



STATE OF WASHINGTON  
DEPARTMENT OF HEALTH

May 17, 2011

CERTIFIED MAIL # 7008 1300 0000 7202 9119

Andrew Gilbert, Regional Operations Coordinator  
DaVita, Inc. – North Star, Regions 1&5  
1301 A Street, #400  
Tacoma, Washington 98402

RE: CN10-08

Dear Mr. Gilbert:

We have completed our reconsideration review of Central Washington Hospital's Certificate of Need (CN) application to establish a seventeen station dialysis facility in East Wenatchee, within Douglas County. For the reasons stated in the enclosed decision and as directed by Washington Administrative Code 246-310-288<sup>1</sup>, the department is prepared to issue a CN for DaVita, Inc.'s project provided DaVita, Inc. agrees to the following in its entirety.

**Project Description:**

Establish an 8-station facility providing the following services: peritoneal dialysis, training/support for peritoneal and hemodialysis patients, and an evening shift beginning after 5 pm. At project completion, DaVita-East Wenatchee Dialysis Center would be approved to certify and operate a total of eight dialysis stations. The stations are listed below.

Private Isolation Room	1
Permanent Bed Station	1
Home Training Station	1
Other In-Center Stations	5
<b>Total</b>	<b>8</b>

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<sup>1</sup> After applying the tie-breakers, the applications remained tied. However, there is not enough station need that permits the department to approve both projects in their entirety. If [competing] applications remain tied after applying all the tie-breakers, the department will award stations as equally as possible among those applications, without exceeding the total number of stations projected for a planning area.



**Term:**

Prior to providing services at East Wenatchee Dialysis Center, DaVita, Inc. will provide an executed copy of the Patient Transfer Agreement with a local hospital for the department's review and approval. The terms provided in the executed agreement must be consistent with the terms identified in the draft agreement.

**Approved Costs:**

The approved capital expenditure associated with this project is \$2,003,222.

You have two options, either accept or reject the above in its entirety. If you accept the above in its entirety, your application will be approved and a Certificate of Need sent to you. If you reject any provision of the above, you must identify that provision, and your application will be denied because approval would not be consistent with applicable Certificate of Need review criteria. Please notify the Department of Health within 20 days of the date of this letter whether you accept the above in its entirety.

Your written response should be sent to the Certificate of Need Program, at one of the following addresses.

Mailing Address:


Department of Health  
Certificate of Need Program  
Mail Stop 47852  
Olympia, WA 98504-7852

Other Than By Mail:

Department of Health  
Certificate of Need Program  
310 Israel Road SE  
Tumwater, WA 98501

If you have any questions, or would like to arrange for a meeting to discuss our decision, please contact Janis Sigman with the Certificate of Need Program at (360) 236-2955.

Sincerely,

  
Steven M. Saxe, FACHE  
Director, Health Professions and Facilities

Enclosure

cc: Linda Foss, Department of Health, Investigations and Inspections Office  
Karen Stricklett, Department of Health, Customer Service Office

**RECONSIDERATION EVALUATION OF THE CERTIFICATE OF NEED APPLICATION  
SUBMITTED ON BEHALF OF CENTRAL WASHINGTON HOSPITAL PROPOSING TO  
ESTABLISH A SEVENTEEN-STATION DIALYSIS CENTER IN EAST WENATCHEE,  
DOUGLAS COUNTY**

**APPLICANT DESCRIPTION**

The origins of Central Washington Hospital date to the early 1900s with the establishment of Central Washington Deaconess Hospital and St. Anthony's Hospital. The two organizations merged in 1974 to form Central Washington Health Services Association. The St. Anthony's facility was renamed Rosewood Hospital in 1978 and the facilities combined their operations at the remodeled and expanded Rosewood Hospital site under the name Central Washington Hospital. [source: Central Washington Hospital website]

Central Washington Hospital (CWH) is located at 1201 South Miller Street in Wenatchee, within Chelan County. CWH provides healthcare services to the residents of Chelan County through its hospital, home health agency, hospice agency, and dialysis center. All of the health care facilities are located in Chelan County. [source: CN historical files; CWH Application, Exhibit 1]

**PROJECT DESCRIPTION**

CWH proposes to establish a 17-station facility to be located at 795 Grant Road in East Wenatchee. The new dialysis center would be known as CWH Douglas County Dialysis Unit (referenced as "DCDU" in this evaluation) and would serve the residents of Douglas County.

