

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

In the Matter of:)	
)	Docket No. 03-06-C-2001CN
)	
OVERLAKE HOSPITAL MEDICAL)	AMENDED FINDINGS OF FACT,
CENTER, a Washington non-profit)	CONCLUSIONS OF LAW
Corporation; and KING COUNTY)	AND FINAL ORDER
PUBLIC HOSPITAL DISTRICT NO. 2,)	
dba EVERGREEN HEALTHCARE,)	
A Washington public hospital district,)	
)	
Petitioners.)	
_____)	

APPEARANCES:

Petitioner, Overlake Hospital Medical Center, by
Ogden Murphy Wallace PLLC, per
Donald W. Black, Attorney at Law

Petitioner, King County Public Health District No. 2,
dba Evergreen Healthcare, by
Livengood Fitzgerald & Alskog PLLC, per
James S. Fitzgerald, Attorney at Law

Intervenor, Swedish Health Services
dba Swedish Medical Center, by
Bennett Bigelow & Leedom, P.S., per
Stephen I. Pentz, Attorney at Law

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

PRESIDING OFFICER: John F. Kuntz, Health Law Judge

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AMENDED FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND FINAL ORDER

RECONSIDERATION

Swedish Health Services and the Certificate of Need Program filed petitions for reconsideration of the April 26, 2005 Findings of Fact, Conclusions of Law and Final Order. Pursuant to the Order on Request for Reconsideration, the parties were granted time to file responsive pleadings to the petitions, with the final brief on the issue filed on June 1, 2005. **After review of the briefs and reconsideration of the evidence, the Presiding Officer amends the Findings of Fact, Conclusions of Laws and Final Order, with changes made in bold type.**

INTRODUCTION

Overlake Hospital Medical Center and Evergreen Healthcare appeal the Certificate of Need Program decision granting Certificate of Need No. 1246 to Swedish Health Services to establish an ambulatory surgical facility in Bellevue, King County, Washington. Program decision reversed.

ISSUES

Did Swedish correctly define the secondary health service planning area, pursuant to WAC 246-310-270(3), in its ambulatory surgical facility certificate of need application?

If Swedish did not correctly define the secondary health service planning area pursuant to WAC 246-310-270(3), should the Program's certificate of need decision granting the Swedish application be reversed?

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SUMMARY OF EVIDENCE

The Program called Randall Huyck in its case in chief. Mr. Huyck was also called as a rebuttal witness by Swedish (the Intervenor/Applicant). Overlake Hospital Medical Center and Evergreen Healthcare (Overlake) presented the testimony of Robin Edward MacStravic and Jody Carona. Thirteen exhibits were offered and admitted at hearing:

- Exhibit 1: Swedish Health Services Certificate of Need Application Record (as supplemented by the remand documentation).
- Exhibit 2: Health Service Area map showing Southeast (yellow) and East (blue) King County Service Areas, with the Swedish Health Services proposed service area outlined in black.
- Exhibit A: Certificate of Need Program analysis in the Northwest Nasal Sinus Center application (Certificate of Need No. 1250).
- Exhibit B: Resume of Robin Edward MacStravic, Ph.D.
- Exhibit C: Deposition of Certificate of Need Program Analyst Randy Huyck, taken August 27, 2003 (pages 58 through 95)¹.
- Exhibit D: Facsimile dated August 20, 2003 with Certificate of Need Program work sheets used in the original analysis dated August 15, 2003.
- Exhibit E: Four ambulatory surgery center Need Methodology worksheets prepared by Jody Carona, Health Services Planning & Development, based on the Program's worksheets and data from the record, demonstrating the numerical need:
 - E-1: In the Swedish Health Services defined planning area if all exempt ambulatory surgery center operating rooms are included in the available supply;

¹ The Petitioners offered pages 58 through 95 of the deposition, subject to any objections to the deposition or attached exhibits by the Program or Swedish. No objections were received from the Program or Swedish by the deadline.

- E-2: In the Swedish Health Services planning area if all surgeries performed in all exempt ambulatory surgery center operating rooms are excluded from the use rate;
- E-3: In the East King County planning area if all exempt ambulatory surgery center operating rooms are included in the available supply; and
- E-4: In the East King County planning area if all surgeries performed in all exempt ambulatory surgery center operating rooms are excluded from the use rate.

