

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

In Re:)	
)	Docket No. 05-11-C-2043CN
MULTICARE HEALTH SYSTEM)	
GIG HARBOR AMBULATORY)	FINDINGS OF FACT,
SURGERY CENTER,)	CONCLUSIONS OF LAW
)	AND FINAL ORDER
Petitioner.)	
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APPEARANCES:

Petitioner, Franciscan Health System (Franciscan), by
Ogden Murphy Wallace, P.L.L.C., per
E. Ross Farr and Jeffery D. Dunbar, Attorneys at Law

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

Applicant, Multicare Health System (Multicare), by
Dorsey & Whitney, LLP, per
Brian W. Grimm and Peter S. Ehrlichman, Attorneys at Law

PRESIDING OFFICER: Zimmie Caner, Health Law Judge

This is an appeal of the Department of Health Certificate of Need Program's (Program) analysis and denial of Multicare Health System's (Multicare) certificate of need application to establish two outpatient operating rooms in an ambulatory surgery center. Sustained.

ISSUE

Does Multicare's application meet the required certificate of need criteria for an ambulatory surgical facility in the Central Pierce County health service planning area?

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND FINAL ORDER

SUMMARY OF PROCEEDINGS

During the hearing Karen Nidermayer, Richard Petrich and Nancy Field testified.

During the hearing and in Prehearing Order No. 6, the following exhibits were admitted:

- Exhibit 1: Certificate of Need Program administrative record (AR);
- Exhibit 2: Numeric need projections for Gig Harbor;
- Exhibit 3: Numeric need projections for Gig Harbor Pediatrics;
- Exhibit 4: Excerpt from St. Anthony Hospital's floor plan;
- Exhibit 5: NCHS Ambulatory Surgery Study;
- Exhibit 6: Program's evaluation of Franciscan Gig Harbor ASC;
- Exhibit 7: Program's evaluation of Franciscan Gig Harbor Hospital;
- Exhibit 8: Final Order regarding Swedish Bellevue ASC (Docket No. 03-06-C-2001CN);
- Exhibit 9: Franciscan Gig Harbor ASC Application;
- Exhibit 10: Franciscan Gig Harbor ASC Screening Responses;
- Exhibit 11: Franciscan Gig Harbor Hospital Application;
- Exhibit 12: Curriculum vitae of Nancy Field;
- Exhibit 13: Floor plan of St. Anthony Hospital in Gig Harbor;
- Exhibit 14: Curriculum vitae of Jody Corona;
- Exhibit 19: Program's Evaluation of Pacific Rim ASC; and
- Exhibit 20: Final Order regarding Pacific Rim ASC (Docket No. 02-08-C-1003).

I. FINDINGS OF FACT

Multicare's Application

1.1 Multicare filed a certificate of need (CN) application to open an ambulatory surgery center¹ (ASC) with two outpatient operating rooms (ORs) in Gig Harbor.

Following review of Multicare's ASC application, Program denied the application.

Multicare appealed the denial of its application. Franciscan, a competitor of Multicare, intervened to support Program's denial.

Health Planning Area

1.2 Multicare's proposed ASC would be located within the "Central Pierce health planning area", the central portion of Pierce County.² This health planning area includes a number of outpatient and mixed use (inpatient and outpatient) operating rooms that are located within a hospital or outside of a hospital. All but two of the nine ASCs located outside of hospitals within the Central Pierce health planning area are exempt from the CN process. These exempt ASCs are not required to obtain a CN because the ASCs are located within physicians' private offices and the use of the outpatient ORs is restricted to physicians within that private practice.³

1.3 Central Pierce planning area includes the Tacoma and Gig Harbor areas. Four hospitals are located within the Central Pierce planning area. Three of the Central

¹ WAC 246-310-010(5) defines an ASC as any free-standing entity "that operates primarily for the purpose of performing surgical procedures to treat patients not requiring hospitalization." ASC facilities located in private physicians' individual or group practice offices are exempt from the CN requirements if the privilege of the using the ASC is not extended to physicians outside the individual or group practice". WAC 246-310-010.

² WAC 246-310-270(3) lists the planning areas to be used to determine the need for additional outpatient operating rooms.

³ WAC 246-310-010(5).

