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NO. 66304-6-I

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**COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON**

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

Appellants,

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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**RESPONDENT STATE OF WASHINGTON DEPARTMENT OF  
HEALTH'S AND SECRETARY MARY SELECKY'S BRIEF**

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## I. INTRODUCTION

The Department of Health (Department) issued a final order approving Odyssey Healthcare Inc.'s (Odyssey) Certificate of Need (CN) application to establish a hospice agency in King County to serve terminally-ill patients. AR 1018-28; 1721-22.<sup>1</sup> Petitioners, who are existing King County hospice providers, filed a Petition for Judicial Review under RCW 34.05 contesting the Department's decision to approve Odyssey's hospice application. CP 1-20.

The King County Superior Court reversed the decision to approve Odyssey's application, and remanded the case to the Department for further review. CP 963-76. Odyssey appealed the superior court decision.

The Department does not agree with all of Odyssey's arguments against the superior court's decision. However, for its own reasons, the Department submits that the superior court erred in overturning the approval of Odyssey's application. Contrary to the superior court's conclusion, in approving the application, the Department reasonably considered updated information that showed need for another hospice provider to serve terminally-ill patients in King County, and reasonably determined that Odyssey's application met all Certificate of Need criteria. Moreover, the administrative process for approving the application

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<sup>1</sup> AR refers to the Administrative Record, compiled by the Department, in this case.

complied with RCW 70.38.115(10)(c), and allowed Petitioners a full and fair opportunity to contest the approval under the Certificate of Need criteria.

## **II. STATEMENT OF THE CASE**

### **A. Certificate Of Need Process**

RCW 70.38 and WAC 246-310 require health care providers to obtain a Certificate of Need in order to establish certain new health care facilities and services. The law aims to assure there are “accessible” health care services in the state to “promote, maintain, and assure” the health of all citizens in the state. RCW 70.38.015(1).

One service requiring Certificate of Need review is a hospice agency. RCW 70.38.025(6).<sup>2</sup> For approval, an applicant must demonstrate the proposed project satisfies four criteria: Need (WAC 246-310-210); Financial Feasibility (WAC 246-310-220); Structure and Process of Care (WAC 246-310-230); and Cost Containment (WAC 246-310-240).

The Certificate of Need process involves an application by a health care provider; an opportunity for public comment on the application; and a decision by the Department whether to approve or deny the application.

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<sup>2</sup> Hospice care is “symptom and pain management provided to a terminally ill individual.” WAC 246-310-290(1)(e).

RCW 70.38.115. A denied applicant may request an adjudicative proceeding before a Department Health Law Judge to contest the denial. RCW 70.38.115(10).<sup>3</sup>

**B. Initial Denial of Odyssey’s Certificate Of Need Application**

In October 2006, Odyssey filed a Certificate of Need application to establish a hospice agency in King County.<sup>4</sup> AR 14. A numeric “methodology” in WAC 246-310-290 determines “need” for new hospices in a particular county. Applying the methodology, the Department determined no need existed for a new hospice in King County, and therefore denied the application. AR 1033-58. In September 2007, Odyssey requested an adjudicative hearing to contest the denial of its application. AR 1-40. The Health Law Judge continued the hearing to allow time for the Department to consider a rule-making petition filed by Odyssey related to WAC 246-310-290. AR 195, 198-99.<sup>5</sup>

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<sup>3</sup> The Health Law Judge is designated by the Secretary of Health to make final Department decisions in Certificate of Need cases. RCW 70.38.025(13); WAC 246-10-102 (definition of “presiding officer”).

<sup>4</sup> At the same time, Odyssey also filed hospice applications for Pierce County and Snohomish County. The Department also denied these two applications, and Odyssey no longer appeals these denials.

<sup>5</sup> Odyssey’s rule-making petition was denied by the Department, and is not an issue in this case.

**C. Odyssey's Federal Lawsuit Against The Department**

In April 2009, when its request for an adjudicative proceeding was pending, Odyssey filed a federal lawsuit under 42 U.S.C. § 1983 against the Department, challenging both the validity of WAC 246-310-290 and the Department's denial of Odyssey's hospice application. AR 1059-80. The lawsuit claimed that, by restricting approval of new hospice providers, the rule violated the federal Sherman Antitrust Act and the dormant Commerce Clause of the U.S. Constitution. In September 2009, the Department settled the lawsuit in part by agreeing to propose approval of Odyssey's application based on the fact that new data showed that need now existed for a new hospice in King County. AR 1093-95. As explained below, the Department did not agree to approve the application, but only to consider its approval.

