

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

In Re:	)	Master Case No. M2008-118573
	)	
Certificate of Need on the Applications	)	FINDINGS OF FACT,
of Puget Sound Kidney Centers and	)	CONCLUSIONS OF LAW,
DaVita, Inc., to Establish Dialysis	)	AND FINAL ORDER
Centers in the Snohomish County	)	
Planning Area No. 1,	)	
	)	
Puget Sound Kidney Centers,	)	
	)	
Petitioner.	)	
_____	)	

**APPEARANCES:**

Petitioner, Puget Sound Kidney Centers, by  
Ryan, Swanson & Cleveland, PLLC, per  
Thomas H. Grimm, Attorney at Law

And by

Davis Wright Tremaine, PLLC, per  
Douglas C. Ross and Lisa R. Hayward, 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:** Theodora M. Mace, Health Law Judge

The Presiding Officer convened an evidentiary hearing in this matter on June 25, 2009, on the sole issue of whether Puget Sound Kidney Center's (Puget Sound) application for a certificate of need should be denied for failure to adequately document the identity of and expense for a medical director for its proposed Smokey Point dialysis facility. Application GRANTED.

FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND FINAL ORDER

## I. PROCEDURAL HISTORY

1.1 In November 2007, both Puget Sound and DaVita, Inc. (DaVita), filed certificate of need applications with the Department of Health's Certificate of Need Program (Program), for permission to construct kidney dialysis facilities in Snohomish County Planning Area No. 1. The Puget Sound application requested authority to add ten dialysis stations to its existing Smokey Point facility located in Arlington, Washington. DaVita's application requested authority to establish a new ten-station, stand-alone, facility in Marysville, Washington.

1.2 The Program treated the two applications as competing applications subject to concurrent review under RCW 70.38.115(7), WAC 246-310-120, and WAC 246-310-280(3).

1.3 On July 31, 2008, the Program issued its decision approving the DaVita application and denying the Puget Sound application.

1.4 Puget Sound filed a request for reconsideration of the Program's decision, which the Program denied on September 19, 2008.

1.5 On October 9, 2008, Puget Sound filed an Application for Adjudicative Proceeding to Appeal Program's Decision.

1.6 On October 17, 2008, the Presiding Officer granted DaVita status as an intervenor in the proceeding, pursuant to the stipulation of the parties.

1.7 On November 25, 2008, Puget Sound filed a Motion for Summary Judgment, claiming that the Program failed to compare the Puget Sound application and

the DaVita application as to their respective impacts on the cost of health care prior to applying the tie breaker provisions in WAC 246-310-288.

1.8 On December 10, 2008, DaVita filed a Cross-Motion for Summary Judgment, claiming that it had met all requirements governing certificate of need applications, including the tie-breaker provisions, and its application should be granted.

1.9 On February 27, 2009, the Presiding Officer granted, in part, the Motion for Summary Judgment, and denied the Cross-Motion for Summary Judgment. In her rulings, the Presiding Officer found that the Program had failed to properly compare the applications as to whether they met cost containment criteria prior to implementing tie-breaker provisions, and that the matter of proper comparison should be resolved at an evidentiary hearing. See Prehearing Order No. 4.

1.10 On May 8, 2009, prior to the evidentiary hearing, Davita withdrew its application for a certificate of need, but did not withdraw as an intervenor in the proceeding.

1.11 On June 17, 2009, the Presiding Officer, after receiving briefs on the issue, ruled that DaVita's standing as an intervenor in this proceeding should be rescinded and that the matter should proceed to hearing with only Puget Sound and the Program as parties. See Prehearing Order No. 14.

1.12 The Presiding Officer convened the evidentiary hearing on June 25, 2009. The Program presented the testimony of Peter Agabi, Department of Health Certificate of Need (CN) Analyst. The Program presented Exhibit P-1, the Administrative

Record (AR), Exhibit P-2, a group of exhibits including pages from the AR, and two new documents: a January 1, 2007 contract between Puget Sound and Western Washington Medical Group, and a March 1, 2009 agreement between Puget Sound and Dr. Salwa Labib. These exhibits were admitted in evidence.

