

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

In Re: Certificate of Need Application of:)	Docket No. 04-07-C-2005CN
SWEDISH MEDICAL CENTER)	FINAL ORDER ON REMAND
)	AFFIRMING FINDINGS OF FACT,
)	CONCLUSIONS OF LAW AND
)	FINAL ORDER DATED
)	AUGUST 23, 2005
_____)	

APPEARANCES:

Petitioner, University of Washington Medical Center by
Benedict & Garratt, PLLC, per
Kathleen Benedict and Sally Garratt, Attorneys at Law

Intervener, Swedish Medical Center, by
Dorsey & Whitney, LLP, per
Peter Ehrlichman and Brian Grimm, Attorneys at Law

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

PRESIDING OFFICER: Zimmie Caner, Health Law Judge

Pursuant to a remand order issued by Thurston County Superior Court, a hearing was held on June 6, 2006. The August 23, 2003 Findings of Fact, Conclusions of Law and Final Order is affirmed.

I. PROCEDURAL BACKGROUND

1.1 On June 11, 2003, Swedish Medical Center (Swedish) submitted its application to the Department of Health Certificate of Need Program's (Program) for a liver transplant program. The University of Washington Medical Center's (University)

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requested a copy of the application and any other information submitted to Program regarding the Swedish application.

1.2 On July 30, 2003, the University requested a public hearing regarding Swedish's application. Prior to and during the public hearing, the University and other interested parties submitted written comments and documents regarding the Swedish application. During the November 6, 2003 public hearing, the University and Swedish presented testimony and documents. On November 24, 2003, pursuant to WAC 246-310-160(1)(a), the University and Swedish submitted rebuttal documents to oral and written information submitted during the public hearing. Swedish raised a new theory within its rebuttal statement regarding patients falling through the cracks. On November 24, 2003, the rebuttal period ended and Program closed the period for public/party input.

1.3 On June 30, 2004, Program issued Swedish a CN to establish a liver transplant program for adult patients. Pursuant to RCW 70.38.115(10), the University filed a request for an adjudicative proceeding protesting the issuance of this CN.¹

1.4 During the January 25, 26, 27, February 3 and 4, 2005 administrative hearing before a Health Law Judge (HLJ), the University presented the testimony of six physicians, a health care consultant, and a staff member with United Network for Organ

¹ Prior to the adjudicative appeal, the University participated in the administrative application review process as an "affected party" (defined in WAC 246-130-010) contesting Swedish's application for a liver transplant program CN.

Sharing.² Swedish presented the testimony of five physicians, the Program analyst, and the Program manager. Eleven exhibits were admitted two of which included a copy of Program's 1,548 page administrative record (AR) and the transcript of the public hearing regarding Programs' review of the Swedish application.

1.5 During the 2005 adjudicative proceeding, the HLJ concluded that the University failed to exhaust its administrative remedies by its failure to request reconsideration of Program's decision; and that reconsideration was the appropriate procedure to submit additional facts and data in respond to Swedish's November 2003 rebuttal statement.³ As a result, the HLJ sustained objections regarding the presentation of facts and data that were not a part of the administrative record. During the 2005 administrative hearing, the University made an offer of proof in the form of the proposed exhibits. Swedish made a responding offer of proof.

1.6 On August 23, 2005, the HLJ issued Findings of Fact, Conclusions of Law and Final Order (Final Order) that affirmed Program's approval of Swedish's CN application for a liver transplant program. The HLJ concluded that even if the offers of proof were admitted as evidence, the findings of fact in the Final Order would not

² The University's expert witnesses disagreed with Swedish's theory that patients are falling through the cracks and that Swedish's proposed liver transplant program is needed.

³ Within 28 days of the Program's decision, any interested or affected person may, for good cause shown, request a public hearing for the purpose of reconsideration" of the decision on a certificate of need application. WAC 246-310-560(1). Good cause for a reconsideration hearing include but is not limited to:

(i) Significant relevant information not previously considered by the department which, with reasonable diligence, could not have been presented before the department made its decision; ... (iii) Evidence the department materially failed to follow adopted procedures in reaching a decision.

WAC 246-310-560(2)(b).

The HLJ concluded in Prehearing Order No. 4 that subsections (i) and (iii) encompass the University's arguments for a remand and additional hearing; and that the reconsideration procedure is more efficient for all parties consuming less time and expense than pursuing a remand through an adjudicative appeal.

substantially change, and the conclusions of law and order would not be modified.

The University appealed this Final Order to Thurston County Superior Court.

1.7 On January 13, 2006, Superior Court Judge Gary R. Tabor held that the HLJ erred. Judge Tabor held that the University did not lose its right to present additional evidence in response to Swedish's rebuttal at the adjudicative proceeding by failing to request reconsideration of Program's decision. In his remand order Judge Tabor outlined the scope of the remand:

(5) The offer of proof submitted in the administrative proceeding below informed the court of the substance of the excluded testimony but does not go into sufficient detail to substitute for the testimony itself. Therefore, the administrative proceeding must be reopened in order to receive the information in the form of additional testimony.