Services to be provided at DCDU include hemodialysis, peritoneal dialysis, and training/support for dialysis patients. The 17-station facility would a permanent bed station and an isolation station. [source: Application, p7]

The capital expenditure associated with the establishment of the 17-station facility is \$1,451,612. Of that amount 57% is related to leasehold/construction; 37% for fixed/moveable equipment; and the remaining 6% is related to fees. [source: Application, p27]

If this project is approved, CWH anticipates all 17 stations would become operational by the end of April 2011. Under this timeline, year 2012 would be the facility's first full calendar year of operation and 2014 would be year three. [source: Application, p10 & p27; October 30, 2009, supplemental information, p1]

**BACKGROUND INFORMATION ON THE PROJECT**

CWH's initial application was submitted under the year 2009 Kidney Disease Treatment Centers-Concurrent Review Cycle #3. At the same time, an application from DaVita, Inc. (DaVita) was also submitted to establish a 17-station dialysis center in Douglas County. The two applications were reviewed concurrently. On October 21, 2010, the department approved CWH's application and denied DaVita's application.

On November 10, 2010, DaVita submitted its “Request for Reconsideration” related to the department’s approval of CWH’s application.<sup>1</sup> The department granted DaVita’s reconsideration request, and on February 15, 2011, conducted a public hearing and received additional clarifying information from both CWH and DaVita. CWH and DaVita submitted rebuttal comments on March 17, 2011, related to any comments received at the public hearing. This document is the evaluation of the reconsideration information.

### **APPLICABILITY OF CERTIFICATE OF NEED LAW**

This project is subject to Certificate of Need review as the establishment of a new health care facility under the provisions of Revised Code of Washington (RCW) 70.38.105(4)(a) and Washington Administrative Code (WAC) 246-310-020(1)(a).

### **CRITERIA EVALUATION**

WAC 246-310-200(1)(a)-(d) identifies the four determinations that the department must make for each application. WAC 246-310-200(2) provides additional direction in how the department is to make its determinations. It states:

*“Criteria contained in this section and in WAC 246-310-210, 246-310-220, 246-310-230, and 246-310-240 shall be used by the department in making the required determinations.*

*(a) In the use of criteria for making the required determinations, the department shall consider:*

- (i) The consistency of the proposed project with service or facility standards contained in this chapter;*
- (ii) In the event the standards contained in this chapter do not address in sufficient detail for a required determination the services or facilities for health services proposed, the department may consider standards not in conflict with those standards in accordance with subsection (2)(b) of this section; and*
- (iii) The relationship of the proposed project to the long-range plan (if any) of the person proposing the project.”*

In the event the WAC 246-310 does not contain service or facility standards in sufficient detail to make the required determinations, WAC 246-310-200(2)(b) identifies the types of standards the department may consider in making its required determinations. Specifically WAC 246-310-200(2)(b) states:

*“The department may consider any of the following in its use of criteria for making the required determinations:*

- (i) Nationally recognized standards from professional organizations;*
- (ii) Standards developed by professional organizations in Washington state;*
- (iii) Federal Medicare and Medicaid certification requirements;*
- (iv) State licensing requirements;*
- (v) Applicable standards developed by other individuals, groups, or organizations with recognized expertise related to a proposed undertaking; and*
- (vi) The written findings and recommendations of individuals, groups, or organizations with recognized expertise related to a proposed undertaking, with whom the department consults during the review of an application.”*

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<sup>1</sup> WAC 246-310-560.

WAC 246-310-280 through 289 contains service or facility specific criteria for dialysis projects and must be used to make the required determinations.

To obtain Certificate of Need approval, CWH must demonstrate compliance with the applicable criteria found in WAC 246-310-210 (need); 246-310-220 (financial feasibility); 246-310-230 (structure and process of care); and 246-310-240 (cost containment). Additionally, CWH must demonstrate compliance with applicable kidney disease treatment center criteria outlined in WAC 246-310-280 through 284.<sup>2</sup>

**APPLICATION CHRONOLOGY**

As directed under WAC 246-310-282(1) the department accepted CWH and DaVita’s applications under the year 2009 Kidney Disease Treatment Centers-Concurrent Review Cycle #3. Below is a chronologic summary of the initial review of both projects.

<b>Action</b>	<b>DaVita</b>	<b>CWH</b>
Letter of Intent Submitted	July 31, 2009	July 31, 2009
Application Submitted	August 31, 2009	August 31, 2009
Department’s pre-review Activities including screening and responses	September 1, 2009 through November 15, 2009	
Beginning of Review	November 16, 2009	
End of Public Comment	January 15, 2010	
Rebuttal Comments Received	February 15, 2010	
Department’s Anticipated Decision Date	March 31, 2010	
Department’s Actual Decision Date	October 21, 2010	

Under this reconsideration, only CWH’s application was reviewed.

**Reconsideration Review**

<b>Action</b>	<b>Date</b>
DaVita Submits Request for Reconsideration	November 10, 2010
Department Grants Reconsideration	December 10, 2010
Reconsideration Public Hearing Conducted in Tumwater <ul style="list-style-type: none"> <li>• Comments submitted by CWH and DaVita at the public hearing</li> </ul>	February 15, 2011
Rebuttal Documents Received by the Department	March 17, 2011
Department’s Anticipated Reconsideration Decision Date	May 2, 2011
Department’s Actual Reconsideration Decision Date	May 17, 2011

<sup>2</sup> Each criterion contains certain sub-criteria. The following sub-criteria are not discussed in this evaluation because they are not relevant to this project: WAC 246-310-210(3), (4), (5), and (6).