- Exhibit F: Oversized Map of Proposed Service Area for Swedish ambulatory surgery center (Exhibit 7 from the Huyck deposition).

- Exhibit G: Swedish Defined Service Area (actual Swedish defined service area facilities per Department of Health directory of certified ambulatory surgery centers and Swedish application).

- Exhibit H: Summary of East King Surgery 2001 Utilization Data and Use Rate Calculations corrected Calculation of Need – Northwest Nasal Surgery Center.

- Exhibit I: 2006 East King Secondary Health Service Area – Excluding Exempt Facilities.

- Exhibit J: Swedish Bellevue Ambulatory Surgery Center Need Methodology:
 - J-1: Methodology using 102/1000 use rate.
 - J-2: Methodology using 82/1000 use rate.
 - J-3: Methodology using 57/1000 use rate.
 - J-4: Methodology using 76/1000 use rate.

- Exhibit K: November 27, 2002 letter to Lori Aoyama, Health Facilities Planning & Development from Randy Huyck with attached copies of the Program's application of the ambulatory surgery center numeric need methodology contained in WAC 246-310-270:
 - K-1: Program methodology

- K-2: Methodology using Evergreen/Overlake number of surgeries (prepared November 27, 2002).
- K-3: Methodology using Northwest Nasal Sinus Center projected surgeries (prepared November 27, 2002).
- K-4: Methodology as prepared by applicant Northwest Nasal Sinus Center (prepared November 27, 2002).
- K-5: East King Ambulatory Surgery Center Survey CN Facilities (prepared November 27, 2002).
- K-6: East King Ambulatory Surgery Center Survey All Responding (prepared November 27, 2002).

PROCEDURAL HISTORY

Pre-Hearing Procedural History

On November 14, 2002, Swedish Health Services (Swedish) applied for a certificate of need to establish a freestanding ambulatory surgical facility² in Bellevue, Washington. Swedish proposed its secondary health services planning area (the health planning area) include portions of the East King County and Southeast King County service areas, as it identified the majority of its potential clients living and traveling along the Interstate 90 corridor. Swedish based its health planning area on resident commuting patterns, and the current and expected growth in transportation corridor congestion along Interstate 405 and the bridges across Lake Washington.

The Program began processing the application on December 27, 2002. In his analysis Program Analyst Randy Huyck identified the Swedish health planning area as

² An “ambulatory surgical facility” means any free-standing entity, including an ambulatory surgery center that operates primarily to perform surgical procedures for patients not requiring hospitalization. WAC 246-310-010. The terms ambulatory surgical facility and ambulatory surgery center are often used interchangeably.

a portion of East King County. The Program conditionally granted the Swedish application on May 8, 2003, subject to Swedish meeting certain charity care requirements, and upon providing copies of executed copies of ancillary agreements. Swedish met the required conditions and the Program issued Certificate of Need No. 1264 to Swedish on May 14, 2003.

Petitioners Overlake Hospital Medical Center and Evergreen Healthcare (Overlake) appealed the Program's certificate of need decision on June 5, 2003. Among the issues Overlake identified in its appeal was that Swedish failed to correctly identify the appropriate health planning area as a part of its application. The Program moved to stay the proceedings on September 4, 2003, and requested the Swedish analysis be remanded for further consideration. The Program discovered it might have misidentified the Swedish service area when conducting its ambulatory surgical facility need determination by using only a portion of the East King County health planning area. On November 6, 2003, the parties submitted, and the Presiding Officer issued, a stipulation and agreed order staying the adjudication during the remand to the Program. Under the terms of the order the adjudication was stayed pending the Program's review of the Swedish health planning area. Under the terms of the order the Program would provide notice of this additional review to all affected parties³ and facilities contained in the Program's records in the East King County and Southeast King County planning areas.

³ An "affected person" is defined as an interested person who: (1) is located or resides in the applicant's health planning area; (2) testified at the public hearing or submitted written evidence; and (3) requested in writing to be informed of the Program's decision. WAC 246-310-010.

During the period November 6, 2003 through June 14, 2004 the Program sent out supplemental ambulatory surgery center surveys to the affected parties, and accepted comments regarding those surveys. Following a review of the additional surveys and comments, the Program determined the East King County/Southeast King County area identified by Swedish was consistent with the definition of a health planning area. Using the East King County/Southeast King County health planning area, the Program reviewed and agreed with Swedish's assertion that need existed in the planning area for the project year (2006). The Program issued its remand analysis on August 25, 2004. The stay order was lifted and a hearing was scheduled on the remand analysis.

