STATE OF WASHINGTON
DEPARTMENT OF HEALTH
ADJUDICATIVE SERVICE UNIT

In Re: EVALUATIONS DATED FEBRUARY 26, 2013 FOR THE FOLLOWING CERTIFICATE OF NEED APPLICATIONS PROPOSING TO ADD DIALYSIS STATION CAPACITY TO KING COUNTY PLANNING ARE #9: (1) NORTHWEST KIDNEY CENTERS PROPOSING TO ADD ELEVEN STATIONS TO RENTON KIDNEY CENTERS IN RENTON; AND (2) DAVITA, INC., PROPOSING TO ESTABLISH AN ELEVEN STATION DIALYSIS CENTER IN RENTON, Petitioner.	Master Case No. M2013-364 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND INITIAL ORDER

APPEARANCES:

Petitioner, Northwest Kidney Center (Northwest Kidney), by
Davis Wright Tremaine LLP, per
Brad Fisher and Lisa Rediger Hayward, Attorneys at Law

Petitioner, DaVita Inc., (DaVita), by
Perkins Coie LLP, per
Brian Grimm and Anastasia K. Anderson, Attorneys at Law, and
Law Offices of James M. Beaulaurier, per
James M. Beaulaurier, Attorney at Law

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

PRESIDING OFFICER: John F. Kuntz, Review Judge

A hearing was held in this matter on January 13, 2014, regarding DaVita's certificate of need (CN) application to establish a new 11-station kidney dialysis facility in Renton, Washington.

ISSUES

Whether DaVita's application for a CN to establish an 11-station kidney dialysis facility in Renton, Washington (King County Planning Area #9) meets all the relevant CN criteria.

SUMMARY OF PROCEEDINGS

At the hearing, the Program presented the testimony of Karen Nidermayer, CN Program Analyst. DaVita presented testimony of Jason Bosh, Divisional Vice President, DaVita Healthcare Partners, Inc., and Frank Fox, Ph.D., Economist/Statistician/CON Consultant.

The Presiding Officer admitted the following Program exhibit:

1. The 998-page Application Record (AR) regarding CN applications of DaVita and Northwest Kidney.

The Presiding Officer admitted the following DaVita exhibits:

1. Complete application record; and

2. Curriculum vitae of Frank Fox, Ph.D.

The Presiding Officer admitted the following Northwest Kidney exhibits.

1. The Administrative Record; and

2. *In Re King 4* Master Case No. M2012-360, Findings of Fact, Conclusions of Law and Final Order (March 22, 2013).

The Presiding Officer allowed the parties to submit briefs in lieu of closing argument pursuant to RCW 34.05.461(7). The initial briefs of the parties were due by February 14, 2014. The final briefs of the parties were due by February 28, 2014. The administrative record was closed on February 28, 2014.

PROCEDURAL HISTORY

On February 29, 2012, Northwest Kidney applied to add 11 stations to its existing 28-station facility in Renton, Washington. On February 29, 2012, DaVita applied to establish a new 11-station kidney dialysis facility in Renton, Washington. DaVita submitted its first amended application on March 30, 2012, and its second amended application on April 16, 2012.

The Program concurrently reviewed Northwest Kidney's February 29, 2012 and DaVita's April 16, 2012 CN application pursuant to WAC 246-310-280. The Program approved DaVita's CN application and denied Northwest Kidney's CN application on February 26, 2013.

Northwest Kidney appealed both the Program's denial of its CN application and the Program's decision granting DaVita's CN application. However, on November 5, 2013, the Presiding Officer granted summary judgment denying Northwest Kidney's application. *See* Prehearing Order No. 3. Thus, the only issue remaining for hearing was whether DaVita's CN application to establish a kidney dialysis facility met all of the CN requirements.

I. FINDINGS OF FACT

1.1 DaVita is a publicly held, for-profit corporation that provides dialysis services through its facilities across the nation. DaVita applied to establish an 11-station facility in Renton, King County, Washington (located in King County Planning Area #9). The facility is named the Renton Dialysis Center. The capital expenditure associated with the project is $1,786,383.

1.2 In order to qualify for a CN, an applicant must show compliance with WAC 246-310-210 (determination of need); WAC 246-310-220 (financial feasibility); WAC 246-310-230 (structure and process of care); and WAC 246-310-240 (cost containment).