## **CRITERIA EVALUATION**

The review for a reconsideration project is limited to only those criteria that were identified in the reconsideration request.<sup>3</sup> For this project, DaVita identified two grounds for reconsideration.

- 1) CWH failed to completely and accurately disclose its capital costs for the proposed new facility, which affects the financial viability of the application and does not allow for the ‘economies of scale’ tie-breaker point; and
- 2) CWH does not qualify for the ‘training services’ tiebreaker point.

These two issues focus on two of the four main review criteria: WAC 246-310-220 (financial feasibility) and WAC 246-310-240 (cost containment). The criteria of need (WAC 246-310-210) and structure and process of care (WAC 246-310-230) will not be re-evaluated in the reconsideration review.

## **CONCURRENT REVIEW AND AFFECTED PERSONS**

The purpose of the concurrent review process is to comparatively analyze and evaluate competing or similar projects to determine which of the projects may best meet the identified need. In the case of the projects initially submitted by DaVita and CWH, the department issued one single evaluation and determined that DaVita’s application was denied and CWH’s application was approved. During the initial review, each applicant sought and received affected person status under WAC 246-310-010 for the other application. In the initial review, no other entities sought and received affected person status for either of the two projects. During the reconsideration review, only DaVita and CWH participated in the process.

## **SOURCE INFORMATION REVIEWED**

### **Initial Review**

- DaVita, Inc.’s Certificate of Need application submitted August 31, 2009
- Central Washington Hospital’s Certificate of Need application submitted August 31, 2009
- DaVita, Inc.’s supplemental information dated October 30, 2009
- Central Washington Hospital’s supplemental information dated October 30, 2009
- Public comment received during the review
- DaVita, Inc.’s rebuttal comments received February 16, 2010
- Central Washington Hospital’s rebuttal comments received February 16, 2010
- Years 2003 through 2008 historical kidney dialysis data obtained from the Northwest Renal Network
- Year 2008 Northwest Renal Network 4<sup>th</sup> Quarter Data
- Licensing and/or survey data provided by the Department of Health’s Investigations and Inspections Office
- Licensing and/or survey data provided by out of state health care survey programs
- Data obtained from DaVita, Inc.’s webpage ([www.davita.com](http://www.davita.com))
- Data obtained from Central Washington Hospital’s webpage ([www.cwhs.com](http://www.cwhs.com))
- Data obtained from Centers for Medicare and Medicaid Services (CMS) webpage ([www.medicare.gov/dialysis](http://www.medicare.gov/dialysis))

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<sup>3</sup> While the reconsideration review focuses on the criteria identified in the reconsideration request, the result of the department’s evaluation may impact other review criteria.

**SOURCE INFORMATION REVIEWED**

**Initial Review (continued)**

- Data obtained from the Washington Secretary of State office and webpage
- Data obtained from the Douglas County Assessor webpage
- Maps and driving directions (maps.yahoo.com)
- Certificate of Need historical files

**Reconsideration Review**

- DaVita, Inc.’s reconsideration request received November 10, 2010
- Central Washington Hospital’s response to the reconsideration request received December 1, 2010
- Central Washington Hospital’s comments submitted at the February 15, 2011, reconsideration public hearing
- DaVita, Inc.’s comments submitted at the February 15, 2011, reconsideration public hearing
- Central Washington Hospital’s rebuttal comments received on March 17, 2011
- DaVita, Inc.’s rebuttal comments received on March 17, 2011

**CONCLUSION**

For the reasons stated in this evaluation, the department has concluded that the applications submitted by Central Washington Hospital and DaVita, Inc. each proposing to establish a 17-station dialysis facility in Douglas County are consistent with the applicable review criteria. After applying the tie-breakers, the applications remained tied. However, there is not enough station need that permits the department to approve both projects in their entirety. Therefore, in accordance with WAC 246-310-288, the department will award Central Washington Hospital and DaVita, Inc. each eight stations, provided each applicant agrees to the following project description in its entirety and term related to their respective projects.

**Central Washington Hospital**

**Project Description:**

Establish an 8-station facility providing the following services: peritoneal dialysis, training/support for dialysis patients, and an evening shift beginning after 5 pm. At project completion, CWH-Douglas County Dialysis Center would be approved to certify and operate a total of eight dialysis stations. The stations are listed below.

Private Isolation Room	1
Permanent Bed Station	1
Home Training Station	1
Other In-Center Stations	5
<b>Total</b>	<b>8</b>

**Term:**

Prior to providing services at Douglas County Dialysis Unit, Central Washington Hospital will provide an executed copy of the Medical Director Agreement for the department’s review and approval. The executed agreement must identify the name and professional license number of the proposed medical director and any temporary substitute medical directors as referenced in the draft agreement. The costs and terms provided in the

executed agreement must be consistent with the costs and terms identified in the draft agreement.

