

NO. 87574-0

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SUPREME COURT OF THE STATE OF WASHINGTON

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.

**SUPPLEMENTAL BRIEF OF WASHINGTON STATE
DEPARTMENT OF HEALTH**

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I. INTRODUCTION

Healthcare providers in Washington must obtain a “certificate of need” from the Department of Health (Department) to provide certain health care services. RCW 70.38.105. The overriding purpose of the requirement is to ensure patient needs are met. *Overlake Hosp. Ass’n v. Dep’t of Health*, 170 Wn.2d 43, 55, 239 P.3d 1095 (2010). In 2006, Odyssey Healthcare applied for a certificate of need to provide in-home hospice services in King County. In the context of settling the resulting adjudicative proceeding, the Department granted the certificate based on its December 2008 determination that additional services were needed to serve terminally-ill patients. The Department’s health law judge properly exercised his discretion when he considered the December 2008 determination. Had Odyssey reapplied in October 2008, the certificate would have been granted because the Department found need for additional hospice services in King County shortly thereafter. However, it was reasonable for Odyssey not to have reapplied because it lacked information about need at the time of the application deadline. Under RCW 70.38.115(10)(c), Evergreen and Providence had ample opportunity to present argument opposing the certificate of need. Thus, it was not arbitrary to grant Odyssey a certificate of need allowing it to meet additional patient need for hospice in King County.

II. STATEMENT OF THE CASE

Washington law generally requires providers to obtain a certificate of need to provide in-home hospice care.¹ RCW 70.38.025(6), .105(4)(a). The legislature intended the certificate of need requirement to assure patient access and promote, maintain, and assure public health while controlling costs through effective healthcare planning. RCW 70.38.015(1), (2). A certificate of need applicant must demonstrate the proposed project satisfies four criteria: need, financial feasibility, structure and process of care, and cost containment. RCW 70.38.115(2); WAC 246-310-210 to -240, -290. In 2003, the Department's certificate of need program (program) adopted a methodology for forecasting hospice need. WAC 246-310-290.

In October 2006, Odyssey submitted applications for certificates of need to provide hospice services in King, Pierce, and Snohomish Counties beginning in 2009. AR at 13, 53, 92.² To assess need for new services, the program gathered data from licensed hospice providers statewide about services they had provided in 2003 through 2005. AR at 17. The program used this data, and data from other sources, to determine whether

¹ Hospice care involves "symptom and pain management provided to a terminally ill individual." WAC 246-310-290(1)(e).

² Odyssey had previously submitted applications for the same counties in 2003, but those applications were denied for lack of need and that denial was upheld. *Odyssey Healthcare Operating B, LP v. Dep't of Health*, 145 Wn. App. 131, 185 P.3d 652 (2008).

need would arise for additional hospice services in any counties before 2012. AR at 33-38; WAC 246-310-290(7).³ The program also conducted public hearings on the applications. AR at 14, 54, 93. Existing services in King County exceeded projected future need, so Odyssey's application failed to meet the need criterion. WAC 246-310-210, -290; AR at 19, 23.⁴

The program also evaluated the remaining criteria, but the analysis of each was driven by the projection that there would not be unmet need in King County. For example, the program concluded Odyssey had not satisfied the financial feasibility criterion, WAC 246-310-220, but only because the finding of insufficient need affected the projected number of patients Odyssey could expect, and thus its financial feasibility. *See* AR at 25-27. Similarly, in analyzing the structure and process of care criterion, the program concluded that Odyssey could hire adequate staff, provide ancillary services, and meet licensing criteria,⁵ but need projections indicated adequate existing services, so adding another agency would risk fragmentation of care. AR at 27-30; WAC 246-310-230. Finally, cost containment was not met because a new hospice agency was not the most

³ Need is found only if existing providers in a county will offer services at a rate that is 35 patients per day below the state average, indicating need to increase hospice use. Need is hard to show; in December 2008, need existed in only three counties.

⁴ The program similarly found no need in Pierce and Snohomish Counties, but those conclusions are not at issue in this appeal. AR at 56, 95.

⁵ The program was aware of prior licensing complaints in two states, but found Odyssey had resolved the issues. AR at 29.

efficient alternative given the lack of need. AR at 30; WAC 246-310-240.

