

STATE OF WASHINGTON  
DEPARTMENT OF HEALTH  
OFFICE OF THE SECRETARY

In the Matter of:

Master Case No. M2015-102

EVALUATION DATED OCTOBER 27, 2014,  
OF THE CERTIFICATE OF NEED  
APPLICATIONS SUBMITTED BY  
NORTHWEST KIDNEY CENTERS,  
FRESENIUS MEDICAL CARE HOLDINGS  
INC., AND DAVITA HEALTHCARE  
PARTNERS INC., TO ADD DIALYSIS  
CAPACITY TO KING COUNTY PLANNING  
AREA #1

FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND FINAL ORDER

DAVITA HEALTHCARE PARTNERS INC.,

Petitioner,

NORTHWEST KIDNEY CENTERS,

Intervenor.

**APPEARANCES:**

Petitioner DaVita Healthcare Partners, Inc., by  
Perkins Coie, LLP, per  
Brian Grimm and Anastasia Anderson, Attorneys at Law

Intervenor Northwest Kidney Centers, Inc., by  
Davis Wright Tremaine LLP, per  
Brad Fisher and Lisa Rediger Hayward, Attorneys at Law

Department of Health Certificate of Need Program, by  
Robert W. Ferguson, Attorney General, per  
Richard A. McCartan, Assistant Attorney General

FINDINGS OF FACT, CONCLUSIONS  
OF LAW, AND FINAL ORDER

Page 1 of 13

Master Case No. M2015-102

ORIGINAL

## PROCEDURAL HISTORY ON REVIEW

This matter comes before the Review Officer for administrative review of the Findings of Fact, Conclusions of Law, and Initial Order (Initial Order) dated October 27, 2015, of the Presiding Officer, John F. Kuntz. The Presiding Officer issued the Initial Order after a contested administrative hearing held June 8-9, 2015, regarding two Certificate of Need (CN) applications to establish five additional kidney dialysis stations in King County Planning Area #1 (King 1). DaVita Healthcare Partners, Inc. (DaVita) submitted an application to establish a new kidney dialysis facility at 18503 Firlands Way North, Seattle, Washington. Northwest Kidney Centers, Inc. (Northwest) submitted an application to expand an existing facility, located at 14524 Bothell Way NE, Lake Forest Park, Washington, by five additional stations.

The Initial Order approved the CN for Northwest to add dialysis stations to its existing facility and was served on the parties on October 28, 2015. DaVita filed a timely Petition for Administrative Review (Petition) on November 18, 2015. Northwest and the Certificate of Need Program (Program) filed timely responses on December 8, 2015.

The Review Officer reviewed the administrative record including, but not limited to, the Petition and both responses, application record, hearing transcript, written closing arguments and rebuttals of all parties, Northwest's Notice of Supplemental Authority and the replies of DaVita and the Program.

## PETITION FOR REVIEW

DaVita contends the Presiding Officer improperly relied on criteria other than the methodology in WAC 246-310-288 to compare the competing CN applications to meet the

FINDINGS OF FACT, CONCLUSIONS  
OF LAW, AND FINAL ORDER

need for five additional dialysis stations in King 1. Pet. at 1. DaVita argues that the Department enacted -288 "to create an objective, consistent standard on which it would decide between competing dialysis applications." Without adherence to -288, potential dialysis providers endure "the uncertainty, inconsistency, and inevitable litigation" that results from use of ad hoc criteria. Therefore, DaVita requests that the Review Officer reverse the Initial Order, approve its application, and deny Northwest's application. Pet. at 2.

#### NORTHWEST'S RESPONSE

Northwest argues that the Presiding Officer appropriately determined that in a concurrent review of competing kidney dialysis CN applications, WAC 246-310-240 and -288 require a comparison of the applications to determine superiority in terms of cost, efficiency, and effectiveness. The tiebreaker criteria in -288 should only be used if both applications meet all the criteria in WAC 246-310-210 through -240, and neither application is clearly superior under WAC 246-310-240(1). Northwest requests that the Review Officer affirm the Initial Order approving its application. NW Resp. at 2.

In addition, in its Notice of Supplemental Authority, Northwest asks the Review Officer to "reject the Program's attempt to contingently challenge" the Initial Order because the Program agrees the CN was properly awarded to Northwest; the Program never filed a petition for review; and the Program's "position that DaVita could fail financial feasibility under -220 but somehow still be equally superior under -240 defies common sense and contradicts the substantial evidence supporting the Presiding Officer's determination." NW Notice of Supp. Auth. at 2.