**Approved Costs:**

The approved capital expenditure associated with this project is \$1,451,612.

**DaVita, Inc.**

**Project Description:**

Establish an 8-station facility providing the following services: home hemodialysis, peritoneal dialysis, training/support for dialysis patients, and an evening shift beginning after 5 pm. At project completion, DaVita-East Wenatchee Dialysis Center would be approved to certify and operate a total of eight dialysis stations. The stations are listed below.

Private Isolation Room	1
Permanent Bed Station	1
Home Training Station	1
Other In-Center Stations	5
<b>Total</b>	<b>8</b>

**Term:**

Prior to providing services at East Wenatchee Dialysis Center, DaVita, Inc. will provide an executed copy of the Patient Transfer Agreement with a local hospital for the department's review and approval. The terms provided in the executed agreement must be consistent with the terms identified in the draft agreement.

**Approved Costs:**

The approved capital expenditure associated with this project is \$2,003,222.



## RECONSIDERATION EVALUATION

### **A. Financial Feasibility (WAC 246-310-220)**

Based on the source information reconsidered, the department concludes that Central Washington Hospital's project continues to meet the applicable financial feasibility criteria in WAC 246-310-220.

(1) *The immediate and long-range capital and operating costs of the project can be met.*

WAC 246-310 does not contain specific WAC 246-310-220(1) financial feasibility criteria as identified in WAC 246-310-200(2)(a)(i). There are also no known recognized standards as identified in WAC 246-310-200(2)(a)(ii) and (b) that directs what the operating revenues and expenses should be for a project of this type and size. Therefore, using its experience and expertise the department evaluates if the applicant's pro forma income statements reasonably project the proposed project is meeting its immediate and long-range capital and operating costs by the end of the third complete year of operation.

### **Initial Evaluation Summary**

In its initial evaluation, the department concluded that both CWH and DaVita's projects met this sub-criterion. This conclusion was based on a review of each applicant's pro forma financial statements, specific lease agreements, and medical director agreements.

### **Reconsideration Evaluation**

In its reconsideration request, DaVita made several assertions that can be broken into three main issues:

- 1) CWH 'disguised' building construction costs as rent/lease costs within its pro forma financial statements. This resulted in:
- 2) a deliberate underestimation of CWH's capital expenditure for the project which, in turn,
- 3) allowed CWH to be awarded the economies of scale 'tie breaker' that it did not deserve.

Below is a summary of each assertion, CWH's responses to DaVita's assertion, and the department's evaluation.

#### *Rent/Lease Costs*

DaVita asserted that CWH's lease arrangement is legally void and unenforceable because CWH did not provide a notary acknowledgement as required by Washington State law. DaVita also asserts that the lease arrangements are unenforceable as a building contract because all essential elements of the building plans and specifications are omitted. Further, DaVita asserts that CWH would never agree in good faith to be bound by an express waiver of all legal rights to obtain a suitable building as stated in the building lease. DaVita states that both leases—the building lease and the land lease—are conflicting and carelessly prepared demonstrating an absence of a good faith intention to implement the arrangement.

In response to DaVita's assertions, CWH states that its land and building leases are *bona fide* and legitimate. CWH states that there are many ways to demonstrate that the leases are legitimate, but the best proof is that both leases have been executed.

### **Department's Evaluation**

During the review of the initial application, DaVita raised these same concerns related to the both the land and the building leases. Within its public comment, CWH provided a detailed explanation of the land lease and building lease and how they fit with each other. In writing the initial evaluation, the department does not generally included long, detailed explanations of documents. Supporting documents for the land and building leases are part of the initial application and were adequately addressed by CWH. DaVita has not presented any additional arguments that cause the department to change its initial conclusion. While DaVita may identify the leases as illusory and unenforceable, CWH acted in good faith by executing the leases and moving forward with its approved project.

### **Capital Expenditure**

DaVita asserts that CWH failed to disclose its construction costs within its capital expenditure, rather, the construction costs are in the pro forma financial statement's rent/lease line item. This action reduces CWH's capital expenditure for the project.

In response to DaVita's assertions, CWH points out the plain language of the land lease and the building lease. At the end of the 50-year lease term, Mortenson Development, Inc—the entity that will construct the building—will own the facility. At this time, Mortenson Development, Inc. can lease the building to any third party. As a result the capital costs would not be included in CWH's capital expenditure for the project.

### **Department's Evaluation**

During the review of the initial application, DaVita raised this concern related to the capital expenditure, and CWH provided a detailed explanation of plain language of the lease. In short, this issue was raised and addressed in the initial evaluation. A review of CWH and DaVita's applications reveals that both applicants appropriately identified the capital costs.

