

STATE OF WASHINGTON
DEPARTMENT OF HEALTH
OFFICE OF THE SECRETARY

In the Matter of:

CERTIFICATE OF NEED APPLICATION OF
UNIVERSITY OF WASHINGTON MEDICAL
CENTER,

Applicant,

vs.

PROVIDENCE HEALTH & SERVICES –
WASHINGTON, D/B/A PROVIDENCE
REGIONAL MEDICAL CENTER EVERETT,
PROVIDENCE HEALTH & SERVICES –
WASHINGTON, D/B/A PROVIDENCE
SACRED HEART MEDICAL CENTER, and
SWEDISH HEALTH SERVICES, D/B/A
SWEDISH MEDICAL CENTER/FIRST HILL,

Petitioners.

Master Case Nos. M2013-1393(lead)
M2013-1394
M2013-1395

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND FINAL ORDER

APPEARANCES:

Petitioners: Providence Health and Services – Washington,
d/b/a Providence Sacred Heart Medical Center, and
d/b/a Providence Regional Medical Center Everett, by
Dorsey and Whitney, LLP, per
Peter Ehrlichman, Shawn Larsen-Bright, and Amy Sterner, Attorneys at Law, and
Swedish Health Services, d/b/a Swedish Medical Center/First Hill, by
Stephen Pentz, PLLC, per
Stephen Pentz, Attorney at Law

Intervenor: University of Washington Medical Center, by
Freimund Jackson and Tardif, per
Jeff Freimund, Attorney at Law

Department of Health Certificate of Need Program, by

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Robert W. Ferguson, Attorney General, per
Richard A. McCartan, Assistant Attorney General

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 September 12, 2014, of the Presiding Officer, Frank Lockhart, Health Law Judge. The Presiding Officer issued the Initial Order after a contested administrative hearing held June 16-20, 2014, to address the certificate of need (CN) application filed by the University of Washington Medical Center (UWMC) to add 79 acute care beds to its existing hospital in Seattle, Washington.

As noted in the Initial Order, UWMC began planning to expand its existing Seattle facility in 2005. Construction of an eight-story tower began in 2007 and was completed in 2012. The last three stories of the tower were shelled-in for future use. Related to this construction project, in approximately 2010, UWMC successfully requested a CN to convert 18 acute care beds to use as neonatal intensive care unit (NICU) beds. The net result was a reduction of available acute care beds from 378 to 360¹ in October of 2012.

In November of 2012, UWMC applied for the CN currently at issue. On November 5, 2013, after evaluation, the Certificate of Need Program (Program) determined UWMC's application should be granted. CN #1516 was issued to UWMC on November 18, 2013. Providence Health and Services, doing business as Providence Sacred Heart Medical Center and Providence Regional Medical Center Everett (Providence), and Swedish Health Services, doing business as Swedish Medical Center/First Hill (Swedish), collectively

¹ In addition, there were five acute care beds not set-up, for a total of 365. AR 10.

identified as "Petitioners" herein, were granted "affected person" status by the Program.² Petitioners requested adjudicative proceedings to contest the award of the CN to UWMC, and UWMC was granted intervenor status.

The Initial Order approved the CN for UWMC to add 79 acute care beds and was served on the parties on September 15, 2014. Petitioners filed a Petition for Administrative Review on October 6, 2014. UWMC and the Program each filed a Response on October 27, 2014.

The Review Officer reviewed the entire record including, but not limited to, the Petition and both responses, application record, supplemental application record, hearing transcript, written closing arguments and rebuttals of all parties, and Petitioners' Offer of Proof Regarding Petitioners' Evidence Concerning 2012 CHARS Data.

PETITION FOR REVIEW

Petitioners request that the Review Officer "reject the Initial Order in its entirety" and enter a final order denying UWMC's application and "revoking the erroneously granted" CN. In the alternative, Petitioners request a stay of the CN, if affirmed, to "allow the completion of all administrative and judicial review in this case." Finally, Petitioners request oral argument prior to the issuance of a final order pursuant to RCW 34.05.464(6). Pet. at 3

Petitioners cite seven specific grounds upon which exception is taken:

- 1) The Initial Order's determination that UWMC satisfied the need criterion.
- 2) The Initial Order's determination that UWMC satisfied the financial feasibility

² As noted in the Initial Order, the record does not state the basis for the Program's grant of "affected persons" status to Petitioners. The Review Officer adopts the presumption that Petitioners have standing to challenge the award of the CN to UWMC for purposes of this administrative proceeding. The Review Officer takes no position as to whether they have appellate standing beyond this review.

criterion.

