

**STATE OF WASHINGTON
DEPARTMENT OF HEALTH
ADJUDICATIVE SERVICE UNIT**

In Re:)	
)	Docket No. 07-06-C-2011CN
Certificate of Need Remand Decision by)	Master Case No. M2008-117737
Department of Health Re: Certificate of)	
Need Application of Swedish Health)	FINDINGS OF FACT,
to Establish a 175-Bed Hospital in the)	CONCLUSIONS OF LAW AND
City of Issaquah)	AND FINAL ORDER ON REMAND
)	
OVERLAKE HOSPITAL ASSOCIATION)	
and OVERLAKE HOSPITAL MEDICAL)	
ASSOCIATION, Washington nonprofit)	
Corporations; KING COUNTY PUBLIC)	
HOSPITAL DISTRICT NO. 2, d/b/a)	
EVERGREEN HEALTHCARE, a)	
Washington Public Hospital District;)	
KING COUNTY PUBLIC HOSPITAL)	
DISTRICT NO. 4, d/b/a SNOQUALMIE)	
VALLEY HOSPITAL, a Washington)	
Public Hospital District; and)	
CHILDREN'S HOSPITAL AND)	
REGIONAL MEDICAL CENTER, a)	
Washington nonprofit corporation,)	
)	
Petitioners.)	
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APPEARANCES:

Overlake Hospital Association and
Overlake Hospital Medical Association, by
Ogden Murphy Wallace PLLC, per
Donald W. Black, E. Ross Farr, and Jeffrey D. Dunbar, Attorneys at Law

King County Public Hospital District No. 2, d/b/a
Evergreen Healthcare, by
Livengood, Fitzgerald & Alskog, PLLC, per
James S. Fitzgerald and Gregory A. McBroom, Attorneys at Law

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
FINAL ORDER ON REMAND

King County Public Hospital District No. 4, d/b/a
Snoqualmie Valley Hospital, by
Jay R. Rodne, Attorney at Law

Children's Hospital and Regional Medical Center, by
Davis Wright Tremaine, LLP, per
Robert G. Homchick and Lisa Rediger Hayward, Attorneys at Law

Swedish Health Services, by
Dorsey & Whitney LLP, per
Brian W. Grimm and Peter S. Ehrlichman, Attorneys at Law

Department of Health Certificate of Need Program, by
Office of the Attorney General, per
Richard A. McCartan, Assistant Attorney General

PRESIDING OFFICER: John F. Kuntz, Health Law Judge

Following a remand order from the King County Superior Court, the Certificate of Need Program reviewed the application from Swedish Health Services to establish a new hospital in East King County. Application granted.

ISSUES

- A. Whether the Swedish Health Services application to establish a new hospital in East King County met the applicable certificate of need criteria?
- B. Whether there was sufficient need for additional acute care hospital beds in East King County to support the Swedish Health Services application?

I. FINDINGS OF FACT

Docket No. 05-06-C-2001CN¹

1.1 In 2004, Swedish Health Services (Swedish) and Overlake Hospital Association (Overlake) each filed a certificate of need application to establish a new

¹ Docket No. 05-06-C-2001CN represents the four appeals which were consolidated on August 18, 2005. See Prehearing Order No. 2, signed November 2, 2005, Docket No. 05-06-C-2001CN.

hospital in Issaquah, Washington. The city of Issaquah is located in East King County, Washington. This geographic area is known, for certificate of need purposes, as a health service area (service area). A service area is defined as a geographic region appropriate for effective health planning.

1.2 The Department of Health Certificate of Need Program (the Program) reviewed the Swedish and Overlake applications simultaneously. On May 10, 2005, the Program denied both the Overlake and Swedish applications, based on its determination that there was no need for additional acute care hospital beds in the East King County service area. The Program applied the hospital bed need methodology (the need methodology) contained in the 1987 Washington State Health Plan to determine that no additional need existed. Under chapter 70.38 RCW, the State Health Coordinating Council developed the need methodology as a tool for the long-term strategic planning of health care resources in Washington. The Washington Health Plan was “sunset” (lapsed) in 1989.² While the Washington Health Plan lapsed in 1989, the methodology for calculating or forecasting hospital bed need remains a viable tool for predicting the baseline need for acute care beds.