### **Economies of Scale 'tie breaker**

DaVita states that a direct result of moving construction costs from the capital expenditure line item into the pro forma financial statements is that CWH's capital expenditure is lower than DaVita's capital expenditure. The lower capital expenditure allowed CWH to be awarded the economies of scale tie-breaker point under 246-310-288(2). If the department required CWH to include its construction costs in its capital expenditure, DaVita anticipates that its own costs would be less then CWH's costs and DaVita would be awarded the economies of scale tie-breaker point.

CWH asserts that it appropriately identified its capital expenditure for this project, and in turn was properly awarded this tie-breaker point.

### **Department's Evaluation**

Based on the department's position that CWH properly identified its capital expenditure for this project, the economies of scale tie-breaker point was appropriately awarded to CWH.

- (2) The costs of the project, including any construction costs, will probably not result in an unreasonable impact on the costs and charges for health services.

WAC 246-310 does not contain specific WAC 246-310-220(2) financial feasibility criteria as identified in WAC 246-310-200(2)(a)(i). There are also no known recognized standards as identified in WAC 246-310-200(2)(a)(ii) and (b) that directs what an unreasonable impact on costs and charges would be for a project of this type and size. Therefore, using its experience and expertise the department compared the proposed project's costs with those previously considered by the department.

#### **Initial Evaluation Summary**

In its October 21, 2010, initial evaluation the department concluded that both CWH and DaVita's projects met this sub-criteria. [source: Departments initial evaluation, pp19-23]

#### **Reconsideration Review**

There was no additional information reviewed in this reconsideration that would change the department's initial conclusion. This sub-criterion remains met for both applicants.

- (3) The project can be appropriately financed.

WAC 246-310 does not contain specific source of financing criteria as identified in WAC 246-310-200(2)(a)(i). There are also no known recognized standards as identified in WAC 246-310-200(2)(a)(ii) and (b) that directs how a project of this type and size should be financed. Therefore, using its experience and expertise the department compared the proposed project's source of financing to those previously considered by the department.

#### **Initial Evaluation Summary**

In its October 21, 2010, initial evaluation the department concluded that both CWH and DaVita's projects met this sub-criteria. [source: Departments initial evaluation, pp19-23]

#### **Reconsideration Review**

There was no additional information reviewed in this reconsideration that would change the department's initial conclusion. This sub-criterion remains met for both applicants.

### **B. Cost Containment (WAC 246-310-240)**

Based on the source information reconsidered, the department concludes that the CWH application has met the applicable cost containment criteria in WAC 246-310-240.

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

To determine if a proposed project is the best alternative, the department takes a multi-step approach. Step one determines if the application has met the other criteria of WAC 246-310-210 thru 230. If it has failed to meet one or more of these criteria then the project is determined not to be the best alternative, and would fail this sub-criterion.

If the project met WAC 246-310-210 through 230 criteria, the department would move to step two in the process and assess the other options the applicant or applicants considered prior to submitting the application under review. If the department determines the proposed project is better or equal to other

options the applicant considered before submitting their application, the determination is either made that this criterion is met (regular or expedited reviews), or in the case of projects under concurrent review, move on to step three.

Step three of this assessment is to apply any service or facility specific (tie-breaker) criteria contained in WAC 246-310. The tie-breaker criteria are objective measures used to compare competing projects and make the determination between two or more approvable projects which is the best alternative. If WAC 246-310 does not contain any service or facility criteria as directed by WAC 246-310-200(2)(a)(i), then the department would look to WAC 246-310-240(2)(a)(ii) and (b) for criteria to make the assessment of the competing proposals. If there are no known recognized standards as identified in WAC 246-310-200(2)(a)(ii) and (b), then using its experience and expertise, the department would assess the competing projects and determine which project should be approved.

### **Initial Evaluation Summary**

In its October 21, 2010, evaluation, the department reviewed both CWH and DaVita's project using the three step method outlined above. Both applicants passed steps one and two. For step three, the department applied the tie-breaker criteria under WAC 246-310-288(1) and (2). At the end of the tie-breaker review, CWH's application was approved and DaVita's application was denied. [source: Department's initial evaluation, pp32-38]

### **Reconsideration Evaluation**

In its reconsideration request, DaVita asserts that the department incorrectly applied the 'training service' tie breaker under WAC 246-310-288(1)(a), which states:

- (1) *The department will award one point per tie-breaker to any applicant that meets a tie-breaker criteria in this subsection.*
- (a) *Training services (1 point):*
- (i) *The applicant is an existing provider in the planning area and either offers training services at the facility proposed to be expanded or offers training services in any of its existing facilities within a thirty-five mile radius of the existing facility; or*
  - (ii) *The applicant is an existing provider in the planning area that offers training services in any of its existing facilities within thirty-five miles of the proposed new facility and either intends to offer training services at the new facility or through those existing facilities; or*
  - (iii) *The applicant, not currently located in the planning area, proposes to establish a new facility with training services and demonstrates a historical and current provision of training services at its other facilities; and*
  - (iv) *Northwest Renal Network's most recent year-end facility survey must document the provision of these training services by the applicant.*