- 3) The Initial Order's determination that UWMC satisfied the structure and process of care criterion.
- 4) The Initial Order's determination that UWMC satisfied the cost containment criterion.
- 5) The Initial Order's determination that UWMC satisfied all applicable review criteria and that UWMC is awarded the CN it requested.
- 6) The Presiding Officer's determination that Petitioners would not be allowed to present evidence concerning 2012 CHARS data.
- 7) The "myriad specific statements set forth in the Initial Order as being contrary to law, Department policy or practice, and/or the record in this case."

At the heart of Petitioners' argument is the contention that it is inappropriate to use any criteria to determine bed need other than the numeric need methodology generally used by the Program. In addition, Petitioners believe UWMC's failure to list 34 million dollars used to build the shell of the last three floors renders the application and subsequent analysis deficient.

UWMC's RESPONSE

UWMC refutes each of Petitioners' grounds for exception and argues that a preponderance of the evidence supports the decision of the Program to grant the CN and the Presiding Officer's approval in the Initial Order. Therefore, it requests that the CN be approved and the request for a stay be denied.

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THE PROGRAM'S RESPONSE

The Program's response supports the decision of the Program to grant the CN and the Presiding Officer's approval in the Initial Order. The Program also requests that the stay be denied.

REVIEW OFFICER'S ANALYSIS

Petition for Review

1. Determination of need.

Petitioners cite 7 grounds upon which exception is taken. The first and primary objection is to the Initial Order's determination that UWMC satisfied the need criterion.

Petitioners present the somewhat puzzling argument that the Program cannot use the Criterion 2 methodology to establish need because it is "stray language" contained in the "defunct, legally nonexistent" 1987 State Health Plan that was sunset in 1990. Pet. at 13. Instead, the Program must continue to use the numeric need methodology established in the very same document which, when applied, shows no need for additional acute care beds. Pet. at 14.

The State Health Plan (SHP) was developed in 1987 by the State Health Coordinating Council under the provisions of the State Health Planning and Development Act (chapter 70.38 RCW). The SHP has two parts. Volume 1 reviews the health status of state residents at the time and presents health principles, goals, objectives and strategies. Volume 2 presents health service performance standards, including methods for forecasting the need for beds at various types of health care facilities that were designed specifically to meet requirements for state review of proposed projects.

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The Hospital Bed Need Forecasting Method in Volume 2 of the SHP contains thirteen "Criteria and Standards" in subsection (c) as well as a detailed numeric need methodology in subsection (d). Criterion 2 acknowledges that hospital bed need forecasts are only one aspect of planning, and it may be appropriate to allow a facility to expand even if the total bed supply is adequate if certain conditions exist that show the benefits of expansion outweigh the potential costs of possible bed surplus.

The 1987 SHP was sunset in 1990. However, it has continued to be used as an evaluative tool by the Program, applicants, and interested parties. As noted by the Presiding Officer in the Initial Order, the Program states in each of its hospital bed evaluations that the department has concluded that this methodology remains a reliable tool for predicting baseline need for acute care beds in most circumstances. AR 1227. Normally, the application of the SHP is an uncontested matter.

Criteria for the review of CN applications shall include consideration of "the need that the population served or to be served by such services has for such services." RCW 70.38.115(2)(a). Thus, the focus is on the needs of the population to be served. In most cases, the population being served consists of local residents of the planning area in which the proposed services will be offered, whether that planning area spans multiple counties or portions of a single county. Therefore, it is generally appropriate to use the numeric need methodology found in the SHP because it focuses on the needs of planning area residents.

But use of the numeric need methodology for acute care beds in the SHP is not mandated in law or rule. In addition to the needs of the population to be served, RCW 70.38.115 directs consideration of additional factors that may impact need such as the

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accessibility of the proposed services to all residents of the area served; the need for and the availability in the community of services and facilities for physicians and their patients; the impact on existing and proposed institutional training programs for physicians, students, interns and residents; and the level of charity care provided.

The CN rules state that the population served or to be served must have need for the project and other services and facilities of the type proposed are not or will not be sufficiently available or accessible to meet that need. WAC 236-310-210(1). As with the statute, the focus is on the people who will use the services and no specific methodology to determine need is identified. To aid in determining need, the Program may consider standards set by national and Washington state professional associations, as well as standards developed by other individuals, groups, or organizations with recognized expertise related to the proposed undertaking. WAC 246-310-200.

