

STATE OF WASHINGTON
DEPARTMENT OF HEALTH
OFFICE OF THE SECRETARY

In the Matter of:

CERTIFICATE OF NEED DECISION BY
DEPARTMENT OF HEALTH
REGARDING KADLEC REGIONAL
MEDICAL CENTER APPLICATION TO
ADD 144 ACUTE CARE BEDS TO
EXISTING HOSPITAL,

KADLEC REGIONAL MEDICAL
CENTER, A WASHINGTON NON-
PROFIT CORPORATION,

Petitioner,

and

EVALUATION OF THE FOLLOWING
TWO CERTIFICATE OF NEED
APPLICATIONS PROPOSED TO ADD
ACUTE CARE BED CAPACITY TO THE
BENTON/FRANKLIN PLANNING AREA:
KADLEC REGIONAL MEDICAL CENTER
PROPOSING TO ADD 114 ACUTE
CARE BEDS TO THE EXISTING
HOSPITAL IN RICHLAND; KENNEWICK
GENERAL HOSPITAL PROPOSING TO
ADD 25 ACUTE CARE BEDS TO THE
AUBURN CAMPUS IN KENNEWICK,

KENNEWICK PUBLIC HOSPITAL
DISTRICT,

Petitioner.

Master Case Nos. M2010-1529
(lead) and M2011-375

FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
FINAL ORDER

APPEARANCES:

Petitioner Kadlec Regional Medical Center, by
Perkins Coie LLP, per
Brian W. Grimm and Anastasia K. Anderson, Attorneys-at-Law

Petitioner Kennewick General Hospital District, by
Foster Pepper PLLC, per
Christopher G. Emch and Lori K. Nomura, Attorneys-at-Law

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

PROCEDURAL HISTORY ON REVIEW

This matter has come before the Review Officer for administrative review of the Findings of Fact, Conclusions of Law, and Initial Order (Initial Order) dated September 2, 2014, of the Presiding Officer, John F. Kuntz. The Presiding Officer issued the Initial Order after a contested administrative hearing held on May 19-21, 2014, to address certificate of need (CN) applications filed by Kadlec Regional Medical Center (Kadlec) and Kennewick Public Hospital District dba Kennewick General Hospital¹ (KGH).

The Initial Order is the result of several years of litigation between the parties. The procedural history is fully explained in the Initial Order and will not be repeated here. It is sufficient to note that in 2009 Kadlec submitted a CN application to add either 55 acute care beds, 75 acute care beds, or 114 acute care beds. KGH, which is located in the same planning area as Kadlec, applied to add 25 acute care beds. After a concurrent evaluation of the two applications, the Department of Health Certificate of Need Program (Program) granted 55 beds

¹ Kennewick General Hospital is now doing business as Trios Health. It will be identified as Kennewick General Hospital or KGH, which is consistent with the proceedings in this matter.

to Kadlec and denied KGH's application.

Following litigation at the administrative level, Superior Court, and Court of Appeals, the case was remanded for a hearing before the Presiding Officer to determine whether Kadlec should be granted its alternative requests for 75 or 114 beds. At the hearing, KGH withdrew its appeal of the Program's award of 55 beds to Kadlec. Ultimately, the Initial Order affirmed the grant of 55 beds to Kadlec, and denied the alternative requests for 75 or 114 beds. KGH's request for an additional 25 acute care beds was also denied.

It is not lost on the Review Officer that the May 2014 administrative hearing was held nearly five years after the 2009 applications were originally filed. The key issue in this case is the proper selection of the method to forecast future population growth in the Benton/Franklin planning area – growth which has now occurred and can be verified. However, the administrative review is based entirely upon the record and determines whether the Initial Order was appropriate based solely on the information available during the application process.

KADLEC'S PETITION FOR REVIEW

On September 24, 2014, Kadlec filed a timely Petition for Administrative Review (Kadlec's Petition). Kadlec requests that its CN application to add a total of 114 additional acute care beds (or "some other number of additional beds" beyond the 55 already approved) be granted. Kadlec's argument is based on the premise that the Presiding Officer erred by applying the Office of Financial Management's (OFM) 2007 medium series population forecast rather than the high series, and that the high series was the most accurate predictor of population growth in the Benton/Franklin planning area because:

- OFM's 2002 medium series population forecast was less accurate than the high series

when compared to the actual population growth in 2002-2006.

- The actual population growth in 2006-2009 exceeded even the 2002 high series.
- OFM's 2007 forecast failed to correct the errors that caused the 2002 forecast to underestimate population growth in the planning area.

In addition, Kadlec contends the Presiding Officer erred by applying a seven year planning horizon (2009 to 2016) rather than a ten year planning horizon (2009 to 2019).

KGH'S PETITION FOR REVIEW

On September 24, 2014, KGH also filed a timely Petition for Administrative Review (KGH's Petition). KGH opposes the grant of additional beds to Kadlec above the 55 already given but, in the event need is established and beds are granted, asks that up to 25 of those beds be awarded to KGH.