Pierce planning area hospitals are located in Tacoma. Multicare operates two of these hospitals, Tacoma General/Allenmore and Mary Bridge Children's Hospital. Franciscan operates the third Tacoma hospital, St. Joseph Medical Center. Franciscan is constructing the fourth Central Pierce planning area hospital in Gig Harbor, St. Anthony Hospital.⁴ St. Anthony is scheduled to be operational in 2009. St. Anthony will provide five ORs that may be used for outpatient surgery. The St. Anthony ORs should be considered when determining need of additional outpatient ORs to avoid the approval of an oversupply of outpatient ORs in the planning area.⁵

Need

1.4 The parties do not dispute that the Central Pierce planning area has a surplus of outpatient ORs under the numeric need methodology set forth in the regulations.⁶ The degree of the surplus is contested, because the parties start with different assumptions before completing their need calculations.

1.5 Multicare makes several erroneous or unsubstantiated assumptions in calculating an 11 OR surplus. Multicare describes 11 as a "modest" surplus. Even if Multicare's calculations were correct, this is not a "modest" surplus for two reasons.

First, the 11 OR surplus represents approximately 20% of the 54 operating rooms that

⁴ On May 14, 2004, Program approved Franciscan CN to establish a full service hospital in Gig Harbor (St. Anthony Hospital). AR 525. On May 16, 2004, Multicare filed its ASC application to establish a two outpatient OR in Gig Harbor.

⁵ Program counted 48 mixed use (inpatient/outpatient) and 14 dedicated ORs for special use, such as open heart surgery, that are not to be counted when determining need for additional outpatient ORs. AR 753. Multicare counted 39 mixed use ORs in the Central Pierce planning area. Pursuant to RCW 34-6-310-270(9)(a)(iv), Multicare correctly excluded the St. Joseph ORs dedicated to open heart surgery. Program did not deduct these ORs because St. Joseph had not responded to the survey, so it did not have this information. Multicare incorrectly excluded St. Anthony's 5 ORs. Even though these ORs are not yet operational, they must be included, otherwise too many ORs may be approved, creating a surplus. *Providence v. DSHS*, 112 Wn.2d 353, 358 (1989).

⁶ RCW 246-310-270(9).

Multicare identified for the Central Pierce planning area.⁷ Second, the ASC facilities in the Central Pierce planning area are not operating to full capacity, and St. Anthony Hospital will add five ORs in 2009. Using accurate and substantiated assumptions, the Central Pierce planning area OR surplus is at least a 23 OR surplus rather than an 11 OR surplus.

1.6 The second error Multicare made in its application is the failure to provide the data Multicare used to calculate the 159 minute average for inpatient surgery and the 85 minute average for outpatient surgery. Multicare relied upon Multicare's operating room utilization data that it did not provide in its application.⁸ Multicare should have provided this data in its application or in a response to Program's survey request regarding the use of Multicare's operating rooms.⁹ The applicant is responsible for providing the data upon which the application relies to demonstrate need for additional services.

1.7 Insufficient data was available to reasonably calculate Central Pierce planning area's average minutes for inpatient/outpatient surgery.¹⁰ Therefore, Program

⁷ AR 33.

⁸ During the hearing, Multicare's witnesses explained that they relied on Multicare's utilization data that was not disclose in Multicare's application or in a response to Program's survey.

⁹ The parties do not dispute that the needs methodology calculations are to be conducted pursuant to the methodology outlined in WAC 246-310-270(9).

¹⁰ Program conducted a survey of existing providers to gather data on the surgery volumes in the Central Pierce planning area. Only two of the providers responded to the survey. Multicare did not respond to the survey. When data is not available the default minutes are to be used. WAC 246-310-270(9)(b)(iii). Multicare submitted an article addressing national trends in the utilization of outpatient ORs that indicate an increasing percentage of outpatient surgeries versus inpatient surgeries and the increasing duration of the outpatient surgeries. This article is insufficient evidence to support Multicare's Central Pierce average surgery minutes.

correctly relied on the “default” minute averages, 100 minutes for inpatient surgery, and 50 minutes for outpatient surgery.¹¹