The 1987 SHP contains standards developed by a group with recognized expertise in health planning. The fact that it was sunset in 1990 does not render those standards void. To the contrary, those standards continue to be used by the Program, applicants, and interested parties to this day. The consideration of Criterion 2 to determine need is not invalid merely because it is contained within the 1987 SHP.

Petitioners rely heavily on the fact that Criterion 2 "has never once been applied, in the 35-year history of the CON statutory framework." Pet. at 13. Assuming, but not finding, this is true does not render its use improper as long as that use was not arbitrary or capricious. An "arbitrary and capricious" act means "willful and unreasoning action in disregard of facts and circumstances." *Washington Waste Sys., Inc. v. Clark County*, 115

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Wash.2d 74, 81, 794 P.2d 508 (1990). "Though the agency's discretion is unfettered at the outset, if it announces and follows ... a general policy by which its exercise of discretion will be governed, an irrational departure from that policy ... [as opposed to an avowed alteration of it] could constitute action that must be overturned as 'arbitrary, capricious, [or] an abuse of discretion.' " *Torres-Valdivias v. Holder*, 766 F.3d 1106, 1114 (2014) citing *INS v. Yueh-Shaio Yang*, 519 U.S. 26, 32, 117 S.Ct. 350, 136 L.Ed.2d 288 (1996). Where there is room for two opinions, an administrative action is not arbitrary or capricious if the agency rendered its decision honestly and with due consideration, even if a reviewing court believes that the agency reached an erroneous conclusion. *Freeman v. State*, 178 Wash.2d 387, 403, 309 P.3d 437 (2013); *Porter v. Seattle Sch. Dist. No. 1*, 160 Wash.App. 872, 880, 248 P.3d 1111 (2011).

Here, the decision of the Presiding Officer was rendered with due consideration to the extensive arguments of all parties. Importantly, there was no surprise to the parties. UWMC referenced its reliance on Criterion 2 in its CN application dated November 2, 2012. AR 28. Criterion 2 was also referenced in UWMC's answers to the Program's second screening questions dated March 28, 2013. AR 242. This placed all parties on notice that need might be evaluated using factors other than use of the numeric need methodology and allowed the issues to be fully and fairly debated. Petitioners' written public comments dated May 15, 2013, acknowledged this by stating "While the Department has some latitude in evaluating other indicators of "need" in unique applications, we do not believe that UWMC's application warrants special consideration, since it is not unique." AR 417, AR 504.

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The record is replete with arguments from both sides regarding why UWMC's application does or does not merit special consideration. The Review Officer is persuaded that it does for the same reasons detailed in Finding of Fact 1.8 in the Initial Order. Two facts are particularly compelling. First, UWMC has the distinction of being attached to the only allopathic medical school in the state. Second, 89% of UWMC's patient days are comprised of patients who come from outside the North King County planning area (TR47), and it is forced to turn away patients on a regular basis due to capacity constraints³. It is not logical to apply a methodology that only measures the need within the planning area when 89% of the care is provided to patients from outside that planning area.

A finding that UWMC meets the need criteria because it primarily serves a population beyond its planning area should not be confused with a finding of institutional need. Throughout the record, Petitioners refer to the decision in *In re: Certificate of Need on Providence Sacred Heart Medical Center Proposal to add 152 Acute Care Beds to Spokane County* (2011) (Sacred Heart). In that case, surplus beds capacity in the service area precluded a grant of the requested CN despite the hospital's individual internal need.

Sacred Heart was clearly decided based on the numeric bed methodology, not Criterion 2. In the current case, the population served is the state of Washington⁴. There is no showing of a surplus of beds providing the types of complex care UWMC provides to citizens of the state of Washington. To the contrary, UWMC receives a large number of

³ This is noted frequently in the record and generally uncontested, although the exact number of patients turned away is debated by the parties.

⁴ And beyond. Ten percent of UWMC's patient days come from outside of Washington. AR 35.

transfer patients from other hospitals (including Petitioners' facilities) that do not have adequate staffing or resources to provide complex care. AR 1092-93.

2. Inclusion of the 34 million construction costs.

Petitioners also contend that UWMC failed to include the 34 million dollar construction cost for the three shelled out floors. This cost was paid in full prior to the CN application. As such, it was an existing asset of UWMC regardless of whether the CN was granted or not. The Presiding Officer correctly determined inclusion of the shell costs in the budget would not have made a difference in the operating costs of the project. Finding of Fact 1.21.