1.3 In calculating the need methodology to determine whether need existed in the East King County service area, the Program included 132 beds located at the Group Health Eastside Hospital in the existing supply of beds following 2007.

² A “sunset law” is defined as a statute or provision in a law that requires periodic review of the rationale for the continued existence of the particular law or the specific administrative agency or other government functions. The legislature must take positive steps to allow the law, agency, or functions to continue in existence by a certain date or such will cease to exist. Black’s Law Dictionary (6th Edition) (1991), page 1436.

1.4 Overlake and Swedish both timely appealed the Program decisions denying their respective certificate of need applications.

1.5 On January 17, 2006, the parties filed a Stipulation of Facts (Regarding Testimony of Karen Nidermayer) (the Stipulation) with the Adjudicative Service Unit. Under the terms and conditions of the Stipulation, Program Analyst Karen Nidermayer determined both the Swedish and Overlake applications each met the criteria set forth in WAC 246-310-220 (financial feasibility), WAC 246-310-230 (structure and process of care) and 246-310-240 (cost containment), but not whether both applicants met the need criteria under WAC 246-310-210.

1.6 Following the Stipulation, the Overlake and Swedish appeals were consolidated and a joint hearing was convened on January 17-20, 2006. Following the hearing, Health Law Judge Zimmie Caner (Judge Caner) issued a Findings of Fact, Conclusions of Law and Final Order on April 27, 2006 (the 2006 Order). Judge Caner affirmed the Program's denial decision for both the Overlake and Swedish applications. More specifically, she affirmed the Program's decision that no need existed for a new hospital in the East King County service area, based on the calculations using the need methodology.

1.7 Swedish chose to appeal the 2006 Order to King County Superior Court. Overlake chose not to appeal the 2006 Order. That portion of the Program's 2006 Order that denied the Overlake application is final and binding.

1.8 On February 15, 2007, King County Superior Court Judge Bruce Hilyer (Judge Hilyer) issued an "Order Reversing the Department of Health's Final Order

Denying Swedish's Application for a Certificate of Need to Establish a Hospital in Issaquah and Remanding Swedish's Application to the Department" (the Remand Order). Judge Hilyer ruled that the Department *did not* err in using the mathematical calculation of numerical need as the sole measure of determining need for Swedish's proposed hospital under WAC 246-310-210(1). The Remand Order, page 4.

Judge Hilyer further ruled the Department *did* err by including the 132 Group Health hospital beds in calculating the need methodology after 2008. The Remand Order, pages 2-3.

1.9 Accordingly, Judge Hilyer's Remand Order stated:

IT IS SO ORDERED that Swedish's CN application is remanded to the Department to perform a new calculation of numeric need in the East King planning area, excluding the Group Health beds from that calculation beginning in 2008, and to determine whether Swedish's CN application satisfies the ((need)) criteria so as to allow approval of the application for a designated number of beds.

The Remand Order, pages 5-6.

1.10 On April 23, 2007, Judge Caner convened a status conference with Swedish, Overlake, and the Program to address the February 15, 2007 Remand Order by Judge Hillyer. On May 1, 2007, Judge Caner issued an "Order on Remand Based Upon Superior Court Order." Judge Caner remanded the matter to the Program for its further analysis and decision consistent with Judge Hilyer's Remand Order. Post Hearing Order No. 1. The Program's remand analysis and review was due by May 31, 2007.