WAC 246-310-280(13) provides the following definition for 'training services'

*"Training services" means services provided by a kidney dialysis facility to train patients for home dialysis. Types of home dialysis include at least, but are not limited to, the following:*

- (a) *Home peritoneal dialysis (HPD); and*
- (b) *Home hemodialysis (HHD).*

DaVita asserts that CWH must demonstrate that it provides both home peritoneal dialysis and home hemodialysis at one of its dialysis centers. Since the only dialysis facility that CWH operates is in the neighboring county of Chelan, CWH must demonstrate that it provides both types of home training

dialysis services at that facility. DaVita states that Northwest Renal Network's most recent year-end facility data shows that CWH does not provide home hemodialysis training. As a result, CWH should not be awarded this tie-breaker point.

CWH refutes DaVita's assertions by stating that the training services definition does not mean that a facility must offer both types of home dialysis, rather, it means that a facility could offer only one of the listed home modalities, or other types of home services. CWH does not dispute that it does not offer home hemodialysis training at its Chelan County facility.

CWH also asserts that if the department determines that DaVita is correct in its interpretation of the definition and CWH must offer both types of home dialysis, then DaVita cannot be awarded the training services point either. CWH states that phrase "*at its other facilities*" in sub-section 246-310-288(1)(a)(iii) means that DaVita has to provide both types of home dialysis services at all of its other facilities. DaVita has 14 facilities in Washington State, but does not offer both types of training services in all 14 facilities. As a result, DaVita would not qualify for this training services tie-breaker point.

### **Department's Evaluation**

During a concurrent review, tie breakers (WAC 246-310-288) are the third step of a three step process used by the department in evaluating WAC 246-310-240(1) when two or more applications are approvable and there is not enough station need projected for all applications to be approved. WAC 246-310-288 also provides direction to the department if the competing applications remain tied after applying the tie breakers.

WAC 246-310-288(1)(a) states:

*(1) The department will award one point per tie-breaker to any applicant that meets a tie-breaker criteria in this subsection.*

**(a) Training services (1 point):**

- (i) The applicant is an existing provider in the planning area and either offers training services at the facility proposed to be expanded or offers training services in any of its existing facilities within a thirty-five mile radius of the existing facility; or*
- (ii) The applicant is an existing provider in the planning area that offers training services in any of its existing facilities within thirty-five miles of the proposed new facility and either intends to offer training services at the new facility or through those existing facilities; or*
- (iii) The applicant, not currently located in the planning area, proposes to establish a new facility with training services and demonstrates a historical and current provision of training services at its other facilities; and*
- (iv) Northwest Renal Network's most recent year-end facility survey must document the provision of these training services by the applicant.*

[emphasis added]

In the evaluation of the training services tie breaker, the first determination is whether the applicant is an existing provider in the planning area or is a new provider to the planning area. CWH is an existing provider in Washington State, but is not already located in the Douglas County planning area

where CWH is proposing to establish this new dialysis facility. CWH does not meet the qualifications of WAC 246-310-288(1)(a)(i) or (ii) as an existing provider. To be considered for this tie breaker, CWH must propose to provide training services at the new dialysis facility in Douglas County. In its application, CWH states “*the new facility will include in-center hemodialysis, home training, home training support, and visitor capacity.*” [source: Application, p6] Based on this information, the department concluded CWH would qualify for further consideration about providing training services.

WAC 246-310-280(13) provides the following definition for training services.

*“...services provided by a kidney dialysis facility to train patients for home dialysis.*

*Types of home dialysis include at least, but are not limited to, the following:*

*(a) Home peritoneal dialysis (HPD); and*

*(b) Home hemodialysis (HHD).*

[emphasis added]

Based on the clear reading of the ‘training services’ definition under WAC 246-310-280(13) and the intended purpose of the tie-breakers, the department concludes that training services include at least home peritoneal dialysis and home hemodialysis. CWH does not dispute that it does not offer home hemodialysis training, as a result, the department incorrectly awarded CWH the training services tie-breaker point in its initial evaluation.

CWH asserts that if the department concludes that both types of home training must be provided at CWH’s new Douglas County dialysis center, than DaVita’s Douglas County application would not qualify for this tie-breaker point either because DaVita is not providing both types of training at all of its existing centers in Washington. To evaluate this issue, the department considered WAC 246-310-288 in its entirety.

Sections (i) and (ii) permit dialysis providers already located in the planning area to rely on the training services of one of its other dialysis facilities to be eligible for and receive a tie-breaker point. The facility relied upon must be within 35 miles of the facility subject to the review and already offering both types of home dialysis training services.