On August 17, 2007, the program denied Odyssey's applications for certificates of need in all three counties. AR at 15, 55, 94. Odyssey initiated an adjudicative proceeding to contest the denials before a health law judge, the Department's final decision-maker in certificate of need cases. AR at 1, 41, 80; RCW 70.38.115(10)(a); RCW 34.05.410-476. Evergreen, an existing King County hospice-care provider, intervened. AR at 153. The proceedings were continued pending a Court of Appeals decision on a challenge to the Department's interpretation of the hospice rules, and then further continued to resolve a petition to amend those rules. AR at 175-86, 189; *Odyssey Healthcare Operating B, LP v. Dep't of Health*, 145 Wn. App. 131, 145 n.6, 185 P.3d 652 (2008) (upholding rules). While the proceeding was still pending but stayed, Odyssey filed a federal suit arguing Washington's certificate of need rules violated the Sherman Antitrust Act and dormant commerce clause. AR at 256, 276-77.⁶

In the meantime, a provider applied for a certificate of need in another county, triggering updated statewide hospice need calculations using data on services provided in 2005 through 2007. See AR at

⁶ Similar arguments have since been rejected by federal courts. *Yakima Valley Mem. Hosp. v. Washington Dep't of Health*, 654 F.3d 919, 931 (9th Cir. 2011) (antitrust); *Yakima Valley Mem. Hosp. v. Washington Dep't of Health*, No. 09-CV-03032-EFS, 2012 WL 2720874 (E.D. Wash. July 9, 2012) (on remand, no dormant commerce clause violation).

817-22. New provider surveys revealed increased use of hospice, and an underreporting of hospice admissions in previous surveys. *Compare* AR at 33 (2005) *with* 817 and 1271. Accordingly, the new December 2008 need determination found need for one additional King County hospice agency by 2009, and two by 2013. AR at 822; WAC 246-310-290.

The program initially indicated it would not consider the December 2008 need determination in evaluating Odyssey's still-pending 2006 application. AR at 1074, 1086. In part due to settlement negotiations, however, the program recognized that had Odyssey reapplied in October 2008, its application would have been evaluated using the December 2008 determination. AR at 1026. Odyssey was disadvantaged because the new determination was not available in October, the deadline for applying each year. *See* WAC 246-310-290(3). Odyssey's decision not to submit a 2008 application absent the 2008 data was understandable, given its applications had twice been denied for lack of need, an adjudicative hearing was still pending on the second denial, and the application fee was more than \$18,000. AR at 1026. The 2008 calculation reflected King County need in 2009, within the three-year horizon to be considered for a 2006 application. AR at 1027; WAC 246-310-290(6). The program concluded it was reasonable here to attempt to settle the federal case and the adjudicative proceeding by considering the updated need data. AR at 1025-27.

As a result, the program and Odyssey agreed to settle the federal case. The Department did *not* agree to grant Odyssey a certificate of need for King County. Instead the Department agreed only to *propose* settlement of the pending adjudicative proceedings pursuant to RCW 70.38.115(10)(c), based on the December 2008 finding of patient need for additional hospice services in King County. AR at 1091-95. The federal settlement recognized that the program, after considering competitors' comments, could deny the certificate of need in good faith. AR 1092-95. In addition, even if the program requested approval, the health law judge could deny the certificate. *See* AR 1092-95. Odyssey agreed to withdraw its Pierce and Snohomish applications, dismiss the federal suit, and comply with certain conditions, like charity care minimums. AR at 1091-95.

The program gave existing King County hospice providers notice of its proposal to settle the adjudicative proceeding and opportunity to comment. AR at 1102-03. After reviewing comments, the program would either present settlement to the health law judge or notify Odyssey of its decision not to do so. AR at 1095. The health law judge allowed King County providers Providence, Swedish, and Franciscan to intervene, allowed them to submit "written evidence and argument," and concluded this satisfied statutory process for settlement. AR at 1002, 1009.

Evergreen, Providence, Swedish, and Franciscan (the intervening competitors) all opposed settlement by providing written arguments and

exhibits. AR at 1104-1158. After due consideration, the program submitted its settlement proposal to the health law judge for approval. AR at 1018. In support, the program argued its initial rejection of Odyssey's application was based on lack of need, and the Department had discretion to consider the updated data under the circumstances. AR at 1020-28.

The intervening competitors then filed additional briefs and documentary evidence before the health law judge. AR at 1179-1527, 1700-20.⁷ After consideration, the health law judge approved Odyssey's certificate of need for King County with the conditions in the settlement. AR at 1721-22. He found (1) the intervening competitors had notice and opportunity to be heard regarding settlement as required by RCW 70.38.115(10)(c); (2) "[i]n the exercise of discretion," the program properly used updated December 2008 data to determine need; and (3) Odyssey's application met all certificate of need criteria. AR at 1721-22.