1.11 On May 31, 2007, the Program issued a Remand Evaluation of the Certificate of Need Application Submitted by Swedish Health Services. In performing the need methodology, the Program changed its original need methodology calculation by excluding the Group Health beds from the hospital bed count after 2008 pursuant to the Remand Order.³ When it excluded the 132 Group Health beds from the need methodology after 2008, the Program determined need did exist to establish a new hospital. Given that the parties previously stipulated to the financial feasibility, structure and process of care, and cost containment criteria, the Program found Swedish's application was consistent with the application criteria of the Certificate of Need Program.

1.12 On June 22, 2007, Overlake; King County Public Hospital District No. 2, d/b/a Evergreen Healthcare (Evergreen); King County Public Hospital District No. 4, d/b/a Snoqualmie Valley Hospital (Snoqualmie Valley); and Children's Hospital and Regional Medical Center (Children's) (jointly the Petitioners) filed an Application for Adjudicative Proceeding with the Adjudicative Service Unit.⁴ The Petitioners sought the entry of an order reversing the Program's May 31, 2007 Remand Determination and denying the Swedish application to establish a hospital.

³ The Program did make one additional change in its new analysis. More specifically, the Program did not conduct a simultaneous project review of Overlake and Swedish. See page 5.

⁴ The Petitioners previously sought and had received affected person status under WAC 246-310-010(2).

A. Procedural History.

1.13 Following the filing of the June 22, 2007 appeal, the Petitioners requested entry of an order that remanded the matter to the Program for a full review, arguing that the Program's review on remand should have encompassed a full review of Swedish's certificate of need application. Judge Caner denied this request. She ruled that a full certificate of need remand review would exceed the scope of Judge Hilyer's order.

Prehearing Order No. 3.

1.14 On March 7, 2008, the Presiding Officer issued an Order of Continuance to continue the hearing date to April 9-11, 2008.⁵ Prehearing Order No. 4. The prehearing order contained a further ruling that limited the scope of the hearing to the issue of need.

1.15 On March 17, 2008, Swedish filed a Motion for Issuance of Final Order Approving Swedish's Application. Swedish argued that there were no material factual disputes between the parties regarding need, there was no relevant evidence for the Presiding Officer to receive and that a final order should be entered approving Swedish's application. On March 21, 2008, the Presiding Officer issued an order denying the motion as untimely, since it was filed after the scheduling order cutoff date for the submission of motions. Prehearing Order No. 5.

⁵ The matter was assigned to the present Presiding Officer in early December 2007. Judge Caner left employment with the Department of Health to accept a position with another employer.

1.16 On April 9, 2008, the scheduled hearing was convened with the parties. On April 10, 2008, Swedish renewed its motion for the issuance of a final order, which was supported by the Program. After further discussion, the parties agreed to a brief postponement of adjournment of the hearing to enable briefing to be completed on the legal issue, namely whether Judge Hilyer's Remand Order constricted the issues to be litigated to whether or not the Program appropriately applied the 12-step need methodology while taking into account the removal of the Group Health Eastside Hospital beds.⁶ The hearing was suspended pending the submission of briefing on the issues.

B. Findings.

1.17 The State Health Plan methodology consists of a 12-step analysis to forecast the future need for acute health care beds in a given service area. Steps 1 through 4 analyze the trend information regarding the utilization of the hospital beds to evaluate need for additional beds. Steps 5 through 10 then address the baseline for the calculation of need for non-psychiatric beds. Step 11 evaluates the need for short stay psychiatric beds, which are not at issue in the Swedish application. Step 12 then allows for the adjustments in the need methodology to reflect any special circumstances of a service area.

1.18 The State Health Plan 12-step methodology forecasts the need for non-psychiatric, acute care hospital beds. The methodology requires:

Develop trend information on hospital utilization.

⁶ 4/10/08 - Transcript of Proceeding, page 53, lines 8 – 18.

Step 1: Compile state historical utilization data (compile the patient days within major service categories) for at least ten years proceeding the base year. The base year is the most recent year about which data is collected as the basis for a set of forecasts.