When the applicant is new to the planning area, section (iii) applies. To qualify for this tie-breaker point, an applicant must state in the application that it intends to provide training services at the proposed new facility. The documented historical and current provision of training services at other facilities owned or operated by an applicant is a reasonable means to validate that the new provider would implement the training services as stated in the application.

CWH’s interpretation of WAC 246-310-288 produces two equally unreasonable results. The first is that only existing Washington State dialysis providers could qualify for this tie-breaker. New providers to the state could not use documentation of historical and current home training services outside Washington State to validate training services and be eligible for the tie-breaker point. This would give existing Washington providers preferential treatment over new providers to the state. This interpretation is not consistent with the department’s position of reviewing applications in a fair and equitable manner.

Second, if all dialysis facilities of a provider had to be offering both types of training services, the results are also unreasonable. For example, DaVita would have to provide both types of training services in all 1,400 of its centers; Fresenius in all 1,700 of its centers; Northwest Kidney Centers in all 14 of its centers; and DSI Renal, Inc.<sup>4</sup> in all of its 100 centers to be eligible for this tie-breaker point. This interpretation is not reasonable.

Finally, even if CWH asserts that the applicant must provide training services in all of its Washington State facilities, sections (i) and (ii) of WAC 246-310-288 would be meaningless. Clearly, both of these sub-sections allow for an applicant to receive a training point even if training services are not offered in every facility it owns in Washington State. It is inconsistent and unreasonable to read the language in sub-section (iii) more strict than the two sub-sections before it.

As previously stated, in the initial evaluation, the department incorrectly awarded CWH the training services tie-breaker point in its initial evaluation. Below is a reconsideration of all tie-breaker points under WAC 246-310-288(1) and (2) for both CWH and DaVita.

### **WAC 246-310-288(1)**

*(1) The department will award one point per tie-breaker to any applicant that meets a tie-breaker criteria in this subsection.*

*(a) Training services (1 point):*

*(i) The applicant is an existing provider in the planning area and either offers training services at the facility proposed to be expanded or offers training services in any of its existing facilities within a thirty-five mile radius of the existing facility; or*

*(ii) The applicant is an existing provider in the planning area that offers training services in any of its existing facilities within thirty-five miles of the proposed new facility and either intends to offer training services at the new facility or through those existing facilities; or*

*(iii) The applicant, not currently located in the planning area, proposes to establish a new facility with training services and demonstrates a historical and current provision of training services at its other facilities; and*

*(iv) Northwest Renal Network's most recent year-end facility survey must document the provision of these training services by the applicant.*

*(b) Private room(s) for isolating patients needing dialysis (1 point).*

*(c) Permanent bed stations at the facility (1 point).*

*(d) Evening shift (1 point): The applicant currently offers, or as part of its application proposes to offer at the facility a dialysis shift that begins after 5:00 p.m.*

*(e) Meeting the projected need (1 point): Each application that proposes the number of stations that most closely approximates the projected need.*

### **DaVita-East Wenatchee Dialysis Center**

A total of five points is possible. Table 1 on the following page shows the distribution of tie-breaker points under this sub-criterion for DaVita.

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<sup>4</sup> DSI Renal, Inc. has over 100 dialysis centers located in 23 states. Currently, there are three DSI Renal facilities in Spokane County within Washington State. [source: DSI Renal, Inc. website]

**Table 1**  
**WAC 246-310-288(1)**  
**DaVita Tie-Breaker Review**

<b>WAC 246-310-288(1)</b>	<b>Point</b>	<b>Source</b>
(a) Training services	1	Application, p9
(b) Private room(s) for isolating patients	1	Application, Appendix 16
(c) Permanent bed stations at the facility	1	Application, pp8-9
(d) Evening shift	1	Application, p9
(e) Meeting the projected need	1	Application, p20
<b>DaVita-Total Points</b>	<b>5</b>	

CWH-Douglas County Dialysis Unit

A total of five points is possible. Table 2 below shows the distribution of tie-breaker points under this sub-criterion for CWH.

**Table 2**  
**WAC 246-310-288(1)**  
**CWH Tie-Breaker Review**

<b>WAC 246-310-288(1)</b>	<b>Point</b>	<b>Source</b>
(a) Training services	0	12/31/08 NWRN data-CWH does not provide training services as defined in WAC 246-310-280(13)
(b) Private room(s) for isolating patients	1	October 30, 2009, supplemental information, Attachment 2
(c) Permanent bed stations at the facility	1	October 30, 2009, supplemental information, Attachment 2
(d) Evening shift	1	Application, p24
(e) Meeting the projected need	1	Application, p17
<b>CWH-Total Points</b>	<b>4</b>	

Under WAC 246-310-288(1) where each applicant could receive a maximum of 5 points, DaVita received 5 points and CWH received 4 points.