WAC 246-310-210 "Determination of Need"

1.3 WAC 246-310-210 addresses the determination of need in a planning area. Using the calculation methodology described in WAC 246-310-284(4), it was undisputed that need exists for 11 additional kidney dialysis stations in King County Planning Area #9.[1]

1.4 The need methodology also requires that all kidney dialysis approved stations in the planning area must be operating at 4.8 in-center patients per station. WAC 246-310-284(5). When DaVita applied, the only other facility in the planning area was Northwest Kidney and it was already operating at the 4.8 in-center standard.

1.5 WAC 246-310-284(6) further requires that DaVita's kidney dialysis project meet this 4.8 in-center patient per station requirement. DaVita projected it would be serving 55 in-center patients by its third year (2016). Given that DaVita applied for 11 stations, dividing the number of in-center patients (55) by the number of available kidney dialysis stations (11), would translate into a 5.0 in-center patient per station

[1] Based on verified population and patient information from the Northwest Renal Network (the private, not-for-profit corporation that collects and analyzes data on patients enrolled in the Medicare end stage renal disease programs), DaVita calculated a need for 10.9 additional stations. This figure is rounded up to 11 stations. The calculation for 11 stations by 2016, was confirmed by need methodology calculations performed by the CN Program and Northwest Kidney.

ration. Thus, DaVita would exceed the WAC 246-310-284(6) requirement of 4.8 in-center patients per station by the third year of operation.

1.6 WAC 246-310-210(2) requires that DaVita show whether all residents in the service area (including low-income; racial and ethnic minorities; women; handicapped persons; the elderly; and other underserved groups) will have access to the proposed project. DaVita provided a copy of its current policy for accepting patients for treatment, which states that DaVita will provide end stage renal disease treatment to patients without regard to race, color, national origin, sex, age, religion, or disability. *See* DaVita's Second Amended Application (Appendix 14). DaVita currently provides services to both Medicare and Medicaid eligible patients at its existing Washington facilities. It anticipates receiving Medicare and Medicaid revenues at the Renton Dialysis Center. *See* DaVita's Second Amended Application (Appendices 9 and 14). DaVita outlined the process for providing patient access to those without the financial means to pay for services. *See* DaVita's Second Amended Application (Appendices 9 and 14). When reviewed together, the residents of the service area will have adequate access to services at the Renton Dialysis Center and DaVita meets the access requirements of WAC 246-310-210(2).

1.7 Based on the Application Record and the testimony at hearing, DaVita meets the "need" requirements of WAC 246-310-210.

WAC 246-310-220 "Financial Feasibility"

1.8 WAC 246-310-220 requires DaVita's application to how that its kidney

dialysis project is financially feasible. Specifically, DaVita's application must demonstrate that: the immediate and long-range capital and operating costs can be met; that the cost of the project will probably not result in an unreasonable impact on the costs for health services; and that the project can be appropriately financed. However, the rule does not lay out a single method of evaluating whether capital and operating costs can be met. Therefore the Program has adopted a practice of looking at income and expenses for the third year of operation in an applicant's "pro forma" statement (a profit/loss statement) as an indicator of financial feasibility.

1.9 To meet the WAC 246-310-220(1) requirement, DaVita's pro forma statement must reasonably show that its CN kidney dialysis project meets its immediate and long-range capital and operating expenses (that is, income exceeding expenses, or in the case of a for-profit corporation such as DaVita, making a profit) by the end of the third complete year of operation (2016). *See* AR 164-165. DaVita anticipated that its 11-station facility would be operational in mid-year 2013, so the first full year of operation would be calendar year 2014. DaVita anticipates it would make a net profit by 2016 (the third year) of $397,245. *See* AR 165.

1.10 At hearing however, Northwest Kidney questioned the reasonableness of DaVita's pro forma under WAC 246-310-220(1). Northwest Kidney argued that the anticipated revenues for DaVita's Renton kidney dialysis project were not reasonable because of: (1) DaVita's refusal to disclose its commercial charges for the private pay patients; and (2) DaVita's use of a national "blended" rate per treatment rather than King County Planning Area #9 specific data when calculating its revenue projections for

the dialysis project.