Step 2: Subtract psychiatric patient days from each year's historical data.

Step 3: For each year, compute the statewide and health service area (HAS) average use rate.

Step 4: Using the ten-year history of use rates, compute the use rate trend line, and its slope, for each HAS and for the state as a whole.

Calculate baseline non-psychiatric bed need forecasts.

Step 5: Using the latest statewide patient origin study, allocate non-psychiatric patient days reported in hospitals back to the hospital planning areas where patients live.

Step 6: Compute each hospital planning area's use rate (excluding psychiatric services) for each of the age groups considered (at a minimum, ages 0-64 and 65+).

Step 7A: Forecast each hospital planning area's use rates for the target year by "trend adjusting" each age-specific use rate. The use rates are adjusted upward or downward in proportion to the slope of either the statewide ten-year use rate trend or the appropriate health planning region's ten-year use rate trend, whichever trend would result in the smaller adjustment.⁷

Step 8: Forecast non-psychiatric patient days for each hospital planning area by multiplying the area's trend-adjusted use rates for the age groups by the area's forecasted population in each age group at the target year. Add patient days in each age group to determine total forecasted patient days.

Step 9: Allocate the forecasted non-psychiatric patient days to the planning areas where services are expected to be provided in accordance with (a) the hospital market shares and (b) the percent of out-of-state use of Washington hospitals, both derived from the latest statewide patient origin study.

Step 10: Apply the weighted average occupancy standards, and determine each planning area's non-psychiatric bed need. Calculate the

⁷ Step 7B is an alternative to step 7A, and does not apply to the facts in this case.

weighted average occupancy standard as described in the Hospital Forecasting Standard 11f.⁸ This should be based on the total number of beds in each hospital (Standard 11b⁹), including any short-stay psychiatric beds in general acute-care hospitals. Psychiatric hospitals with no other services should be excluded from the occupancy calculation.

Determine the total baseline hospital bed need forecasts.

Step 11: To obtain a bed need forecast for all hospital services, including psychiatric, add the non-psychiatric bed need from step 10 above to the psychiatric in-patient bed need from step 11 of the short-stay psychiatric hospital bed need forecasting method.

Step 12: Determine and carry out any necessary adjustments in population, use rates, market shares, out-of-state use, and occupancy rates...

1.19 Whether the existing hospitals will meet the projected population needs requires the calculation of the total number of available beds in the proposed service area, including the beds in competing hospitals within the service area. The State Health Plan outlines the acute care bed needs that should be included in the calculation of present and future available beds in the proposed area. In doing so, the determination of need necessarily includes a determination that existing hospitals will not be unfairly impacted by the establishment of the new hospital.

1.20 Following the receipt of Judge Hilyer's Remand Order (which was further remanded to the Program by Judge Caner), the Program calculated the need methodology by excluding the 132 Group Health bed figure beginning in 2008.

⁸ Standard 11f states: "The occupancy standard applied to each planning area ... shall be based, for forecasting purposes, on the current weighted average of the appropriate occupancy standard for each facility in the planning area. This is calculated as the sum, across all hospitals in the planning area, of each hospital's occupancy rates times that hospital's percentage of total beds in the area"

⁹ Standard 11b provides the hospital occupancy standards used in forecasting need.

1.21 The Swedish application proposed to establish the hospital in three phases:

A. Phase One included the built out of space for 80 inpatient beds,¹⁰ beginning in July 2005. The Swedish facility's first full year of operation would be 2009.

B. Phase Two depended on the 80-bed hospital's utilization. This phase included the completion of the shelled-in space for the 40 remaining beds and obtaining licensure for those beds. Phase Two would commence in early 2009 and be completed in approximately December 2011, with the first full year of operation being 2012.

C. Phase Three, like Phase Two, depended on the utilization of completed beds. Assuming utilization, this phase would include the completion of the space for the remaining 55 beds. Swedish anticipated Phase Three would commence in early 2012 and be completed by approximately December 2015.