3. Use of 2012 CHARS data.

Throughout the record, Petitioners repeatedly and strenuously objected to the Program's use of 2011 CHARS data and introduction of incomplete or annualized 2012 data. Petitioners sought to introduce the actual 2012 CHARS data that was released on July 9, 2013. TR 844-45. On the final day of hearing, the Presiding Officer ruled that he would not consider 2012 CHARS data but would consider annualized 2012 data. TR 1025-26.

It is within the sound discretion of the health law judge to admit, or not admit, evidence that came into the existence after the close of the public comment period. *Univ. of Wash. Med. Ctr. v. Dept. of Health*, 164 Wash.2d 95,104, 187 P.3d 243 (2008). In this case, the public comment period ended on May 15, 2013. AR 337-38. The parties were given until July 11, 2013, to rebut the public comments. AR 1288-89. The 2012 CHARS data was released after the close of public comment but two days before the close of the rebuttal period and almost four months prior to completion of the Program's evaluation.

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On August 11, 2014, Petitioners filed an Offer of Proof Regarding Petitioners' Evidence Concerning 2012 CHARS Data that lists 16 points its expert would make if allowed to use the information. The Review Officer carefully analyzed the Offer of Proof and found it did not impact the ultimate decision in this case. Several points relate to application of the numeric need methodology which is inapplicable here because Criterion 2 was used to determine need. Other points purport to show that UWMC's anticipated growth, using 2012 annualized data, did not materialize at projected rates and that its cases are not unique based on diagnostic-related group (DRG) codes and case mix index.

While reasonable minds can and will differ, the Presiding Officer's decision to exclude the 2012 CHARS data was supported by law and the facts of the case. In addition, while it was undeniably more correct than the projections, the data was not so different that its use would have required (or even strongly suggested) a different outcome under a Criterion 2 analysis.

Request for Stay

If the grant of the CN is upheld, Petitioners request a stay pending resolution of the administrative review and all subsequent judicial and appellant actions because it would be "irresponsible and inappropriate" for UWMC, as a state agency, to expend the funds to implement the CN when there is a "substantial likelihood" it will be revoked. Pet. at 46-47.

Whether a stay pending appeal should be granted depends on (1) whether the issue presented by the appeal is debatable, and (2) whether a stay is necessary to preserve for the movant the fruits of a successful appeal. *Purser v. Rahm*, 104 Wn.2d 159, 177, 702 P.2d 1196 (1985). (emphasis added)

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Petitioners have failed to argue that a stay is necessary to preserve for itself the fruits of a successful appeal. A successful appeal for Petitioners would result in maintaining the status quo of beds within the North King County Planning area. Unlike situations where the benefit of a successful appeal would be lost prior to the conclusion of a case, Petitioners will lose nothing in the absence of a stay. To the contrary, it is UWMC that bears the risk of implementing the CN prior to exhaustion of any appellate review.

Request for Oral Argument

Petitioners requested oral argument. RCW 34.05.464(6) states "The reviewing officer shall afford each party an opportunity to present written argument and may afford each party an opportunity to present oral argument." The opportunity for oral argument on a petition for review is clearly discretionary.

The Review Officer has read the entire record for this case which included nearly 1300 pages of application record, more than 200 pages of supplemental record, more than 1200 pages of transcript, and three four-inch binders containing the clerk's files. The parties have each provided detailed and compelling written argument. Oral argument would not assist the Review Officer with her decision making and would likely cause further delay and expense to the parties.

I. FINDINGS OF FACT

1.1 The Findings of Fact in the Initial Order dated September 12, 2014, are adopted herein.

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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 Petitioners' Petition for Administrative Review and the responses of UWMC and the Program were timely filed. WAC 246-10-701.

2.4 The Conclusions of Law in the Initial Order dated September 12, 2014 are adopted herein.

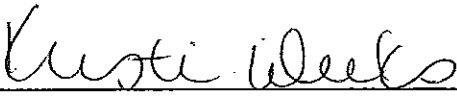
III. FINAL ORDER

Based on the foregoing, IT IS HEREBY ORDERED:

- 3.1 The Initial Order dated September 12, 2014, is AFFIRMED.
- 3.2 The motion for a stay is DENIED.
- 3.3 The motion for oral argument is DENIED.

Dated this 26th day of January, 2015

JOHN WIESMAN, DrPH, MPH
SECRETARY OF HEALTH


By KRISTI WEEKS
REVIEW OFFICER

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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

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).

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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.