Health Law Judge to restrict the evidence to five weeks after the public hearing. Id.*

Contrary to the “snapshot” position that the Department took in *Univ. of Wash. Medical Ctr.*, the Court of Appeals’ opinion permits the Department to use any data from any time period, even if the evidence is obtained more than two years after the submission of the application and the decision. The Court of Appeals’ opinion substantially conflicts with the statutory intent found by this Court in *Univ. of Wash. Medical Ctr.*

The Court of Appeals attempted to distinguish the limitations as to what information may be considered based on the *University of Washington Medical Center* case. While it is true that this matter did not involve an agency decision following an adjudicative proceeding and instead involved a summary agency decision without opportunity for oral argument, the distinction as to what may be considered based on those differences is artificial. The 2009 Methodology utilized by the Department was used to justify and enter an agency decision – an order granting Odyssey’s 2006 CN application – just as evidence allowed at an adjudicative proceeding could be used to justify an agency decision on a CN application. Neither the Department, Odyssey, nor the Court of Appeals cited any authority allowing a HLJ to deviate from general policy or law applicable to agency decisions merely because the agency decides to reverse its prior position and grant a CN in its entirety.

Finally, the proposed settlement would be prejudicial to other providers and the general public that the CN laws were expressly designed to protect and would not provide the continuity needed for reliable health planning purposes. It is well settled that Washington agencies must follow their own rules and regulations. *See Ritter v. Bd. of Comm'rs*, 96 Wn.2d 503, 507, 637 P.2d 940 (1981); *Samson v. City of Bainbridge Island*, 149 Wn. App. 33, 44, 202 P.3d 334 (2009). In enacting Ch. 70.38 RCW, the legislature sought to oversee development of Washington's health and medical resources “in a planned, orderly fashion . . . .” *Children's Hosp.*, 95 Wn. App. at 865; RCW 70.38.015(2).

It is hard to imagine oversight that would be any less planned and orderly than opening the agency record to a period of time more than two years after CN applications have been filed and a year and a half after the Department's decision. The CN process is a method of “forecasting” future demand, and there is nothing in the CN laws that guarantee the outcome of every forecast. It is based upon the best available data in the hands of the Department at the time of the evaluation and it is applied consistently to all CN applicants. Each of the Petitioners has likewise been denied CNs in the past, but this does not justify a derogation of Washington's established CN laws and health planning.

This is of great concern because the Department's new *post-hoc* policy will create substantial uncertainty with future CN decisions. The Petitioners rely upon the Department to consistently apply CN rules in a planned and orderly fashion. *Post-hoc* rationalizations are not what the legislature intended under Ch. 70.38 RCW.

**3. The Trial Court Correctly Remanded to Have Issues of Fact and Law on the Four CN Criteria Resolved in an Adjudicative Proceeding.**

There is no dispute that genuine issues of material fact and law exist as it concerns each of the four CN criteria which, as found by the trial court, requires an adjudicative proceeding to resolve.<sup>16</sup> The Department never conducted a reevaluation of all the CN criteria rejected in the original application as required under WAC 246-310-490. All it did was apply the 2009 Methodology and claimed that was the basis (a “special circumstance”) for approval.<sup>17</sup> Appendix E (AR 1102-03).

The Department’s 2007 evaluation clearly establishes that it failed to meet *all the CN criteria*. The Department’s analyst specifically determined that Odyssey’s application was “not consistent with Need ... Financial Feasibility ... Structure and Process of Care . . . [and] Cost Containment ....” AR 11. Although the Department *now argues* that the four regulatory requirements were rejected “only because Odyssey had not demonstrated need” (AR 1021), a review of the evaluation by the Department’s analyst demonstrates that the applications were rejected based upon each and every one of the CN criteria, including need.

Petitioners showed no need exists even under the 2009 Methodology. The Department clearly failed to include Kline Galland in

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<sup>16</sup> The CN evaluation process is detailed; a normal application may consist of several hundred pages. The testimony at adjudicative proceedings is generally presented by expert CN analysts with substantial experience in the health planning field. This, however, could not occur here because Petitioners were limited to “commenting” on the Department’s settlement and denied the right to an adjudicative hearing.

<sup>17</sup> Again, the Department’s 2007 and 2008 Methodology forecasts both showed no need for additional hospice agencies in King County. The 2003-2005 historical use rates used for the 2007 Methodology were applicable to Odyssey’s 2006 CN application. The 2008 Methodology (using 2004-2006 use rates) is provided at AR 1073, AR 1086.

its 2009 Methodology. On October 29, 2009, Kline Galland received an exemption to provide hospice services up to an average daily census of 40 patients. AR 1191-92, AR 1194. This information was available to the Department *before* it granted Odyssey's CN. Because Kline Galland has been in the planning area less than three years, the Department should have allocated an average daily census (ADC) of thirty-five and the most recent Washington average length of stay data for the assumed annual admissions for the first three years. WAC 246-310-290(1)(c)(ii).

The Department, however, excluded Kline Galland from its 2009 Methodology. It argues that it need not consider Kline Galland because the legislation that allowed this exemption, ESHB 1926, was approved after Odyssey's application. However, the Department is simultaneously advocating for approval of Odyssey's 2006 application based upon December 2008 data, which became available long after Odyssey's 2006 application. The Department cannot have it both ways. It cannot approve Odyssey's application based on some, but not all, of the later information that affects the need for hospice services in King County. The omission of Kline Galland violates WAC 246-310-290 and, if it were included, the 2009 Methodology would not demonstrate any need.<sup>18</sup> The Department's

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<sup>18</sup> Similarly, the Department failed to include Providence ElderPlace in its 2009 Methodology. AR 1347. This is a Medicare-certified home care and home health program that operates an innovative, all-inclusive program of health care and social services for older adults. *See id.* ElderPlace has operated a PACE program in King County since 1995, which offers hospice-focused end of life care to its enrollees in King County. *See id.* Because this provider meets the definition of "current supply of hospice services" under WAC 246-310-290(1)(b)(i), it should have been included.

use of some data but not all data created after Odyssey's application further reflects the arbitrary and capricious nature of its decision.

Moreover, in the 2009 Methodology, the Department extended the planning horizon to 2013 to make it appear as though the 2009 Methodology would support two hospice agencies. This is deceptive. The correct planning horizon for the 2009 Methodology should have been 2009-2011, as the Department now appears to concede. AR 1687. Therefore, the Department's 2009 Methodology shows need for no more than one additional hospice agency and, as stated above, when applied correctly, the 2009 Methodology shows no need in the planning area.

In addition, in the Financial Feasibility section of the 2007 evaluation (AR 24-27), the Department noted several questionable areas. Odyssey was inconsistent on its use of the average length of stay. AR 25. Odyssey used an average length of stay for its revenue and expense forecast that was *20 days longer* than what it used in its evaluation of need. *Id.* The Department also recognized that the average length of stay used by Odyssey was "28 days higher then [sic] the state average and 25 days greater than the average length of stay of 55 days for the hospice providers currently serving King County." *Id.* The Department found that using a more realistic average length of stay would considerably lower Odyssey's 2011 financial projections. *Id.*

The Department also found Odyssey's projection for number of patient days, average daily census, and unduplicated census to be suspect because Odyssey used the same numbers for King, Pierce, and Snohomish Counties. *Id.* The Department stated, "[t]he department is concerned that

the projections as presented may not be reflective of what the applicant actually expects to provide but instead is what is needed to project having an average daily census by the 3rd year of operation as required by rule.” *Id.* The Department, however, neither addressed these concerns nor re-evaluated Odyssey’s financials as part of its settlement.

For the Structure and Process of Care regulatory criteria, the Department stated that Odyssey would need to agree to a condition “requiring it to provide copies of [ancillary and support agreements] for review and approval, identifying vendors and charges for these services consistent with the draft provided.” AR 28. Similarly, the Department said that Odyssey would need to identify a director of clinical services and a back-up before a CN would be granted. AR 29. The Department, however, never placed such conditions on the grant of Odyssey’s CN application for King County for purposes of settlement. The previous requirements clearly go beyond the issue of need.

Finally, the Department has also failed to address the public hearing testimony on Odyssey’s 2006 CN application for King County. The testimony was *overwhelmingly* against Odyssey’s proposal, demonstrating a surplus of services in the community, and greatly supported the Department’s denial. *See, e.g.*, AR 1383, AR 1425-49.

In sum, failing to address the deficiencies identified in the original evaluation further demonstrates the arbitrary and capricious decision making of the Department. Notwithstanding the Department and Odyssey’s opinions to the contrary, there was no meaningful analysis, *let alone analysis at all*, of these other criteria despite the HLJ’s statement

that they had been met.<sup>19</sup> This was something that could not be concluded without an updated evaluation and findings from a CN analyst. They were conclusory statements made solely to justify the Department's decision to settle the federal litigation with Odyssey. Had the Department intended to properly evaluate Odyssey's 2006 CN application for King County and come to a reasoned conclusion as to all four criteria, it would have issued an reevaluation as normal under WAC 246-310-290. The Department, however, only issued its Notice of Settlement. AR 1102-03.

#### **4. Petitioners' Due Process Rights Were Violated.**

As an additional ground for remand, the Petitioners' Due Process rights were violated because the Department refused to provide an opportunity to present oral or written testimony and argument in a hearing on the merits, as required under RCW 70.38.115(10)(b)(iii) and longstanding policy. "Integrity of the fact finding process and basic fairness of the decision are principal due process considerations." *Parker v. United Airlines*, 32 Wn. App. 722, 728, 649 P.2d 181 (1982). The *sine qua non* of due process is notice and opportunity to be heard. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

Existing providers have a statutory right "to present oral or written testimony and argument in [an adjudicative] proceeding." RCW 70.38.115(10)(b)(iii); *see also* WAC 246-10-119 (rights of intervening

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<sup>19</sup> The Court of Appeals did not address the statements identified by the Department and Odyssey in their briefing regarding why other criteria were not met or explaining how those statements did not establish that there were concerns concerning the other criteria independent of the initial "need" criterion not being met.

parties). CN adjudicative proceedings are governed by RCW 34.05.410 thru .494. *See* RCW 70.38.115(10)(a) & (10)(b)(iii).

In addition, *it cannot be refuted that the Department has long permitted existing providers the right to challenge the grant of a CN in an adjudicative proceeding to correct errors of law and fact.* The fact that the grant of a CN comes by way of settlement instead of original approval by the Department is a distinction without substance. It has long been held that affected providers have standing to correct errors of law and fact in the Department's CN evaluation process and are the only ones with the knowledge and motivation to take such action. *St. Joseph Hosp.*, 125 Wn.2d at 742 (“[w]hile an applicant who is denied a CN has both a motive and a statutory right to seek review of the Department's determination, no comparable motivation or statutory authority to seek review exists when the Department grants a CN. Practically, this review can only be achieved if competitors have standing.”).

Evergreen and Providence both sought a hearing *on the merits* and their requests were repeatedly denied. The Court of Appeals recognized the Department did not conduct a full review on the merits, stating “[t]he Department's evaluation and settlement proposal did not analyze why the non-need criteria were met, rather it focused on the need criterion.” *King County Pub. Hosp. Dist. No.*, 167 Wn. App. at 753 n. 11.

In addition, the Department's internal communications also show that it believed Petitioners were entitled to “the right to contest the settlement through the administrative process.” *See* Appendix C (Decl. Fitzgerald, at Ex. M). Nevertheless, despite the clear statutory and

regulatory rights provided to existing providers, the Department continually refused to provide a hearing on the merits. This refusal contravenes the CN laws and longstanding departmental policy and, therefore, is a violation of the Petitioners' Due Process rights.

## V. CONCLUSION

If the Department is allowed to ignore CN laws, regulations, longstanding departmental policy, and established statutory and regulatory rights of affected CN providers – RCW 70.38.115(10)(b)(iii) – for the sole purpose of settling an unrelated federal money damages lawsuit, it will result in substantial uncertainty in the CN health planning process and will be contrary to the legislative purpose of promoting greater utilization of existing healthcare services and avoiding the fragmentation and duplication of healthcare resources. *See* Section III.A above.

Providers rely upon established and consistent CN health planning criteria and methodologies. In fact, many providers hire their own CN health planning analysts to evaluate the projected need to support new healthcare facilities or the expansion of existing facilities. The Court of Appeals' opinion would make CN health planning highly unpredictable, which the legislature sought to prevent. The issue is inherently one of substantial public interest because few things are of greater importance than access to affordable, quality health care.

The Department contends that the methodology in WAC 246-310-290 shows a “current” need for an additional hospice agency in King County. However, the issue is not whether there is a current need for an additional hospice agency. The issue is whether there was a *projected*

*need* using the established regulatory methodology when Odyssey applied for a CN in 2006. The answer is unquestionably no. If the methodology is applied in the same manner used to evaluate all other CN applications, using data applicable to a 2006 CN application (2003-2005 use data), the methodology demonstrates a surplus of hospice agencies — this is consistent with the overwhelming public hearing testimony. If the methodology “now” shows need for additional services, Odyssey can submit a new CN application as other providers must do.

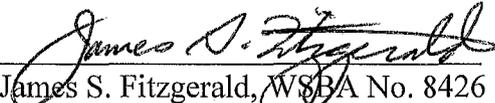
The Department should not be permitted to settle an unrelated federal lawsuit by granting a CN when doing so departs from established CN law and practice. The Court of Appeals erred by holding that the CN laws do not need to be followed when a CN is granted by way of settlement. Its opinion is contrary to the “statutory objective of expeditious decision making” and encouraging “meaningful public input on th[e] evidence.” *Univ. of Washington Medical Ctr.*, 164 Wn.2d at 104. The Department’s evaluation should be based upon data in existence at or near the time of its evaluation, not two years later. In addition, the legislature never intended to dispose of Evergreen and Providence’s statutory right to have an adjudicative hearing for correcting errors of law and fact. In this case, genuine issues of material fact and law exist, which require an adjudicative proceeding to resolve. The standard of review for summary determinations by an agency should apply.

Evergreen and Providence respectfully request that the Court affirm the decision of the trial court, reversing and remanding to conduct the adjudicative proceeding. On remand, the Department should be

instructed that the 2009 Methodology cannot be used to evaluate Odyssey's 2006 CN application for King County. The HLJ would then determine, based on the applicable law and the relevant evidence available at the time the record was open, whether or not Odyssey's CN application satisfied all of the applicable CN regulatory criteria.

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## **VI. APPENDICES**

# APPENDIX A

Ruling of King County Superior Court Judge Mary I. Yu  
issued on September 24, 2010

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR THE COUNTY OF KING

KING COUNTY PUBLIC HOSPITAL  
DISTRICT NO. 2 d/b/a/ EVERGREEN  
HEALTHCARE, a Washington public hospital  
district, *et al.*,

Petitioners,

vs.

WASHINGTON STATE DEPARTMENT OF  
HEALTH, a Washington governmental agency,  
*et al.*,

Respondents.

No. 10-2-02490-5 SEA

SUMMARY DECISION GRANTING  
PETITIONERS' RELIEF

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THIS MATTER came before the undersigned upon Petitioners' appeal of the Final Order Approving Settlement and Granting Odyssey's King County Hospice Application, dated December 8, 2008 (the "Final Order").

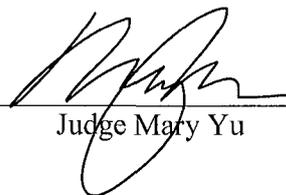
The court considered the entire record (including the supplementation), all briefs filed on appeal, and oral argument from counsel.

Having been duly advised, the court reverses the Final Order and remands the matter to the Health Law Judge for a determination, based on the applicable law and the relevant evidence available at the time the record was open, whether or not Odyssey's CN application satisfied all of the applicable criteria for approval of its application.