After the final order, only Evergreen requested a new adjudicative hearing, but later withdrew the request, choosing instead to petition for judicial review of the health law judge's order approving settlement. CP at 1-20, 863-65. The King County Superior Court granted the petition and remanded, but the Court of Appeals reversed, recognizing the health law judge had discretion to admit the updated 2008 data showing patient

⁷ Three intervening competitors sent letters to the health law judge expressing intent to provide additional written argument and evidence in opposition, but none asked to present oral testimony. AR at 1161, 1166, 1171.

need for a new hospice agency in King County. CP at 963-76; *King Cnty. Pub. Hosp. Dist. 2 v. Dep't of Health*, 167 Wn. App. 740, 751-52, 275 P.3d 1141 (2012). The court also held the record supported the finding that the non-need criteria were met once need was shown, and the need determination was not arbitrary. *Id.* at 753-56. Evergreen and Providence petitioned for review, which this court granted.

III. STATEMENT OF THE ISSUES

1. Did the health law judge abuse his discretion by considering December 2008 data for a 2006 certificate of need application, where the 2008 data showed unmet patient need, suggested that earlier data understated need, and the applicant did not have access to the new data in time to submit a renewed application in 2008?
2. Where RCW 70.38.115(10)(c) requires only that the Department provide certain competitors notice and opportunity to comment in advance of a proposed settlement, have Evergreen and Providence demonstrated the Department violated statutory or constitutional requirements when they had two opportunities to submit written evidence and argument in opposition to the settlement?
3. Does substantial evidence support the Department's finding that Odyssey's application met all of the certificate of need criteria, and was the granting of the certificate arbitrary?

IV. ARGUMENT

A. Standard Of Review

Evergreen and Providence bear the burden to show the health law judge's order was incorrect. RCW 34.05.570(1)(a). When reviewing an agency order, this Court applies the standards of the Washington Administrative Procedure Act, RCW 34.05, directly to the agency record,

rather than reviewing the superior court decision. *Ames v. Med. Quality Assurance Comm'n*, 166 Wn.2d 255, 260, 208 P.3d 549 (2009). A court may reverse an administrative order only if (1) it is based on an error of law, (2) it is unsupported by substantial evidence, (3) it is arbitrary or capricious, (4) it violates the constitution, (5) it is beyond the agency's statutory authority, or (6) it was made using improper procedure. *Id.*; RCW 34.05.570(3).

This court summarized the standards of review in certificate of need cases in *University of Washington Medical Center v. Dep't of Health*, 164 Wn.2d 95, 102-03, 187 P.3d 243 (2008) (*UWMC*). The agency decision is presumed correct, and this court does not reweigh facts, but accepts findings unless they are clearly erroneous. *Id.* at 102 Even credible contrary evidence, by itself, does not warrant reversal. *Id.* This court may substitute its interpretation of the law for the agency's, but it accords substantial deference to the agency's interpretation of the laws it administers, particularly where the agency has expertise. *Id.* To find a decision arbitrary or capricious, it must have been a "willful and unreasoning disregard of the facts and circumstances." *Id.* This court respects the discretion the legislature has delegated to the agency. *Id.*; *Wash. Indep. Tel. Ass'n v. Utils. & Transp. Comm'n*, 148 Wn.2d 887, 904, 64 P.3d 606 (2003).

B. The Department's Decision To Approve Odyssey's Application Met All Legal Requirements And Should Be Upheld

1. The Department Did Not Abuse Its Discretion In Considering The December 2008 Need Calculation, Given The Circumstances Of This Case

The health law judge did not abuse his discretion when he considered evidence of need that arose in December 2008, while Odyssey's adjudicative proceeding was still pending. As this Court recently recognized, the health law judge has broad discretion to decide whether to admit updated evidence. *UWMC*, 164 Wn.2d 95.

In *UWMC*, the UW Medical Center objected to a certificate of need for a competing liver transplant program. *Id.* at 100. The health law judge set an evidentiary cutoff that admitted evidence arising until about six months after the application, preventing consideration of evidence UWMC wanted to rely on. *Id.* at 101. This Court applied an "abuse of discretion" standard, explaining that the law gives considerable discretion to administrative law judges to determine the scope of admissible evidence. *Id.* at 103-04. The Court noted that "[r]equiring the health law judge to admit evidence created long after" the evaluation period contemplated by the certificate of need statutes would undermine "expeditious decision making and prevent meaningful public input on that evidence." *Id.* at 104 (emphasis added). But the Court ultimately held "[i]t was within the sound discretion of the health law judge to admit, or

not admit, evidence that came into existence after the close of the public comment period.” *UWMC*, 164 Wn.2d at 104 (emphasis added).