1.11 Kidney dialysis treatment providers receive the majority of their income as reimbursements from Medicare and Medicaid, and a minority of their income from private pay patients (insurance or HMO).[2] Whereas Medicare and Medicaid reimburse providers of dialysis treatments on a fixed scale, reimbursement for private pay patients can vary.

1.12 Northwest Kidney is familiar with Medicare and Medicaid reimbursement rates. However, it did not know DaVita's private pay patient reimbursement rates. DaVita has traditionally claimed trade secret protection on how it negotiates the private pay patient rate with insurance/HMOs. To enable Northwest Kidney to ascertain whether DaVita's private pay patient rates were reasonable, DaVita was directed by Prehearing Order No. 5 to disclose its average commercial charges.

1.13 However, DaVita did not calculate its revenue projections using an average commercial rate for private pay patients. Nor did DaVita calculate its revenue projections using planning area specific data. DaVita chose to calculate its revenue projections by multiplying the total number of anticipated treatments by a "blended" reimbursement rate. DaVita calculated the blended reimbursement rate amount ($355.00) based on historical revenue data from comparable DaVita facilities. TR 109 (Jason Bosh testimony). DaVita then multiplied the blended rate amount times the total

[2] DaVita projects its revenue by type of payor would be 61 percent of its revenue from Medicare; 9 percent from Medicaid/state; and 30 percent from private pay patients (insurance/HMO). *See* AR 16 (Table 4). DaVita also anticipated that it would receive revenue (by percentage of patient per payor) at 79 percent from Medicare; 9 percent from Medicaid/state; and 12 percent by insurance/HMO. AR 16 (Table 5).

number of treatments per patient per year or 156 (a number calculated by assuming the patient received three treatments per week times 52 weeks), times the patient census and discounted by four percent to reflect missed treatments. TR 110. Stated another way, DaVita used the $355.00 blended rate times the 156 treatments per year (as discounted) times the year end census of patients (total number of patients). This figure is also discounted to reflect that the patient census increases gradually over the course of a year. TR 111. This information is sufficient to show how DaVita calculated its projected revenue, less expenses, to show the $397,245.00 profit by 2016 (the third year). AR 165; *see also* AR 718 (Table 6, which refers to information contained in AR 165).

1.14 Northwest Kidney contends DaVita's approach prevents it from determining if DaVita meets the WAC 246-310-220(1) criteria (are DaVita's revenues projections reasonable). This is not a new fight for Northwest Kidney. In a 2012 CN case,[3] Northwest Kidney prevailed over DaVita for a CN when the Presiding Officer found that DaVita's higher charges to commercial carriers (private pay insurance) would drive up health costs. However, that analysis was done under WAC 246-310-240's "superior alternative" test, where two competing applicants are compared against each other. That is not the case here. Here, under WAC 246-310-220, where there is only one applicant, the question is whether DaVita is financially feasible, i.e., whether it can

[3] *See* the Final Order in Master Case M2012-360 (Evaluations dated February 9, 2012, for the following Certificate of Need Application Proposing to Add Dialysis Station Capacity to King County Planning Area #4: (1) Northwest Kidney Centers Proposing to Add Five Stations to SeaTac Kidney Center; and (2) DaVita, Inc., Proposing to Establish a Five Station Dialysis Center in Des Moines).

show a profit by the third year. Under the WAC 246-310-220 analysis, DaVita's revenue projections are reasonable and show financial feasibility.

1.15 Northwest Kidney's second argument was that DaVita's pro forma statement must include landlord expenses (common-area maintenance, taxes, and insurance). The landlord pays these expenses for its facility and apportions a percentage of the total figure to each leaseholder based on the amount of space leased. TR 197 (Dr. Frank Fox testimony). DaVita is leasing the kidney dialysis kidney facility space and Northwest Kidney argues that DaVita's net profit figure must include or account for the landlord expenses. DaVita disclosed in a footnote to its pro forma statement that it did not include the landlord expenses. *See* AR 165. The question is whether the absence of such information makes DaVita's pro forma statement "unreliable."