FINDINGS OF FACT, CONCLUSIONS  
OF LAW, AND FINAL ORDER

## THE PROGRAM'S RESPONSE

The Program requests that the Review Officer affirm the grant of the CN to Northwest but for the reasons articulated in the Program's evaluation rather than the Initial Order. Prog. Resp. at 1. The Program's evaluation found that Northwest met all the criteria for the CN but failed DaVita under WAC 246-310-220 because it proposed to build 16 stations when there was established need for only five. Prog. Resp. at 2. Therefore, questions regarding comparative superiority between the two applications and/or use of tiebreaker criteria are not relevant to this case.

## INTERVENING CASE LAW

On December 28, 2015, while this case was under review, Division One of the Washington Court of Appeals filed a published opinion in the case of *DaVita Healthcare Partners, Inc. v. Washington State Department of Health and Northwest Kidney Centers*, -- P.3d --, 2015 WL 9461629, no. 73630-2-1. The fundamental issue in that case was very similar to the current case -- whether the "superior alternative" analysis required by WAC 246-310-240 involves a comparison of each individual applicant's proposal to its own alternatives or also a comparison of the applicants' proposals to each other.

The Court held:

- 1) The plain and unambiguous language of WAC 246-310-288 requires the use of tiebreaker criteria only if both applications first satisfy all other review criteria;<sup>1</sup>

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<sup>1</sup> In footnote 6 the Court stated "Because we conclude that the language of WAC 246-310-288 is plain on its face and unambiguous, we do not reach DaVita's arguments that the legislative and agency intent favor its interpretation. Nor do we reach any of DaVita's arguments based on other canons of construction."

FINDINGS OF FACT, CONCLUSIONS  
OF LAW, AND FINAL ORDER

- 2) The Presiding Officer<sup>2</sup> did not err by directly comparing the two applications under the relevant review criteria and determining reasonability based on that comparison; and
- 3) Substantial evidence showed DaVita's more expensive proposal would result in significantly greater costs to provide dialysis services than Northwest's proposal. The inference that those costs would be passed to private pay patients or their insurers was not unreasonable.

The parties provided additional briefing following issuance of the Court of Appeal's decision. Northwest asserts the case definitively determines that the CN rules require a comparative superiority analysis under 246-310-240(1) before turning to the tiebreakers in WAC 246-310-288. NW Notice of Supp. Auth. at 2. If the Review Officer does revisit the financial feasibility determination as requested by the Program, Northwest requests a finding that DaVita did not satisfy WAC 246-310-220 because DaVita's proposal would be roughly 16 times more expensive than Northwest's proposal. *Id* at 4-5.

DaVita responds that although the Court of Appeals held that a superiority analysis must be conducted, it did not determine what criteria should be used in that analysis. It advocates for use of the tiebreakers in WAC 246-310-288. Under the tiebreakers, DaVita would be the successful applicant. DaVita's Reply at 11.

The Program makes alternative arguments. First, that DaVita's application fails to meet the WAC 246-310-220 criterion because it proposes to overbuild by 11 stations. In the alternative, if DaVita's application does meet the -220 criterion, neither application is superior

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<sup>2</sup> When the administrative case was decided, Presiding Officers had authority to issue final orders.

under WAC 246-310-240(1). Therefore, the CN should be granted based on the tie-breaker criteria under WAC 246-310-288 which would result in DaVita being the successful applicant.

In addition, the Program contends that its arguments should be considered by the Review Officer although it did not file a petition for administrative review. This is because under RCW 34.05.464(4), the Review Officer has authority to fully decide the case as if she had actually presided over the hearing. Program's Reply at 2.

### REVIEW OFFICER'S ANALYSIS

#### Consideration of Program's Response

As an initial matter, the Review Officer will evaluate Northwest's contention that the Program's responsive brief should not be considered for various reasons, including because it failed to file a petition for administrative review.

The reviewing officer shall exercise all the decision-making power that the reviewing officer would have had to decide and enter the final order had the reviewing officer presided over the hearing. RCW 34.05.464(4). The reviewing officer shall personally consider the whole record or such portions of it as may be cited by the parties. RCW 34.05.464(5). The reviewing officer shall afford each party an opportunity to present written argument and may afford each party an opportunity to present oral argument. RCW 34.05.464(6). [An] opposing party may file a response to a petition for administrative review filed as provided in this section. WAC 246-10-701.

Based on the law and rules, the Program was entitled to file a response and the Review Officer will consider it as part of the record.