**D. Adjudicative Proceeding On Approval Of Odyssey's Application**

Odyssey's adjudicative proceeding to contest denial of its application was stayed pending resolution of the federal case. AR 252-55. Once the federal case settled, the adjudicative proceeding went forward. RCW 70.38.115(10)(c) states that when an applicant (i.e., Odyssey) files an adjudicative proceeding contesting the denial of an application, the

Department may settle by approving the application after giving interested persons an opportunity to comment on the proposed settlement.

As part of the settlement in the federal lawsuit, the Department agreed to propose settlement of the Odyssey application based on new data showing need for a new hospice in King County. The Department agreed to submit the proposed settlement to comment by interested persons, consistent with RCW 70.38.115(10)(c). AR 1093-95. After reviewing the comments, the Department would determine whether to recommend approval of the application – as consistent with Certificate of Need criteria – to the Health Law Judge in the adjudicative proceeding. AR 1095.<sup>6</sup>

Pursuant to this process, the Department received comments opposing the Certificate of Need approval. AR 1104-12 (Providence); AR 1113-21 (Evergreen); AR 1122-26 (Franciscan); AR 1128-1129 (Swedish). Despite the opposition, the Department decided to recommend that the Health Law Judge approve the application. AR 1018-1160. The Department determined that the application met all four Certificate of Need criteria, including the “need” criterion based on the new data.

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<sup>6</sup> Specifically, the agreement stated that, after considering the comments, the Department would “either (i) present the Stipulation to the Health Law Judge for entry of an Order approving the proposed settlement and granting the King County application . . . , or (ii) notify Odyssey of its decision not to present the Stipulation to the Health Law Judge . . . .” AR 1095.

When the Department recommended approval, Petitioners urged the Health Law Judge to reject the settlement and not approve the application. AR 1179-1527. Odyssey and the Department responded to the comments opposing settlement by explaining why the application met the four Certificate of Need criteria. AR 1528-1681; 1682-1699. As with any settlement proposed pursuant to RCW 70.38.115(10)(c), the Health Law Judge had discretion on whether to approve the application. After considering arguments from the competing providers, the Department, and Odyssey, the Health Law Judge issued a final order approving Odyssey's application as meeting the four Certificate of Need criteria. AR 1721-22.

**E. King County Lawsuit Challenging Approval Of Odyssey's Application**

On January 2, 2010, Petitioners filed a Petition for Judicial Review under RCW 34.05.470(3), challenging the Health Law Judge's final order approving Odyssey's Certificate of Need application. CP 1-20.

On October 29, 2010, the King County Superior Court reversed the decision to approve the application. CP 966-976. The superior court found that the Department improperly approved Odyssey's application "without an adjudicative proceeding," and that the Department was "arbitrary and capricious" in considering the updated 2007 information that showed need for another hospice agency in King County. CP 974.

The superior court remanded the case to the Department for further review. CP 975.

Odyssey appealed the superior court ruling reversing the Department order approving its CN application. The Department appears in this appeal to defend its Final Order, which the superior court reversed in error.

### **III. ASSIGNMENT OF ERROR**

The Department concurs in Odyssey's Assignments of Error.

### **IV. ISSUES**

Under RCW 70.38, the Department approved Odyssey's Certificate of Need application to establish a hospice agency to serve terminally-ill patients in King County. Petitioners are existing hospice providers who challenge the approval. The issues are:

(A) Did Petitioners demonstrate that the Health Law Judge abused his discretion in allowing admission of new data that showed need for another hospice agency in King County?

(B) Was there substantial evidence to support the Department's conclusion that the Odyssey application satisfied the four Certificate of Need criteria in WAC 246-310-210, 246-310-220, 246-310-230, 246-310-240?

(C) Did Petitioners demonstrate that, following a proposed settlement under RCW 70.38.115(10)(c), the Department improperly approved Odyssey's Certificate of Need application on motion without holding a full adjudicative proceeding?

(D) Are Petitioners precluded from raising the above-adjudicative proceeding issue when they failed to timely raise the issue in the case before the Department?