Post-Hearing Procedural History

Swedish requested the matter be remanded to the Program to correct the need calculation, as the administrative record contained all of the necessary data to perform the calculation. Swedish argued it placed all of the necessary data in the record during the Program's review of the certificate of need application.

The Program accepted the Presiding Officer's conclusion that Swedish's proposed service area under WAC 246-310-270(3) was East King County because the facility was located there. The Program acknowledged that Swedish proposed, and the Program accepted, a different and invalid service area. The Program sought reconsideration of language used by the Presiding Officer, arguing the Presiding Officer incorrectly used the term 'de novo' in his decision. It requested deletion of the 'de novo' language contained in the final order.

Unless the Presiding Officer corrected the ‘de novo’ language, the effect of the final order would be to restrict future competing parties and the Program to adhere to reasons spelled out in the Program’s analysis. The Program argued such a restriction creates an imbalance, granting the Petitioner with an unlimited ability to argue whether the application should be approved or denied but restricting the Program’s and any other party to arguments based on the language contained in the analysis.

I. FINDINGS OF FACT

1.1 On November 14, 2003, Swedish Health Services (Swedish) applied for a certificate of need to establish a freestanding ambulatory surgical facility in Bellevue, Washington. In its application Swedish identified its health planning area as portions of the East King/Southeast King County service areas.

1.2 The Program found the Swedish application met, or was consistent with, all of the ambulatory surgical facility criteria and conditionally approved the Swedish application on May 8, 2003. In its initial analysis the Program found the Swedish health planning area to consist of twenty-seven zip codes in East King County, clustered along Interstate-90. The Program concluded this sub-area of East King County met the health planning area criteria for an ambulatory certificate of need application and issued Certificate of Need No. 1264 on May 14, 2003. Overlake appealed the Program decision on June 5, 2003.

1.3 On September 4, 2003, the Program moved to stay the adjudicative proceeding and remand the analysis to allow it to review whether it misidentified the

health planning area as a portion of East King County rather than portions of East King County and Southeast King County. The parties entered into a stipulation and agreed order to stay the adjudication pending the remand, and this order was signed on November 7, 2003.

1.4 Following a review of the additional surveys and comments, the Program issued the remand analysis and granted the Swedish application on August 25, 2004. In its remand analysis the Program determined the area identified by Swedish, which included portions of the East King County and Southeast King County health planning areas, was consistent with the definition of health planning area criteria. The Program agreed with the Swedish calculations and found that additional operating rooms and increased surgeries were needed for the 2006 project year.⁴

1.5 To determine whether additional inpatient and outpatient operating rooms are needed in a health planning area the applicant uses a mathematical formula or methodology.⁵ The applicant determines the capacity of the existing operating rooms in the health planning area and compares it to the need for additional capacity in the health planning area in the future (which is three years after the applicant anticipates starting the operation of the facility). Capacity speaks to the number of surgeries that can be performed in an operating room. Surgery information is obtained from information derived from surveys provided by facilities in the health planning areas or by use of a default figure provided in the regulation.⁶ Facilities in a health planning area

⁴ Swedish requested eleven kidney dialysis stations in its application, and the Program authorized ten.

⁵ See WAC 246-310-270(9).

⁶ See WAC 246-310-270(9)(a).

are not required to complete the surveys regarding surgical capacity at their respective facilities. The capacity calculations are affected in any given application by the number of facilities that reply to the submitted surveys.⁷

1.6 To determine if additional capacity is necessary requires the calculation of a figure known as a “use rate”. The use rate means a projection of the number of inpatient and outpatient surgeries within the applicant’s health planning area for the applicant’s target year (the third year of operation).⁸ The projection is based on the current number of surgeries adjusted for forecasted growth in the population served and may be adjusted for trends in surgeries per capita (i.e., surgeries according to the number of individuals). The use rate is represented by a percentage of surgeries required per each one thousand population (e.g. 100/1000).