FINDINGS OF FACT, CONCLUSIONS  
OF LAW, AND FINAL ORDER

## Financial Feasibility

WAC 246-310-200 requires that the Program's review of CN applications, and the decision of the Secretary's designee, be based on four factors:

- Determination of need (WAC 246-310-210);
- Determination of financial feasibility (WAC 246-310-220);
- Criteria for structure and process of care (WAC 246-310-230); and
- Determination of cost containment (WAC 246-310-240).<sup>3</sup>

Both Northwest and the Program argue that DaVita's application did not meet the financial feasibility criteria because DaVita's capital costs were significantly higher due to overbuilding. Specifically, DaVita proposed to build 11 stations that are not currently needed, essentially "banking" them for later use when additional need arises in the planning area. Additionally, Northwest argues that DaVita's charges per commercial treatment are significantly higher than Northwest's.

The Court of Appeals decision is instructive. In that case, the Presiding Officer found that Northwest's application was superior because DaVita's capital costs were 19 times more (\$1,992,705 compared to \$100,969). There was evidence that Northwest's revenue would exceed its expenses in every year of operation while DaVita's would not. There was also evidence that Northwest's expenses per treatment would be significantly lower than DaVita's. Substantial evidence supported the Presiding Officer's determination that DaVita's proposal could result in an unreasonable impact on the costs and charges for

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<sup>3</sup> Additional methodology and exceptions related to determining need for kidney dialysis facilities are found in WAC 246-310-284 and -287. Those rules are not at issue in this case because the parties agree there is need for five new dialysis stations in King 1.

dialysis services because private pay patients and/or their insurers would be charged significantly higher rates for dialysis services.

In the present case, the Presiding Officer found that both Northwest and DaVita met the applicable criteria under WAC 246-310-220 for financial feasibility even though DaVita proposed to build out expansion space for 11 additional stations and its capital expenditure was significantly higher than Northwest's (\$1,923,388 compared to \$128,616). This was based on findings that: a) both parties could finance the project from existing cash reserves; b) projected net revenues for both projects would exceed operating expenses during or before the third full year of operation; and c) DaVita's higher costs (and any potential impact on the costs and charges for health services) were not inherently unreasonable given the average cost per station of other dialysis projects and its ability to finance the project with existing funds.

Bob Russell, the Program staff who wrote the evaluation, testified the only reason DaVita's application was denied was the overbuilding of future expansion stations. TP2 at 351, 353.<sup>4</sup> He testified that he had no particular guidance from his superiors about the number of excess stations that could be appropriately built (TP2 at 344-345) and the Program had not, to his knowledge as a CN analyst since 2008, previously denied a project based on overbuilding. TP2 at 346. Mr. Russell further testified that the Program did not do any analysis of how much, if any, the expansion space would increase cost for healthcare services, nor did it determine what exactly the impact on the cost of healthcare services would be if DaVita's project was approved. TP2 at 354.

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<sup>4</sup> TP2 refers to day two of the transcript of the proceedings.



While it is tempting and easy to assume that substantially higher costs or building stations in excess of current need will necessarily result in an impact on the costs of charges for health services, the evidence must show the impact would probably be unreasonable. Based on Mr. Russell's testimony and other evidence in the record, the Presiding Officer correctly held that the Program's determination of DaVita's financial feasibility under -220 was erroneous because there was no evidence it would probably cause an unreasonable impact on the costs and charges for health services. Thus, DaVita did not fail the financial feasibility criteria in WAC 246-310-220.

#### Superiority

The Program reviews CN applications for kidney dialysis facilities during four concurrent review cycles per year. WAC 246-310-282. Concurrent review is defined as "the process by which applications competing to provide services in the same planning area are reviewed simultaneously by the department. The department compares the applications to one another and the rules." WAC 246-310-280 (emphasis added). During a concurrent review, "[i]f two or more applications meet all applicable review criteria and there is not enough station need projected for all applications to be approved, the department will use tie-breakers to determine which application or applications will be approved." WAC 246-310-288.

In its Petition (which was filed before the decision of the Court of Appeals), DaVita argued that this case presents "precisely the type of issue for which the Review Officer's role in reviewing CON decisions is essential," namely resolving conflicts between how the Program interprets and applies a rule and how a presiding officer interprets and applies the

FINDINGS OF FACT, CONCLUSIONS  
OF LAW, AND FINAL ORDER

same rule. Pet. at 2. DaVita is correct. This is one role of the Review Officer. However, in this situation the Court of Appeals unwittingly intervened before the review was complete.