Evergreen and Providence may argue, as they did below, that *UWMC* held that the certificate of need determination must be made based on a “snapshot” of the facts at or around the time of the application. But this interpretation confuses the Court’s description of an argument made in the case with its holding. *Id.* at 103. The Court unambiguously held that the health law judge has discretion to decide whether to admit or not admit updated evidence. *Id.* at 104. In short, while the *UWMC* Court recognized that a health law judge is not *required* to admit new evidence that arose during the pendency the adjudicative proceeding, it also recognized that he or she *may* admit such evidence, so long as doing so was not manifestly unreasonable. *Id.*; *Gildon v. Simon Prop. Group Inc.*, 158 Wn.2d 483, 494, 145 P.3d 1196 (2006) (defining abuse of discretion as manifestly unreasonable or exercised on untenable grounds). And as the Court of Appeals recognized in this case, RCW 70.38 does not place any evidentiary or substantive limitations on the settlement of certificate of need adjudicative proceedings. *King Cnty. Pub. Health Dist. 2*, 167 Wn. App. at 752.

Here, the health law judge considered December 2008 need calculations in the adjudicative proceeding reviewing Odyssey’s October 2006 application. AR at 1722. The program and health law judge

reasonably recognized that had Odyssey reapplied in October 2008, the application would have been granted based on the December 2008 determination reflecting patient need for additional hospice services in King County. Because need existed, Odyssey also met the remaining criteria. AR at 1020-28, 1721-22. Need for an additional King County hospice agency began in 2009, within the three-year horizon to be considered for a 2006 application. *See* WAC 246-310-290(6); AR at 822. Moreover, no other hospice provider had applied for a King County certificate, so there was no unfairness to other applicants. AR at 1027. Thus, it was principled, fair, and certainly not manifestly unreasonable for the Department to consider the December 2008 need calculations in the pending adjudicative process. *See UWMC*, 164 Wn.2d at 104. Doing so was within the scope of the health law judge's discretion.⁸ *See id.*

Finally, settlement in these circumstances would not lead to widespread uncertainty in certificate of need proceedings as Evergreen and Providence claim. Pet. at 14-15. This situation was unusual (and unlikely to often recur) because two Odyssey applications had been rejected for lack of need in 2003 and 2006, the first showing of need in

⁸ Evergreen and Providence also rely on a letter from the Secretary of Health to the health law judges, issued *before* the *UWMC* case was decided, stating that new information should not be considered. AR at 1127 (dated October 22, 2007). The letter explained that its directive applied while the *UWMC* case was pending, and subsequently the *UWMC* decision made it clear that allowing evidence arising *after* the program's decision was within the administrative judges' sound discretion. *UWMC*, 164 Wn.2d at 104.

King County was not available until after the deadline for applying in 2008, the December 2008 need calculation suggested hospice use had been underreported in prior years, and it was reasonable under the circumstances for Odyssey not to have submitted a new application until need was shown. AR at 1025-27. Given the unusual circumstances of this case, it is unlikely it will lead to provider uncertainty as to what evidence will generally be considered. As a result, the health law judge acted well within his discretion when considering the 2008 data.

2. Evergreen And Providence Had Ample Notice And Opportunity Be Heard In Opposition To The Settlement, In Accordance With RCW 70.38.115 And Due Process

The Department complied with the specific statutory process for evaluating settlements, and the intervening competitors had ample notice and opportunity to be heard. Where a party claims an agency action is invalid based on procedural error, the challenger must show both that the agency did not follow correct procedure and that the irregularity resulted in substantial prejudice. *Alpha Kappa Lambda Fraternity v. Washington State Univ.*, 152 Wn. App. 401, 414, 216 P.3d 451 (2009); RCW 34.05.570(1)(d).