If the facility was constructed as planned, Swedish anticipated that the first full year of operation as a 175-bed facility would be 2016.

1.22 If Swedish were to construct the proposed hospital in 2009, as described in the application, the project would create: a surplus of 76 beds in 2008, the first year of phase one; a surplus of 64 beds in 2012, the first year of phase two; and a surplus of 53 beds in 2016, the first year of phase three. By the third year of operation for

¹⁰ The hospital bed numbers included intensive care, acute care, obstetric-birthing, and pediatric beds.

phase three, 2018, a surplus of approximately 15 beds is projected. By 2019, a need for four additional beds would be forecast, even with the full implementation of the project.¹¹

1.23 The Swedish project will create a surplus of bed capacity in the East King County planning area through 2018. If the need calculation for acute care beds in the East King region is performed without including the beds proposed in Swedish's project, a shortage of acute care beds will likely occur, given the time it takes to bring a hospital on line or increase the number of beds in existing facilities. Under this reasoning, the creation of some surplus capacity can be considered reasonable. This is consistent with the Program's historical approach regarding the anticipated increase in patient days in the planning area.

1.24 The Petitioners do not dispute the Program's application of the 12-step methodology and the mathematical calculations.

II. CONCLUSIONS OF LAW

2.1 In response to the 1974 National Health Planning and Resource Development Act, the Washington State Legislature adopted Washington's 1979 Health Planning & Development Act (chapter 70.38 RCW). *St. Joseph Hospital & Health Care Center v. Department of Health*, 125 Wn.2d 733, 735-736 (1995). One of the purposes of the federal and state health care planning acts was to control health care costs. *Id.* Both of the legislative bodies were concerned that competition in health care "had a

¹¹ The Program anticipated a two-year adjustment in measuring the surplus bed capacity to reflect the decision being under appeal for two years. Program Remand Evaluation, page 17. Such an adjustment exceeds the scope of Judge Hilyer's Remand Order.

tendency to drive health care cost up rather than down, and government, therefore needed to restrain market place forces.” *St. Joseph Hospital & Health Care Center v. Department of Health*, 125 Wn.2d at 742.

2.2 The applicant bears the burden of showing or establishing that the application meets all of the applicable criteria. WAC 246-10-606. The Program then renders a decision whether to grant a certificate of need in a written analysis that must contain sufficient information to support the Program’s decision. See WAC 246-310-200(2)(a). Admissible evidence in certificate of need hearings is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs. RCW 34.05.452(1). The standard of proof is a preponderance of the evidence. An applicant denied a certificate of need has the right to an adjudicative proceeding. RCW 34.05.413 and WAC 246-310-610.

2.3 Certificate of need criteria apply to a new hospital application. See RCW 70.38.115(2) and WAC 246-310-200. The criteria include 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). As there are no specific rules that contain a need methodology calculation process for acute care hospital beds or new hospital applications, the applicants and the Program refer to applicable standards developed by other organizations with recognized expertise. WAC 246-310-200(2)(b). In this instance, the applicable standards are the need methodology contained in the lapsed 1987 Washington State Health Plan.

2.4 The question at hand is limited to the issue of the need criterion, as the Program determined that Swedish failed the remaining criteria only because there was no need for the hospital. The need criteria are set forth in WAC 246-310-210.¹² The relevant section states:

The determination of need for any project shall be based on the following criteria, except these criteria will not justify exceeding the limitation on increases of nursing home beds provided in WAC 246-310-810.