RCW 70.38.115(10)(c) authorizes the Department to settle with an applicant prior to the conclusion of the adjudicative proceeding. However, this court is not persuaded the intent of the Legislature in enacting this provision, would have been to allow a "settlement" to circumvent established procedures or to modify a decision of the Department without an adjudicative hearing, especially if the primary settlement arose from an entirely separate lawsuit and proceeding.<sup>1</sup> The Department's decision to settle the federal lawsuit by granting Odyssey a CN in King County under the guise of "special circumstance" and based upon its 2009 methodology long after the record was closed on a 2006 application, is arbitrary and capricious. The Health Law Judge's subsequent summary adoption of the settlement agreement without an adjudication or finding that Odyssey had actually met all of four of the criteria was similarly arbitrary and capricious and thus, error as a matter of law.

Given the summary nature of this order, the court directs Petitioner's to confer with opposing counsel and submit proposed findings of fact and conclusions of law consistent with this court's decision.

IT IS SO ORDERED this 24<sup>th</sup> day of September, 2010

  
\_\_\_\_\_  
Judge Mary Yu

<sup>1</sup> Contrary to assertions made at oral argument that settlement of the federal lawsuit was separate from the approval of the application, the Department represented to the HLJ that "as part of the resolution of Odyssey's federal lawsuit against the Department, the Department agreed to propose settlement of the adjudicative proceeding by approving the King County application. . ." AR 1683 and 710.

King County Superior Court  
Judicial Electronic Signature Page

Case Number: . 10-2-02490-5  
Case Title: . . KING COUNTY PUBLIC HOSPITAL DIST 2 DBA ET  
AL VS WA STATE OF HEALTH ET A  
Document Title: . ORDER  
Signed by Judge: Mary Yu  
Date: 9/24/2010 4:17:28 PM

digitally signed

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Judge Mary Yu

This document is signed in accordance with the provisions in GR 30.

Certificate Hash: 4764B5F5F0D4A5B6552C9BB0F84A5A936A7E50CF

Certificate effective date: 4/26/2010 7:36:51 AM

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CA, O=State of Washington PKI, C=US

# APPENDIX B

Findings of Fact, Conclusions of Law and Judgment  
entered on October 29, 2010

FILED  
KING COUNTY, WASHINGTON

OCT 29 2010

SUPERIOR COURT CLERK  
ANGIE VILLALONOS  
DEPUTY

Honorable Mary I. Yu  
Without Oral Argument

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR KING COUNTY

KING COUNTY PUBLIC HOSPITAL  
DISTRICT NO. 2 d/b/a EVERGREEN  
HEALTHCARE, a Washington public  
hospital district, *et al.*,

Petitioners,

v.

WASHINGTON STATE DEPARTMENT  
OF HEALTH, a Washington governmental  
agency, *et al.*,

Respondents.

NO. 10-2-02490-5 SEA

FINDINGS OF FACT, CONCLUSIONS OF  
LAW AND JUDGMENT

[Proposed]

Clerk's Action Required

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS MATTER came on for hearing with oral argument on September 24, 2010,  
before the Honorable Mary I. Yu of the above-titled Court upon the Petitioners' Petition for  
Judicial Review. The Court considered:

1. Petitioners' Opening Brief;
2. The Declaration of James S. Fitzgerald, dated August 31, 2010;
3. Department of Health Memorandum Opposing Petition for Judicial Review;
4. Odyssey Healthcare's Response to Petitioners' Opening Brief;
5. Petitioners' Reply Brief;

FINDINGS OF FACT, CONCLUSIONS OF LAW  
AND JUDGMENT - 1

ORIGINAL

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1 proceedings. In October and November 2007, the Health Law Judge granted the request of  
2 King County Public Hospital District No. 2 d/b/a Evergreen Healthcare to intervene in the  
3 King and Snohomish County adjudicative proceedings. The King, Snohomish, and Pierce  
4 County proceedings were later consolidated and stayed until resolution of Odyssey I.

5 5. In October 2008, Odyssey petitioned for rulemaking and obtained another  
6 continuance. In December 2008, the Department denied Odyssey's petition for rulemaking.

7 6. In February 2009, Providence Hospice and Home Care of Snohomish County  
8 and Hospice of Seattle petitioned to intervene in Odyssey II. That same month, Odyssey  
9 requested another stay because Odyssey planned to file a lawsuit in federal court. Odyssey  
10 also asserted as a basis for the continuance that it believed that there would be sufficient  
11 need for a CN application filed in October 2009 and that it might choose to apply for that  
12 need rather than continuing to appeal. In March 2009, the Health Law Judge granted  
13 Odyssey's request to stay the case until September 2009. The petition for intervention filed  
14 by Providence was also stayed pending Odyssey's decision as to which action it would take.

#### 14 Odyssey's Federal Lawsuit

15 7. In April 2009, Odyssey filed a lawsuit in federal court alleging violations of  
16 the Sherman Act under 15 U.S.C. § 1, the Commerce Clause of the United States  
17 Constitution under Article I, § 8, cl. 3, and liability under 42 U.S.C. § 1983 ("Federal  
18 Lawsuit").

19 8. In June 2009, the Department filed an answer to the Federal Lawsuit,  
20 continuing to oppose Odyssey's contention that its 2006 CN applications were improperly  
21 evaluated. In its answer, the Department denied (1) that it had failed to properly evaluate  
22 Odyssey's 2006 CN applications, (2) that the 2009 Methodology (i.e., using data obtained  
23 by the Department in 2008) could be used as the basis for granting Odyssey's 2006 CN  
24 application, and (3) that the 2008 Methodology (using data obtained by the Department in

1 2007, the year it denied Odyssey's application) showed need for additional hospice  
2 agencies.

### 3 The Settlement

4 9. In September 2009, Odyssey informed the Health Law Judge that it had  
5 engaged in settlement negotiations with the Department "on both the federal and  
6 administrative proceedings" and requested and received another continuance until  
7 November 2009. None of the Petitioners were ever advised of the negotiations (or  
8 participated in them) despite the fact that Evergreen was an intervenor and Providence had  
9 filed for intervention in the adjudicative proceeding.

10 10. On September 25, 2009, the Department and Odyssey agreed to settle the  
11 Federal Lawsuit if, *inter alia*, the Department agreed to grant Odyssey's 2006 CN  
12 application for King County based upon data obtained in 2008 (the "2009 Methodology").  
13 The Federal Lawsuit settlement stated, "[t]he parties will enter into the attached Settlement  
and Stipulation in the pending adjudicative proceeding before the Department of Health."

14 11. The Federal Lawsuit settlement also contained a specific "bad faith"  
15 provision to encourage the Department to submit the proposed settlement to the Health Law  
16 Judge for approval, which stated:

17 Odyssey is precluded from seeking damages, costs, or attorneys' fees related  
18 to any event allegedly occurring prior to the date of signing this settlement.  
19 *This preclusion will not apply if the Certificate of Need Program, pursuant to*  
20 *Paragraph 4 of the attached Stipulation and Settlement, makes a decision not*  
*to present the Stipulation and Settlement to the Health Law Judge for*  
*approval of the King County application, and in subsequent litigation,*  
*Odyssey proves that the decision was made in bad faith.*

21 12. The Department stated that it "conducted a survey of existing King County  
22 providers based on services offered in 2007 . . . [and] the data shows a current need for two  
23 additional hospice agencies in King County . . . [and] [b]ased on this data showing need, the  
24 undersigned parties propose settlement under RCW 70.38.115(10)(c) approving Odyssey's

1 [2006] application to establish a new hospice agency in King County . . . .” Odyssey also  
2 agreed to withdraw its 2006 CN applications for Snohomish and Pierce Counties.

3 13. The stipulation included an attachment showing the Department’s need  
4 calculation for Odyssey’s 2006 CN application was based upon the 2009 Methodology. The  
5 attachment did not include any re-evaluation of the other CN criteria found to be unmet in  
6 the original evaluation (financial feasibility, structure and process of care, and cost  
7 containment). The grant of a CN to Odyssey for King County was central to the settlement.

8 14. On September 29, 2009, the Department issued a Notice of Proposed  
9 Settlement, stating that a “special circumstance” existed for granting Odyssey’s 2006 CN  
10 application for King County and requested comments within 14 days.

11 15. The Department confirmed that “the proposed settlement of the adjudicative  
12 proceeding was part of the settlement between the parties resolving the federal lawsuit,” and  
13 included in the proposed settlement the following:

14 In 2008, the Program conducted its survey of existing King County providers  
15 for 2007 use data. Applying the hospice need methodology to this data  
16 showed a current need for two additional hospice agencies. Due to a *special  
17 circumstance*, the Program will consider this new data in deciding whether to  
18 approve Odyssey’s King County application. The special circumstance is  
19 that this new need data was not available to Odyssey by the deadline for  
20 applications in 2008.

21 16. The Department stated that it would make a decision within 7 days after  
22 receiving comments. The Notice of Proposed Settlement also stated: “Odyssey’s position  
23 regarding the law applicable to this settlement is not necessarily consistent with the  
24 Department’s position, but the parties had agreed that any disagreements over the  
interpretation of the applicable law do not affect this settlement.”

17 17. The Petitioners and Franciscan Health Systems submitted comments on the  
18 “special circumstance.” The comments included the fact that the Department had not

1 complied with the CN laws or with its own policies regarding competent information for the  
2 evaluation of CN applications.

3 18. The Petitioners contended that the Department properly evaluated Odyssey's  
4 2006 CN application in August 2007 using the same methodology upheld by the court in  
5 Odyssey I and that a deviation would require rulemaking. They further asserted that the  
6 Department could not use data obtained 15 months after its decision to grant Odyssey's  
7 2006 CN application.

8 19. The Petitioners also contended that the Department failed to include some  
9 approved hospice providers in the 2009 Methodology and artificially extended the forecast  
10 horizon applicable for the need methodology. Finally, they asserted that the Department  
11 failed to evaluate how Odyssey satisfied the other CN criteria that the Department had  
12 earlier found to be unmet (financial feasibility, structure and process of care, and cost  
13 containment).

14 20. In October 2009, Providence renewed its motion to intervene and Swedish  
15 Health Services d/b/a Swedish Visiting Nurse Services ("Swedish") and Franciscan also  
16 moved to intervene. Odyssey opposed intervention and, although the Department did not  
17 oppose, it argued that intervention must be limited to "commenting" on the proposed  
18 settlement, nothing more. The Health Law Judge granted the petitions to intervene, but only  
19 for the limited purpose of commenting on the proposed settlement under RCW  
20 70.38.115(10)(c). The Health Law Judge stated:

21 The only issue before the Presiding Officer is whether to accept the Proposed  
22 Settlement in the event it is offered by the program. There are no issues  
23 regarding discovery, cross-examination, or other participation in the  
24 adjudicative proceeding at this time. Limiting intervention to the submission  
of comments and argument on the Proposed Settlement is appropriate. The  
plain language of RCW 70.38.115(10)(c) requires nothing more.

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**Presentment of Settlement to Health Law Judge**

21. On October 30, 2009, the Department submitted its proposed settlement to the Health Law Judge for approval. On November 10, 2009, the Petitioners and Franciscan submitted responses to the Department's request to have the Health Law Judge approve the settlement proposal with Odyssey. The Petitioners provided their legal bases for rejecting the Department's settlement of the Federal Lawsuit, reiterating their contention that the settlement contravenes well-established CN laws and longstanding departmental policy.

22. On November 18, 2009, Odyssey and the Department submitted arguments in support of their settlement proposal. On November 30, 2009, the Petitioners and Franciscan filed a joint reply brief in opposition to the settlement proposal. On December 8, 2009, the Health Law Judge approved the Department's proposed order to grant Odyssey's 2006 CN application for King County, finding, *inter alia*,

For reasons stated by the Program in its evaluation and settlement proposal:

- (a) Odyssey's hospice application for King County meets the requirements of WAC 246-310-210, 246-310-220, 246-310-230, and 246-310-240; and
- (b) In the exercise of discretion, the Program's 2008 WAC 246-310-290 methodology – showing "need" for an additional hospice agency in King County in 2009 – may be used in deciding that need exists for Odyssey's proposed hospice in King County;

Final Order at 2:1-7.

23. On January 13, 2010, the Department issued a certificate of need (#1416) to Odyssey.

**Evergreen Files for Adjudicative Proceeding**

24. Evergreen timely filed in Thurston County Superior Court for an adjudicative proceeding to challenge the merits of the Department's December 8, 2009 decision. On January 29, 2010, Evergreen, the Department, and Odyssey stipulated to dismiss, agreeing

1 that this judicial review controlled whether Odyssey's 2006 CN application for King County  
2 should be granted and reserving the right to reinstate the adjudication if anyone argued  
3 failure to exhaust administrative remedies or if this Court determined that the Petitioners  
4 were first required to bring a separate action at the agency level. The parties agreed that  
5 having the Petitioners file separate applications for adjudication would be futile given the  
6 Department's December 8, 2009 final order.

7 Based on the foregoing Findings of Fact, the Court hereby makes the following  
8 Conclusions of Law:

9 Conclusions of Law

10 1. RCW 70.38.115(10)(c) authorizes the Department to settle with an applicant  
11 prior to the conclusion of the adjudicative proceeding. However, it is clear that the intent of  
12 the Legislature in enacting this provision was not to allow a "settlement" to circumvent  
13 established evaluation procedures or to modify a decision of the Department without an  
14 adjudicative hearing, especially if the primary settlement arose from an entirely separate  
15 lawsuit and proceeding.

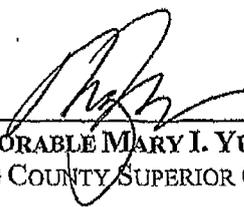
16 2. The Department's decision to settle the Federal Lawsuit by granting Odyssey  
17 a CN in King County under the guise of "special circumstance" and based upon its 2009  
18 methodology long after the record was closed on a 2006 application, was arbitrary and  
19 capricious.

20 3. The Health Law Judge's subsequent summary adoption of the settlement  
21 agreement without an adjudication or finding that Odyssey had actually met all four of the  
22 CN criteria was similarly arbitrary and capricious and thus, error as a matter of law.

23 4. The request on judicial review to reverse the Final Order Approving  
24 Settlement and Granting Odyssey's King County Hospice Application, dated December 8,  
2010 (the "Final Order") should be granted.

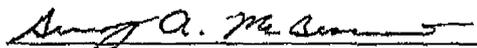


1 ENTERED this 29 day of October, 2010.

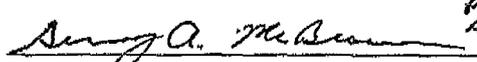
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5 HONORABLE MARY I. YU  
6 KING COUNTY SUPERIOR COURT JUDGE

7 **Presented and Approved By:**

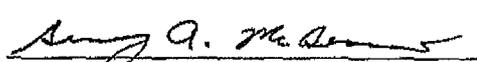
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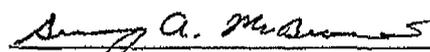
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**Approved as to form;  
Notice of presentation waived by:**

WASHINGTON STATE OFFICE OF  
THE ATTORNEY GENERAL

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and Odyssey Healthcare, Inc.

# APPENDIX C

Relevant Portions of the  
Decl. of James S. Fitzgerald, dated August 31, 2010  
(Exhibits K, L, M & N Only)

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Honorable Mary I. Yu

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR KING COUNTY

KING COUNTY PUBLIC HOSPITAL  
DISTRICT NO. 2 d/b/a EVERGREEN  
HEALTHCARE, a Washington public  
hospital district, *et al.*,  
  
Petitioners,  
  
v.  
  