## V. STANDARD OF REVIEW

The Health Law Judge entered a final order approving Odyssey's Certificate of Need application. AR 1721-22. The superior court reversed the final order on two grounds: (1) the Health Law Judge improperly allowed admission of new evidence in support of the application; and (2) the Health Law Judge failed to accord Petitioners a full adjudicative proceeding to contest approval of the application. The burden is on Petitioners to show the Department's decision was incorrect. RCW 34.05.570(1)(a); *Univ. of Wash. Med. Ctr. v. Dep't of Health*, 164 Wn.2d 95, 103, 187 P.3d 243 (2008).

First, in considering whether the Health Law Judge improperly considered new data, the standard of review is "abuse of discretion." *Id.* at 104. The standard is met only when the ruling is "manifestly

unreasonable.” *Gildon v. Simon Prop. Group Inc*, 158 Wn.2d 483, 494, 145 P.3d 1196 (2006).<sup>7</sup>

Second, in considering whether the Health Law Judge followed proper procedure, the standard of review is error of law. RCW 34.05.570(3)(d). Courts accord “substantial deference” to the Department’s interpretation of the Certificate of Need law, “particularly in regard to the law involving the agency’s special knowledge and expertise.” *Univ. of Wash. Med. Ctr.*, 164 Wn.2d at 102 (upholding Department finding of need for a new liver transplant program). Courts also defer to an agency’s interpretations of its own procedural rules. *Alpha Kappa Lambda Fraternity v. Wash. State Univ.*, 152 Wn. App. 401, 414, 216 P.3d 451 (2009). Deference means that an agency’s “reasonable” conclusions should be upheld, even though a court might find a different conclusion more persuasive. *Marsh v. Or. Natural Res. Coun.*, 490 U.S. 360, 378, 109 S. Ct. 1851, 104 L. Ed. 2d 377 (1989).

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<sup>7</sup> The superior court applied a similar “arbitrary and capricious” standard, which is a standard of judicial review under RCW 34.05.570(3)(i). Arbitrary and capricious, like abuse of discretion, is a narrow standard of review that is “highly deferential” to the agency. *ARCO Prods. Co. v. Washington Util. & Transp. Comm’n*, 125 Wn.2d 805, 812, 888 P.2d 728 (1995). Applying this standard, a reviewing court will overturn an agency decision only if the decision is made “willfully and unreasonably, and in disregard of the facts and circumstances.” *Univ. of Wash. Med. Ctr.*, 164 Wn.2d at 102. A ruling is not arbitrary and capricious if “there is room for two opinions . . . even though the reviewing court believes it to be erroneous.” *Rios v. Wash. Dep’t of Labor & Indus.*, 145 Wn.2d 483, 501, 39 P.3d 961 (2002).

## VI. ARGUMENT

Contrary to the superior court's ruling, the Health Law Judge properly exercised his discretion in considering new data that showed need for another hospice agency in King County, and properly approved Odyssey's application under the applicable Certificate of Need criteria. In approving the application, the Department followed the proper settlement procedure in RCW 70.38.115(10)(c). In reversing the Department, the superior court misunderstood both the facts of the case and the law related to approval of Certificate of Need applications through the statutory settlement procedure. Accordingly, the Department requests that this court reverse the superior court ruling and reinstate the Department's approval of Odyssey's Certificate of Need application.

**A. Odyssey's Application Satisfied The "Need" Criteria Under WAC 246-310-210 And 246-310-290**

**1. The WAC 246-310-290 Methodology Initially Showed No Need For A New Hospice In King County**

WAC 246-310-290 provides a "methodology" for determining "need" in the county where the Certificate of Need applicant proposes to establish a new hospice agency. Subsection (7) of the rule contains the six steps of the methodology:

Under Step 1, calculate the statewide “use rate” for four hospice groups: age 65 or older with and without cancer, and under age 65 with and without cancer; (WAC 246-310-290(7)(a))

Under Step 2, calculate the average number of total resident deaths over the last three years in the planning area (i.e., King County), sorted into the four groups from Step 1; (WAC 246-310-290(7)(b))

Under Step 3, multiply each hospice use rate for the four groups from Step 1 by the planning area’s total number of resident deaths identified in Step 2; (WAC 246-310-290(7)(c))