Ordinary or Extraordinary Circumstances

1.8 Despite the surplus in the Central Pierce planning area, Multicare asserts extraordinary circumstances¹² warrant the issuance of a CN because the surplus is “modest,” and Gig Harbor patients should have access to pediatric and reproductive outpatient surgical care and provider choice within Gig Harbor.¹³ In this argument, Multicare attempts to justify the creation of a sub health planning area, within the Central Pierce planning area. Even if the rules permitted the creation of a sub planning area under the ASC need methodology, there is an OR surplus in the Gig Harbor area with St. Anthony Hospital’s five mixed use operating rooms. The surplus is evident by the fact that the existing outpatient surgery center in Gig Harbor operated between 53% and 64% capacity during the three years preceding Multicare’s application.¹⁴ It is very important that hospital mixed use ORs are used to the fullest extent possible because hospitals pay for a tremendous amount of charity care.¹⁵

1.9 Due to the large OR surplus, and the accessibility of outpatient OR services from the four hospitals and two non-hospital ASCs, extraordinary circumstances do not exist in Central Pierce planning area to warrant the issuance of

¹¹ WAC 246-310-270(9)(b)(iii).

¹² Multicare’s promise to close two of Multicare’s Tacoma hospital Ors in lieu of two new Gig Harbor ORs does not sufficiently support the exceptional circumstances because CNs are not required for hospital outpatient ORs.

¹³ Multicare argues extraordinary circumstances support the issuance of a CN under WAC 246-310-270(4).

¹⁴ AR 535.

¹⁵ Even Multicare’s expert Nancy Field emphasized how important it is that hospitals’ operating rooms are used to the fullest extent possible.

the CN for two outpatient ORs in Multicare's Gig Harbor facility. Gig Harbor must be considered a part of the Central Pierce planning area. Considering the distance between Gig Harbor and Tacoma and recent completion of the additional Narrows Bridge, the services located in the Tacoma portion of the Central Pierce service area are reasonably accessible to patients residing in the Gig Harbor area.

1.10 The Narrows Bridge does not create a special need since the new St. Anthony hospital will take care of emergent care, and the non-emergent outpatient surgical care may be handled at St. Anthony Hospital or at one of the three hospitals in Tacoma.¹⁶

1.11 Outpatient pediatric care is available at Mary Bridge Children's Hospital in Tacoma. This Multicare hospital draws patients from a region greater than Central Pierce planning area, and from an area greater than Pierce County. It is not unreasonable to expect families to transport their children approximately 11 miles from the Gig Harbor area to Mary Bridge Children's Hospital for non-emergent care such as outpatient surgery, and pre and post outpatient surgical care.¹⁷

1.12 Similarly, it is not unreasonable for a patient to travel approximately 11 miles for non-emergent reproductive care that a patient may not obtain from Franciscan outpatient surgical care facilities in the Gig Harbor area. Franciscan

¹⁶ When Multicare was fighting Franciscan's application to establish the St. Anthony Hospital in Gig Harbor, Multicare argued that the new bridge would alleviate any perceived access issue. Exhibit 7 at 11. Multicare now makes a different argument, that the new bridge will not solve the traffic problem. It is not clear how long or how much the new bridge will relieve unreasonable traffic delays, but what is clear at this time is that the bridge does not trigger the exceptional circumstances exception to the need criteria.

¹⁷ Some questions were raised during the hearing whether Multicare actually budgeted the special staffing, training and equipment that are needed to treat pediatric patients. It is not necessary to address this issue for the reasons stated in this decision.

facilities do not provide reproductive outpatient surgical care due to its religious policies. Some reproductive procedures, such as vasectomies, are provided in physician offices, and therefore, may be available in the Gig Harbor area. Even assuming that none of these services are available by physicians in their Gig Harbor offices, sterilization and other outpatient reproductive related surgeries are available in Central Pierce planning area from Multicare's Tacoma Hospital or other health care providers.

1.13 Patient's choice of a provider within the Gig Harbor service area does not support Multicare's extraordinary circumstances theory because there is a significant surplus of outpatient ORs in the planning area. Similarly, Multicare's continuity of care with a seamless electronic medical records system does not support Multicare's extraordinary circumstances argument because patients may receive outpatient surgery from Multicare's Tacoma facilities.¹⁸

II. CONCLUSIONS OF LAW

2.1 In response to the 1974 National Health Planning and Resources Development Act, the Washington State Legislature adopted Washington's 1979 Health Planning & Development Act. This act created the Certificate of Need Program.