WASHINGTON STATE DEPARTMENT  
OF HEALTH, a Washington governmental  
agency, *et al.*,  
  
Respondents.

NO. 10-2-02490-5 SEA  
  
DECLARATION OF  
JAMES S. FITZGERALD

JAMES S. FITZGERALD declares under penalty of perjury under the laws of the State of Washington as follows:

1. I am District General Counsel for King County Public Hospital District No. 2 d/b/a Evergreen Healthcare (“Evergreen”) and lead counsel for Evergreen in this case. I am competent to testify and make this declaration of my personal knowledge.
2. AR 11-38 — **Exhibit A** attached hereto is a true and accurate copy of the August 2007 decision of the Department of Health (the “Department”) denying Odyssey’s CN applications for King, Snohomish, and Pierce Counties. (AR 11-38)
3. AR 1059-80 — **Exhibit B** attached hereto is a true and accurate copy of the federal lawsuit filed by Odyssey in April 2009.
4. AR 1081-88 — **Exhibit C** attached hereto is a true and accurate copy of the

1 Department's answer to Odyssey's complaint in the federal lawsuit filed in June 2009.

2 5. AR 1091-92 — **Exhibit D** attached hereto is a true and accurate copy of the  
3 settlement agreement for the federal lawsuit executed on September 29, 2009.

4 6. AR 352-60 — **Exhibit E** attached hereto is a true and accurate copy of the  
5 Proposed Settlement and Stipulation that Odyssey and the Department executed on  
6 September 29, 2009. The 2009 Methodology is attached to this pleading.

7 7. AR 297-99 — **Exhibit F** attached hereto is a true and accurate copy of a  
8 representative letter from the Department to affected providers, dated September 29, 2009,  
9 providing notification of the decision to grant Odyssey's 2006 CN application for King  
County and requesting comment within 14 days.

10 8. AR 1721-23 — **Exhibit G** attached hereto is a true and accurate copy of the  
11 Final Order Approving Settlement and Granting Odyssey's King County Hospice  
12 Application issued by the Department's Health Law Judge on December 8, 2009.

13 9. AR 1328-42 — **Exhibit H** attached hereto is a true and accurate copy of the  
14 June 2008 decision of the Department relating to a certificate of need application submitted  
15 by Heart of Hospice, LLC, which contains the Department's 2008 Methodology, which also  
demonstrates a surplus of hospice agencies in King County.

16 10. AR 1104 — **Exhibit I** attached hereto is a true and accurate copy of a letter  
17 of the September 2009 letter of intent submitted by The Kline Galland Center, providing  
18 notification of its intent to establish a new hospice agency in King County.

19 11. AR 1191-92 — **Exhibit J** attached hereto is a true and accurate copy of the  
20 Department's' October 2009 letter to The Kline Galland Center, approving its request to  
establish an exempt hospice agency in King County.

21 12. **Exhibit K** attached hereto is a true and accurate copy of the Stipulation and  
22 Order of Dismissal Without Prejudice entered into by the Department, Evergreen, and  
23 Odyssey, and issued by the Department's Health Law Judge on January 29, 2010.

24 13. **Exhibit L** attached hereto is a true and accurate copy of an email exchange

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on September 29, 2009 between the Department's and Odyssey's counsel concerning the federal settlement, evidencing that the grant of a CN to Odyssey in King County was central to the settlement of the federal lawsuit.

14. **Exhibit M** attached hereto is a true and accurate copy of the Department's March 2010 memo, which constitutes an admission that the Petitioners have the right to seek judicial review of the Department's decision to approve Odyssey's 2006 CN application.

15. **Exhibit N** attached hereto is a true and accurate copy of a February 19, 2009 email from the Department's counsel to Odyssey's counsel, which constitutes an admission that the Department cannot use the 2009 Methodology and stating that Odyssey must re-apply for a certificate of need.

SIGNED at Kirkland, Washington this 31st day of August, 2010.

  
\_\_\_\_\_  
JAMES S. FITZGERALD

# **EXHIBIT A**



STATE OF WASHINGTON  
DEPARTMENT OF HEALTH

August 17, 2007

CERTIFIED MAIL: 7006 2150 0000 4067 0783

W. Bradley Bickham  
VP and General Counsel  
Odyssey Healthcare  
717. N. Harwood, Ste. 1500  
Dallas, Texas 75201

Dear Mr. Bickham:

We have completed review of the Certificate of Need application submitted on behalf of Odyssey Healthcare Inc., proposing to establish a new Medicare certified in-home hospice agency to serve King County. Enclosed is a written evaluation of the application. The department has concluded that Odyssey Healthcare Inc.'s application is not consistent with the Certificate of Need review criteria below, and a Certificate of Need is denied.

Need	Washington Administrative Code 246-310-210
Financial Feasibility	Washington Administrative Code 246-310-220
Structure and Process of Care	Washington Administrative Code 246-310-230
Cost Containment	Washington Administrative Code 246-310-240

You have two options should you wish to appeal our decision. You may request a public hearing within 28 days from the date of this letter for reconsidering our denial on grounds specified in Washington Administrative Code (WAC) 246-310-560. A request for a reconsideration hearing should be sent to the Certificate of Need Program, 310 Israel Road, Building 4, Post Office Box 47852, Olympia, Washington 98504-7852.

Additionally, you may request an adjudicative proceeding within 28 days from the date of this letter by filing notice of appeal according to the provisions of Revised Code of Washington 34.05 and WAC 246-310-610. A request for an adjudicative proceeding must be delivered to the Adjudicative Clerk Office, 310 Israel Road, Building 6, or sent to that office at Post Office Box 47879, Olympia, Washington 98504-7879. You are entitled to an adjudicative proceeding if you are not satisfied with the results of the reconsideration hearing.

Please note that the Certificate of Need Program will not accept faxed responses to this letter. Responses should be sent by regular mail or overnight delivery. If you have any questions, or



W. Bradley Bickham  
Odyssey Hospice – King County Project #07-09  
August 17, 2007  
Page 2 of 2

would like to arrange for a meeting to discuss our decision, please contact Janis Sigman with the Certificate of Need Program at (360) 236-2956.

Sincerely,



Steven M. Saxe, FAGHE  
Director, Facilities Services and Licensing

Enclosure

cc: DOH, Office of Health Care Survey

**CONCURRENT REVIEW EVALUATION OF THE CERTIFICATE OF NEED  
APPLICATION SUBMITTED BY ODYSSEY HEALTHCARE, INC., PROPOSING TO  
ESTABLISH A MEDICARE CERTIFIED / MEDICAID ELIGIBLE HOSPICE AGENCY  
TO SERVE THE RESIDENTS OF KING COUNTY**

**PROJECT DESCRIPTION**

Odyssey HealthCare is a for-profit corporation and operator of hospice agencies in approximately thirty states, based in Dallas, Texas. As of the writing of this evaluation, Odyssey HealthCare has over 81 hospice agencies across the nation. The hospice facilities are each owned by one of two owners of record, Odyssey HealthCare Operating A, LP, and Odyssey HealthCare Operating B, LP, depending on the tax laws in the state where each hospice agency is located. Further, both operating companies are 99% owned by Odyssey Health Care LP, LLC, and 1% owned by Odyssey GP, LLC. Each of those entities is wholly owned by Odyssey HealthCare, Inc. Odyssey HealthCare does not currently own or operate any health care facilities in Washington. [Application, p4; Appendix B]

Odyssey HealthCare proposes to establish a Medicare certified/Medicaid eligible hospice to be known as Odyssey HealthCare, Seattle.<sup>1</sup> The draft lease agreement provided in the application identifies the King County hospice agency's location to be NE 100<sup>th</sup> St. in the city of Seattle. The agency would provide Medicare certified hospice services for the residents of King County. [February 20, 2007 supplemental information, p1] For ease of reference, the department will refer to the proposed agency as "Odyssey-Seattle" and the applicant as "Odyssey"

Under the Medicare hospice benefit, the following services are provided: doctor services; nursing care; medical equipment; medical supplies; drugs for symptom control and pain relief; short-term care in the hospital, including respite care; home health aide and homemaker services; physical and occupational therapy; social worker services; dietary counseling; grief and loss counseling. Respite care and outpatient drugs are each subject to a small co-payment; other services are covered in full<sup>2</sup>.

The estimated capital expenditure to establish Odyssey's King County office is identified as \$45,000. Of that amount, 66.66% is related to moveable equipment (\$30,000); and the remaining 33.33% is related to furniture (\$15,000). [Application, p18]

Odyssey anticipates commencement of this project immediately upon Certificate of Need (CN) approval. The first full year of operation as a Medicare certified hospice agency is expected to be year 2009. [February 20, 2007 supplemental information, Appendix SC1-D]

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<sup>1</sup> A Medicare certified hospice agency is also Medicaid eligible. Therefore, the term "Medicaid eligible" will not be repeated throughout this evaluation. Those agencies that are state licensed, but not Medicare certified, will be referred to as "licensed only."

<sup>2</sup> Medicare Hospice Benefits, p. 7, Health Care Financing Administration Publication No. HCFA 02154, Revised March 2000.

**APPLICABILITY OF CERTIFICATE OF NEED LAW**

This project is subject to Certificate of Need review because it would establish a new health care facility under Revised Code of Washington (RCW) 70.38.105(4)(a) and Washington Administrative Code (WAC) 246-310-020(1)(a).

**APPLICATION CHRONOLOGY**

September 29, 2006	Letter of Intent Submitted
October 30, 2006	Application Submitted
October 31, 2006 through May 6, 2007	Department's Pre-Review Activities <ul style="list-style-type: none"><li>• 1<sup>st</sup> screening activities and responses</li><li>• 2<sup>nd</sup> screening activities and responses</li></ul>
May 7, 2007	Department Begins Review of the Application <ul style="list-style-type: none"><li>• public comments accepted throughout review</li></ul>
June 12, 2007	Public Hearing Conducted/End of Public Comment
June 28, 2007	Rebuttal Documents Submitted to the Department
August 13, 2007	Department's Anticipated Decision Date
August 17, 2007	Department's Actual Decision Date

**CONCURRENT REVIEW**

This application was submitted under the 2006 hospice agency concurrent review schedule for calendar year 2006 outlined in WAC 246-310-290(2). However, no other hospice care agency application was submitted for King County during the 2006 concurrent review cycle. According to WAC 246-310-295(5), when an application initially submitted under a concurrent review is deemed not to be competing with another application; the department may convert the application to regular review process. Therefore, this application was converted to regular review.

**AFFECTED PARTIES**

Throughout the review of this project, multiple entities sought and received affected person status under WAC 246-310-010. These entities are listed below; each provider of Medicare certified Hospice services in King County are identified with an asterisk (\*).

1. Evergreen Healthcare \*
2. Franciscan Health Systems Hospice and Palliative Care \*
3. Good Samaritan Home Health & Hospice\*
4. Group Health Home Health & Hospice \*
5. Highline Home Care \*
6. Home Care of Snohomish County
7. Providence Hospice of Seattle \*
8. Providence Sound Home Care & Hospice
9. Providence Hospice And Home Care Of Snohomish County
10. Providence Senior & Community Services
11. Swedish Medical Center/Hospice \*
12. Richard Block, King County resident & Assured Home Health

### SOURCE INFORMATION REVIEWED

- Odyssey HealthCare's Certificate of Need Application dated October 30, 2006
- Completed provider utilization surveys received from existing providers
- Screening responses and comments received from Odyssey HealthCare received February 20, 2007
- Appendix D to Screening responses received from Odyssey HealthCare received March 7, 2007
- Screening responses and comments received from Odyssey HealthCare received April 27, 2007
- Documents and comments received from community members and existing providers at the June 12, 2007 public hearing
- Odyssey HealthCare's June 28, 2007 rebuttal comments
- Population data obtained from the Office Financial Management based on year 2000 census published January 2002.
- Health Care Financing Administration Publication No. HCFA 02154
- WAC 246-310-290 Hospice services-standards and need forecasting method
- Draft Report: Hospice Methodology Advisory Committee, April 3, 2001
- Recommendations of the Hospice Methodology Advisory Committee, Rev. September 13, 2001
- Data obtained from Odyssey HealthCare's website
- Certificate of Need Historical files

### CRITERIA EVALUATION

To obtain Certificate of Need approval for King County, Odyssey HealthCare must demonstrate compliance with the criteria found in WAC 246-310-210 (need); 246-310-220 (financial feasibility); 246-310-230 (structure and process of care); 246-310-240 (cost containment); and 246-310-290 (Hospice services-standards and need forecasting method).<sup>3</sup>

### CONCLUSION

For the reasons stated in this evaluation, the application submitted by on behalf of Odyssey HealthCare proposing to establish a Medicare certified hospice agency to serve the residents of King County is not consistent with applicable criteria of the Certificate of Need Program, and a Certificate of Need is denied.

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<sup>3</sup> Each criterion contains certain sub-criteria. The following sub-criteria are not discussed in this evaluation because they are not relevant to this project: WAC 246-310-210(3), (4), (5), and (6); and WAC 246-310-240(2) and (3).

A. *Need (WAC 246-310-210 and WAC 246-310-290)*

Based on the source information reviewed, the department determines that the applicant has not met the need criteria in WAC 246-310-210 and 246-310-290:

- (1) The population served or to be served has need for the project and other services and facilities of the type proposed are not or will not be sufficiently available or accessible to meet that need.

The determination of numeric need for hospice services is performed using the hospice services need forecasting method contained in the WAC 246-310-290. The methodology is a six-step process of information gathering and mathematical computation. The first two steps examine historical hospice utilization. The remaining four steps apply that utilization to current and future populations and are intended to determine total baseline hospice services need and compare that need to the capacity of existing providers.

The completed methodology is presented as Appendix A to this analysis. The methodology uses population and healthcare utilization statistics on statewide and planning area levels. By rule, the planning area for hospice services is each individual county. Although the planning area for this application under review is King County, need projections for the entire state have been prepared.

This document will describe, in summary, the calculations made at each step and the assumptions and adjustments made in that process. The titles for each step are excerpted from the WAC.

*STEP 1: Calculate the following four statewide predicted hospice use rates using CMS and department of health data or other available sources.*

- (i) The predicted percentage of cancer patients sixty-five and over who will use hospice services. This percentage is calculated by dividing the average number of hospice admissions over the last three years for patients the age of sixty-five and over with cancer by the average number of past three years statewide total deaths sixty-five and over from cancer.*
- (ii) The predicted percentage of cancer patients under sixty-five who will use hospice services. This percentage is calculated by dividing the average number of hospice admissions over the last three years for patients under the age of sixty-five with cancer by the current statewide total of deaths under sixty-five with cancer.*
- (iii) The predicted percentage of non-cancer patients sixty-five and over who will use hospice services. This percentage is calculated by dividing the average number of hospice admissions over the last three years for patients age sixty-five and over with diagnoses other than cancer by the current statewide total of deaths over sixty-five with diagnoses other than cancer.*
- (iv) The predicted percentage of non-cancer patients under sixty-five who will use hospice services. This percentage is calculated by dividing the average number of hospice admissions over the last three years for patients under the age of sixty-*

*five with diagnoses other than cancer by the current statewide total of deaths under sixty-five with diagnoses other than cancer.*

For these sub-steps within Step 1, the Department obtained utilization data for 2003 through 2005 from the licensed only and Medicare certified hospice providers throughout the state. The department asked providers to report their admissions by age group (under 65 and 65 and over) and diagnosis (cancer/non-cancer) for each of the most recent three years. This information was provided by county of resident. The results of this survey were compared with data provided by the Department's Center for Health Statistics and Cancer Registry to determine the percentages of deaths due to cancer and non-cancer causes for the two age groups.