1.7 In its application Swedish proposed a use rate of 102/1000. Swedish based this rate on information obtained from a 1996 National Center for Health Statistic study. The Petitioners disagreed with the Swedish use rate and calculated a figure that was substantially lower (57.76/1000). Rather than accepting either the Swedish or Petitioners use figure, the Program substituted a use rate figure from a recently approved (November 4, 2002) ambulatory surgical facility application for Northwest Nasal Sinus Center (Northwest Nasal).⁹ The Program determined the Northwest Nasal use rate (82/1000) was more accurate than the rate proposed by Swedish because: (1)

⁷ The Program analyst acknowledged at hearing that an issue exists with any use rate calculation, as the figure is calculated without complete surgical statistics. The statistics are incomplete because the Program does not receive a response to the surveys from all of the affected facilities in the health planning area.

⁸ See WAC 246-310-270(9)(b)(i).

⁹ Certificate of Need No. 1250.

it relied on Washington, rather than national, statistics; and (2) the use rate was calculated closer to the time of the application. The Program determined the Northwest Nasal use rate was also more accurate than the use rate proposed by Overlake. It based this decision on its reading of the regulation, which the Program interpreted to include surgeries from both exempt and non-exempt ambulatory surgical facilities.

1.8 The Northwest Nasal use rate relied upon calculations using East King County planning area information and not upon calculations using the East King County/Southeast King County health planning area proposed by Swedish.

1.9 While determining the Northwest Nasal use rate was a more accurate measure than the Swedish or Evergreen use rates, the Program completed its analysis of the Swedish need calculations by using all three use rates for the project year (2006). The Northwest Nasal use rate was determined using the East King County service area, but the Program found it was reasonably close to a 1999 use rate (78.20/1000) determination in a Southeast King County application. AR at 562. **The Program calculated need for additional operating room capacity in Swedish's proposed service area was demonstrated using the procedure times contained in the Program's ambulatory surgical center survey regardless of which of the three use rates was used.**

II. CONCLUSIONS OF LAW

2.1 The certificate of need program is regulated pursuant to chapter 70.38 RCW and chapter 246-310 WAC. The development of health services and resources

should be accomplished in a planned, orderly fashion, consistent with identified priorities and without unnecessary duplication or fragmentation. RCW 70.38.015(2).

2.2 In all cases involving an application for license, the burden shall be on the applicant to establish that the application meets all applicable criteria.

WAC 246-10-606.¹⁰ **The Program then renders a decision whether to grant a certificate of need in a written analysis that must contain sufficient information to support the Program's decision.** See WAC 246-310-200(2)(a); see also *In re Auburn Regional Medical Center*, Docket No. 01-05-C-1052CN (February 20, 2003).

Admissible evidence in certificate of need hearings is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs. RCW 34.05.452(1); WAC 246-10-606.

The Program Does Not Have the Authority to Combine Health Planning Areas.

2.3 An “ambulatory surgical facility”¹¹ is a “new health care facility” subject to certificate of need review. RCW 70.38.105(4)(a) and RCW 70.38.025(6). To receive approval, an ambulatory surgery facility must meet the specific need criteria set forth in WAC 246-310-270(2) through (9) in addition to applicable review criteria set forth in WAC 246-310-210 (general need); WAC 246-310-220 (financial feasibility); WAC 246-310-230 (structure and process of care) and WAC 246-310-240 (cost containment). WAC 246-310-270(1). The area to be used to plan for operating rooms and ambulatory surgical facilities is the secondary health services planning area (health

¹⁰ Certificate of need proceedings are governed by the Administrative Procedure Act (chapter 34.05 RCW), chapter 246-310 WAC and chapter 246-08 WAC. WAC 246-310-610. In 1993 chapter 246-10 WAC replaced the relevant sections of chapter 246-08 WAC. See WAC 246-10-101.

¹¹ See WAC 246-310-010.

planning area). WAC 246-310-270(2). The Program does not have the authority to combine health planning areas based on the statutory definition:

Secondary health service planning areas are: 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-Skamania, 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).

2.4 The law does not support the Swedish-identified health planning area combining both the East King County and Southeast King County areas. Finding of Fact 1.1. The law also does not support the Program's decision to allow the Swedish health planning area following its remand analysis (Finding of Fact 1.4) because it does not comply with the plain language of WAC 246-310-270(3). Unlike some other certificate of need program statutes (e.g., kidney dialysis applications) the health planning area section does not authorize modification of health planning areas.¹² 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). 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

¹² 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.

statute is not ambiguous simply because arguments regarding distinct interpretations of it are conceivable. See *In re Riley*, 122 Wn.2d 722 (1993). So Swedish cannot define, and the Program cannot approve, a health planning area other than the ones identified in the WAC 246-310-270(3) need methodology calculation process.