1.8 During a March 2006 status conference and in Post-Hearing Order No. 1, the HLJ ruled that the evidence will be presented in the following order during the remand hearing;

1. The University may submit evidence in response to the Swedish's November 24, 2003 Rebuttal Statement that was submitted to Program.⁴
2. Swedish may submit evidence in response to the University's evidence admitted during the remand hearing.
3. The University may submit evidence in response to Swedish's evidence admitted during the remand hearing.⁵

⁴ The University was not limited to oral testimony although such a limitation could have been issued pursuant to paragraph 5 of Judge Tabor's remand order.

⁵ The Program did not request the opportunity to present any evidence

1.9 Under the Washington Administrative Procedures Act (APA) chapter 34.05 RCW, a HLJ shall provide parties an opportunity to present evidence to the extent necessary for full disclosure of all the relevant facts and issues. RCW 34.05.449(2). The HLJs shall regulate the course of the proceedings in conformity with applicable rules and the prehearing order if any. RCW 34.05.449(1). In doing so the HLJ may restrict a party's opportunity to present evidence. RCW 34.05.449.

1.10 During the March 2006 status conference and in Post Hearing order No 1, the HLJ set a May 5, 2006 deadline for the filing of witness lists and proposed exhibits,⁶ and limited the evidence to information that relies on facts and data that existed as of December 31, 2003.⁷ This date is approximately five weeks after the rebuttal statements were submitted to Program, and five weeks after Program "closed" the public input stage pursuant to WAC 246-310-160. The public input stage is closed so Program may review and analyze an application with all the information that the applicant, interested parties and the public deem relevant and submit to Program.⁸

1.11 The December 31, 2003 date was selected by the HLJ because it provided the University with an opportunity to respond to the new theory raised in

⁶ Evidence that is not submitted in advance as ordered by the presiding officer should not be admitted in the absence of a "clear showing that the offering party has good cause for his or her failure to produce the evidence sooner, unless it is submitted for impeachment purposes". WAC 10-08-140(2)(a),(b). The purpose of the deadline is to provide the parties with sufficient time to prepare for hearing.

⁷ During a May 18, 2006 prehearing conference, the HLJ granted the University a May 18th extension of time to submit additional exhibits that were not filed by the May 5th deadline. The parties were also granted a May 22nd extension of time to present redacted versions of timely filed exhibits (redacting the post 2003 data). The University did not provide good cause for its failure to file a number of its proposed exhibits by the extended deadline.

⁸ The remand order did not address whether facts and data that did not exist at the time of Program's record "closure" should be admitted during the remand adjudicative proceeding.

Swedish's November 2003 rebuttal statement, and at the same time set a reasonable date that does not deviate unnecessary far from the closure of the public input stage of the administrative record. If no date was set as the University requested, new information could be submitted that did not exist at the time the Program made its decision. Such a ruling could result in a revolving door of litigation with additional information submitted for the first time during the adjudicative and judicial stages. As a result, applicants and/or interested parties may tactically benefit from postponing the submission of additional facts until the adjudicative or judicial stages. This may be of special advantage when the interested party is a potential competitor who may want additional time to change the manner in which it provides health care. Closure is needed so a revolving door of delayed responses does not unreasonable draw out the process. Late presentation of facts and data would result in an increase number of appeals/remands and delays in the resolution of CN appeals. The purpose of CN adjudicative appeals is not to supplant the certificate of need application review process but to assure that the procedural and substantive rights of the parties were observed and that the factual record supports Program's analysis and decision.⁹ The December 31, 2003 cut off date for evidence during the remand hearing is reasonable and consistent with the facts at hand and the CN regulatory framework.¹⁰

⁹ See page 8 Prehearing Order No. 6, Order on Motion for Partial Summary Judgment In re the Certification of Need Application of Ear, Nose, Throat and Plastic Surgery Association, Inc., Docket No. 00-09-C-1027CN.

¹⁰ The CN applicant has the burden to provide information necessary to grant the requested CN. WAC 246-310-090. Interested parties may comment on the application and parties may provide rebuttal information. WAC 246-310-060, -180. Program shall complete its final review and make its decision on

II. REMAND HEARING

2.1 The remand hearing was scheduled for a three day hearing on June 6-8, 2006.

2.2 On June 6th the University rested after presenting its exhibits and the testimony of Robert Carithers, M.D. and James Perkins, M.D. Their testimony was extremely limited because they stated that they could not dispute the new theory raised in the November 2003 Swedish rebuttal without post 2003 facts and data.

2.3 None of the University's proposed exhibits were admitted because they were not timely filed,¹¹ contained post 2003 facts and data, and/or lacked proper foundation.

2.4 Swedish did not present any rebuttal evidence due to the limited evidence presented by the University.

2.5 The parties submitted closing arguments through briefs.

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the application within 45 days of the end of the public comment period, unless the public comment period is extended in accordance with the rules. WAC 246-310-160. A party may request reconsideration of the program's decision. WAC 246-310-560. Program's decision to grant or deny an application for a CN must be in writing and include the findings that are the basis of Program's decision. WAC 246-310-490(1).

¹¹ The University argues in its closing brief that deadlines are not applied in other CN adjudicative proceedings to preclude exhibits, and therefore the University is not being fairly treated. This is not true. This HLJ rejects exhibits that are not timely filed by deadlines set in prehearing orders when a party objects to the admission of the untimely identified exhibit. These deadlines would be meaningless unless so applied, and the failure to reject untimely identified exhibits would place the complying party at a strategic disadvantage.

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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).