Although not all hospice providers in the state responded to the program's surveys, 7 of the 8 surveys mailed to King County providers identified by the Department were returned<sup>4</sup>. In contrast, all providers identified by the applicant as serving King County provided responses, [Application, p13]

*STEP 2: Calculate the average number of total resident deaths over the last three years for each planning area.*

This step was completed using death statistics from the Department's Center for Health Statistics. The total deaths in each of the planning areas for 2003-2005 were averaged for each planning area for each of the age/cancer diagnosis groups identified in Step 1, above.

Step 2 requires that the Department calculate the "average number of total resident deaths over the last three years for each planning area." The Step 2 calculation then is used in the Step 3 multiplication to calculate the number of likely hospice patients for each of the four age/diagnosis categories.

In interpreting Step 2, the Department interprets "total" to mean the total number of death for each of the four categories of patients identified in Step 1. The Department adopts this interpretation because the various steps in the methodology build on each other and should be read together.

*STEP 3: Multiply each hospice use rate determined in Step 1 by the planning area's average total resident deaths determined in Step 2.*

In this step, the use rates from Step 1 were multiplied by the applicable age group's death rate for each planning area to determine the number of likely hospice patients for each of the four age/diagnosis categories.

*STEP 4: Add the four subtotals derived in Step 3 to project the potential volume of hospice services in each planning area.*

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<sup>4</sup>The Department included Christian Health Services as a provider of services for King County

The numbers of likely hospice patients from each of the four categories derived in Step 3 are added together for each planning area. This number is described as the "potential volume" of hospice services in the area. This represents the number of patients expected to elect hospice services in the area.

*STEP 5: Inflate the potential volume of hospice service by the one-year estimated population growth (using OFM data).*

The values derived in Step 4, above, were inflated by the expected populations for each planning area. The age-specific population projections for each county were obtained from the state's Office of Financial Management. The most recent age-specific data set is the "2002 Projections developed for Growth Management Act (Developed January 2002)". This age-specific data is available for 5-year intervals only. The department has used these 5-year interval values to estimate population projections for the interstitial years.

The department applied the one-year estimated population growth to the potential volume of hospice services derived in Step 4 to estimate potential hospice volume in 2006, the first year following the three-year data range. In order to estimate need for hospice services in the first three years of the proposed projects, the department applied the use rates derived to the expected populations of each of the state's counties for the first three full years of the proposed project (2007, 2008, and 2009).

*STEP 6: Subtract the current hospice capacity in each planning area from the above projected volume of hospice services to determine unmet need. Determine the number of hospice agencies in the proposed planning area which could support the unmet need with an ADC of thirty-five.*

Current hospice capacity is defined in the rule as the average number of admissions for the most recent three years of operation for those agencies that have operated or have been approved to operate in the planning area for three years or more. For the remaining agencies that have not operated in the service area for at least three years, an average daily census (ADC) of 35 is assumed for that agency.

Each of the hospice providers in King County have been in operation at least three years. The department calculated the ADC for each hospice by multiplying the state's most recent average length of stay (ALOS), calculated from responses to the department's survey, by each hospice's average admissions for the past three years and divide that total by three hundred sixty-five (days per year).

Twenty-six counties showed some need for additional hospice services, but all at a level less than an ADC of 35, which is indicative of insufficient need to support an additional hospice agency. The remaining thirteen counties showed a no need or a surplus of hospice services. Those counties were Benton, Clark, Cowlitz, Ferry, Franklin, Jefferson, Klickitat, King, Lewis, Pierce, Skagit, Snohomish and Wahkaikum. The chart below summarizes the department's numeric need methodology for King County. [Appendix A]

	2011 Potential volume	Current Capacity	2011 Unmet Need admits	Statewide ALOS	2011 Unmet Need Patient Days	2011 Unmet Need ADC	Agency Need
King County	4,091	4,199	(108)	51.658324	(5,556)	(15)	None

**Odyssey's Application of the Numeric Methodology**

The Department mailed copies of the 2006 Hospice Survey results to the applicant on November 16, 2006, prior to receipt of the applicant's responses to initial screening questions on February 20, 2007. This information provided the necessary data for the modification of any preliminary methodologies constructed by the applicant. [Application, p12] Odyssey contends that the department's survey is an unreliable source and understates the need of planning data. The survey is the data collection tool used by the department to apply the numeric methodology. As an alternative, Odyssey prepared two versions of the department's numeric need methodology during the application process. Below is a summary of the two versions and the department's response to each. [February 20, 2007 Supplemental Information, Attachment SCI-B & E]

**Applicant's 1<sup>st</sup> Methodology, Appendix B - (CMS)**

Odyssey's initial version of the methodology uses a Medicare data source, the Standard Analytical File (SAF). Odyssey obtained a "limited data set" of SAF 2002-2004 data from the University of California-Irvine. Odyssey followed the calculation steps prepared by the department, but substituted information from this source for the survey data.

This version begins with a data set that does not contain all the data elements required to prepare the methodology. Odyssey notes, first, that SAF data for 2005 was not available; therefore Odyssey obtained SAF data for years 2002-2004. Odyssey also noted that the SAF data it obtained did not contain any data for non-Medicare patients. While it is not directly stated from Odyssey's narrative, it appears that Odyssey has assumed that the SAF data accounts for all patients over age 65. Odyssey states that it estimated hospice admissions for patients under age 65 by relying on the department's hospice survey for a percentage of total admits then applied that percentage to the SAF data. Finally, Odyssey notes that the process of removing identifying data from the SAF also removes all length-of-stay information from the file. In response to this, Odyssey adopted the ALOS calculated from Medicare Cost Reports.

Once these modifications are inserted, the applicant calculates the projected patient count in Step #4 to total 2,982. This differs from a Department total projection of 3,873. The primary source of the discrepancy resides in the applicant calculating a lower need in the 65+ age categories than that of the Department.

This version relied upon the limited data set and established current capacity by estimating the less than 65 age group in relation to reported 65+ capacity. This produced an estimated capacity of 3,157.3. This value is 1042 patients fewer than the department's calculation, representing a 25% difference.

When the applicant calculates the Average Length of Stay derived from the Medicare Cost Reports, rather than the survey data used by the Department described above in Step 6, they cite an ALOS of 59.95. In contrast, Department survey results indicate a statewide ALOS of 51.66. When the applicant's ALOS is applied to determine unmet need in the service area, Odyssey derives a calculation for unmet need in this methodology of an ADC of 37 patients. According to the summary table included, this equates to a need for 1.05 additional hospices agencies under this version of the methodology. Contradicting this, the applicant then states a different need value of 1.75 hospices in the text of the discussion regarding the need conclusions. [February 20, 2007 Supplemental Information, SC1-B, p7]

Applicant's 2<sup>nd</sup> Methodology, Appendix E - (WAC)

Odyssey's second version of the methodology is described as "*the literal language of the hospice need methodology.*" Odyssey notes that this method submission is based upon the applicant's summary of the responses to the Department's survey and adopts the literal language of the CoN need methodology.

The result of Odyssey's calculations indicates an estimated unmet need ADC of 1,109 patients in 2006, increasing to an unmet need of 1180.5 patients in 2011. The department's calculations show a substantially smaller unmet need in King County. In summary, this second version calculates a need for 33 new hospice agencies for King County and thus justifies approval of Odyssey's application. [February 20, 2007 Supplemental Information, p1] Department calculations indicate a surplus in 2006 through 2011. Therefore, a closer look at Odyssey's methodologies is necessary.

In the calculation details, the applicant uses two separate sets of population data; 2002 through 2004 as well as 2003 through 2005. In the calculation steps outlined above, steps #1 and #2 follow the Department's process.

No explanation can be found regarding Step #3 when calculations rely solely on 2002-2004 population data in the projection of potential volume in each of the state's planning areas, including King County. It is also unclear how the numbers have been calculated to produce such dramatically larger projections. The applicant and the department record similar averages per age group in step #2 when comparing the 2003-2005 population period, but the applicant projects dramatically more need in the following years. These differences are depicted below.

Step #3 - Projected Deaths in reported Population periods			
Ages 0-64	Applicant		Department
	2002-2004	2003-2005	2003-2005
0-64 Average Deaths	2,892	2,886	2,886
0-64 Cancer Projected	6,466	x	500
0-64 Non-Cancer Projected	852	x	171
Ages 65 and above			
65+ Average Deaths	8,560	8,515	8,515
65+ Cancer Projected	7,881	x	1311
65+ Non-Cancer Projected	3,091	x	1891

x - Applicant did not provide age group projection for 2003-2005 population figures

Based upon the applicant's 2002-2004 population calculations, average deaths in the 0-64 age group increase from 2,892 to 7,318 and the 65+ age group increases from 8,560 to 10,972. The applicant's method also forecasts that the number of deaths by cancer alone to total 14,347, (combining 6,466 for 0-65 and 7,881 for 65+), exceeding the department's calculated total deaths in the county by 2,896.

As this methodology continues steps 4 through 6, a split is made to report the results according to both population projection periods of 2002 - 2004 and 2003-2005 as well as by age groups. This split is in contrast to the methodology as outlined above and in WAC 246-310-290. Because the appropriate time period for this application is 2003-2005, the remainder of the review will focus on those calculations based upon 2003-2005 population rates.

Odyssey's Step #5 calculations show a potential volume of 14,489 in 2011 when combining projections for both age groups. In Step #6, the 2011 projected volume is cited at only 12,804. There is no explanation to assist in determining the cause for the decrease in volume in each of the projection years of 2006 through 2011 from Step #5 to step #6.

Further, accepting the slightly lower capacity figure (4,365) and Average Length of Stay (51.06) cited by the applicant, this methodology also shows unmet need. The unmet need ADC calculations using these factors equal 1,180.5. This then calculates to a need of 33.73 additional hospice agencies. This again stands in stark contrast to the Department's application of the need methodology which shows a surplus of service for King County residents.

In both Versions #1 and #2 above, Odyssey contends that the department's survey is an unreliable source of planning data. Odyssey notes several criticisms of the agency's survey, citing inappropriate use of population data for specific age cohorts, the failure of some hospice agencies to fully complete the survey, and a lack of clarity in the questions. [February 20, 2007 Supplemental Information, p2; June 28, 2007 rebuttal comments, p3]

The Department contends that the current practice of relying on survey data more closely adheres to the recommendations reached by the Hospice Methodology Advisory Committee in the development of the current hospice methodology. The committee recommended a data source which was collected through a "state-specific utilization data from all state hospice agencies". Through the use of survey data, the department has been able to establish a database of information to rely upon. Though there was consideration made by the committee for short-term implementation issues, survey data exists for the years necessary to review this application. [Recommendations of the Hospice Methodology Advisory Committee, Rev. September 13, 2001, p3]

Additional review of the advisory committee discussions regarding the projection of total need for hospice service provides additional guidance. When considering available options, the committee opted for versions which "avoided complex refinements that would make the method more difficult to understand or to carry out without necessarily increasing accuracy". [Draft Report: Hospice Methodology Advisory Committee, April 3, 2001, p7] As noted by the applicant, the Standard Analytical File requires removal of any data affected by HIPPA regulations and must be converted into a Limited Data Set (LDS). This data set is also insufficient in that it omits admissions for 2 of the 4 required patient groups and all length of stay data is removed. The LDS requires additional manipulation based upon data collected through the Department's original survey data the applicant has cited as unreliable.

The department concludes that it cannot support Odyssey's assertion that the responses received by the department through a survey are inherently inaccurate or unreliable. The department has no evidence that the responses returned by the providers are either intentionally or unintentionally inaccurate. Finally, the department concludes that Odyssey's version of the methodology in WAC 246-310-290 that is based on Medicare data [Odyssey Versions #1, Appendix B] can only be applied if several data elements are estimated. Odyssey has based those estimates on the department's survey responses. These efforts appear to be contrary to guidance provided by the Hospice Methodology Advisory Committee. Further, the use rates and lengths of stay to be considered in the methodology are identified in rule and not subject to substitution with alternate standards.

On the basis of the department's need methodology, and given the significant number of assumptions required by Odyssey to apply its alternative calculations, the department concludes that its own application of the numeric methodology is reasonable and consistent with WAC 246-310-290. The results of the department's methodology conclude that there is not sufficient need demonstrated in King County to approve an additional hospice agency.

(1)(b) In the case of health services or facilities proposed to be provided, the efficiency and appropriateness of the use of existing services and facilities similar to those proposed;

In addition to comments from the affected persons cited in the introduction, the department received numerous letters of opposition to the Odyssey project from community members, business owners, local physicians and healthcare providers in King County. Many of the letters of opposition from community members were form letters. The common concern in the form letters is that approval of another hospice agency in the county would jeopardize the financial viability, depth, and quality of service currently provided by the existing two

hospice providers. Additionally, the letters of opposition indicate that the local healthcare providers refer to each of the existing hospice agencies in the county and patients referred for hospice services are not experiencing delays in service or difficulty obtaining the appropriate hospice care necessary. [June 12, 2007, public hearing documents]

The applicant contends that the use rates of hospice patients in Washington State, and specifically in King, Pierce and Snohomish counties are lower than they should be. In addition, the applicant cites statements from the "State Initiatives for End of Life Care" report which compares National average length of stay of 59 days in 1998 to the reported Washington average for 2001-2003 of 44.5 days as an indicator that the patients are not accessing the services early enough to achieve the optimum benefits. [Application, p10] Based on the standards contained in WAC 246-310-290, the department concludes that hospice providers in King County are providing services at or very near the level of the state as a whole. If, as stated in the rule, statewide levels of services are to be considered the benchmarks; the department concludes that no additional need has been demonstrated on this basis.

An additional factor examined to determine the accessibility or availability of existing providers is the time between referral of a patient to a particular hospice and admission of the patient. Odyssey contends that existing hospices are not admitting patients quickly enough. Odyssey offers as a standard its corporate policy of admitting all patients within three hours of referral.

In examination of the applications and comment provided by members of the community, healthcare providers, and the applicants, the department discovered no compelling evidence to demonstrate that the current time between referral and admission in this area is either too long or indicative of a lack of ability of existing hospice providers to admit new patients in a timely manner. The department cannot, therefore, accept this factor as demonstrative of need in King, Pierce and Snohomish counties.

Based upon the above information, the department concludes that there is no unmet need for hospice service in the King County area. This sub-criterion is not met.

- (2) All residents of the service area, including low-income persons, racial and ethnic minorities, women, handicapped persons, and other underserved groups and the elderly are likely to have adequate access to the proposed health service or services.

To determine whether all residents of the service area would have access to an applicant's proposed services, the department requires applicants to provide a copy of its current or proposed admission policy. The admission policy provides the overall guiding principles of the facility as to the types of patients that are appropriate candidates to use the facility and any assurances regarding access to treatment.

To determine whether low-income residents would have access to the proposed services, the department uses the facility's Medicaid eligibility or contracting with Medicaid as the measure to make that determination. To determine whether the elderly would have access or

continue to have access to the proposed services, the department uses Medicare certification as the measure to make that determination.

A facility's charity care policy should confirm that all residents of the service area including low-income, racial, and ethnic minorities, handicapped, and other underserved groups have, or would have, access to healthcare services of the applicant. The policy should also include the process one must use to access charity care at the facility.