1.16 During the application process the CN Program advised DaVita that it was not required to include landlord expenses in DaVita's pro forma, as landlord expense are not "certain" or could not be calculated with certainty.[4] This approach is consistent

[4] Despite the Program's acquiescence, the omission of the landlord's operating expenses is troublesome. Both the landlord and DaVita are sophisticated professionals with experience in budgeting fluctuating expenses. Normally, all calculable expenses should be included in a pro forma. However, when the Program directs or allows an applicant to omit an expense, it puts the applicant in a difficult position and it is difficult to envision the applicant disobeying the Program's directive. If landlord expenses were required in DaVita's pro forma, DaVita's application contains sufficient information to calculate what effect the landlord expenses would have on the viability of DaVita's application. DaVita included a copy of its lease agreement for the kidney dialysis site and that agreement contains landlord expense information. *See* AR 470-519. The landlord expenses were $5.74 per foot for the first year. When multiplied by the square footage of the lease, it equals $34,515.00. The lease provided the landlord expense amount could be adjusted no more than five percent per year. If the disclosed landlord expenses were adjusted by five percent per year ($34,515 + 5 percent + 5 percent) the landlord expenses by the 2016 would be $38,052.00. Even subtracting the $38,052.00 amount from the $397,245.00 net profit figure (*see* Paragraph 1.9 above), DaVita's net profit would be $359,193.00 Thus, even with these expenses, DaVita's project is financially feasible.

with many of the CN Program's decisions in past kidney dialysis applications. Transcript (TR) pages 23-24 (Karen Nidermayer testimony). Given that the CN Program provided DaVita with this information, and based on the exclusion of landlord expenses in past kidney dialysis applications, DaVita could exclude landlord expenses from its pro forma statement. In this case, excluding the landlord expenses in its pro forma statement does not make DaVita's application "unreliable."

1.17 Northwest Kidney further challenges the pro forma statement in DaVita's application because DaVita reported the amount needed to make the facility "building ready" in DaVita's April 16, 2012 second amended application differed by approximately $80,000.00 from the same figure contained in the initial February 29, 2012 application. However, DaVita provided an acceptable explanation for the difference in the two applications. DaVita's February 29, 2012 application was based on a draft lease and the April 16, 2012 application was based on the finalized lease. Between reaching agreement between the February 29, 2012 application and the April 16, 2012 second amended application, DaVita and the landlord re-negotiated the final amount of the leasehold improvements. TR 136-137 (Jason Bosh testimony). Originally the landlord and DaVita anticipated the landlord's contribution to be $100,000 toward the capital costs. TR 137 (Jason Bosh testimony). Once the parties completed their negotiations on the capital cost issue, the landlord's contribution was $30,445. *Id*; *see also* AR 14 (Table 1). Based on the testimony, the final amount was reduced by $69,555 ($100,000 - $30,445). DaVita agreed to perform more of the work represented by the leasehold improvements. There is no contrary evidence to dispute the change in the

amount of work that DaVita will perform. DaVita's application shows that it can meet the immediate and long-range capital costs of the project regarding this issue.

1.18 WAC 246-310-220(2) requires DaVita to show that the costs of the project, including any construction costs, will probably not result in an unreasonable impact on health care service costs and charges. DaVita estimated its capital costs (construction cost and equipment costs) to be $1,786,383. *See* AR 160. These capital costs are reasonable given the size of the project. Northwest Kidney argues that DaVita's costs are not reasonable as DaVita did not include a percentage of the total cost from the building of the shopping center in which DaVita located its kidney dialysis facility. In past kidney dialysis applications, the CN Program requires applicants leasing a portion of a pre-existing building for a dialysis facility to show what costs were necessary to make the dialysis facility "building ready." TR 55-56 and 64-65. DaVita did so here. What DaVita did not include in its "building ready" cost was a percentage of the original construction costs for the shopping center (costs incurred by the owner before DaVita sought to lease the space). Northwest Kidney contends DaVita's failure to include a percent of the initial building construction costs makes DaVita's application unreliable and requires the denial of the application. Northwest Kidney relies on the fact that it lost on summary judgment because it did not do so. *See* Prehearing Order No. 3.

1.19 However, the Northwest Kidney and the DaVita dialysis projects differ in one key respect. In 2011, Northwest Kidney relocated a CN-approved 28-station facility to a site in Renton. Pursuant to WAC 246-310-289(3)(b), the CN Program ruled the relocation did not require CN approval so long as no new stations were added to the

approved 28-stations. In constructing its Renton facility, Northwest Kidney built the facility to provide space for 41 stations. While it only equipped the CN-approved 28 stations, it built additional space for future expansion beyond the approved 28 stations. In so doing, Northwest Kidney exceeded the scope of the relocation project.