¹⁸ The CN regulations do not encourage a vertical monopoly with a patient's care entirely provided by only one health care provider. This is contrary to the CN criterion requiring the proposed project to have "an appropriate relationship to the service area's existing health care system." WAC 246-310-230(4). Therefore Multicare's argument regarding continuity of care under the roof with electronic records fails. Multicare's argument would result in a tremendous amount of surplus services/facilities if each CN applicant succeeded in this argument when there is no need, whether the health care service is outpatient surgery, cancer treatment, or other specialty services. This would unreasonably drive up the costs of health care.

Chapter 70.38 RCW and *St. Joseph Hospital & Health Care Center v. Department of Health*, 125 Wn.2d 733, 735-736 (1995).

2.2 One of the purposes of the federal and state health care planning acts was to control health care costs by ensuring better utilization of existing health care facilities and services. *Children's Hosp & Medical Center v. Washington State Dept. of Health*, 95 Wn. App. 858, 865 (1999) (quoting *St. Joseph*) and RCW 70.38.105(3). Congress and the Washington Legislature were concerned that competition in health care had a tendency to drive health care costs up rather than down, and government therefore needed to restrain market place forces. *St. Joseph* at 741. As the Washington Supreme Court clearly stated;

Congress was concerned "that market place forces in this industry failed to produce efficient investment in facilities and to minimize the costs of health care." (cite omitted)
Congress endeavored to control costs by encouraging state and local health planning. It offered grants to state agencies provided the agencies met certain standards and performed certain functions. Among the specified functions was the administration of a CN program.

St. Joseph at 735-736.

2.3 The CN statutory scheme is designed, in part, to control rapidly rising health care costs by limiting competition within the health care industry and therefore protecting existing facilities from competition "unless a need for additional services" can be demonstrated. *St. Joseph* at 742.

The CN program seeks to control cost by insuring better utilization of existing institutional health services and major medical equipment. Those health care providers wishing to establish or expand facilities or acquire certain types of

equipment are required to obtain a CN, which is a nonexclusive license.

St. Joseph. at 736.

2.4 The CN statutory requirements limit provider entry into health care markets so the development of health care resources is “accomplished in a planned, orderly fashion, consistent with identified priorities and without unnecessary duplication or fragmentation.” RCW 70.38.015(2). This health planning process strives to provide accessible health care services while avoiding unnecessary duplication and unnecessary costs that may drive up health care costs. RCW 70.38.015(1) and (5). Unnecessary duplication, such as an unneeded ASC, should be avoided to prevent the potential increase in health care costs. RCW 70.38.015.

2.5 The Department of Health Certificate of Need Program is responsible for implementing this statute. RCW 70.38.105(1). A CN shall be issued or denied in accordance with the Health Planning and Development Act and the Department of Health rules that outline the review procedures and criteria for the Certificate of Need Program in chapter 246-310 WAC. RCW 70.38.115(1).

Burden of Proof

2.6 The CN applicant bears the burden of establishing that the application meets all applicable criteria. WAC 246-10-606. Program then renders a decision whether to grant the requested CN in a written analysis that contains sufficient information to support Program’s decision. WAC 246-310-200(2). The party challenging the decision bears the burden of showing that Program’s decision is incorrect. The burden of proof is a preponderance of the evidence. WAC 246-10-606.

2.7 ASCs are health care facilities¹⁹ subject to CN approval.

RCW 70.38.105(4)(a) and RCW 70.38.025(6). WAC 246-310-010(5)

defines an ASC as any facility “that operates primarily for the purpose of performing surgical procedures to treat patients not requiring hospitalization.”²⁰

Need - WAC 246-310-210 and 246-310-270

2.8 The general certificate of need criteria apply to an ASC application.

RCW 70.38.115(2) and WAC 246-310-200 outline the criteria that Program must address in determining whether it should grant or deny a certificate of need. Those criteria are “need” (WAC 246-310-210), “financial feasibility” (WAC 246-310-220), “structure and process (quality) of care” (WAC 246-310-230), and “cost containment” (WAC 246-310-240). In this case “need” is the pivotal issue.

2.9 ASC applications must meet the numeric need criteria set forth in

WAC 246-310-270(2) through (9), unless extraordinary circumstances warrant approval of more outpatient operating rooms than found numerically needed under

WAC 246-310-270. The parties do not dispute that under WAC 246-310-270(9), there is not a numeric need for additional outpatient operating rooms in the Central Pierce planning area.²¹ This need methodology clearly defines Central Pierce as the planning area to use when determining need and whether extraordinary circumstances exist.