To demonstrate compliance with this sub-criterion, Odyssey provided copies of its current Access to Care admission criteria, non-discrimination compliancy, and Funding Non-discrimination policies that are currently utilized in the Odyssey facilities. The Access to Care policy indicates that "[Odyssey] offers palliative care to terminally ill patients and support to those patients and their families without regard for diagnosis, gender, sexual orientation, national origin, race, color, creed, disability, age, place of residence or ability to pay for services." Odyssey also included information regarding efforts in cultural competence to various Spanish-language, Asian, and Eastern European communities in an effort to provide hospice services to as many patients as possible. [Application, p17]

Also, the policy on Funding Non-discrimination states "...[Odyssey] will not discontinue or diminish health care provided to a Medicare beneficiary in the event the beneficiary becomes ineligible or the funding source changes". [Application, Appendix J]

The department concludes that, if approved, Odyssey would obtain Medicare certification and become Medicaid eligible. Odyssey's projected sources of revenue confirm this conclusion. [Application, p21] WAC 246-310-210(2) requires the department to evaluate the extent to which medically underserved groups such as Medicare, Medicaid and medically indigent will have access to services. The funding policy as previously stated only speaks to not reducing or discontinuing services to Medicare beneficiaries whose funding status changes. The policy does not make the same statements for patients with other payor sources. A review of the projected financial statements shows charity care as a line item under sources of revenue and as a deduction from revenue. The amount identified is 2.5% of Medicare revenue. It is not clear if this 2.5% is in fact Medicare contractual allowances, charity care for only Medicare patients or the amount of charity care for all payor types. If this project is approved the applicant would need to agree to a term and condition that would require the policy on funding non-discrimination be modified to be inclusive of all patients regardless of payor source and report to the department on an annual basis the amount of charity care provided to residents of King County. The charity care report would be due 120 days from the close of the agency's fiscal year.

Based upon the above information, the department concludes that all residents of the service area would have adequate access to the health services at Odyssey-Seattle provided the applicant would agree to the above term and condition. This sub-criterion is met.

**B. Financial Feasibility (WAC 246-310-220)**

Based on the source information reviewed, the department determines that the applicant has not met the financial feasibility criteria in WAC 246-310-220.

(1) The immediate and long-range capital and operating costs of the project can be met.

Odyssey anticipates becoming operational by July 1, 2008. [Application, p8] Based on this timeline, year 2009 would be the Medicare certified hospice agency's first full calendar year of operation. Using the financial information provided in the application, Table 1 below illustrates the projected revenue, expenses, and net income for partial year 2008, and full years 2009-2011 for Odyssey's Medicare certified hospice agency. [February 20, 2007 Supplemental Information, Attachment SCI-D]

**Table 1  
Odyssey Health Care Projected Revenue and Expenses for Years 2008 - 2011**

	2008 Partial Year	2009 Full Year 1	2010 Full Year 2	2011 Full Year 3
Projected Patient Days	640	4480	8720	12960
Projected Unduplicated Census	8	56	109	162
Projected Average Daily Census	3.4	12.2	23.8	35.5
Net Patient Revenue*	\$159,985	\$663,579	\$1,299,290	\$1,935,003
Total Operating Expenses	\$444,164	\$907,604	\$1,294,113	\$1,520,777
Net Profit or (Loss) - EBITDA	(\$284,179)	(\$244,025)	\$5,177	\$414,226
Net Patient Revenue per Patient Day	\$249.98	\$148.12	\$149.00	\$149.31
Total Expenses per Patient Day	\$694.01	\$202.59	\$148.41	\$117.34
Net Profit/(Loss) per Patient Day	(\$444.03)	(\$54.47)	\$0.59	\$31.96

\* Includes deductions for bad debt and charity care

As shown in Table 1 above, at the projected volumes identified in the application, Odyssey expects it would be operating at a loss in partial year 1 (2008) through 2009. By the end of year 2010, the second full year, Odyssey would be operating at a profit. This forecast also relies on an average length of stay of 80 days, more than 20 days longer than used in the applicant's need forecasts. This rate is 28 days higher than the state average and 25 days greater than the average length of stay of 55 days for the hospice providers currently serving King County. Projecting an ADC for the third year using the county ALOS would be 24.4 and this would lower 2011 projections accordingly. [February 20, 2007 Supplemental Information, Attachment SCI-C, p3]

In addition to this application, Odyssey has two other applications undergoing review for establishing hospices in Pierce and Snohomish counties. The department notes that for each application (King, Pierce and Snohomish) the projected number of patient days, average daily census and unduplicated census are exactly the same. In the department's experience it is highly unusual that three separate hospice agencies in different counties would have the exact same projections in these categories. The department is concerned that the projections as presented may not be reflective of what the applicant actually expects to provide but instead is what is needed to project having an average daily census by the 3<sup>rd</sup> year of operation as required by rule.

However in the need section of this evaluation the department concluded that need for an additional Medicare certified hospice agency has not been demonstrated. As a result, the department concludes that Odyssey's projected number of patient days is not reliable and the department cannot conclude that sufficient revenue would be generated to meet the expenses of the proposed project.

Based on the above information, the department concludes that the project's revenues may be overstated and this sub-criterion is not met.

- (2) The costs of the project, including any construction costs, will probably not result in an unreasonable impact on the costs and charges for health services.

The applicant addressed these factors in the following way:

Capital cost Impact

Minimal capital expense will be required for Odyssey to serve patients of King County. At a system level, hospice care reduces the need for expenditure for more capital-intensive care.

Operating costs

The national Medicare Hospice benefit reduces operating costs for health care at the system level. Medicare hospice patients elect to receive palliative and end-of-life care in the home or other environment vs. seeking curative treatment in more expensive settings such as ICU's at the end of life. This patient decision, supported by passionate end of life care, results in reduced total healthcare expenses. Medicare estimates this savings as about \$1.50 for each \$1.00 spent on hospice care.

Charges

Medicare reimburses hospice agencies on a fixed per diem basis." [Application, p19]

Odyssey-Seattle is leasing space for the proposed hospice agency and a copy of the draft lease agreement was submitted, [February 21, 2007, Supplemental Information, Appendix SC-1A] The department compared the costs identified in the lease document to the amounts contained in Odyssey's projected financial statements and found them to be consistent.

The department concludes that, while the initial capital expenditure of \$45,000 proposed to establish this agency may be small, the applicant has not been able to show need for additional hospice services in King County except through significant modification of the department's need projection methodology. Absent sufficient unmet need to support a new hospice agency, the department concludes that any capital or operating expenditures incurred pursuing this project would be an unnecessary duplication of those made by existing providers and may result in an increase in the costs and charges for health services in the county. This sub-criterion is not met.

(3) The project can be appropriately financed.

The estimated capital expenditure to establish Odyssey's King County office is identified as \$45,000. Of that amount, 66.66% is related to moveable equipment (\$30,000); and the remaining 33.33% is related to furniture (\$15,000). [Application, p18]

The source of financing for the project will be from Odyssey HealthCare's cash on hand. [Application, p20] A review of Odyssey HealthCare's historical financial statements shows the funds necessary to finance the project are available. Odyssey HealthCare provided a letter confirming that the Odyssey's Chief Financial Officer has authorized allocation of funds to this project. [Application, Appendix O; February 20, 2007 Supplemental Information, Attached Letter]

Based on the above documentation, the department concludes the capital costs to establish Odyssey-Seattle would not adversely affect the financial stability of Odyssey HealthCare and the project can be appropriately financed. This sub-criterion is met.

C. *Structure and Process (Quality) of Care (WAC 246-310-230)*

Based on the source information reviewed, the department determines that the applicant has not met the structure and process (quality) of care criteria in WAC 246-310-230.

(1) A sufficient supply of qualified staff for the project, including both health personnel and management personnel, are available or can be recruited.

Given that Odyssey does not currently provide Medicare certified hospice services in King County, all staff for the hospice agency would have to be recruited. Table 2 below shows the projected number of staff for partial year 2008 and the first three full years of operation. [February 20, 2007 Supplemental Information, Attachment SC1-D]

**Table 2**  
**Odyssey Health Care Staffing Input – by FTE**

Type of Personnel	Partial Year 2008	Year 1 2009	Year 2 2010	Year 3 2011
Nursing/Patient Care	0.6	2.23	4.69	7.51
Administrative	3.5	7.25	7.50	9.50
Other*	0.4	0.67	1.33	1.92
Therapists	0.0	0.00	0.00	0.00
Medical Director	0.0	0.00	0.00	0.00
<b>Total FTEs</b>	<b>4.49</b>	<b>10.15</b>	<b>13.52</b>	<b>18.93</b>

\*Includes medical social worker; massage therapists, volunteers, and pastoral

As shown in Table 2 above, in year 2008, Odyssey plans to recruit 4.49 FTEs to begin providing Medicare certified services in King County, then majority of staff would be recruited in full throughout the next three years until fully staffed in 2011.

To supplement efforts to meet these projections, the applicant states:

“Odyssey HealthCare invests substantial resources in employee recruitment and retention efforts. These investments have resulted in a very stable nursing staff and permit us to provide a full range of care without needing to use contract agency nurses.

“A number of experienced Odyssey RN’s in other communities have already expressed interest in relocating to the Northwest if we develop services there.”

Odyssey status as a hospice-only program should enable it to recruit “committed hospice nurses.” Odyssey also cites its “program of generous benefits, including a bonus program, a stock option program, tuition reimbursement and a company-wide career ladder with opportunities for advancement are very attractive to this cohort of nursing professionals.” [Application, p23]

Odyssey concludes that these factors, in addition to access to a national pool of professionals, would help to promote health care related professional studies through demand and education. Intentions are to pursue affiliations with area learning institutions to increase the source of training for those in related career paths.

Based on the available information, the department concludes that adequate staffing for the Medicare certified hospice agency will be available, this sub-criterion is met.

- (2) The proposed service(s) will have an appropriate relationship, including organizational relationship, to ancillary and support services, and ancillary and support services will be sufficient to support any health services included in the proposed project.

In its responses to the department’s screening questions, Odyssey provided copies of standard vendor agreements [Application, Appendix N]. The appendix contained samples of Odyssey’s standard ambulance/transportation services, occupational, speech and physical therapy services, supplemental staffing, respite services, inpatient services, laboratory services, pharmacy services, durable medical equipment and supplies agreements. Odyssey did not, however, identify any prospective vendors of such services or document that any of those services would be readily available on the terms identified in those draft agreements.

The types of vendor agreements provided are consistent with what department would expect for this type of project. If this project is approved, to ensure that appropriate ancillary and support agreements will be established the applicant must agree to a term requiring it to provide copies of these agreements for review and approval, identifying vendors and charges for services consistent with the draft provided.

Based on the evaluation and the supporting documents provided, the department concludes that with agreement to the term above, Odyssey has demonstrated reasonable assurance that it will have appropriate ancillary and support services with healthcare providers in King County. This sub-criterion is met.

- (3) There is reasonable assurance that the project will be in conformance with applicable state licensing requirements and, if the applicant is or plans to be certified under the Medicaid or Medicare program, with the applicable conditions of participation related to those programs.

As stated in the project description portion of this evaluation, Odyssey HealthCare is based in Dallas, Texas and operates over 81 hospice agencies across the nation. To evaluate this sub-criterion, the department requested quality of care histories from the 30 states where Odyssey HealthCare, or any of its subsidiaries, owns or operates healthcare facilities. Of the 30 states, 23 states provided information related to the quality care history and 8 states did not respond.<sup>5</sup> Of the 23 states that responded, two identified either minor or unsubstantiated claims or minor deficiencies that resulted in fines<sup>6</sup>. Three states indicated significant non-compliance issues at one or more of the healthcare facilities operated by Odyssey HealthCare within in last 3 years.<sup>7</sup> Georgia reported immediate jeopardy in two separate investigations in 2005 and 2006. The remaining non-compliance citations related to isolated incidences and did not represent immediate jeopardy to patients. According to documents provided by the out-of-state licensing agencies, Odyssey HealthCare resolved the investigated issues and minor disciplinary actions taken by the out-of-state surveying agencies. [Compliance survey data provided by each state agency]

Odyssey has not identified a medical director of its proposed King County hospice agency. A copy of a draft medical director agreement was provided for reference with this criterion. [April 26, 2007 Screening Responses, p 1]

WAC 246-335-100 outlines the key staff positions that each Medicare certified hospice agency must maintain. One of the key positions is a director of clinical services to be available 24/7, and the hospice agency must identify a similarly qualified alternate to act in the director's absence. Neither of these positions was identified in the application, therefore, the compliance history of the individuals proposed to fill these two positions could not be evaluated. If this project is approved, the department would attach a term to the approval requiring Odyssey HealthCare to identify for review and approval these two key positions for review and approval prior to commencing the project.

Based on this information, the department concludes that there is reasonable assurance that King County location would be operated in conformance with state and federal regulations with agreement to the term above. This sub-criterion is met.

- (4) The proposed project will promote continuity in the provision of health care, not result in an unwarranted fragmentation of services, and have an appropriate relationship to the service area's existing health care system.

Odyssey addressed this sub-criterion with the following statement:

<sup>5</sup> States that did not respond: Arkansas, Colorado, Florida, Georgia, New Mexico, Ohio, South Carolina and Texas.

<sup>6</sup> California had unsubstantiated claims in one of three facilities and Wisconsin listed \$493 in fines

<sup>7</sup> States indicating significant non-compliance issues: Georgia, Oregon and Virginia

"The design of the Medicare hospice benefit assures continuity and avoids fragmentation. Because services are planned and monitored and are reimbursed on a per diem basis and paid for by that same entity, there is inherent coordination of all providers around the care of the patient and his or her family.

During the start-up phase of Odyssey's program in King County, we will begin contracting with hospitals, nursing homes, and other facilities and contract professionals for provision of services to our patients that we do not provide directly." [Application, p25]

Odyssey asserts that there is need for additional Medicare certified hospice agencies in King County. However, in the need section of this evaluation, the department concluded that the existing providers are both available and accessible to adequately provide current and future hospice need in the county through 2011. Additionally, a number of the existing providers indicated that they have capacity to serve the patients within the service area without adding staff.

Therefore, the department concludes that approval of this project has the potential of fragmentation of Medicare certified hospice services within the service area, and this sub-criterion is not met.

- (5) There is reasonable assurance that the services to be provided through the proposed project will be provided in a manner that ensures safe and adequate care to the public to be served and in accord with applicable federal and state laws, rules, and regulations.

This sub-criterion is addressed in sub-section (3) above.

**D. Cost Containment (WAC 246-310-240)**

Based on the source information reviewed, the department determines that the applicant has not met the cost containment criteria in WAC 246-310-240.

- (1) Superior alternatives, in terms of cost, efficiency, or effectiveness, are not available or practicable.

Acquisition of an existing hospice agency

The applicant evaluated this option based upon 4 criteria; Timeliness, Financial feasibility, Capital Costs and Staffing impact. Odyssey determined that, due to the lack of hospice's available for acquisition, this is not a viable alternative to the start-up of a new facility.

The department concurs with the applicant's assertion that there has been no information available that would indicate any of the current hospices are available for acquisition. Further, approval of this project would allow an additional Medicare certified hospice agency in King County. However, as previously concluded in this evaluation, no need has been demonstrated for additional services.

On the basis of the information provided within this application, the department concludes that adding another hospice agency is not the best available alternative for King County. This sub-criterion is not met.