1.20 When Northwest Kidney applied to expand its Renton facility by 11 stations from the 2011 relocation in its current application, it did not include any of the construction costs from the 2011 relocation project. Failing to report such costs under-reported the CN project construction costs as required under WAC 246-310-220(2), and resulted in the denial of its CN project. *See* Prehearing Order No. 3. There is a clear difference between Northwest Kidney pre-building a facility for itself and a shopping center that was constructed to rent to any business. DaVita was not required to contribute any funding to make the shopping center "building ready." It was only required to contribute construction costs to make a portion of the shopping center "building ready" to house the kidney dialysis facility. Given that key difference, DaVita was not required to include a percentage of the original building construction costs. DaVita's construction costs for its facility are reliable.

1.21 WAC 246-310-220(3) requires that a CN project must be appropriately financed. DaVita estimated the total project cost at $1,786,383. DaVita's chief operating officer stated that the project will be paid from DaVita's $394 million cash reserves. AR 158, 392, and 409. This information was confirmed at hearing. TR 116, 141-142 (Jason Bosh testimony). Given the size of DaVita's cash reserves and the

limited amount of money needed to complete the Renton kidney dialysis facility, DaVita (the corporation) did not require DaVita (the kidney dialysis facility project) to pay any interest or depreciation expense.

1.22 Northwest Kidney contends the DaVita's total project cost should include interest payments based on the general bond indebtedness incurred by DaVita's overall operations. DaVita's long term debt at the end of 2011 was more than $4.4 billion. AR 382. DaVita (the corporation) borrowed money by using all of its assets (including the proposed facility) as collateral. At the cost of DaVita's reported borrowing, Northwest Kidney submits that DaVita's Renton project would incur $89,000 of interest every year and accruing such interest was not reported as required by DaVita. Northwest Kidney thus questions the reliability of DaVita's $1,786,383 project amount.

1.23 The information regarding both DaVita's board/cash reserves and DaVita's debt analysis are derived from DaVita's 2011 Securities and Exchange Commission Form 10-K. *See* AR 354-449. As of December 31, 2011, DaVita's Form 10-K shows it has assets of $393 million. AR 409. There is no evidence to suggest that the cash reserves do not exist. Northwest Kidney did not submit any evidence that DaVita's accounting information and methods, as reflected in the Form 10-K, do not reflect acceptable accounting practices. Absent any showing that the asset does not exist, there is no reason that DaVita cannot finance the $1,786,383.00 project cost from the existing $393 million cash reserve. The DaVita project can be appropriately financed.

WAC 246-310-230 "Structure and Process of Care"

1.24 WAC 246-310-230 sets forth the criteria for the structure and process of care. DaVita must show its application meets five criteria: adequate staffing; appropriate organizational structure and support; conformity with the licensing requirements; continuity of health care; and the provision of safe and adequate care.

1.25 WAC 246-310-230(1) requires that any kidney dialysis project show it has adequate staffing. DaVita has experience in building, staffing, and operating dialysis facilities. DaVita's staffing model for its Renton dialysis facility includes a medical director, administrative staff, and the necessary nursing/technical staffing to assist the dialysis patients. DaVita appears capable of adequately staffing its 11-station dialysis facility due to the attractiveness of the Renton location, its wage and benefit package, and its past success in attracting qualified recruits. DaVita's application file provides sufficient evidence that it can comply with the WAC 246-310-230(1) requirements.

1.26 WAC 246-310-230(2) requires that any kidney dialysis application shows that it will have an appropriate relationship to ancillary and support services. DaVita will provide social services, nutritional services, patient and staff education, and administrative and human resources at its Renton site. Any additional services will be coordinated with the DaVita corporate offices, as well as its support office in Tacoma, Washington. DaVita provided a sample transfer agreement in the event a dialysis patient must be transferred to a hospital. *See* AR 453-459. DaVita's application provides sufficient evidence that it can and will comply with the WAC 246-310-230(2) criteria.