KGH asserts that it satisfies the CN criteria for financial feasibility, structure and process of care, and cost containment. It also contends that Kadlec's application is not the superior alternative because there is no planning need for Kadlec's request, Kadlec has inflated its internal need and service complexity assertions, KGH's costs are lower, and approving Kadlec's CN application would preclude the growth of other hospitals in the planning area for many years.

THE PROGRAM'S PETITION FOR REVIEW

The Program filed a single response to the petitions of both Kadlec and KGH. Although not captioned as a petition for administrative review, on page 5, lines 14-17, the Program requests the Review Officer to rule that it was correct in using the medium series based on the fact OFM has determined that the medium series is the "most likely" growth to occur.

REVIEW OFFICER'S ANALYSIS OF KADLEC'S PETITION

The fundamental issues in Kadlec's Petition are whether the Program should have used: 1) OFM's 2007 high series population forecast; and 2) a ten year planning horizon. Using either or both of these options could increase the forecasted acute care bed need for the Benton/Franklin planning area.

1. Population Forecast

The State Health Plan methodology requires use of the "most accurate" population forecast for the planning area. It directs that OFM forecasts should be used, including age and sex-specific forecasts. Each OFM forecast contains three series – high, medium and low. The medium projection is what OFM believes is most likely to occur. Unlike the low and high series, the medium series contains breakdowns by age categories at the county level. TR 61, 393. Age categories are significant because people age 65 and above use hospital facilities at a rate of about five times the use by people age 0-64. TR 143.

OFM publishes these forecasts every five years. At the time of the 2009 applications, OFM's 2007 forecast was the most recent. Prior to that, OFM had issued a forecast in 2002.

The Program always uses OFM's medium forecast. TR 54. The medium forecast represents what is most likely to occur. RCW 43.62.035. Thus, is likely to be "most accurate." TR 60.

In this case, the Program consulted with OFM staff and was assured the medium series of the 2007 forecast was most appropriate. TR 149-50, AR1266. This was particularly important because Benton and Franklin Counties, and Franklin in particular, experienced rapid growth between 2002 and 2008 that was not fully captured in the 2002 forecast. AR 1127.

When compared to the actual numbers, the 2002 forecast significantly underestimated the planning area's growth between 2002 and 2008. TR 101, AR 1127. The actual growth exceeded even the high series of the 2002 forecast. TR102. The Program informed the parties of its intent to use the medium series but allowed the opportunity to argue for the high series. TR 98, AR 1266.

Kadlec presented testimony by Frank G. Fox, PhD, whom the Presiding Officer recognized as an expert in economics, health care economics and health care planning. TR 217-18. Dr. Fox assisted Kadlec with its CN application, including determining the bed need for the Benton/Franklin planning area. TR 318. Using OFM's 2007 medium series, Dr. Fox estimated a need for 28.94 acute care beds by 2016 and 54.02 beds by 2019. Using the 2007 high series, he estimated the need as 91.71 beds by 2016 and 132 beds by 2019.

Dr. Fox testified that he believed the 2007 high series was the most accurate and should be used in this proceeding. TR 324, 334-35. In summary, his belief is based in large part on the fact that OFM's 2002 medium series missed the actual growth that occurred in Benton and Franklin Counties. TR 338. He contends that although OFM recognized this error and purported to correct it in the 2007 forecast, he had no confidence they did actually fully correct the prior mistakes. TR 341, 435. However, he concedes that some corrections were in fact made. TR 434. He also acknowledges that "OFM population data is considered much more reliable than commercially available data" and "one would always choose the OFM data if it is available." TR 331.

KGH presented the testimony of Jody Carona, an expert in the field of health planning and primary author of KGH's CN application. TR 467. Ms. Carona testified that she

had a prior experience using OFM's 2002 forecast for a CN in the Benton/Franklin planning area. At that time, OFM indicated the 2002 high series was the better indicator. Seeking clarification for the KGH can application, she again contacted OFM in 2009 and was assured the error was corrected in the 2007 forecast and the medium series was recommended. TR 473-74, 513-16, 579-81.

Ms. Carona further testified that her own analysis of the relevant data supported use of the medium series. She believed that Kadlec's reliance on the high series was based on its faulty assumptions related to projections of the growth of the age 65 and older age cohort. TR 532-34, 546-49.

Using the 2007 OFM medium series, Ms. Carona estimated a surplus of 6.7 acute care beds in 2016, and a need for 2.1 beds in 2017 and 11.1 beds in 2018². TR 489, AR 993. Using the high series, she estimated a need for 42.8 beds in 2016 and 66.9 beds in 2018. TR 490, AR 1007.

Based on the record, the Program's reliance on OFM's 2007 medium series was reasonable. OFM is required by statute to prepare population projections for the state and each county. Although the projections must contain a high and low range, the middle (or medium) range represents OFM's estimate of the most likely population projection for each county. RCW 43.62.035.