# APPENDIX A

Step 1. Calculate the following four statewide predicted hospice use rates using CMS and department of health data or other available data sources.						
(i) The predicted percentage of cancer patients sixty-five and over who will use hospice services. This percentage is calculated by dividing the average number of hospice admissions over the last three years for patients the age of sixty-five and over with cancer by the average number of past three years statewide total deaths sixty-five and over from cancer.						
(ii) The predicted percentage of cancer patients under sixty-five who will use hospice services. This percentage is calculated by dividing the average number of hospice admissions over the last three years for patients under the age of sixty-five with cancer by the current statewide total of deaths under sixty-five with cancer.						
(iii) The predicted percentage of noncancer patients sixty-five and over who will use hospice services. This percentage is calculated by dividing the average number of hospice admissions over the last three years for patients age sixty-five and over with diagnoses other than cancer by the current statewide total of deaths over sixty-five with diagnoses other than cancer.						
(iv) The predicted percentage of noncancer patients under sixty-five who will use hospice services. This percentage is calculated by dividing the average number of hospice admissions over the last three years for patients under the age of sixty-five with diagnoses other than cancer by the current statewide total of deaths under sixty-five with diagnoses other than cancer.						
<b>I. Hospice Admissions 65+ w/cancer</b>						
	2003	5206	Average		2003	7820
	2004	5023	5210		2004	7723
	2005	5321			2005	7744
						7782.333
<b># of deaths 65+ w/cancer</b>						
<b>Hospice Use Rates by age and diagnosis</b>						
65+ w/Cancer 87.12%						
<65 w/Cancer 62.27%						
65+ w/o Cancer 28.83%						
<65 w/o Cancer 8.19%						
<b>II. Hospice Admissions &lt;65 w/cancer</b>						
	2003	2324	Average		2003	3223
	2004	1768	2022		2004	3255
	2005	1974			2005	3264
						3247.333
<b># of deaths &lt;65 w/cancer</b>						
<b>Rates of Cancer as cause of death</b>						
65+ 22.84%						
<65 27.84%						
<b>III. Hospice Admissions 65+ w/o cancer</b>						
	2003	6459	Average		2003	26451
	2004	7271	7910.333		2004	26384
	2005	8615			2005	26412
						26082.33
<b># of deaths 65+ w/o cancer</b>						
<b>Hospice use rate by age only</b>						
<65 23.25%						
65+ 37.61%						
<b>IV. Hospice Admissions &lt;65 w/o cancer</b>						
	2003	709	Average		2003	8313
	2004	650	889.3333		2004	8341
	2005	699			2005	8565
						8416.333

Department of Health  
Hospice Number Need Methodology

Step 2

Step 2. Calculate the average number of total resident deaths over the last three years for each planning area.

0-34	2003	2004	2005	Average	65+	2003	2004	2005	Average
County					County				
Adams	33	27	36	32	Adams	80	81	79	79
Asotin	40	67	45	47	Asotin	168	155	167	166
Benton	235	244	240	256	Benton	757	751	799	769
Chelan	140	107	132	123	Chelan	455	433	476	454
Columbia	157	172	155	161	Columbia	654	652	671	659
Clark	856	728	733	703	Clark	1,834	1,897	1,981	1,904
Cowlitz	12	14	6	10	Cowlitz	39	35	33	36
Douglas	221	269	279	252	Douglas	718	694	706	725
Ferry	57	67	63	60	Ferry	214	213	195	207
Franklin	25	23	26	26	Franklin	40	48	56	51
Garfield	84	95	81	87	Garfield	176	193	195	188
Gent	3	9	7	5	Grant	18	26	18	20
Grant	188	198	160	185	Grant	410	430	413	408
Greys Harbor	184	216	196	198	Greys Har	572	562	566	567
Island	133	134	116	123	Island	467	458	475	473
Jefferson	67	69	63	73	Jefferson	247	223	212	227
King	2,937	2,942	2,879	2,896	King	8,655	8,348	8,540	8,516
Kitsap	438	462	462	464	Kitsap	1,343	1,309	1,337	1,330
Kittitas	48	49	62	53	Kittitas	200	196	174	190
Klickitat	45	63	48	49	Klickitat	122	109	127	119
Lewis	194	172	197	178	Lewis	645	618	656	606
Lincoln	20	21	29	23	Lincoln	74	83	103	87
Mason	156	165	158	153	Mason	300	376	408	401
Okanogan	101	104	103	103	Okanogan	279	267	282	263
Pacific	71	60	66	66	Pacific	217	218	227	221
Pend Oreille	36	42	33	37	Pend Oreil	90	100	80	94
Pierce	1,545	1,598	1,570	1,542	Pierce	3,851	3,718	3,932	3,870
San Juan	26	17	22	22	San Juan	91	91	81	88
Skaqil	222	211	216	217	Skaqil	871	741	809	806
Skamania	23	21	29	24	Skamania	35	56	50	47
Spokane	1,166	1,129	1,178	1,157	Spokane	3,061	2,978	3,058	3,042
Spokane	856	819	854	809	Spokane	2,803	2,772	2,743	2,773
Stevens	117	108	113	112	Stevens	254	267	276	262
Thurston	420	413	459	428	Thurston	1,271	1,155	1,288	1,248
Wahkiakum	16	9	16	13	Wahkiakum	41	35	27	34
Walla Walla	100	102	114	105	Walla Wall	436	403	433	424
Whatcom	309	317	309	309	Whatcom	999	1,009	1,020	1,009
Whitman	40	35	47	41	Whitman	174	168	178	173
Yakima	424	490	520	478	Yakima	1,344	1,228	1,336	1,303

Prepared by R. Hryck  
April 2007

Corrected 2006 meth with correct ALOS per FHC

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Department of Health  
Hospice Numerical Need Methodology

Step 3

Step 3. Multiply each hospice use rate determined in Step 1 by the planning areas average total resident deaths determined in Step 2.

0-64	2003-2006	Cancer	Non-Cancer	65+		Cancer	Non-Cancer
County	Average Deaths	Projected	Projected	County	Average	Projected	Projected
Adams	32	8	2	Adams	79	12	18
Asotin	77	8	3	Asotin	166	24	35
Benton	256	44	16	Benton	760	118	170
Chelan	126	22	7	Chelan	454	70	101
Clallam	181	28	10	Clallam	659	101	146
Clark	708	122	42	Clark	1804	283	423
Columbia	10	2	1	Columbia	36	6	8
Cowlitz	252	44	16	Cowlitz	725	112	161
Douglas	59	10	3	Douglas	207	32	48
Ferry	29	4	1	Ferry	51	8	11
Franklin	37	15	5	Franklin	169	28	42
Garfield	5	1	0	Garfield	29	3	5
Grant	165	29	10	Grant	408	63	91
Grays Hawk	198	34	12	Grays Hawk	697	87	126
Island	128	22	8	Island	473	73	105
Jefferson	73	13	4	Jefferson	227	35	51
King	2888	500	171	King	8515	1311	1891
Kitsap	454	79	27	Kitsap	1330	205	295
Klallam	53	9	3	Klallam	190	28	42
Klickitat	48	8	3	Klickitat	119	18	27
Lewis	175	31	11	Lewis	608	93	135
Lincoln	23	4	1	Lincoln	67	13	19
Mason	150	28	9	Mason	401	62	88
Okanogan	103	18	6	Okanogan	263	40	58
Pacific	88	11	4	Pacific	221	34	49
Pend Oreil	37	6	2	Pend Oreil	94	14	21
Pierce	1642	287	91	Pierce	3870	608	890
San Juan	22	4	1	San Juan	88	13	19
Skaill	217	38	13	Skaill	608	124	178
Skottland	28	4	1	Skottland	47	7	10
Spokane	1157	201	68	Spokane	3042	460	676
Spokane	889	154	53	Spokane	2773	427	610
Stevens	112	19	7	Stevens	282	43	63
Thurston	428	74	26	Thurston	1248	192	277
Wahakur	13	2	1	Wahakur	34	6	8
Walla Wall	106	18	6	Walla Wall	424	65	94
Whalcom	308	64	18	Whalcom	1008	155	224
Whilman	41	7	2	Whilman	179	27	38
Yakima	476	82	28	Yakima	1393	201	289

Prepared by R. Huyck  
April 2007

Corrected 2006 math with correct ALOS per FHG

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Department of Health  
Hospice Numerate Need Methodology

Step 4

Step 4. Add the four subtotals derived in Step 3 to project the potential volume of hospice services in each planning area.

	Average Deaths	<65 w/ Cancer Projected	<65 w/o Cancer Projected	65+ w/ Cancer Projected	65+ w/o Cancer Projected	Total Projected Patients
Caswell	111	6	2	12	18	37
Adams	203	6	3	24	35	70
Benton	1022	44	15	118	179	348
Cholani	581	22	7	70	101	200
Clallam	820	28	10	101	148	285
Clatsop	2810	122	42	293	423	880
Columbia	46	2	1	5	8	16
Cowlitz	877	44	15	112	161	331
Douglas	209	10	3	32	46	92
Ferry	76	4	1	8	11	25
Franklin	275	16	6	29	42	91
Garfield	26	1	0	3	5	9
Grant	573	29	10	83	91	182
Glays Fork	768	34	12	87	128	260
Island	601	22	8	73	105	208
Jefferson	300	13	4	35	51	102
King	11400	599	171	1311	1891	3973
Kitsap	1784	78	27	205	295	605
Kittitas	243	8	3	28	42	84
Klickitat	189	8	3	18	27	56
Lewis	784	31	11	93	135	269
Lincoln	110	4	1	13	18	38
Mason	551	28	9	62	98	186
Okanogan	386	18	6	40	58	123
Pacific	285	11	4	34	49	98
Pend Oreille	131	6	2	14	21	44
Pierce	6413	287	111	598	836	1814
San Juan	110	4	1	13	19	38
Skanan	1023	38	13	124	179	364
Sksmaniah	71	4	1	7	10	23
Snohomish	4199	201	68	468	676	1413
Spokane	3682	164	53	427	618	1249
Stevens	394	19	7	43	63	132
Thurston	1879	74	25	182	277	568
Wahkiakum	46	2	1	6	9	19
Walla Walla	528	19	6	65	94	184
Whitman	1317	54	18	165	224	451
Wilmot	213	7	2	27	38	74
Yakima	1777	62	28	201	289	600

Prepared by R. Huxek  
April 2007

Corrected 2008 math with correct ALOS per FHC

Printed: 8/20/2007

Department of Health  
Hospital Numeric Need Methodology

Step 5

Step 5. Indicate the potential volume of hospice service by the one-year estimated population growth (using OFM data).

County	Projected Patients	2003-2005 Average population	2006	2007	2008	2009	2010	2011	2006 Potential volume	2007 Potential volume	2008 Potential volume	2009 Potential volume	2010 Potential volume	2011 Potential volume
Adams	37	17,282	17,897	17,897	18,044	18,293	18,502	18,746	38	38	39	38	40	49
Asotin	70	21,276	21,899	21,912	22,136	22,359	22,592	22,770	71	72	72	73	74	75
Benlton	348	149,713	153,485	155,408	157,330	159,253	161,230	162,894	358	361	365	370	374	378
Chelan	203	73,288	74,134	73,099	74,053	75,028	76,093	77,006	208	209	211	214	217	219
Clinton	285	64,511	65,628	66,083	66,546	67,197	67,754	68,357	289	291	293	298	298	301
Clark	880	382,050	389,507	407,750	418,933	424,236	432,479	440,718	920	930	938	977	996	1015
Columbia	18	3,944	3,931	3,948	3,956	3,983	4,000	4,030	18	18	18	18	18	18
Cowlitz	331	97,501	100,692	102,420	104,217	106,075	107,803	109,765	341	348	354	360	366	372
Douglas	82	35,925	36,649	37,433	38,020	38,609	39,199	39,617	85	87	89	100	101	103
Fairy	25	17,753	17,938	18,091	18,191	18,287	18,394	18,473	25	25	25	25	27	27
Franklin	91	61,093	63,392	64,142	64,892	65,642	66,392	67,142	93	95	96	97	98	100
Garfield	9	2,429	2,451	2,408	2,480	2,495	2,510	2,527	9	9	9	9	9	9
Graat	102	80,857	83,694	84,771	85,657	87,144	88,331	89,229	108	201	204	207	210	212
Greys Harbor	200	65,031	66,698	67,445	67,638	68,400	69,070	69,455	201	203	205	208	209	211
Island	295	74,102	75,620	77,103	78,295	79,499	80,650	82,003	219	218	219	223	225	230
Jefferson	102	27,936	28,626	29,312	29,859	30,376	30,892	31,621	108	108	119	112	113	116
King	3873	1,775,849	1,801,661	1,816,409	1,831,246	1,848,191	1,861,042	1,876,911	3927	3959	3992	4024	4057	4091
Knap	608	235,519	240,591	244,078	248,235	253,653	257,841	262,649	610	650	641	652	663	676
Kittitas	84	34,124	34,800	35,285	35,771	36,266	36,742	37,284	86	87	88	89	90	92
Klickitat	58	20,103	20,569	20,853	21,111	21,368	21,628	21,915	59	60	60	60	60	61
Lewis	295	72,124	73,903	74,850	75,898	76,955	77,492	78,245	270	279	285	288	289	292
Linncon	38	16,115	16,163	16,211	16,270	16,328	16,388	16,510	39	38	39	39	39	40
Mason	188	62,012	64,792	65,718	66,670	67,641	68,604	69,085	192	199	199	202	200	209
Okanogan	123	41,079	41,079	42,409	43,020	43,640	44,081	44,612	125	127	129	130	132	133
Pacific	86	20,992	21,017	21,077	21,137	21,197	21,257	21,351	88	89	89	89	89	100
Pend Orella	44	12,490	12,878	13,077	13,276	13,476	13,674	13,881	45	46	47	47	48	49
Pierce	1614	732,934	750,380	759,939	769,493	778,032	788,880	798,975	1658	1661	1605	1628	1652	1678
San Juan	39	15,199	15,847	16,214	16,502	16,948	17,318	17,688	40	41	42	43	43	44
Skanit	354	111,105	115,270	117,303	119,416	121,873	123,807	126,189	357	374	380	387	394	402
Skompania	23	10,391	10,680	10,717	10,834	10,951	11,059	11,201	24	24	24	24	25	26
Snohomish	1413	654,693	670,178	681,624	704,068	716,513	728,957	741,910	1466	1493	1520	1547	1574	1602
Spokane	1249	439,442	446,190	451,208	456,277	461,347	466,417	472,630	1277	1292	1309	1321	1335	1353
Stevens	132	47,097	43,001	43,587	44,173	45,599	46,585	47,099	130	139	142	145	148	151
Thurston	669	228,719	239,980	243,007	248,033	253,700	259,697	264,229	674	671	670	671	672	673
Wahkiakum	16	3,990	3,959	4,011	4,063	4,116	4,169	4,210	16	17	17	17	17	17
Walla Walla	184	57,019	57,989	28,487	69,009	59,519	60,030	60,604	187	192	190	192	194	195
Whitcom	451	177,733	183,471	185,479	188,480	192,498	195,604	198,652	466	470	481	480	498	505
Whitman	74	40,694	40,698	40,727	40,887	41,008	41,149	41,368	76	76	75	75	76	79
Ynkima	800	228,014	227,994	230,347	232,710	235,072	237,435	240,790	808	814	821	827	833	842

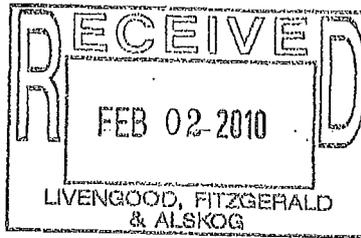
Prepared by R. Huyck  
April 2007

Corrected 2006 meth with correct ALOS per FHO

Printed: 8/20/2007



# **EXHIBIT K**



**FILED**  
JAN 25 2010  
Adjudicative Clerk

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STATE OF WASHINGTON  
DEPARTMENT OF HEALTH  
ADJUDICATIVE SERVICE UNIT

In Re:

CERTIFICATE OF NEED APPLICATION  
OF ODYSSEY HEALTHCARE  
OPERATING B, LP AND ITS PARENT  
COMPANY ODYSSEY HEALTHCARE,  
INC., TO ESTABLISH A HOSPICE  
AGENCY IN KING COUNTY,

NO. M2010-75

STIPULATION AND ORDER  
OF DISMISSAL WITHOUT  
PREJUDICE

King County Public Hospital District No. 2,  
d/b/a Evergreen Healthcare,

Clerk's Action Required

Petitioner.