1.13 Puget Sound presented the testimony of Dr. Alan Haakenstad, Puget Sound's corporate Medical Director, and Harold Kelly, Puget Sound's President and Chief Executive Officer.

1.14 In lieu of closing argument, the Presiding Officer permitted the parties to submit closing briefs. Puget Sound filed a post-hearing brief on July 29, 2009. The Program filed a response brief on August 14, 2009. Puget Sound filed a reply brief on August 21, 2009.

## **II. FINDINGS OF FACT**

2.1 Puget Sound Kidney Centers (Puget Sound) operates four dialysis centers and an acute mobile dialysis service in the state of Washington, including an 18-station facility at Smokey Point in Snohomish County. In November 2007, Puget Sound filed an application for a certificate of need to expand its Smokey Point dialysis facility by adding 10 dialysis stations. Puget Sound's application was reviewed concurrently with a similar application by DaVita to construct a dialysis facility in Snohomish County. As indicated above, DaVita's participation in this proceeding was rescinded prior to the evidentiary hearing.

2.2 The certificate of need application form which Puget Sound filed does not ask the applicant to identify a medical director. Rather, Part I of the application form, titled "Applicant Description," asks the applicant to identify its "active staff per specialty." AR 81. Only the Medicare program that Puget Sound participates in specifically requires that each dialysis facility has medical director services available. 42 CFR sections 494 and 150.

2.3 Puget Sound has no "active staff per specialty," but does contract with Dr. Alan Haakenstad to provide corporate medical director services at an annual compensation rate of \$60,000. Puget Sound also employs "other Medical Directors under exclusive contract with PSKC." AR 5. Puget Sound's medical director staffing has met Department of Health compliance surveys conducted over the last ten years. AR 216.

2.4 With its certificate of need application, Puget Sound filed its June 2006 contract for Dr. Haakenstad's services, which outlined his duties as corporate medical director, as well as his compensation, and which expired December 31, 2007. AR 33.

2.5 On January 1, 2007, Puget Sound contracted with Western Washington Medical Group to provide medical director services specifically for its Smokey Point facility. The contract called for three doctors to provide rotating medical director services at that facility at an annual compensation of \$40,000. The contract expired December 31, 2008. Exhibit P-2. Puget Sound did not file this contract with its application.

2.6 In a screening request issued after Puget Sound filed its application, Mr. Agabi, Program CN Analyst, assumed that Dr. Haakenstad was the Smokey Point medical director, and asked Puget Sound to provide an updated contract with Dr. Haakenstad that would cover the period of the application:

The medical director of PSKC Smokey Point is identified as Dr. Alan O. Haakenstad (page 3) of the application and the Medical Directors Agreement (Exhibit 5) states: 'This agreement shall take effect as of June 1, 2006, and shall be for a term of eighteen months, ending December 31, 2007.' *Please provide an updated medical director agreement which includes compensation and terms of service for partial year if any, and a minimum of 3 full calendar years of operation.* AR 156. (emphasis added).

2.7 In response to the screening request, Puget Sound filed a revised contract with Dr. Haakenstad, similar in all respects to the one filed with its application, except that the revised contract expired on December 31, 2010. AR 162.

2.8 The Program determined that Dr. Haakenstad served as the medical director of the Smokey Point facility, as well as the four other facilities owned by Puget Sound. As part of the application review process, the Program evaluated Dr. Haakenstad's credentialing history with the Medical Quality Assurance Commission and found no recorded sanctions. AR 216.

2.9 At the time of the application, Puget Sound's total pro forma medical expense for all its medical director services was \$130,000 annually. The pro forma statement also included an expense for Smokey Point medical directors of \$40,000. The annual compensation identified in Dr. Haakenstad's contract was \$60,000. AR 35, 115, and 166.