Under Step 4, add the four subtotals in Step 3 to project the total potential volume for hospice in the planning area; (WAC 246-310-290(7)(d))

Under Step 5, inflate the potential volume identified in Step 4 by one-year population growth rate for the planning area; and (WAC 246-310-290(7)(e))

Under Step 6, determine the average number of hospice admissions in the last three years (“current capacity”). The current capacity is subtracted from the potential volume identified in Step 5. This number is multiplied by the average length of stay in hospice. The Department then determines “the number of hospice agencies . . . which could support an

unmet ADC [average daily census]<sup>8</sup> of thirty-five [hospice patients].”  
(WAC 246-310-290(7)(f))

Step 6 is the heart of the methodology. The methodology calculates a statewide use rate for hospice. Step 6 allows approval of a new hospice in a planning area (i.e., King County) only if projections are that existing hospices in the planning area, taken together, will be providing services at a rate that is 35 ADC below the state average. This means that a new agency could be expected to achieve a 35 ADC, which is minimally necessary for the financial viability of an agency. For every 35 ADC below, there is a need for one additional hospice in the planning area. WAC 246-310-290(7)(f).

The Department performed the WAC 246-310-290 methodology for Odyssey’s 2006 application. Based on 2003-05 King County data, the Department found no need for an additional hospice in King County through 2011. AR 13-38 (entire denial decision); AR 16-33 (“need” discussion); AR 33-38 (methodology worksheets). Based on lack of need, the Department denied Odyssey’s application.

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<sup>8</sup> Average daily census is the average number of persons actually receiving care by the agency on one day.

**2. Prior To The Conclusion Of The Adjudicative Proceeding, An Updated Methodology Showed Need For Another Hospice In King County, Justifying Approval Of Odyssey's Application**

As explained above, Odyssey requested an adjudicative proceeding to contest the denial of its application. Before a hearing could be held, Odyssey, as noted above, filed its federal lawsuit challenging the constitutionality of WAC 246-310-290. AR 1059-80. The adjudicative proceeding was stayed pending outcome of the federal lawsuit. AR 252-55. During this stay, the Department performed an updated 2008 methodology. This updated methodology used new 2007 hospice-use data from existing providers in performing the first five steps of the methodology.

Using this new 2007 data, the updated 2008 methodology found, beginning in 2009, a projected unmet need of 37 ADC in King County. Since the 37 ADC number was over 35 ADC, need existed for one additional hospice in King County under step 6 of the methodology, as explained above. AR 1096-1101 (methodology worksheets); AR 1101 (final worksheet).

Based on this finding of need under the methodology, the Department proposed settlement of the adjudicative proceeding by

approving Odyssey's application, and the Health Law Judge decided to approve the application. AR 1721-22.

**3. The Department Was Not Precluded From Approving Odyssey's Application Based On The Updated 2008 Methodology, Showing Need For An Additional Hospice In King County**

In overturning approval of Odyssey's application, the superior court held that the Health Law Judge was arbitrary and capricious in admitting the new 2007 data that showed need for a new hospice in King County, since this data did not exist when the Department made its initial decision to deny the application. This holding is in error.

As stated above, the Department initially makes a Certificate of Need decision based on information provided during review of the application, which includes an opportunity for public comment. When the decision is challenged through an adjudicative proceeding:

The law gives considerable discretion to administrative law judges to determine the scope of admissible evidence. It 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.

*Univ. of Wash Med Ctr.*, 164 Wn.2d at 104. The court further held that any ruling on admissibility of evidence is subject only to the narrow "abuse of discretion" (manifestly unreasonable) standard. *Id.* at 104. As

explained below, the Health Law Judge's ruling was not an abuse of discretion.

The Department initially denied the Odyssey application in 2007. In asking the Health Law Judge to consider the new data, the Department acknowledged that adjudicative proceedings challenging denials are usually based on the evidence in existence at the time of the Department's initial decision. However, the Department explained several circumstances justifying admission of the 2007 data (used in the 2008 methodology) that showed need for a new hospice in King County:

First, the hospice filing deadline is October each year. WAC 246-310-290(2). When adopting WAC 246-310-290, the Department assumed Medicare (CHARS) data would be available by October on how many patients were served by existing providers in the preceding year. WAC 246-310-290(7)(a). The Department also assumed that death statistics would be available from the Department's Center for Health Statistics by October. Had this date assumption been correct, potential applicants would have known whether the methodology showed 'need' for an additional hospice before spending considerable resources in making application in October. However, these date assumptions proved incorrect, meaning that applicants unfortunately had to apply without knowing whether need existed.

