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Date: September 5, 2014	
Time: 9:00 a.m.	
Judge/Calendar:	
Hon. Christine Schaller	

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THURSTON COUNTY

DAVITA HEALTHCARE PARTNERS  
INC.,

Petitioner,

vs.

DEPARTMENT OF HEALTH OF THE  
STATE OF WASHINGTON

Respondent.

No. 13-2-01794-3

~~PROPOSED~~

JUDICIAL REVIEW ORDER

This matter came before the Court on the petition of DaVita HealthCare Partners Inc. ("DaVita") for judicial review of the Findings of Fact, Conclusions of Law, and Final Order (the "Agency Order") of the Washington State Department of Health (the "Department"), dated July 22, 2013, issued by Health Law Judge Frank Lockhart in Department of Health Master Case No. M2012-1073.

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Centers' Responding Brief, filed July 28, 2014; and the Reply Brief of DaVita HealthCare Partners Inc., filed August 7, 2014. The Court heard oral argument on August 22, 2014.

Based on the judicial review standards set forth in RCW 34.05.570, the Court determines as follows:

WAC 246-310-288(2)(d)

The provider choice sub-part of the tie-breaker regulation provides as follows:

*Handwritten notes:*  
2/11/95  
PSK  
PSK

*(2) Only one applicant may be awarded a point for each of the following four sub-branches:*

(d) Provider choice (1 point):

- (i) The applicant does not currently have a facility located within the planning area;
- (ii) The department will consider a planning area as having one provider when a single provider has multiple facilities in the same planning area;
- (iii) If there are already two unrelated providers located in the same planning area, no point will be awarded.

WAC 246-310-288(2)(d).

Neither DaVita nor PSKC had a facility located within the planning area. There was only one kidney dialysis provider located in the planning area. Therefore, both applicants satisfied the provider choice tie-breaker criteria stated in the regulation.

However, the Department awards the provider choice tie-breaker point as follows:

This tie-breaker is written very literally. It will be evaluated as written. Considerations used to determine a tie-breaker of this sub-criterion (if necessary) is the applicant that was awarded a point under (c) above [i.e., patient geographic access]. If a tie still exists, the point will be awarded to the applicant that proposed to be furthest away from the existing providers of the applicants that qualify.

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AR 2088. It is on this basis that the Department awarded the provider choice tie-breaker point to PSKC in this matter.

Interpretation of WAC 246-310-288(2)(d)

The meaning of WAC 246-310-288(2)(d) is plain and unambiguous on its face. An applicant qualifies for the provider choice tie-breaker point if it currently does not have a facility located within the planning area and there are not already two unrelated providers located in the planning area.

If the meaning of a regulation is plain and unambiguous on its face, the Court will give effect to that plain meaning. Neither DaVita nor PSKC had a facility located within the planning area and the planning area had only one kidney dialysis provider. Therefore, both DaVita and PSKC satisfied all criteria for the provider choice tie-breaker point, and neither should have been awarded the provider choice tie-breaker point at the expense of the other.

The Department erroneously interpreted and applied the law in awarding the provider choice tie-breaker point to PSKC. Had PSKC not been awarded this point, the applications would have tied under the tie-breaker regulation. The Department accordingly was required to approve both facilities and award stations as equally as possible without exceeding the total number of stations projected for the planning area, pursuant to WAC 246-310-288.

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Relief

Pursuant to RCW 34.05.574, the Court hereby sets aside the Agency Order and remands this matter to the Department to take action consistent with this Judicial Review Order, *within thirty days from the date of this judicial review order.*

*CP*  
*RAH BWS*  
*(BSP)*

DATED: September 5, 2014.

*Christine Schaller*  
\_\_\_\_\_  
JUDGE CHRISTINE SCHALLER

Presented by:

PERKINS COIE LLP

By: *Brian W. Grimm*  
\_\_\_\_\_  
Brian W. Grimm, WSBA #29619  
Renee M. Howard, WSBA #38644  
Anastasia K. Anderson, WSBA #42808

*PSKC may operate ~~up~~ up to nine stations until one month after DaVita's facility opens, at which point PSKC may only operate the number of stations approved under its new con. The demand to the Department is not stayed.*

*S*

1201 Third Avenue, Suite 4900  
Seattle, WA 98101-3099

Attorneys for Petitioner,  
DaVita HealthCare Partners Inc.

*RAH BWS*  
*(BSP)*

LEGAL123287300.1

Approved as to Form:

*Richard*  
\_\_\_\_\_  
Richard McCartan  
Attorney General's Office  
Attorney for Department of Health

*S*

JUDICIAL REVIEW ORDER - 5

Approved as to form for filing 9/5

*Dak*  
\_\_\_\_\_  
WSBA No. 19895

Perkins Coie LLP  
1201 Third Avenue, Suite 4900  
Seattle, WA 98101-3099  
Phone: 206.359.8000  
Fax: 206.359.9000