**I. STIPULATION**

1. On December 8, 2009, the Honorable John F. Kuntz entered a final order dismissing the adjudicative proceeding filed by Odyssey Healthcare Operating B, LP and its parent company Odyssey Healthcare, Inc. (collectively "Odyssey") and approved a settlement between Odyssey and the CN Program that included the issuance of a CN to Odyssey for establishing hospice services in King County. A copy of the final order is attached hereto as **Exhibit A** (the "Final Order").

2. On December 29, 2009, King County Public Hospital District No. 2, d/b/a Evergreen Healthcare (Evergreen) filed a request for adjudicative proceeding, challenging STIPULATED ORDER OF DISMISSAL - 1.

LIVENGOOD, FITZGERALD & ALSKOG, PLLC  
121 3<sup>RD</sup> AVENUE  
P.O. BOX 908  
KIRKLAND, WASHINGTON 98083-0908  
PHONE: (425) 822-9281 FAX (425) 828-0908

COPY MAILED TO CLIENT  
*Week*  
2/2/10

1 the Final Order and the CN Program's issuance of a hospice CN to Odyssey for King  
2 County. A primary reason Evergreen filed this request for an adjudicative proceeding was  
3 to ensure that it exhausted administrative remedies (RCW 34.05.534) for purposes of  
4 seeking judicial review of the Final Order.

5 3. On January 7, 2010, Evergreen, Swedish Health Services, d/b/a Swedish  
6 Visiting Nurse Services ("Swedish"), Providence Hospice and Home Care of Snohomish  
7 County and Hospice of Seattle (collectively "Providence") filed a petition for judicial  
8 review in King County Superior Court to appeal the Final Order and the issuance of a CN  
9 to Odyssey for providing hospice services in King County. The petition for judicial review  
10 has been assigned to the Honorable Mary I. Yu of the King County Superior Court under  
11 Cause No. 10-2-02490-5 SEA (the "Judicial Action").

12 4. On January 13, 2010, the CN Program issued a CN to Odyssey for  
13 establishing a hospice agency for serving the residents of King County.

14 5. The Department, Odyssey, and Evergreen stipulate and agree for purposes of  
15 appealing the Final Order and the issuance of a CN to Odyssey for King County that  
16 Evergreen has exhausted administrative remedies under RCW 34.05.534, that any further  
17 review of the Final Order at the agency level would be futile, and that the Final Order has  
18 been properly appealed to King County Superior Court through the Judicial Action.

19 6. The Department and Odyssey waive any right to challenge the jurisdiction of  
20 the Judicial Action based upon a failure to exhaust administrative remedies or based upon  
21 Evergreen not being the party that applied for the adjudicative proceeding that resulted in  
22 the issuance of the Final Order. If the Judicial Action gets dismissed because the parties to  
23 the Judicial Action failed to exhaust administrative remedies or because the parties to the  
24 Judicial Action were required to first bring an action before the Department, the parties  
25 stipulate and agree that this request for adjudicative proceeding may be reinstated without  
any objection.

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II. ORDER

Based on the above Stipulation, IT IS ORDERED that this matter is dismissed without prejudice. If the trial court dismisses the Judicial Action because the parties to the Judicial Action failed to exhaust administrative remedies or because the parties to the Judicial Action were required to first bring an action before the Department, Evergreen shall be entitled to reinstate this adjudicative proceeding without any objection.

DATED this 29<sup>th</sup> day of January, 2010.

  
HONORABLE JOHN F. KUNTZ  
HEALTH LAW JUDGE, WASHINGTON STATE  
DEPARTMENT OF HEALTH

Presented by:  
LIVENGOOD FITZGERALD & ALSKOG, PLLC

  
James S. Fitzgerald, WSBA No. 8426  
District General Counsel  
Gregory A. McBroom, WSBA No. 33133  
Attorneys for King County Public Hospital  
District No. 2, d/b/a Evergreen Healthcare

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Approved as to form:  
Notice of presentation waived by:

WASHINGTON STATE OFFICE OF  
THE ATTORNEY GENERAL

*Sammy A. McBeane* PER EMAIL APPROVAL  
Robert M. McKenna, WSBA No. 18327

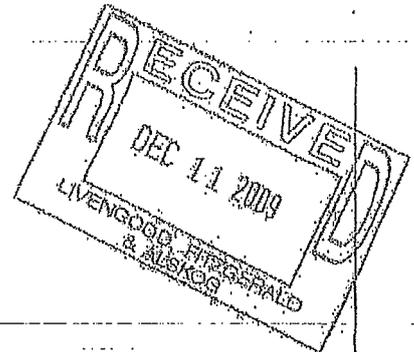
Washington Attorney General  
Richard A. McCartan, WSBA No. 8323  
Assistant Attorney General  
Attorneys for the Department of Health

FREIMUND JACKSON TARDIF &  
BENEDICT GARRATT, PLLC

*Sammy A. McBeane* PER EMAIL APPROVAL  
Kathleen D. Benedict, WSBA No. 7763  
Attorneys for Odyssey Healthcare Operation B, LP  
and Odyssey Healthcare, Inc.

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EXHIBIT A



STATE OF WASHINGTON  
DEPARTMENT OF HEALTH  
ADJUDICATIVE SERVICE UNIT

In re: Certificate of Need Decision  
Denying

Master Case Nos. M2008-117722,  
NM2008-117723, ME-2008-117205

Docket Nos. 07-09-C-2204CN, 07-  
09-C-2204CN; 07-09-C-2008CN

CERTIFICATE OF NEED  
APPLICATION OF ODYSSEY  
HEALTHCARE OPERATING B, LP  
AND ITS PARENT COMPANY,  
ODYSSEY HEALTHCARE INC., TO  
ESTABLISH A MEDICARE CERTIFIED/  
MEDICAID ELIGIBLE HOSPICE  
AGENCY TO SERVE THE RESIDENTS  
OF KING, PIERCE, AND SNOHOMISH  
COUNTIES.

FINAL ORDER APPROVING  
SETTLEMENT AND GRANTING  
ODYSSEY'S KING COUNTY  
HOSPICE APPLICATION.

Petitioner.

THIS MATTER came before the Health Law Judge on a Presentation of Final Order  
Approving Settlement filed by the Certificate of Need Program under RCW 70.38.115(10)(c).  
Having reviewed the settlement proposal and the comments by Intervenor, the Health Law  
Judge finds:

1. Under RCW 70.38.115(10)(c), there was proper notice and opportunity to  
comment on the proposed settlement, and the proposed settlement has been properly presented  
to the Health Law Judge;

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2. For reasons stated by the Program in its evaluation and settlement proposal:

(a) Odyssey's hospice application for King County meets the requirements of WAC 246-310-210, 246-310-220, 246-310-230, and 246-310-240; and

(b) In the exercise of discretion, the Program's 2008 WAC 246-310-290 methodology - showing "need" for an additional hospice agency in King County in 2009 - may be used in deciding that need exists for Odyssey's proposed hospice in King County; and

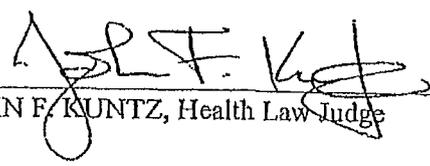
3. Odyssey agrees to voluntarily withdraw its request for adjudicative proceeding to contest denial of its 2006 hospice applications for Pierce County and Snohomish County.

IT IS HEREBY ORDERED That:

1. With the stated conditions in the proposed settlement, Odyssey's Certificate of Need hospice application for King County is APPROVED; and

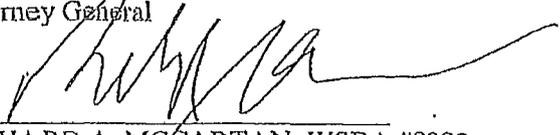
2. Odyssey's request for an adjudicative proceeding to contest denial of the Pierce County and Snohomish County hospice applications is DISMISSED.

DATED this 8<sup>th</sup> day of DECEMBER 2009.

  
JOHN F. KUNTZ, Health Law Judge

PRESENTED BY

ROBERT M. MCKENNA  
Attorney General



RICHARD A. MCCARTAN, WSBA #8323  
Assistant Attorney General

Attorneys for State of Washington  
Department of Health

# **EXHIBIT L**

Jeff Freimund  
Freimund Jackson Tardif & Benedict Garratt, PLLC  
(360) 534-9960

---

**From:** McCartan, Richard (ATG) [mailto:RichardM@ATG.WA.GOV]  
**Sent:** Thursday, September 10, 2009 2:24 PM  
**To:** Jeff Freimund  
**Cc:** Kathleen Benedict; Tribble, Michael (ATG)  
**Subject:** RE: Settlement

Jeff:

Frankly, the idea that we are "trying to avoid" giving Odyssey its CN, "putting up hurdles," and "making additions" to the agreed settlement is simply ridiculous.

In response to your settlement proposal, we spotted two procedural legal issues – what happens if Odyssey appeals & who gets notice of the settlement – that must be resolved. I can't believe you expected us to remain silent about our legal concerns over your proposal. The fact is that we have the right and duty to raise these concerns. Moreover, we quickly brought our concerns to your attention.

I have spent time reviewing your proposal, but I can't go further until we resolve these two legal issues – which we have appropriately raised.

I find it very surprising that you are talking about needing to get this done in two days, when Kathy was the one who proposed two months to complete settlement.

I would be available tomorrow to discuss this matter.

---

**From:** Jeff Freimund [mailto:JeffF@fjtlaw.com]  
**Sent:** Thursday, September 10, 2009 1:42 PM  
**To:** McCartan, Richard (ATG); Tribble, Michael (ATG)  
**Cc:** benedictk@benedictlaw.com  
**Subject:** RE: Settlement

We disagree with your position on this issue and would like another meeting with Mike and you to discuss this issue, as well as your position that the Department would not advocate in support of the settlement if the HLJ rejects the settlement and Odyssey has to seek judicial review of that rejection. With each additional hurdle you've added in the last few days, the likelihood of the King County CN actually being awarded to Odyssey pursuant to the terms of the settlement diminishes - - to the point where it looks like the Department is doing everything it can to avoid actually giving the CN to Odyssey under the settlement agreement. As you know, the King County CN is central to Odyssey's willingness to settle and any added risks and hurdles making that less likely to occur correspondingly make Odyssey less willing to settle. We have some ideas to address your latest additions to the proposed settlement terms that hopefully will satisfactorily resolve both parties' concerns on these issues. Additionally, at the meeting we hopefully can resolve any other disagreements you may have with the draft Settlement Agreement we sent you on Tuesday so we can get the agreement finalized in the next few days. We'd like to meet as soon as possible. Both Kathy and I are available to meet anytime tomorrow afternoon. Is there a time tomorrow afternoon when both of you are

001442

# **EXHIBIT M**

**From:** McCartan, Richard (ATG)  
**Sent:** Monday, March 22, 2010 10:25 AM  
**To:** 'Kathleen Benedict'; 'Jeff Frelmund'; Eggen, Bart (DOH); Sigman, Janis (DOH); Tribble, Michael (ATG)  
**Subject:** Odyssey

Kathy:

Here's our response to your e-mail.

Mike and I would be available for a phone call, if you like to talk further about this.



Doc2 (7).docx

001590

## ODYSSEY

In St. Joseph, the Department denied a CN application, and then entered into a “settlement” with the applicant approving the CN, without providing competitors an opportunity to comment on the settlement.<sup>1</sup> In reversing the Department, the court held that since the statute allowed parties to comment on an original application, parties also had the right to comment on a settlement. 125 Wn.2d at 744.

Following the decision, the legislature enacted RCW 70.38.115(c), which allows competitors to comment on a proposed settlement.

Odyssey argues that St. Joseph means that a competitor’s sole right is to comment on a proposed settlement. Odyssey then states:

[The court] did not find that a competitor has the right to an administrative hearing to contest the CN issued upon remand or settlement to a competitor, which means that a competing provider clearly does not have the right to judicial review of a settlement which includes issuance of a CN following the public comment... Richard’s position that intervenors have the right to contest settlement through the administrative process was not the holding in St. Joseph’s – in fact the holding was the opposite. [Emphasis original.]

The Department cannot agree with Odyssey. First of all, with Odyssey’s consent, the competitors in this case were give the right to oppose settlement in the adjudicative proceeding, and the HLJ rejected their opposition. Moreover,, St. Joseph did not even address the issue of whether a competitor could seek judicial review of a CN settlement approval. We would argue that a settlement approval is subject to judicial review because:

1. The HLJ approved the settlement in a final order in an adjudicative proceeding, finding that the Odyssey application met the four CN criteria.

2. “Review of agency orders in adjudicative proceedings” is subject to judicial review. RCW 34.05.570(3).

3. Nothing in case law or rules/statutes purports to make CN settlement approvals exempt from judicial review. In fact, no agency action is exempt from judicial review. Under Odyssey’s argument, when the Department approves an application in its original decision, the approval is subject to judicial review, but when approval comes via settlement, there is no right to judicial review. This result simply makes no sense.

Odyssey attempts to refute (1) and (2) by arguing that the settlement was a “contract” between the Department and Odyssey, and therefore not subject to judicial review under RCW 34.05. We find no support for the argument that an HLJ’s final order in an adjudicative proceeding could ever be construed as a contract.

---

<sup>1</sup> St. Joseph also held that competitors have standing to contest Department CN decisions. 125 Wn. 2d at 739-42.

Finally, Odyssey vaguely asserts that the Department should go along with its argument based on the fact that the settlement stemmed from the settlement of the federal lawsuit. However, in our opinion, the reviewability of the HLJ's final order is not affected by the federal lawsuit. As part of the federal settlement, the Department agreed to propose approval of Odyssey's application as meeting the four criteria. The HLJ agreed and entered a final order approving the settlement.

In settlement negotiation of the federal lawsuit, the Department consistently told Odyssey that the HLJ would need to approve the settlement. We consistently stated confidence that we could prevail on the merits either before the HLJ or the court. Odyssey expressed confidence that the competitors would not appeal. Never did Odyssey take the position that the HLJ's order would be exempt from judicial review.

Based on the foregoing, we believe that Odyssey's competitors have the right to challenge the settlement on judicial review. We believe that the issue will be whether the application met the four CN criteria, and that we have an excellent chance of prevailing on that issue.

**EXHIBIT N**

Would the Department be willing to conduct the survey and provide potential providers the results before the September letter of Intent period, so that Odyssey, and others, could know whether there would still be the 2 agency need prior to submitting an application?

Kathy

---

**From:** McCartan, Richard (ATG) [mailto:RichardM@ATG.WA.GOV]  
**Sent:** Thursday, February 19, 2009 10:01 AM  
**To:** benedctk@benedctlaw.com  
**Cc:** Eggen, Bart (DOH); Sigman, Janis (DOH)  
**Subject:** RE: Hospice Method

You were able to open it, so I assume I don't need to send it to you.

As you know, we always look at the facts that existed during review. So, we can't approve your application based on a Methodology run long after the record closed. In such cases, applicants must re-apply.

---

**From:** Kathy Benedict [mailto:benedctk@benedctlaw.com]  
**Sent:** Wednesday, February 18, 2009 4:26 PM  
**To:** McCartan, Richard (ATG)  
**Subject:** RE: Hospice Method

Richard:

My secretary was just able to open the attachment. It looks like 2.08 agencies are now needed in King County. Why don't we settle the Odyssey appeals for a certificate of need in King County?

Kathy

---

**From:** McCartan, Richard (ATG) [mailto:RichardM@ATG.WA.GOV]  
**Sent:** Wednesday, February 18, 2009 3:30 PM  
**To:** benedctk@benedctlaw.com  
**Subject:** FW: Hospice Method

Have you seen this?