Second, Odyssey applied in 2003 and 2006. Both applications were denied because, following application, the Program received data and determined the methodology showed no need. Odyssey appealed the 2007 denial, but did not submit a 2008 application, which would have been evaluated under the 2008 methodology. The company's decision to forego a third costly application in 2008 was

reasonable given that (1) the 2007 denial already was on appeal, and (2) there was no way for Odyssey to know in advance whether the 2008 methodology would show need, as the Department had intended when it adopted the methodology.

Third, Intervenors argue that need should be shown by the third year. The Program made its Odyssey decision in 2006. As explained above, the 2008 methodology showed need in King County by 2009, which is within the three-year window of the 2006 decision.

Finally, since no entity applied in 2007 in King County to provide hospice care to terminally-ill patients, applying the 2008 methodology to Odyssey's 2006 application does not prejudice a competing entity.

AR 1026-27 (emphasis in original).

Indeed, these reasons for accepting new data – the lack of data at time of application, the earlier applications, the three-year window showing need, and the lack of new competing applications – are factors unique to Odyssey's application, and justify considering the 2007 data in determining need for Odyssey's proposed hospice. AR 1722. As stated above, the Health Law Judge's decision to consider this data may be overturned only if the decision was an "abuse of discretion," which would mean that the decision was manifestly unreasonable. The decision was not manifestly unreasonable because the Department presented multiple rationales for using the 2007 data. Hence, the Health Law Judge's evidentiary ruling should be upheld on judicial review.

**B. In Approving Odyssey’s Application, The Health Law Judge Found That The Application Met All Four Certificate of Need Criteria**

As stated above, for approval, a Certificate of Need application must meet three other criteria in addition to Need under WAC 246-310-210. These “non-need” criteria include Financial Feasibility (WAC 246-310-220); Structure and Process of Care (WAC 246-310-230); and Cost Containment (WAC 246-310-240).

The superior court erred in finding that the Health Law Judge failed to address all four criteria in approving Odyssey’s application. CP 974. In the adjudicative proceeding, the Department correctly noted that its original decision found that the three non-need criteria would have been satisfied had Odyssey shown need. AR 24-31,<sup>9</sup> 1688. Although contesting need, Petitioners’ lengthy submissions to the Health Law Judge contained no argument against Odyssey on the three non-need criteria. AR 1179-1527. Accordingly, in addition to finding need, the Health Law Judge correctly found that Odyssey met the three non-need criteria. AR 1722.

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<sup>9</sup> With regard to the three non-need criteria, the Department found that the Financial Feasibility criterion was not satisfied only because Odyssey failed to show need. AR 26. The Department found that Odyssey satisfied the Structure and Process of Care criterion only because Odyssey failed to show need. AR 30. The Department found that the Cost Containment criterion was not satisfied only because Odyssey failed to show need. AR 30.

**C. In Approving Odyssey’s Application, The Health Law Judge Followed Proper Procedures Under RCW 70.38.115(10)(c), And Petitioners Failed To Object To Those Procedures**

The superior court further held that the Department failed to follow proper procedures in approving Odyssey’s application. To the contrary, as explained below, the Department followed the correct procedures and allowed Petitioners a full and fair opportunity to contest the approval.

RCW 70.38.115(10)(c) applies to cases where an applicant, like Odyssey, requests an adjudicative proceeding to contest the denial of a Certificate of Need application. It states that when the Department desires to settle with an applicant – by approving the application – the Department must give interested persons notice and an opportunity to comment on the proposed settlement. It is uncontested that the Department followed the RCW 70.38.115(10)(c) notice requirement. In fact, following notice, Petitioners Providence, Evergreen, Franciscan, and Swedish submitted extensive comments opposing settlement. AR 1104-1129.<sup>10</sup>

After reviewing the comments, the Department could have abandoned settlement. Instead, the Department decided to go forward with settlement. Accordingly, in the adjudicative proceeding, the Department requested that the Health Law Judge approve Odyssey’s

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<sup>10</sup> The Department’s protection of Petitioners’ right to challenge the decision is further evidenced by the fact that, in the superior court, the Department successfully opposed Odyssey’s summary judgment motion which attempted to restrict Petitioners’ right to judicial review of the Health Law Judge’s approval of the settlement. CP 505-12.