As noted above, the Court of Appeals has determined the tie-breakers are only used if both applications first satisfy all other review criteria, including the superiority analysis in -240(1). The Review Officer is compelled to follow case law. Although doing so significantly reduces the role of the tie-breakers, it does not render them meaningless since it is possible for a concurrent review to result in a finding that no application is superior.

WAC 246-310-240(1) states:

A determination that a proposed project will foster cost containment shall be based on the following criteria:

(1) Superior alternatives, in terms of cost, efficiency, or effectiveness, are not available or practicable.

...

In this case, the Presiding Officer found that Northwest's application was the superior alternative under -240(1). Specifically, Northwest's application was superior because its project is "easier to complete, costs less, and would be accessible to provide needed kidney dialysis treatment to patients seven months earlier than DaVita's project." Finding of Fact 1.44. Therefore, both applications did not satisfy all the criteria in rule and the tie-breakers were not used.

DaVita argues in favor of using the tie-breaker criteria to determine superiority under -240(1). This is not an illogical argument because it attempts to reconcile the intent of the rules. But, as the Court of Appeals alluded to in footnote 6, such reconciliation is not

FINDINGS OF FACT, CONCLUSIONS  
OF LAW, AND FINAL ORDER

Page 10 of 13

Master Case No. M2015-102

attempted when the rule language is unambiguous and plain on its face as it is here. Tie-breakers will only be used if two or more applications meet all applicable criteria in rule.

### Conclusion

Nothing in this decision should be taken to mean faster and cheaper is always better. Many factors not present in this case could balance the scales in the other direction. However, in a situation such as this where both applications are equally viable but one could be implemented seven months earlier and at a greatly reduced cost, it can reasonably be viewed as the superior alternative.

Although DaVita's application met the criteria in chapter 246-310 WAC for an award of the CN when considered on its own merits, it is not the superior option when compared to Northwest's application. For this reason, the Initial Order is AFFIRMED.

## **I. FINDINGS OF FACT**

1.1 The Findings of Fact in the Initial Order dated October 27, 2015, are adopted herein.

## **II. CONCLUSIONS OF LAW**

2.1 The Department of Health is authorized and directed to implement the CN Program. RCW 70.38.105.

2.2 The Secretary is authorized to designate a Review Officer to review initial orders and to enter final orders. RCW 43.70.740.

2.3 DaVita's Petition for Administrative Review and the responses of Northwest and the Program were timely filed. WAC 246-10-701.

FINDINGS OF FACT, CONCLUSIONS  
OF LAW, AND FINAL ORDER

2.4 The Conclusions of Law in the Initial Order dated October 27, 2015, are adopted herein.

**III. FINAL ORDER**

Based on the foregoing, IT IS HEREBY ORDERED that the Initial Order dated October 27, 2015, is AFFIRMED.

Dated this 2<sup>nd</sup> day of March, 2016

JOHN WIESMAN, DrPH, MPH  
SECRETARY OF HEALTH

  
By KRISTI WEEKS  
REVIEW OFFICER

**NOTICE TO PARTIES**

Any Party may file a petition for reconsideration. RCW 34.05.461(3); RCW 34.05.470. The petition must be filed within ten (10) days of service of this Order with:

Adjudicative Clerk Office  
Adjudicative Service Unit  
PO Box 47879  
Olympia, WA 98504-7879

A copy must be sent to the other parties. If sending a copy to the Assistant Attorney General in this case, the mailing address is:

Agriculture and Health Division  
Office of the Attorney General  
P.O. Box 40109  
Olympia, WA 98504-0109

FINDINGS OF FACT, CONCLUSIONS  
OF LAW, AND FINAL ORDER

The petition must state the specific grounds upon which reconsideration is requested and the relief requested. WAC 246-10-704. The petition for reconsideration is considered denied twenty (20) days after the petition is filed if the Adjudicative Clerk Office has not responded to the petition or served written notice of the date by which action will be taken on the petition.

A petition for judicial review must be filed and served within thirty (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 thirty (30) day period for requesting judicial review does not start until the petition is resolved. RCW 34.05.470(3).

The Order remains in effect even if a petition for reconsideration or petition for judicial review is filed. "Filing" means actual receipt of the document by the Adjudicative Clerk Office. 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).

Final orders are public documents, and may be placed on the Department of Health's website and otherwise released as required by the Public Records Act, chapter 42.56 RCW.