---

**From:** Thomas, Mark A (DOH)  
**Sent:** Wednesday, February 18, 2009 3:14 PM  
**To:** McCartan, Richard (ATG)  
**Cc:** Eggen, Bart (DOH); Sigman, Janis (DOH)  
**Subject:** Hospice Method



## Mark Thomas

Analyst, Certificate of Need Program  
Health Professions & Facilities  
Washington State Department of Health  
Mail: P.O. Box 47852  
Olympia, WA 98504-7852

001847

# APPENDIX D

Supplemental Declaration of James S. Fitzgerald,  
dated September 21, 2010

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Honorable Mary I. Yu

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR KING COUNTY

KING COUNTY PUBLIC HOSPITAL  
DISTRICT NO. 2 d/b/a EVERGREEN  
HEALTHCARE, a Washington public  
hospital district, *et al.*,

Petitioners,

v.

WASHINGTON STATE DEPARTMENT  
OF HEALTH, a Washington governmental  
agency, *et al.*,

Respondents.

NO. 10-2-02490-5 SEA

SUPPLEMENTAL DECLARATION OF  
JAMES S. FITZGERALD

JAMES S. FITZGERALD declares under penalty of perjury under the laws of the  
State of Washington as follows:

1. I am District General Counsel for King County Public Hospital District No. 2  
d/b/a Evergreen Healthcare ("Evergreen") and lead counsel for Evergreen in this case. I am  
competent to testify and make this declaration of my personal knowledge.

2. **Exhibit A** attached hereto is a true and accurate copy of relevant portions of  
the Final Bill Report for Second Engrossed Substitute House Bill (E2SHB) 1908, which  
explains the reasoning for adding Subsection (10)(c) of RCW 70.38.115. This additional  
provision was codified in the 1995 1st sp.s. c 18 § 72 amendment to the statute.

3. The amendment makes clear that the legislature's inclusion of the right to  
comment, in advance, on a proposed settlement, was a right that *supplemented* the existing

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rights of interested healthcare providers. Nothing in the legislative history indicates any intent by the legislature to eliminate any of the existing rights. As stated in the Final Bill Report, the legislature wanted to ensure that interested healthcare providers “also” had an opportunity to comment, in advance, on any proposed settlements.

SIGNED at Kirkland, Washington this 21st day of September, 2010.

  
JAMES S. FITZGERALD

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# EXHIBIT A

## FINAL BILL REPORT

### E2SHB 1908

#### PARTIAL VETO

C 18 L 95 E 1

#### Synopsis as Enacted

**Brief Description:** Modifying long-term care provisions.

**Sponsors:** House Committee on Appropriations (originally sponsored by Representatives Dyer, Cooke, Ballasiotes, Stevens, Elliot, Talcott, Cairnes, Lambert, Pelesky, Hymes, Robertson, Mielke, Carrell, Backlund and L. Thomas).

House Committee on Health Care

House Committee on Appropriations

**Background:** The Aging and Adult Services Administration is the agency within the state Department of Social and Health Services (DSHS) that has management responsibility for publicly funded long-term care services such as nursing homes, chore services, Medicaid personal care, adult family homes, Community Options Program Entry System (COPEs), and boarding homes. In Washington state, approximately 17,000 clients receive care in a nursing home, while 6,000 persons with disabilities live in licensed adult family homes, and approximately 18,000 are receiving some form of long-term care in their own homes.

Expenditures in state-administered, long-term care programs have increased even more rapidly over the past 10 years than the number of persons needing care. In addition, every year the state purchases a higher portion of long-term care services. After controlling for inflation, Aging and Adult Services expenditures have doubled over the past decade and have grown twice as fast as the total state budget. Three-quarters of the growth in long-term care expenditures is due to higher costs per person served. State costs per resident have grown 63 percent in community care while the cost of care in nursing homes has grown 88 percent.

In 1994, the Legislature directed the DSHS to develop a plan for reviewing and reducing Aging and Adult Services expenditures to comply with the 10.3 percent growth rate permitted under Initiative 601. Without changes, the projected growth rate is approximately 28 percent.

Several factors contribute to this increase:

- As the nursing facility rate increases, more people are eligible for Medicaid.
- The federal government has protected Medicaid spouses from impoverishment.
- Creative estate planning use is increasing by seniors.
- There have been demographic increases in persons with disabilities.
- Nursing home payment rates have been increasing an average of 9 percent per year.

To address this rapid growth, it has been recommended that:

- Lower cost long-term care options be expanded.
- The manner in which services are utilized and accessed be reviewed.
- Regulatory reforms be developed.
- The extent to which people can pay for their own care be identified.
- The rate of increase in nursing home payment rates be reduced.

**Summary:**

#### LONG-TERM CARE PROVISIONS

NURSING HOME CENSUS REDUCTION - By June 30, 1997, the Department of

beneficiary who received long-term care services. The trustee and cemetery authority must then give notice of the beneficiary's death to the department's Office of Financial Recovery, who must then file this claim within 30 days. Prearranged funeral service contracts are required to contain language that informs the individual that any unused funds from the policy may be subject to claims by the state for long-term care services that the state had funded. The recovery procedure is outlined.

**NURSING HOME DISCHARGE** - The department is required to follow a notification and appeals process if a Medicaid resident is discharged and chooses to remain in a nursing facility.

**FINANCIAL RECOVERY UPON DEATH** - Any funds held by the nursing home facility on behalf of a resident who received long-term care paid for by the state must be sent to department's Office of Financial Recovery within 45 days of the recipient's death. The department is required to establish release for use for burial expenses. The department is allowed to recover against estates as soon as practicable, but recovery will not include property exempt from estate claims under federal law or treaty, including tribal artifacts. Church or religiously operated nursing facilities, which provide care exclusively to members of its convent, rectory monastery or other clergy members, are exempt from the operating standards for covered facilities.

**NURSING HOME COMPONENT RATES** - The DSHS is authorized to base initial nursing services, food, administrative, and operational rate components rates for the purpose of reimbursement on a formula using the median for facilities in the same county. This is applicable to any facilities receiving original Certificate of Need approval prior to June 30, 1988, and commencing operations on or after January 2, 1995.

**VOLUNTARY NURSING HOME BED CONVERSION** - A nursing home may "bank" or hold in reserve its nursing home beds for any purpose that enhances the quality of life for residents, in addition to those specified by law, without the requirement of a Certificate of Need.

A health facility or health maintenance organization that provides services similar to the services of an applicant for a Certificate of Need in the same service area, and who has testified as an interested party and submitted evidence at a public hearing on the application, may also present testimony and argument at any adjudicative proceeding of the application on appeal. The interested party must first have requested in writing to be informed of the DSHS's decision. The interested party must also be afforded an opportunity to comment in advance of any proposed settlement.

When a building owner has secured an interest in nursing home beds, a licensee, if different from the building owner, must obtain and submit to the department written approval from the building owner to reduce the number of beds in the facility. A building owner may complete a replacement project if a licensee is unable to complete the project.

A licensee may replace existing beds without a Certificate of Need if the licensee has operated the beds for at least one year. If a nursing home closes, the re-use of existing beds will require a Certificate of Need, but the determination of need will be deemed met if the applicant is the licensee.

**NURSING HOME CERTIFICATE OF NEED IN ECONOMICALLY DISTRESSED AREA** - Any nursing home is allowed an additional extension of up to 60

rates inflated by the HCFA nursing home inflation index, instead of inflated by the HCFA nursing home index times 1.5. It is specified that in fiscal year 1998, rates will be determined using fiscal year 1997 rates inflated by the HCFA index times 1.25, instead of rebasing rates using calendar year 1996 costs and inflated by the IPD.

**REIMBURSEMENT RATE COMPONENT MODIFICATIONS** - Nursing home payments for the food rate component are modified to specify that in fiscal year 1997, rates will be determined using fiscal year 1996 rates inflated by the (HCFA) nursing home inflation index, instead of by the HCFA nursing home index times 1.5. It is specified that in fiscal year 1998, rates will be determined using fiscal year 1997 rates inflated by the HCFA index times 1.25, instead of rebasing rates using calendar year 1996 costs and inflated by the (IPD). Nursing home payments for the administrative rate component are modified to specify that in fiscal year 1997, rates will be determined using fiscal year 1996 rates inflated by the HCFA nursing home inflation index, instead of inflated by the HCFA nursing home index times 1.5.

**MULTIPLE YEAR CYCLES** - Reference to multiple year cycles in the property rate component and applying the minimum occupancy level and to multiple year cycles in the return-on-investment rate component and applying the minimum occupancy level are eliminated.

**MEDICAID OVERPAYMENTS** - Provisions related to settlement of medicaid overpayments are removed. The DSHS and nursing homes are required to pay debts owed within 60 days of settlement. The department is authorized to obtain security on debts in excess of \$50,000 and to establish an appeals process for audits, rates, and settlements.

**Votes on Final Passage:**

First Special Session

House 90 0

Senate 45 0

**Effective:** July 1, 1995

**Partial Veto Summary:** The partial veto removes provisions requiring the Legislative Budget Committee to develop a working plan to reform and streamline the long-term care delivery system. The extension of 60 months to apply for a nursing home Certificate of Need and the extension, from 12 to 18 months, for nursing home inspections are also eliminated.

# APPENDIX E

Department's Notice of Settlement (AR 1102-03)

Dated September 29, 2009

**NOTICE OF POSSIBLE SETTLEMENT AND  
OPPORTUNITY TO COMMENT**

On August 17, 2007, the Department of Health's CN Program (Program) denied three separate hospice agency applications from Odyssey Healthcare in King, Pierce, and Snohomish counties. Odyssey requested an adjudicative hearing to contest the denial of these applications. The hearing has been stayed pending resolution of a federal lawsuit filed by Odyssey against the Department.<sup>1</sup> This proposed settlement of the adjudicative proceeding is part of the settlement between the parties resolving the federal lawsuit. This proposed settlement has not been filed with the Health Law Judge in the adjudicative proceeding.

**King County**

In 2008, the Program conducted its survey of existing King County providers for 2007 use data. Applying the hospice need methodology<sup>2</sup> to this data showed a current need for two additional hospice agencies. Due to a special circumstance, the Program will consider this new data in deciding whether to approve the Odyssey's King County application. The special circumstance is that this new need data was not available to Odyssey by the deadline for applications in 2008. When the Department adopted the hospice need method, it had intended that current need data would be available to prospective applicants prior to the application deadline to provide them with guidance on whether to submit an application.

Based on this data showing need, the Program and Odyssey propose a settlement under RCW 70.38.115(10)(c) of the pending adjudicative proceeding.<sup>3</sup> The proposed settlement would approve Odyssey's King County application. The parties also agree that:

- (1) Odyssey's policy on non-discrimination will continue to include all patients regardless of payor source;
- (2) Odyssey will use reasonable efforts to provide charity care in an amount comparable to or exceeding 2.5% of Medicare revenue, and Odyssey will maintain records documenting the amount of charity care provided; and
- (3) Odyssey will provide Medicare certified hospice services to residents within the entirety of King County.

**Pierce and Snohomish County**

Under this proposed settlement, Odyssey will withdraw its adjudicative hearing request to contest the denial of its applications for Pierce and Snohomish counties.

**Opportunity to Comment**

Pursuant to RCW 70.38.115(a) and (c), any health care facility or HMO that meets the following will be given an opportunity to comment, in advance, on the proposed settlement.

- Provides services similar to the services provided by the applicant and review;
- Is located within the health service area;
- Testified or submitted evidence at a public hearing held by the department; and

<sup>1</sup>United States District Court, Western District of Washington, Cause No. C09-0469

<sup>2</sup>WAC 246-310-290

<sup>3</sup>WAC 246-310-610(4)

- Requested in writing to be informed of the Department's decision.

You are receiving this notice because the program has determined you meet the requirements listed above.<sup>4</sup> The timeline as set out in the proposed settlement is listed below. You have until the close of business on October 13, 2009 to submit your comments to the program. The proposed settlement with its attachments is enclosed.

**Proposed Settlement Timeline<sup>5</sup>**

Event	Timeline	Due Date	Date Completed
Signing of proposed Settlement & Stipulation	Done		Sept 25, 2009
Notice to appropriate entities	Within 2 business days	Sept 29, 2009	
Appropriate entities comments due	Within 14 calendar days of mailing	Oct 13, 2009	
Program Review, Conclusion re: Presenting to HLJ	Within 7 calendar days of end of PC	Oct 20, 2009	
Program will either: <ul style="list-style-type: none"> <li>• Present to HLJ for signing final order accepting the proposed settlement agreement and granting the certificate of need OR</li> <li>• Notify Odyssey of decision not to present to HLJ and provide Odyssey with copies of all comments received.</li> </ul>	3 business days	Oct 23, 2009	

**Where to Send Your Comments**

Your comments should be sent to:

Janis R. Sigman, Manager  
Certificate of Need Program

Mailing Address:  
Mail Stop 47852  
Olympia, WA 98504-7852

FedEx and UPS:  
310 Israel Road SE  
Tumwater, WA 98501

Comments should not be filed with the Health Law Judge in the adjudicative proceeding.

If you have any questions, call Janis Sigman, Program Manager, at 360.236.2956

<sup>4</sup> Odyssey's position regarding the law applicable to this settlement is not necessarily consistent with the Department's position, but the parties have agreed that any disagreements over the interpretation of the applicable law do not affect this settlement.

<sup>5</sup> No. 4, Proposed Settlement and Stipulation

# APPENDIX F

Summary of Need Methodologies  
Performed by the Department

**SUMMARY OF METHODOLOGIES  
By Year Performed**

<b>Methodology and Date Performed</b>	<b>Date of CN Application</b>	<b>CN Application</b>	<b>Historical Use Rate Used in Methodology</b>	<b>Result</b>
<b>2007 Methodology</b>  April 2007  AR 33-38	October 2006	Odyssey's 2006 CN application for King County	2003-2005	Shows no need in King County  Denied CN
<b>2008 Methodology</b>  May 2008  AR 1337-42	October 2007	Heart of Hospice	2004-2006	Shows no need in King County  The Department Ignores This Determination
<b>2009 Methodology</b>  February 2009  AR 355-60	N/A	None  Used by the Department as the basis for reversing its previous decision	2007  Based upon data obtained in Dec. 2008	Showing need for one agency, which is disputed

### CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the United States of America and the State of Washington that on the date specified below, I filed and served the foregoing as follows:

<b>The Supreme Court</b> State of Washington Temple of Justice 415 12th Ave. SW P.O. Box 40929 Olympia, WA 98504-0929 Phone: (360) 357-2077	Messenger Service <input type="checkbox"/> First Class U.S. Mail <input checked="" type="checkbox"/> Electronic Mail <input type="checkbox"/> Facsimile <input type="checkbox"/>
Richard A. McCartan Office of the Attorney General PO Box 40109 7141 Cleanwater Drive SW, Bldg. 2 Olympia, WA 98504-0109	Messenger Service <input type="checkbox"/> First Class U.S. Mail <input checked="" type="checkbox"/> Electronic Mail <input checked="" type="checkbox"/> Facsimile <input type="checkbox"/>
Jeffrey Freimund Kathleen D. Benedict Freimund Jackson Tardif & Benedict Garrett, PLLC 711 Capitol Way S, Suite 605 Olympia, WA 98501	Messenger Service <input type="checkbox"/> First Class U.S. Mail <input checked="" type="checkbox"/> Electronic Mail <input checked="" type="checkbox"/> Facsimile <input type="checkbox"/>

DATED: December 10, 2012, at Kirkland, Washington

  
Karen H. Suggs