2.10 DaVita provided comments to the Program during the application review period pointing out the possible discrepancies in the above amounts associated with Puget Sound's compensation for medical directors. The Program responded that "the [Smokey Point] medical director costs are consistent with the pro-forma financial projections." AR 208-209. In coming to this conclusion, the Program assumed that Dr. Haakenstad was the Smokey Point medical director, and that his annual compensation of \$60,000 consisted of \$40,000 for his services at Smokey Point, and \$20,000 for his services in other unidentified parts of the Puget Sound organization. AR 35,166, and 209.

2.11 On July 31, 2009, the Program found that both Puget Sound and DaVita met all the basic requirements governing certificate of need applications, thus necessitating application of tie-breaker provisions found in WAC 246-310-288. After applying the tie-breaker provisions, the Program found that DaVita should be granted the certificate of need rather than Puget Sound.

2.12 On March 1, 2009, subsequent to several of the steps in the procedural history of this case (see Part I above), Puget Sound contracted with Dr. Salwa Labib to serve as the sole Medical Director of the Smokey Point at an annual compensation of \$45,000. Puget Sound contracted with Dr. Labib to comply with new Medicare requirements that were put in place subsequent to the Program's evaluation of Puget Sound's application. Exhibit P-2.

### III. CONCLUSIONS OF LAW

3.1 The Secretary of Health (and by designated authority, the Presiding Officer) has jurisdiction over the Puget Sound Kidney Center certificate of need application and the subject matter of this proceeding.

3.2 An applicant for a certificate of need has the burden of showing by a preponderance of the evidence that its application meets all applicable criteria. WAC 246-10-606(2) and *DaVita v. Department of Health*, 137 Wn. App. 174, 184 (2007). These criteria include: (1) need for the facility (WAC 246-310-200); (2) is the facility financially feasible (WAC 246-310-220); will the facility meet criteria for structure and process (quality) of care (WAC 246-310-230); and (4) will the facility foster containment of health care cost (WAC 246-310-240).

3.3 The evidence relied on should exist at the time the application record closed. See *University of Washington v. Department of Health*, 164 Wn.2d 95, 104 (2008).

3.4 By agreement of the parties, the sole issue for hearing is whether Puget Sound's medical director information complied with the structure and process (quality) of care criteria (WAC 246-310-230) and the financial feasibility criteria (WAC 246-310-220). See transcript and post-hearing briefs. The Program concedes that Puget Sound otherwise meets all certificate of need criteria applicable to its Smokey Point dialysis facility application.

3.5 WAC 246-310-230 governs the structure and process (quality) of care associated with certificate of need applications. It identifies several criteria, including whether the application demonstrates:

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

3.6 WAC 246-310-230(1) does not require the applicant to name a facility-specific medical director, nor does the Program's application form make such a requirement. Nevertheless, Puget Sound adequately satisfied this criteria by providing information about its corporate medical director, and by demonstrating that it also contracted for other medical director services specific to the Smokey Point facility.

3.7 The Program argues that Medicare requires a facility-specific medical director and that Puget Sound's failure to properly identify such a director for the Smokey Point facility prevented the Program from determining whether the director's credentials were current and without blemish. This argument fails because Puget Sound provided information about its corporate medical director whose credentials the Program did check. Moreover, Puget Sound filed sufficient information to put the Program on notice as to the nature of its medical director staffing at Smokey Point. The Program's incorrect assumptions regarding the medical director situation at Smokey Point do not signify a failure of Puget Sound to provide information to the Program. The fact that Puget Sound did not provide the names of its rotating Smokey Point medical directors appears on this record to be more misunderstanding than a failure to actually provide necessary information. Finally, while the record shows that Medicare requirements for

medical director staffing have changed somewhat since Puget Sound filed its application, there is no evidence that Puget Sound's medical director staffing at any time failed to meet Medicare requirements.