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

- (2) *Only one applicant may be awarded a point for each of the following four tie-breaker criteria:*
- (a) *Economies of scale (1 point): Compared to the other applications, an applicant demonstrates its proposal has the lowest capital expenditure per new station.*
  - (b) *Historical provider (1 point)*
    - (i) *The applicant was the first to establish a facility within a planning area; and*
    - (ii) *The application to expand the existing facility is being submitted within five years of the opening of its facility; or*
    - (iii) *The application is to build an additional new facility within five years of the opening of its first facility.*
  - (c) *Patient geographical access (1 point): The application proposing to establish a new facility within a planning area that will result in services being offered closer to people in need of*



them. The department will award the point for the facility located farthest away from existing facilities within the planning area provided:

- (i) The facility is at least three miles away from the next closest existing facility in planning areas that qualify for 4.8 patients per station; or
  - (ii) The facility is at least eight miles from the next closest existing facility in planning areas that qualify for 3.2 patients per station.
- (d) Provider choice (1 point):
- (i) The applicant does not currently have a facility located within the planning area;
  - (ii) The department will consider a planning area as having one provider when a single provider has multiple facilities in the same planning area;
  - (iii) If there are already two unrelated providers located in the same planning area, no point will be awarded.

DaVita-East Wenatchee Dialysis Center

Only one applicant may receive a point for each of the four tie-breaker criteria under this section. Table 3 below shows the distribution of tie-breaker points under this sub-criterion for DaVita.

**Table 3**  
**WAC 246-310-288(2)**  
**DaVita Tie-Breaker Review**

<b>WAC 246-310-288(2)</b>	<b>Point</b>	<b>Source</b>
(a) Economies of Scale	0	October 30, 2009, supplemental information p1 [\$116,581.82]
(b) Historical Provider	0	
(c) Patient Geographical Access	0	
(d) Provider Choice	0	
<b>DaVita-Total Points</b>	<b>0</b>	

CWH-Douglas County Dialysis Unit

Only one applicant may receive a point for each of the four tie-breaker criteria under this section. Table 4 below shows the distribution of tie-breaker points under this sub-criterion for CWH.

**Table 4**  
**WAC 246-310-288(2)**  
**CWH Tie-Breaker Review**

<b>WAC 246-310-288(2)</b>	<b>Point</b>	<b>Source</b>
(a) Economies of Scale	1	Application, p27 [\$84,134.18]
(b) Historical Provider	0	
(c) Patient Geographical Access	0	
(d) Provider Choice	0	
<b>CWH-Total Points</b>	<b>1</b>	

Table 5 below shows the total accumulation of tie-breaker points for both DaVita and CWH.

**Table 5**  
**WAC 246-310-288(1) and (2) – Tie-Breaker Summary Table**

	Tie-Breaker Point Distribution	
	DaVita	CWH
1(a) – Training services	1	0
1(b) – Private Room	1	1
1(c) – Permanent Bed Station	1	1
1(d) – Evening Shift	1	1
1(e) – Meets Need	1	1
2(a) – Economies of Scale	0	1
2(b) – Historical Provider	0	0
2(c) – Geographical Access	0	0
2(d) – Provider Choice	0	0
<b>Cumulative Total</b>	<b>5</b>	<b>5</b>

At the completion of the tie-breaker point allocations, DaVita accumulated a total of five (5) points and CWH accumulated a total of five (5) points. The applicants remained tied.

WAC 246-310-288 also states:

*If 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. The department will approve the application accumulating the largest number of points. If sufficient additional stations remain after approval of the first application, the department will approve the application accumulating the next largest number of points, not to exceed the total number of stations projected for a planning area. If the applications remain tied after applying all the tie-breakers, the department will award stations as equally as possible among those applications, without exceeding the total number of stations projected for a planning area.*

[emphasis added]

As directed by rule above, in this reconsideration evaluation, the department will award stations to both CWH and DaVita without exceeding the total number of stations projected for the planning area.

In the need section of the initial evaluation, the department concluded that 17 stations were projected in the Douglas County planning area. Both CWH and DaVita’s numeric methodology also calculated need for 17 stations. Under this reconsideration evaluation, the department concludes the following.

DaVita-East Wenatchee Dialysis Center

Based on the results of the tie-breaker criteria above, DaVita’s project meets this sub-criterion. The department approves the establishment of an 8-station dialysis center in Douglas County.

CWH-Douglas County Dialysis Unit

Based on the results of the tie-breaker criteria above, CWH's project meets this sub-criterion. The department approves the establishment of an 8-station dialysis center in Douglas County.

(2) In the case of a project involving construction:

(a) The costs, scope, and methods of construction and energy conservation are reasonable;

(b) The project will not have an unreasonable impact on the costs and charges to the public of providing health services by other persons.

**Initial Evaluation Summary**

In its October 21, 2010, initial evaluation the department concluded that both CWH and DaVita's projects met this sub-criteria. [source: Departments initial evaluation, pp37-38]

**Reconsideration Review**

There was no additional information reviewed in this reconsideration that would change the department's initial conclusion. This sub-criterion remains met for both applicants.