1.27 WAC 246-310-230(3) requires a kidney dialysis applicant to conform to state and federal licensing requirements. DaVita provides dialysis services in over 1600 outpatient centers in 43 states and the District of Columbia; it owns or operates 30 kidney dialysis centers in the state of Washington. In February 2010, the Program requested quality of care compliance history from the state licensing and/or survey entities for those states and districts where DaVita has health care facilities. Responses were received from 21 states; five of those states indicated that DaVita was cited for significant non-compliance deficiencies within a three year period. With one exception, none of the deficiencies resulted in fines or enforcement actions. AR 727-728. This essentially means one significant action out of 1600 facilities.

1.28 Since January 2008, the Department of Health Investigation and Inspection Office has completed more than 30 compliance surveys within the state of Washington. The result of these surveys revealed that DaVita had some minor compliance issues within its facilities. DaVita submitted and implemented acceptable correction plans to address the non-compliance issue.

1.29 Northwest Kidney identified an issue regarding DaVita's non-compliance at its Kent dialysis facility (the King Planning Area #10). DaVita had 12 CN-approved stations but there was a 13th station at the facility for training purposes. In 2006 or 2007, DaVita discovered that the 13th station was being used for ongoing dialysis services and not as a training station. AR 665-666. DaVita self-reported the error to the Program and DaVita and the Program decided to phase out the use of the 13th station to bring the Kent facility back to the approved 12-station level. While no new patients were

assigned to the 13th station, the existing patients continued to receive dialysis services at the station to avoid disrupting treatment. Jason Bosh testified that DaVita completed the phase out in 2008. TR 131. It was unclear how or when DaVita may have resolved the station miscount issue with Medicare. *See* TR at 80, lines 19-21 (Karen Nidermayer testimony). Ms. Nidermayer could not testify regarding the Medicare requirements regarding the timing of such corrections. TR at 80, lines 22-24.[5]

1.30 Nonetheless, DaVita's dialysis facility in Kent (King Planning Area #10) was operating beyond the allotted number of kidney dialysis stations. Doing so appears to be in violation of Medicare requirements. *See* Northwest Kidney Centers' Post-Hearing Brief, Appendix D through Appendix H. However, even with this information, DaVita's performance is questionable in only two out of 1600 facilities, and no evidence was presented that Medicare was taking any adverse action against DaVita on this issue. Based on the totality of the evidence, DaVita's application shows that the Renton project conforms to the applicable state licensing requirements, and will conform with the certification under the Medicaid, and Medicare program requirements.

1.31 WAC 246-310-230(3) requires that there is reasonable assurance that the project will be in conformance with applicable laws and Medicaid or Medicare program certification. As stated in Finding of Fact 1.31, DaVita has two compliance issues out of 1600 facilities. DaVita's management of the Kent facility compliance issue does not

[5] Northwest Kidney argued that the Program's agreement with DaVita regarding the phasing out of patients from the 13th station was an *ultra vires* action. The Presiding Officer need not address this contention in deciding the present matter. The Presiding Officer notes the legislative intent that patient access is the overriding purpose of the CN program. *See Overlake Hospital Assoc. v. Department of Health*, 170 Wn. 2d 43, 55 (2010). The decision to award the CN to DaVita appears to meet that legislative intent.

preclude a finding that it meets the WAC 246-310-230(3) requirement.

1.32 WAC 246-310-230(4) requires the proposed kidney dialysis project must promote the continuity of health care. DaVita has a history of providing care to Washington residents, as evidenced by its providing dialysis services in its 30 Washington facilities. This is supported by the Medicare patient survey that shows the northwest division ranking as the number one region for kidney dialysis patient care. TR 97 (Jason Bosh testimony). There is a need for 11 stations in the planning area. Allowing DaVita's facility will promote continuity of health care services. The evidence shows that DaVita will meet the WAC 246-310-230(4) requirements for those reasons.

1.33 WAC 246-310-230(5) requires reasonable assurance that a kidney dialysis project will provide safe and adequate care to the public. Based on Findings of Fact 1.24 through 1.26, DaVita shows it meets the WAC 246-310-230(5) requirements.