¹⁹ WAC 246-310-010(26) definition of “health care facility” includes ambulatory surgical facilities.

²⁰ WAC 246-310-010(5) exempts facilities in offices of private physicians whether for individual or group practice as long as the privilege of using such facility is not extended to physicians outside the individual or group practice. Multicare appealed a final order that concluded that its proposed ASC does not fall under this CN exemption and therefore is subject to CN review.

²¹ In its need calculations, Program properly relied on the “default” average surgery times under WAC 246-310-270(9)(b)(iii) because sufficient data was not available regarding the average inpatient and outpatient surgery times for the Central Pierce planning area.

ASC Planning Area - WAC 246-310-270(2)

2.10 The planning areas for ambulatory surgical facilities are clearly listed in WAC 246-310-270(3):

... San Juan, Whatcom, East Skagit, Whidbey-Fidalgo, Western North Olympic, East Clallam, East Jefferson, North Snohomish, Central Snohomish, East Snohomish, Southwest Snohomish, Kitsap, North King, East King, Central King, Southwest King, Southeast King, **Central Pierce**, West Pierce, East Pierce, Mason, West Grays Harbor, Southeast Grays Harbor, Thurston, North Pacific, South Pacific, West Lewis, East Lewis, Cowlitz-Wahkiakum-Skamaniam, Clark, West Klickitat, East Klickitat, Okanogan, Chelan-Douglas, Grant, Kittitas, Yakima, Benton-Franklin, Ferry, North Stevens, North Pend Oreille, South Stevens, South Pend Oreille, Southwest Lincoln, Central Lincoln, Spokane, Southwest Adams, Central Adams, Central Whitman, East Whitman, Walla Walla, Columbia, Garfield and Asotin.

WAC 246-310-270(3) (Emphasis added).

2.11 Multicare is essentially requesting a modification of the “Central Pierce” planning area in WAC 246-310-270(4).²² The plain language of this rule does not allow modification of the ASC health planning area. Therefore, the law does not support Multicare’s proposed Gig Harbor ASC planning area as a sub planning area of “Central Pierce” planning area.²³ Unlike some other certificate of need program regulations, such as those related to kidney dialysis, the ASC health planning area rules do not authorize modification of the ASC health planning areas.²⁴

²² The parties do not dispute what zip code areas are included in the “Central Pierce” planning area.

²³ The Narrows Bridge traffic does not support the exceptional circumstances exception to the need criteria, because it is in essence creating a sub service area due to geographic/traffic issues that should be addressed by an amendment to the WAC that defines the planning areas.

²⁴ See the WAC 246-310-010 definition of “end stage renal dialysis (ESDR) service areas,” which defines the ESDR area as the individual county, or other service area documented by patient origin.

2.12 The plain language of WAC 246-310-270(3) does not delegate authority to Program to create new health service planning areas.²⁵ A plain and unambiguous rule shall not be construed, and its plain and ordinary meaning shall be applied. *Children's Hospital and Medical Center v. Department of Health*, 95 Wn. App. 858, 868 (1999), *City of Olympia v. Drebeck*, 156 Wn.2d 289, 295 (2006). Words or clauses cannot be added to an unambiguous statute when the legislature does not include the language, and language may not be deleted from an unambiguous statute. *State v. J.P.*, 149 Wn.2d 444, 450 (2003). A statute is not ambiguous simply because arguments regarding distinct interpretations of it are conceivable. *In re Riley*, 122 Wn.2d 722 (1993). Therefore, Multicare cannot define and Program cannot approve a health planning area other than the ones identified in the WAC 246-310-270(3) need methodology calculation process.

Extraordinary Circumstances - WAC 246-310-270(4)

2.13 Relying upon WAC 246-310-270(4), Multicare argues that Program may consider the needs of patients in the Gig Harbor area separately from Central Pierce planning area even though it is not defined as a planning area under WAC 246-310-270(3). Multicare argues that there are extraordinary circumstances that warrant consideration of the Gig Harbor population apart from the needs of the Central Pierce planning area. WAC 246-310-270(4) states:

²⁵ Program, in the past, approved applications using sub health planning areas, but has discontinued doing so once it was informed that it did not have the authority to modify the planning areas clearly delineated in WAC 246-310-270(3). See Health Law Judge Kuntz Amended Final Order Re: Overlake Hospital ASC (Docket No. 03-06-C-2001CN). The agency power to enforce a regulation implies the power to interpret the regulation, but does not permit the agency to contravene the clear regulatory language. *Tuerk v. Dept of Licensing*, 123 Wn.2d 120, 126 (1994).