2.5 The Program argues the WAC 246-310-270(3) language, when read in conjunction with WAC 246-310-270(4), supports an interpretation that an East King County/Southeast King County health planning area can be created. A reading of the plain language of WAC 246-310-270(4) does not support that argument.

WAC 246-310-270(4) states “[o]utpatient 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”. So arguably the WAC 246-310-270(4) language authorizes approval of the addition of outpatient operating rooms where no need for those rooms otherwise exists, but it does not authorize the creation or modification of the health planning areas defined in WAC 246-310-270(3).¹³ A statute is construed so that no portion of it is rendered meaningless or superfluous. *Whatcom County v. Bellingham*, 128 Wn.2d 537, 546 (1996). If the Program’s argument were valid, it would render WAC 246-310-270(3) meaningless or superfluous. WAC 246-310-270(3) clearly defines what constitutes a health planning area, and nothing in the language of WAC 246-310-270(4) authorizes changing those defined health planning areas.

¹³ The Presiding Officer is aware that the Program has, on at least one other occasion, approved an application using a sub area of an identified health planning area. Exhibit 2. While an agency power to enforce a regulation implies the power to interpret that regulation, it may not do so in contravention of the statutory requirements. See *Tuerk v. Department of Licensing*, 123 Wn.2d 120, 126 (1994).

When the Program Incorrectly Combines Two Health Planning Areas in its Need Determination, a Remand to Correct the Health Planning Area is not the Appropriate Remedy

2.6 The Swedish need methodology calculation, as modified by the Program¹⁴, represented a combination of factors using East King County information (e.g., information obtained from the Northwest Nasal application such as the use rate) and factual information derived from the Swedish East King County/Southeast King County health planning area (e.g., the health planning area population figures used in the need calculations). As need calculation must be based on information from the *appropriate* health service area, the calculations cannot be valid without ensuring the use of *all* relevant factors (i.e., the relevant population, annual capacity [whether based on default figures or survey results from the actual health planning area] and future need for the health planning area for the third year of operation).

2.7 Additionally, the underlying basis for the Swedish application was its reliance on the East King County/Southeast King County planning area, including resident commuting patterns and current and expected growth in the identified transportation corridor for that health planning area. As stated above, there are a number of factors which go into the WAC 246-310-270 need methodology calculations. Unless the residential commuting patterns and expected growth are from the correct health planning areas they will impact upon the factors to be used in making the requisite calculations. The Program's decision relied on the Swedish health planning

¹⁴ While the Program can engage in a comparison of information contained in current and past applications to determine whether an application is consistent with the certificate of need criteria, it is unclear whether the Program can substitute or modify the application using such information.

area (East King County/Southeast King County) and the various factors arising from that defined health planning area. Given the interaction of the factors in the need methodology calculations (including the commuting patterns and expected growth), and given that a change in the need calculations has an effect on the financial feasibility, criteria for structure and process of care, and determination of cost containment criteria, any Program analysis relying on the incorrect health planning area cannot stand. The Program's approval of the Swedish application and Certificate of Need No. 1264 must be reversed.¹⁵

Administrative Review Does Not Supplant the Certificate of Need Process.

2.8 Certificate of need **administrative proceedings do not supplant the certificate of review process. Rather the administrative proceeding assures that the procedural and substantive rights of the parties have been observed and that the factual record supports the Program's analysis and decision.** *In Re: Ear Nose Throat*, Docket No. 00-09-C-1037CN (April 17, 2001) (Prehearing Order No. 6).¹⁶ The Program, Petitioners and Swedish each provided a number of alternative calculations at hearing, in support of their respective positions, in which each party substitutes many of the factors required by the WAC 246-310-270 need methodology. As the adjudicative proceeding does not **supplant the certificate of review process**, choosing between the alternative methodology calculations provided by the parties is not appropriate.

¹⁵ The Program argues because need is proven in East King County that the application should be approved even if the health planning area is incorrect. While it is logically correct to state that an application cannot be approved in the absence of need, it does not logically follow that proof of need ensures proof of the application.

¹⁶ Given the reason for the reversal, the Petitioners' argument relating to the use of the same definition terminology on both sides of the need methodology equation need not be addressed.