In RCW 70.38.115, the legislature set forth the process for determining whether a certificate of need should be granted. First, the program evaluates a written application and holds a public hearing if

requested. RCW 70.38.115(6), (9). Once the program grants or denies the application, RCW 70.38.115(10) and WAC 246-310-610 describe the adjudicative process for contesting that decision. An applicant denied a certificate of need has a right to an adjudicative proceeding with a health law judge. RCW 70.38.115(10)(a); WAC 246-310-610(1). A competing provider who meets certain criteria “shall be provided an opportunity to present oral *or* written testimony and argument in a proceeding under this subsection[.]” RCW 70.38.115(10)(b) (emphasis added); WAC 246-310-610(4). When the program proposes to settle with the applicant prior to the conclusion of the adjudicative proceeding, it “shall so inform the [competing health care provider(s)] and afford them an opportunity to comment, in advance, on the proposed settlement.” RCW 70.38.115(10)(c). Once the health law judge has granted or denied the certificate of need, either the applicant or the competing provider may seek judicial review. RCW 34.05.514; *St. Joseph Hosp. v. Dep’t of Health*, 125 Wn.2d 733, 741-42, 887 P.2d 891 (1995).

The program and health law judge plainly complied with the specific statutory procedures for settlements by affording Evergreen and Providence notice and opportunity “to comment, in advance.” RCW 70.38.115(10)(c); *see, e.g., Port Townsend Sch. Dist. 50 v. Brouillet*, 21 Wn. App. 646, 655-56 587 P.2d 555 (1978) (specific statutory requirements control over general ones). In fact, the intervening

competitors received more than the plain language of the statute requires; they had *two* opportunities to present arguments and evidence opposing settlement in the context of the existing adjudicative proceeding. The program considered their written submissions before presenting the proposed settlement to the health law judge and provided all of those materials to the judge for his review as well. AR at 1104-60. The health law judge invited and considered further briefing and evidence before deciding to approve settlement. AR at 1179-1527, 1700-20. While Evergreen and Providence argue that their opportunity to present evidence and argument was not meaningful because the federal settlement predetermined the outcome, the record shows that is not the case. The federal settlement acknowledged the program and health law judge could, in good faith, reject the proposal once comments had been considered. *See* AR at 1091-95.

Evergreen and Providence contend that where competitors object to a proposed settlement of an adjudicative proceeding, RCW 70.38.115(10)(b) entitles them to their own adjudicative hearing, regardless of what subsection 10(c) requires for settlements. Pet. at 19-20. However, no right to a new proceeding derives from (10)(b) where a settlement has been proposed. RCW 70.38.115(10)(b) provides: “in a proceeding under this subsection,” a competitor must be given the

opportunity to present “oral *or* written” testimony. (Emphasis added.) Hence, an opportunity to present argument and testimony either orally *or* in writing is all that (10)(b)’s plain language requires.

More importantly, if the legislature meant for 10(b) to entitle competitors to a full adjudicative hearing upon their objection to a proposed settlement, it would not make sense for it to have also addressed in (10)(c) a more limited right to an “opportunity to comment, in advance.” Indeed, if (10)(b) applied as *Evergreen* and *Providence* suggest, there would have been no need for subsection (10)(c) at all. This Court avoids statutory interpretations that render language superfluous. *Lutheran Day Care v. Snohomish Cnty.*, 119 Wn.2d 91, 104, 829 P.2d 746 (1992).

Moreover, the requirements of notice and opportunity to comment in (10)(c) are consistent with this Court’s discussion of competitors’ rights in the context of proposed settlement. In *St. Joseph Hospital*, decided just before the legislature enacted (10)(b) and (c), *St. Joseph Hospital* challenged a settlement that resulted in a certificate of need being granted to a competitor. *St. Joseph Hosp.*, 125 Wn.2d at 737; Laws of 1995, 1st Sp. Sess., ch. 18, § 72(10). *St. Joseph Hospital* asserted that as a competing certificate holder, it was entitled to notice of the applicant’s request for an adjudicative proceeding and of the Department’s agreement to reopen review of the application, and it was entitled to an adjudicative

hearing when its competitor was granted a certificate of need. *St. Joseph Hosp.*, 125 Wn.2d at 742. This Court held St. Joseph Hospital was indeed entitled to notice of the reopening of the application and an opportunity to respond, but it was not entitled to a hearing. *See id.* Notably, this Court did not hold due process entitled competitors to a hearing to evaluate contested settlement, even though the issue had been raised below. *Id.* at 738, 742-43.⁹

Evergreen and Providence also argue their opportunity to challenge the settlement was inadequate under due process. Pet. at 19-20. The Court of Appeals declined to address the issue because it was not adequately briefed or argued, and Evergreen and Providence should not be permitted to revive the argument here. *See King Cnty. Pub. Hosp.*, 167 Wn. App. at 750 n.8. Yet to the extent this Court chooses to address procedural due process, Evergreen and Providence have not met their heavy burden to show that the challenged settlement procedure is unconstitutional beyond a reasonable doubt. *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 215, 143 P.3d 571 (2006). First, Evergreen and Providence fail to show they have a constitutionally-protected interest in *preventing a competitor* from obtaining a certificate of need. In at least