3.8 The contract with Western Washington Medical Group (WWMG) dated January 1, 2007, which was submitted in discovery, shows that Puget Sound had engaged other medical directors, in keeping with its Answer on the application form, to provide medical oversight at the Smokey Point facility. The WWMG contract was entered during the application review time frame, corroborates Puget Sound's responses to the staffing portion of the application form, and provides additional evidence of Puget Sound's compliance with the structure and quality of care criteria.

3.9 The 2009 contract with Dr. Habib submitted in discovery in this case was admitted in evidence and may have some significance insofar as it demonstrates that it was entered into to meet recent changes to Medicare requirements for medical directors. However, when the Program reviews an application for a certificate of need, it confines its review to a snapshot of the applicant's situation at or near the time the application is filed. Otherwise, the Program (and the Department) is faced with a moving target involving constantly updated information about the application. For this reason, the fact that the March 2009 contract is so distant in time from the date the application was filed, is irrelevant and immaterial to a decision in this case.

3.10 WAC 246-310-220 governs financial feasibility of a certificate of need facility. It requires that:

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

3.11 Puget Sound's pro forma financial statements showing a total medical director expense of \$130,000, and a medical director expense for Smokey Point of \$40,000, in combination with Puget Sound's annual contract compensation for Dr. Haakenstad of \$60,000, provides sufficient information to demonstrate that Puget Sound meets this criteria.

3.12 The medical director expense for Smokey Point is clearly contained within the total medical director expenses shown on the pro forma. The Program incorrectly assumed that the Smokey Point medical director expense was contained within the compensation for Dr. Haakenstad. This incorrect assumption shows that the Program found Puget Sound's application complied with this criteria even though the exact compensation amount in the Haakenstad contract (\$60,000) did not conform with the exact amount of the specific Smokey Point medical director expense (\$40,000) listed in the pro forma statement.

3.13 The Program argues that past certificate of need applications have been denied because of a failure of the applicant's expenses to correspond with the applicant's pro forma financial information. However, as concluded above, it is clear that the Program did not view the lack of correspondence between the compensation amounts contained in Dr. Haakenstad's contract and the medical director expenses contained in the pro forma statements to be a barrier to granting the application. In

addition, it is clear from the Puget Sound contract with WWMG, that the annual compensation of \$40,000 for medical directors who were specifically responsible for Smokey Point corresponded exactly to the Smokey Point medical director expense of \$40,000 identified in the pro forma statement.

3.14 The Program further argues that Puget Sound's 2009 contract with Dr. Habib, showing annual compensation of \$45,000 is evidence of a failure of Puget Sound's expenses to conform with its pro forma financial statement. In light of the finding above, the 2009 contract is immaterial to a decision in this case, the Program's argument lacks foundation and must be rejected.

### ORDER

Consistent with the Findings of Fact and Conclusions of Law stated above, it is ordered that Puget Sound's application for a certificate of need is GRANTED.

Dated this 9 day of September, 2009.

\_\_\_\_\_/s/\_\_\_\_\_  
THEODORA M. MACE, Health Law Judge  
Presiding Officer

### NOTICE TO PARTIES

This order is subject to the reporting requirements of RCW 18.130.110, Section 1128E of the Social Security Act, and any other applicable interstate or national reporting requirements. If discipline is taken, it must be reported to the Healthcare Integrity Protection Data Bank.

Either party may file a **petition for reconsideration**. RCW 34.05.461(3); 34.05.470. The petition must be filed within 10 days of service of this order with:

Adjudicative Service Unit  
P.O. Box 47879  
Olympia, WA 98504-7879

and a copy must be sent to:

Certificate of Need Program  
P.O. Box 47852  
Olympia, WA 98504-7852

The petition must state the specific grounds for reconsideration and what relief is requested. WAC 246-11-580. The petition is denied if the Presiding Officer does not respond in writing within 20 days of the filing of the petition.

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, the above 30-day period does not start until the petition is resolved. RCW 34.05.470(3).

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

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