WAC 246-310-240 "Cost Containment"

1.34 The final criterion for analyzing the viability of DaVita's application is whether DaVita meets the WAC 246-310-240 cost containment requirements. This includes finding that DaVita is the superior alternative in terms of cost, efficiency, or effectiveness. The Presiding Officer analyzed the WAC 246-310-220 financial feasibility findings to determine if DaVita meets the requirements.

1.35 Under WAC 246-310-240(1), DaVita must show that there are no superior alternatives to its CN application. DaVita identified and rejected one alternative, namely to "do nothing." This "do nothing" alternative does not constitute a superior alternative, given that there is a proven need for 11 additional stations in Renton, Washington

(King County Planning Area #9) by 2016. Northwest Kidney, the only other applicant, cannot meet this need because it did not qualify for a CN. The evidence shows that DaVita's choice (build an 11-station dialysis facility) meets the WAC 246-310-240(1) requirement.

1.36 DaVita proposes to build a new facility. It must meet the requirements of WAC 246-310-240(2) related to a project involving construction. The requirements including DaVita showing: the costs, scope, and methods of construction and energy conservation are reasonable; and the project will not have an unreasonable impact on the costs and charges to the public of providing health services by other persons. Based on foregoing analysis under WAC 246-310-220, DaVita will meet this requirement.[6]

II. CONCLUSIONS OF LAW

Evidence in Certificate of Need Decisions

2.1 The Department of Health is authorized and directed to implement the CN program. RCW 70.38.105(1). The applicant must show that its application meets all of the applicable criteria. WAC 246-10-606(2). The standard of proof in CN matters is a preponderance of the evidence. *See* WAC 246-10-606. Admissible evidence in CN 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).

[6] As indicated in Finding of Fact 1.14, the "superior alternative" analysis under WAC 246-310-240 would be different if there were two competing applicants at hearing. Here, however, the only alternative is that the clear need for additional dialysis stations would be unmet.

2.2 The Presiding Officer (on delegated authority from the Secretary of Health) is the agency's fact-finder and final decision maker. *DaVita v. Department of Health*, 137 Wn. App. 174, 182 (2007). As the final decision maker, the Presiding Officer engages in a *de novo* review of the record. *DaVita*, 137 Wn. App. At 182-183; *see also University of Washington Medical Center v. Department of Health*, 164 Wn.2d 95, 103 (2008) (citing to the *DaVita* decision). *De novo* review means the Presiding Officer reviews the application record, the hearing transcript, and the closing briefs of the parties.

Determination of Need

2.3 WAC 246-310-210(1) requires that the CN applicant show whether the population being served has need for the project and other services and facilities of the type proposed are not or will not be sufficiently available or accessible to meet that need. The methodology to calculate whether need exists is found in WAC 246-310-284.

2.4 Based on Findings of Fact 1.3 through 1.5, DaVita meets the criteria under WAC 246-310-210(1).

2.5 WAC 246-310-210(2) requires a CN applicant must also show that all residents of the service area, including low-income persons, racial and ethnic minorities, women, handicapped persons, other underserved groups, and the elderly are likely to have adequate access to the proposed health services. WAC 246-310-210(2).

2.6 Based on Finding of Fact 1.6, DaVita meets the criteria under WAC 246-310-210(2).

Financial Feasibility

2.7 WAC 246-310-220(1) requires the CN applicant to show that the applicant's application meets the immediate and long–range capital and operating costs of the project.

2.8 Based on Findings of Fact 1.8 through 1.17, DaVita meets the criteria under WAC 246-320(1).

2.9 WAC 246-310-220(2) requires that the CN applicant show that the cost of the project, including any construction costs, will probably not result in an unreasonable impact on the costs and charges for health services.

2.10 Based on Findings of Fact 1.18 through 1.20, DaVita meets the criteria under WAC 246-310-220(2).

2.11 WAC 246-310-220(3) requires the CN applicant show that the project can be appropriately financed.

2.12 Based on Findings of Fact 1.21 through 1.23, DaVita meets the criteria under WAC 246-310-220(3).

Structure and Process of Care

2.13 WAC 246-310-230(1) requires the CN applicant show that there is a sufficient supply of qualified staff for the project, including both health personnel and management personnel, are available or can be recruited.

2.14 Based on Finding of Fact 1.25, DaVita meets the criteria under WAC 246-310-230(1).

2.15 WAC 246-310-230(2) requires the CN applicant show the proposed services will have an appropriate relationship, including organizational relationship, to ancillary and support services, and ancillary and support services will be sufficient to support any health services included in the proposed project.