⁹ To the extent Evergreen and Providence argue they were entitled to invoke (10)(b) *after* the health law judge granted Odyssey's certificate of need, only Evergreen requested a new hearing at that time. Pet. at 14 n.4; CP at 863-65. Evergreen waived this argument when it withdrew its request to proceed with judicial review. Pet. at 14 n.4; CP at 863-65.

one similar circumstance, this Court concluded that no protected property interest existed in preventing competitors from obtaining licenses. *See Wash. Indep. Tel. Ass'n v. Utils. & Transp. Comm'n*, 149 Wn.2d 17, 24-25, 65 P.3d 319 (2003).

Even if Evergreen and Providence could show some protected interest, they had ample notice and opportunity to be heard, including two opportunities to submit documentary evidence and argument opposing the settlement. Due process allows summary judgment without oral argument or testimony. *E.g., Parker v. United Airlines, Inc.*, 32 Wn. App. 722, 727-28, 649 P.2d 181 (1982). Moreover, under a *Mathews* balancing test, Evergreen and Providence fail to show their private interest in limiting competition outweighs the public interest in fulfilling patient need for additional hospice services in King County, and they have failed to articulate any value to be gained by the additional process they seek. *See Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). In fact, Evergreen and Providence fail to identify a single issue or argument they were unable to raise under the process afforded them by RCW 70.38.115(10)(c). Thus, if the Court reaches the issue, it should find the process for evaluating settlements under (10)(c) to be constitutional.

C. Substantial Evidence Supports The Findings That The Criteria Were Met, And Granting The Certificate Of Need Was Not Arbitrary Or Capricious

When calculating need, the Department correctly did not consider

a provider who was not yet licensed or operating, and the health law judge appropriately found all four criteria were met. *See* Pet. at 10-13. Thus, the Department's findings were supported by substantial evidence. Substantial evidence is evidence sufficient to persuade a fair-minded and rational person, a "highly deferential" standard. *Alejandro v. Bull*, 159 Wn.2d 674, 681, 153 P.3d 864 (2007); *ARCO Prods. Co. v. Utils. & Transp. Comm'n*, 125 Wn.2d 805, 812, 888 P.2d 728 (1995). The Department's determination of need will be overturned only if found "arbitrary and capricious." *See Overlake Hosp. Ass'n v. Dep't of Health*, 170 Wn.2d 43, 56-57, 239 P.3d 1095 (2010).

A hospice serving ethnic or religious groups is exempt from having to obtain a certificate of need, but its patient census *is* counted when determining need. RCW 70.38.111(9)(a)-(b). However, it was reasonable not to consider Kline Galland in the 2008 need determination because, at the time, Kline Galland had not yet applied for an exemption under RCW 70.38.111(9)(a), and even at the time of settlement, Kline Galland had no patient census because it was not yet licensed or operating. AR at 1024, 1422-23. Given these facts, the Department was correct in not considering services from Kline Galland.

Evergreen and Providence have also asserted the Department improperly extended the three-year need horizon to be considered for the 2006 application. Pet. at 12; WAC 246-310-290(6). But the program

projected need in 2009 for another hospice in King County. AR at 822. Evergreen and Providence also incorrectly assert the health law judge failed to consider the non-need criteria, but the health law judge specifically found each of the non-need criteria was met. AR at 1722. This was consistent with the program's detailed explanation that the three non-need criteria would have been met, but for lack of need. *Supra* pp. 3-4. Once the Department decided to use the updated December 2008 need determination, it then followed that the non-need criteria were met. In sum, the Department's findings are supported by substantial evidence.

V. CONCLUSION

This Court should affirm the Court of Appeals and uphold the granting of a certificate of need to Odyssey to establish a hospice agency to care for terminally-ill patients in King County.

RESPECTFULLY SUBMITTED this 10th day of December 2012.

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//s//
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NO. 87574-0

SUPREME COURT OF THE STATE OF WASHINGTON

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.

CERTIFICATE OF SERVICE

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I certify, under penalty of perjury under the laws of the state of Washington, that on this date I have caused a true and correct copy of Supplemental Brief Of Washington State Department Of Health to be served on the following via first class mail, postage prepaid, and a .pdf version to the listed e-mails:

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King County Public Hospital District 2 v. Department of Health

Cause No. 87574-0

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