Certificate of Need application. Petitioners were afforded another opportunity to comment on the application and again submitted argument against approval. The Department and Odyssey both responded to those arguments. After considering all the arguments, the Health Law Judge approved Odyssey's application as meeting the four Certificate of Need requirements. AR 721-22. In reversing the approval, the superior court held:

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

CP 972.

The superior court misunderstood the process that occurred in this case, as Petitioners actually received a full and fair opportunity to contest the settlement and the approval of Odyssey's application. As stated above, in accordance with RCW 70.38.115(10)(c), Petitioners received notice and opportunity to comment on the proposed settlement. Then, in the adjudicative proceeding before the Health Law Judge, the Department moved for an order approving the application as meeting the four Certificate of Need criteria. Petitioners responded by submitting extensive

written material to the Health Law Judge opposing approval. Only then did the Health Law Judge enter an order approving the application. The process was consistent with the settlement provision of RCW 70.38.115(10)(c), and simply did not “circumvent” Petitioners’ opportunity to fully contest approval of Odyssey’s application.

Furthermore, contrary to the superior court’s ruling, the settlement of the federal lawsuit, as described above, was irrelevant to the approval process. The federal settlement merely provided for the Department to “propose” settlement, approving Odyssey’s application, for public comment. After receiving public comment, the Department could either abandon settlement or recommend approval of the application to the Health Law Judge. AR 1095. When the Department decided to recommend approval, the Health Law Judge, after hearing argument, could either approve or deny the application. Plainly, the Department proposed settlement to the Health Law Judge, and the Health Law Judge approved the application, based on the merits of the application – not based on the federal lawsuit settlement.

Finally, in submissions to the Health Law Judge, Petitioners never timely argued that they were entitled to a full hearing or that the issues could not be resolved on motion. To the contrary, Petitioners entered into the settlement process, and argued to the Health Law Judge that the facts

and law required denial of Odyssey's application. AR 1179-1527. Only on judicial review, after the Health Law Judge ruled against them, did Petitioners complain that there was no full adjudicatory hearing. Petitioners cannot now make their procedural objection, because an issue not raised before the agency cannot be subsequently raised on judicial review. RCW 34.05.554(1).<sup>11</sup> The prohibition on raising new issues is not a mere technicality, but is essential to the integrity of the administrative process and to possibly obviate the need for judicial review of the case. *Alpha Kappa Lambda Fraternity*, 152 Wn. App. 420, *quoting King Cy. v. Wash. State Boundary Review Bd.*, 122 Wn.2d 648, 668, 860 P.2d 1024 (1993).

In summary, the Department correctly followed procedures in approving Odyssey's application. What constitutes proper procedure is a legal issue, and the Department's interpretation is entitled to deference on judicial review. However, even if the Department had somehow failed to follow proper procedures, the issue cannot be raised on judicial review, because Petitioners failed to raise the issue before the Department when they had the opportunity to do so.

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<sup>11</sup> The statute makes three narrow exceptions, which are not even arguably applicable to this case.

## VII. CONCLUSION

Based on the foregoing, the Department of Health respectfully requests that the Court affirm its decision to approve Odyssey's Certificate of Need application to establish a needed new hospice agency to serve terminally-ill patients in King County.<sup>12</sup>

RESPECTFULLY SUBMITTED this 10 day of February, 2011.

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and Mary E. Selecky

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<sup>12</sup> If the court finds Petitioners were entitled to a full adjudicatory hearing, and had properly preserved that issue for judicial review, the case should be remanded to the Department for hearing. RCW 34.05.574(1). In case of remand, the court should hold, as discussed above, that the Health Law Judge may consider the 2007 hospice use data in making a decision whether to approve Odyssey's application.

**PROOF OF SERVICE**

I certify that I served a copy of this document on all parties or their counsel of record on the date below as follows:

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

DATED this 10<sup>th</sup> day of February, 2011, at Olympia, WA.

  
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ELIZABETH TALEN