It is undisputed that OFM's 2002 forecast for Benton and Franklin Counties was not accurate. OFM staff confirmed this. However, a key part of this acknowledgement is their statement that the error existed in the 2002 forecast *and was corrected in the 2007 forecast*.

² KGH's projections end with 2018 rather than 2019.

Therefore, despite Dr. Fox's skepticism regarding the thoroughness of the correction, the Program's reliance on the medium series in this instance was not misplaced.

2. Planning Horizon

The State Health Plan states "For most purposes, bed projections should not be made for more than seven years into the future." This is because, in general, long-range forecasts are unreliable. TR 158. The Program primarily uses the seven year horizon for hospital additions. TR 107, AR 687. Exceptions are sometimes made based on the size and scope of the project. TR 108-13.

Given the stated preference in the State Health Plan, the Program's decision to use the seven year planning horizon was reasonable. Although Kadlec's CN application contained three alternatives with differing levels of complexity, the request was for the type of project for which the Program normally uses this planning horizon.

Regardless, use of the medium series renders this issue moot. Kadlec was awarded 55 new acute care beds. According to the calculations and testimony of its expert, using the 2007 medium series forecast, Kadlec projected a need of 28.94 beds in 2016 and 54.02 in 2019. Due to an error by the Program that all parties accept, Kadlec received one bed more than its 2019 need projection.

REVIEW OFFICER'S ANALYSIS OF KGH'S PETITION

KGH does not contest the grant of 55 acute care beds to Kadlec. It requests that should additional beds be needed in the Benton/Franklin planning area, up to 25 be granted to KGH rather than Kadlec. Because the medium series does not show need, no additional beds are granted to either Kadlec or KGH.

REVIEW OFFICER'S ANALYSIS OF THE PROGRAM'S PETITION

As stated above, the Program filed a single response to the petitions of both Kadlec and KGH. In its response, the Program requests the Review Officer to rule that it was correct in using the medium series based on the fact OFM has determined that the medium series is the "most likely" growth to occur. As discussed above, the Program's use of the medium series was correct.

KADLEC'S MOTION TO STRIKE

On October 22, 2014, Kadlec filed a Motion to Strike the New Need Calculation Provided by the CON Program with Its Response to Kadlec's Petition for Administrative Review. Kadlec contends the Program is attempting to introduce new evidence not contained in the administrative record. In its response filed October 30, 2014, the Program argues the calculation merely makes a legitimate argument using evidence in the record.

The agency record of an adjudicative proceeding includes any motions, pleadings, briefs, petitions, and requests filed, and rulings thereon. WAC 246-10-705. Final orders shall be issued following a review of the record. WAC 246-10-702.

The challenged calculation appears in the worksheet titled "Reworking of Exhibit 8 to modify the 65+ percentages" attached to the Program's response. The same document was also attached to the Program's Post-Hearing Brief. Although it was not admitted as an exhibit, it is a part of the administrative record. Therefore, Kadlec's Motion to Strike is DENIED.

I. FINDINGS OF FACT

1.1 The Findings of Fact in the Initial Order dated September 2, 2014, are adopted herein.

1.2 The most accurate population forecast available at the time of the CN applications was OFM's 2007 medium series. The errors that caused OFM's 2002 forecast to underestimate the population growth in the Benton/Franklin planning area were acknowledged by OFM staff and corrected in the 2007 forecast.

1.3 The appropriate planning horizon for these CN applications was seven years.

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 Kadlec's and KGH's Petitions for Administrative Review and the Program's Response to the petitions were timely filed, as were the parties' responses to each other's petitions. WAC 246-10-701.

2.4 The Conclusions of Law in the Initial Order dated September 2, 2014 are adopted herein.

///

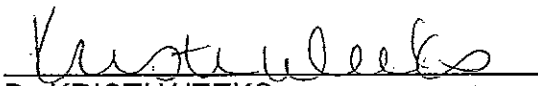
///

III. FINAL ORDER

Based on the foregoing, IT IS HEREBY ORDERED that the Initial Order dated September 2, 2014, is AFFIRMED.

Dated this 8th day of December, 2014

JOHN WIESMAN, DrPH, MPH
SECRETARY OF HEALTH


By KRISTI WEEKS
REVIEW OFFICER

NOTICE TO PARTIES

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

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

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

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

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

A petition for judicial review must be filed and served within thirty (30) days after service of this Order. RCW 34.05.542. The procedures are identified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. A petition for reconsideration is not required before seeking judicial review. If a petition for reconsideration is filed, the thirty (30) day period for requesting judicial review does not start until the petition is resolved. RCW 34.05.470(3).

The Order remains in effect even if a petition for reconsideration or petition for judicial review is filed. "Filing" means actual receipt of the document by the Adjudicative Clerk Office. RCW 34.05.010(6). This Order was "served" upon you on the day it was deposited in the United States mail. RCW 34.05.010(19).

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