2.16 Based on Findings of Fact 1.26 through 1.30, DaVita meets the criteria under WAC 246-310-230(2).

2.17 WAC 246-310-230(3) requires a CN applicant show that there is reasonable assurance that the project will be in conformance with applicable state licensing requirements and, if the applicant is or plans to be certified under the Medicaid or Medicare program, with the applicable conditions of participation of those programs.

2.18 Based on Finding of Fact 1.31, DaVita meets the criteria under WAC 246-310-230(3).

2.19 WAC 246-310-230(4) requires the CN applicant show the proposed project will promote continuity in the provision of health care, not result in an unwarranted fragmentation of services, and have an appropriate relationship to the service area's existing health care system.

2.20 Based on Finding of Fact 1.32, DaVita meets the criteria under WAC 246-310-230(4).

2.21 WAC 246-310-230(5) requires the CN applicant show that there is a reasonable assurance that the services to be provided through the proposed project will be provided in a manner that ensures safe and adequate care to the public to be served and in accordance with applicable federal and state laws, rules, and regulations.

2.22 Based on Finding of Fact 1.33, DaVita meets the criteria under WAC 246-310-230(5).

Cost Containment

2.23 WAC 246-310-240(1) requires the CN applicant show that superior alternatives, in terms of cost, efficiency, or effectiveness are not available or practicable.

2.24 Based on Finding of Fact 1.35, DaVita meets the criteria under WAC 246-310-240(1).

2.25 WAC 246-310-240(2)(a) requires a CN applicant show, in the case of a project involving construction, that the costs, scope, and methods of construction and energy conservation are reasonable.

2.26 Based on Finding of Fact 1.36, DaVita meets the criteria under WAC 246-310-240(2)(a).

2.27 WAC 246-310-240(2)(b) requires the CN applicant show that the project will not have an unreasonable impact on the costs and charges to the public of providing health services by other persons.

2.28 Based on Findings of Fact 1.36, DaVita meets the criteria under WAC 246-310-240(2)(b).

III. ORDER

Based on the foregoing Procedural History and Findings of Fact, and Conclusions of Law, DaVita's CN application to establish an 11-station kidney dialysis

station in Renton, Washington (King County Planning Area #9) is GRANTED.

Dated this __14__ day of April, 2014.

/s/
JOHN F. KUNTZ, Review Judge
Presiding Officer

NOTICE TO PARTIES

When signed by the presiding officer, this order shall be considered an initial order. RCW 18.130.095(4); Chapter 109, law of 2013 (Sec. 3); and WAC 246-10-608.

Any party may file a written petition for administrative review of this initial order stating the specific grounds upon which exception is taken and the relief requested. WAC 246-10-701(1). A petition for administrative review must be served upon the opposing party and filed with the Adjudicative Clerk Office within 21 days of service of the initial order. WAC 246-10-701(3).

"Filed" means actual receipt of the document by the Adjudicative Clerk Office. RCW 34.05.010(6). "Served" means the day the document was deposited in the United States mail. RCW 34.05.010(19). The petition for administrative review must be filed within 21 calendar days of service of the initial order with:

Adjudicative Clerk Office
Adjudicative Service Unit
P.O. Box 47879
Olympia, WA 98504-7879

and a copy must be sent to the opposing party. If the opposing party is represented by counsel, the copy should be sent to the attorney. 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

Effective date: If administrative review is not timely requested as provided above, this initial order becomes a final order and takes effect, under WAC 246-10-701(5), at 5:00 pm on _____. Failure to petition for administrative review may result in the inability to obtain judicial review due to failure to exhaust administrative remedies. RCW 34.05.534.

Final orders will be reported to the National Practitioner Databank (45 CFR Part 60) and elsewhere as required by law. Final orders will be placed on the Department of Health's website, and otherwise disseminated as required by the Public Records Act (Chap. 42.56 RCW) and the Uniform Disciplinary Act. RCW 18.130.110. All orders are public documents and may be released.

For more information, visit our website at:
http://www.doh.wa.gov/PublicHealthandHealthcareProviders/HealthcareProfessionsandFacilities/Hearings.aspx