(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 assessment of the conformance of a project with this criterion shall include, but need not be limited to, consideration of the following:

(a) In the case of a reduction, relocation, or elimination of a service, the need the population presently served has for the service, the extent to which the need will be met adequately by the proposed relocation or by alternative arrangements, and the effect of reduction, elimination, or relocation of the service on the ability of low-income persons, racial and ethnic minorities, women, handicapped persons, and other underserved groups and the elderly to obtain needed health care;

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

(c) In the case of an application by an osteopathic or allopathic facility, the need for and availability in the community of services and facilities for osteopathic and allopathic physicians and their patients, and the impact on existing and proposed institutional training programs for doctors of osteopathy and medicine at the student, internship, and residency training levels; and

¹² Each criterion contains certain sub-criterion. The sub-criteria set forth in WAC 246-310-210(3), (4), (5), and (6) are not relevant to the Swedish project and not discussed in the decision.

(d) In the case of a project not involving health services, the contribution of the project toward overall management and support of such services.

WAC 246-310-210(1).

2.5 In its original analysis, the Program assessed need based on two factors: (1) that no need existed under the need methodology (WAC 246-310-210(1)); and (2) if the project was approved, that Swedish could be expected to serve underserved groups at the new hospital (WAC 246-310-210(2)). There does not appear to be any dispute regarding Swedish's ability to meet the WAC 246-310-210(2) criteria.

2.6 Following the Program's denial decision, Swedish appealed to King County Superior Court. In the Remand Order, Judge Hilyer returned the Swedish application to the Program with a specific instruction, namely to calculate the need methodology excluding the 132 Group Health beds beginning in 2008. More specifically, Judge Hilyer's ruling in the Remand Order stated that the Program did not misinterpret the statutory and regulatory requirement that it consider "need" for the facility (specifically RCW 70.38.115(2)(a) and WAC 246-310-210(1)) by interpreting this to mean only numeric bed need as defined by the 1987 State Health Plan. A new trial may be limited to certain issues where it clearly appears that the original issues were distinct and justice does not require resubmission of the entire case. *See Mina v. Boise Cascade*, 104 Wn. 2d 696, 707 (1985).

2.7 The "certain issue" here was determining what numeric bed need, if any, existed in this application, under the 1987 State Health Plan need methodology, once

the 132 Group Health beds were removed from the calculation. Judge Hilyer's order did not instruct the Program to reopen the need determination beyond that point. As the Petitioners do not dispute the Program's application of the 12-step methodology and the mathematical calculations, and the Program completed the need methodology calculation as instructed by Judge Hilyer, no further need analysis is required here.

2.8 The Petitioners argue that the State Health Plan need methodology is a threshold inquiry regarding number, WAC 246-310-210, and additional analysis is required to determine need. The Petitioners' argument is clearly incorrect to the extent they believe additional evidence is required pursuant to WAC 246-310-210(1).

Judge Hilyer's ruling in the Remand Order is the law of the case. The law of the case doctrine stands for the proposition that once there is an appellate holding enunciating a principle of law, that holding will be followed in subsequent stages of the litigation.

Roberson v. Douglas County, 156 Wn.2d 33, 41 (2005) (citing 15 Lewis H. Orland & Karl B. Tegland, *Washington Practice: Judgments* sec. 380, at 55-56 (4th ed. 1986)).

Under the law of this case, there is no additional need analysis required by the Program.

2.9 The Petitioners argue, in relevant part, that a determination of need necessarily includes criteria in addition to the State Health Plan need methodology. Otherwise, a remand evaluation would not be required. More specifically, Judge Hilyer could have simply awarded or directed that the Swedish application for a certificate of need be awarded. The only true indication of Judge Hilyer's intention is, in fact, the

A **petition for judicial review** must be filed and served within 30 days after service of this order. RCW 34.05.542. The procedures are identified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. A petition for reconsideration is not required before seeking judicial review. If a petition for reconsideration is filed, however, the 30-day period will begin to run upon the resolution of that petition. RCW 34.05.470(3).

The order remains in effect even if a petition for reconsideration or petition for review is filed. "Filing" means actual receipt of the document by the Adjudicative Service Unit. RCW 34.05.010(6). This Order was "served" upon you on the day it was deposited in the United States mail. RCW 34.05.010(19).