Outpatient operating rooms should **ordinarily** not be approved in planning areas where the total number of operating rooms available for both inpatient and outpatient surgery exceeds the area need.

WAC 246-310-270(4) (Emphasis added).

2.14 Multicare should not be permitted to create a new ASC planning area by circumventing the plain language of WAC 246-310-270(3) through an extraordinary circumstances argument. Even if such an argument does not circumvent the planning area regulation, Multicare failed to present a preponderance of evidence to support its extraordinary circumstances argument under WAC 246-310-270(4).

2.15 The CN regulations do not guarantee that ASCs or hospitals should operate close to all residents of the planning area. WAC 246-310-270(3). Multicare's approach would undermine the planning area concept specifically outlined in WAC 246-310-270(3) that assumes all ORs are accessible to patients in the health planning areas.

2.16 Program must consider the "efficiency and appropriateness of the use of existing services and facilities similar to those proposed." WAC 246-310-210(1)(b). Therefore, Program did not err when it determined there is no need because there is a surplus of outpatient ORs in the Central Pierce County service area.

RCW 70.38.115(2).

Unnecessary Duplication of Services - WAC 246-310-210(1)

2.17 Multicare's ASC would create an unnecessary duplication of services that the CN program was designed to avoid. RCW 70.38.015(2) and WAC 246-310-210(1). To encourage the efficient and appropriate use of existing facilities, proposed facilities

should not be approved when existing facilities offer similar and reasonably accessible services. WAC 246-310-210(1)(b). The evidence clearly demonstrates that the existing ASC's offer similar services that are not used to capacity. As a result, approval of Multicare's application would undermine the "efficient and appropriate use of the existing facilities." A preponderance of the evidence demonstrates that the existing ASCs are "sufficiently available or accessible to meet the need" of the population in this service area. WAC 246-310-210(1).

Financial Feasibility - WAC 246-310-220

2.18 With no need, Multicare's proposal fails to meet sub-criterion (3) under the "financial feasibility" criterion because the project costs will probably result in an unreasonable impact on health care costs and charges. WAC 246-310-220(3).

Structure and Process (Quality) of Care - WAC 246-310-230

2.19 Multicare's proposal fails to meet sub-criterion (4) under "structure and process of care" criterion because the unneeded addition of outpatient operating rooms in the Central Pierce planning area may result in an "unwarranted fragmentation of services".²⁶ WAC 246-310-230(4).

Cost Containment - WAC 246-310-240

2.20 Multicare failed to demonstrate that its project is the superior alternative in terms of cost, efficiency, or effectiveness in comparison to the available services. WAC 246-310-240(1). Multicare proposes to establish a facility that would provide similar services available in Central Pierce County facilities that have the capacity to

²⁶ Multicare's proposal satisfies the other sub-criterion in WAC 246-310-220 and WAC 246-310-230.

treat more patients. Such a duplication of services will probably result in “an unreasonable impact on the cost and charges” of providing health care in Washington. WAC 246-310-240(2)(b). This project would not “foster cost containment” and “cost effectiveness” because it will create an unnecessary duplication of similar services. WAC 246-310-240(1) and (3).

Conclusion

2.21 Multicare’s application fails to meet the numeric need for additional outpatient operating rooms under WAC 246-310-270. Multicare failed to present a preponderance of evidence that there are extraordinary circumstances to warrant the issuance of a CN despite the lack of numeric need for additional outpatient operating rooms in Central Pierce planning area. Therefore, Multicare failed to prove with a preponderance of evidence that Program erred in its analysis and decision to deny Multicare’s ASC application.

III. ORDER

Program’s denial of Multicare’s certificate of need application to establish an ASC in Gig Harbor is SUSTAINED.

Dated this ___13___ day of December, 2007.

/s/
ZIMMIE CANER, 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/national reporting requirements. If adverse action 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); RCW 34.05.470. The petition must be filed within 10 days of service of this Order with:

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

and a copy must be sent to:

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

The request must state the specific grounds upon which reconsideration is requested and the relief requested. The petition for reconsideration is considered denied 20 days after the petition is filed if the Adjudicative Service Unit 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 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. 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).