

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

In Re:)	
)	Master Case No. M2008-118432
Certificate of Need Decision on the)	
Applications of Puget Sound Kidney)	CORRECTED
Centers and DaVita, Inc., to Establish)	FINDINGS OF FACT
Dialysis Centers in the City of Everett)	CONCLUSIONS OF LAW
(Snohomish County Planning)	AND FINAL ORDER ON
Area No. 2) Facilities in Douglas County,)	SUMMARY JUDGMENT
)	
Puget Sound Kidney Centers,)	
)	
Petitioner.)	
_____)	

APPEARANCES:

Petitioner, Puget Sound Kidney Centers, by
Ryan, Swanson & Cleveland, per
Thomas H. Grimm, Attorney at Law

And by

Davis Wright Tremaine, per
Douglas C. Ross and Lisa R. Hayward, Attorneys at Law

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

Intervenor, DaVita, Inc., by
Law Offices of James M. Beaulaurier, per
James M. Beaulaurier, Attorney at Law

PRESIDING OFFICER: Theodora M. Mace, Health Law Judge¹

¹ This matter was reassigned from Health Law Judge John Kuntz to Health Law Judge Theodora Mace on December 15, 2008.

CORRECTED
FINDINGS OF FACT
CONCLUSIONS OF LAW
AND FINAL ORDER ON
SUMMARY JUDGMENT

A Scrivener's error occurred in the original Findings of Fact, Conclusions of Law and Final Order on Summary Judgment wherein the Notice to Parties language was not included. The error has been corrected. For that reason, under the rationale of CR 60(a), this Corrected Order is entered and the Notice to Parties language is in bold face.

On December 11, 2008, DaVita, Inc. (DaVita),² filed a motion for summary judgment seeking that the Department of Health (Department) uphold the Certificate of Need Program's (Program's) grant of a certificate of need to DaVita and the Program's denial of a certificate of need to Puget Sound Kidney Center (Puget Sound).³

DaVita's Motion for Summary Judgment is granted.

On January 21, 2009, Puget Sound filed a cross motion for summary judgment seeking that the Department deny DaVita's certificate of need on grounds that DaVita failed to supply a zoning letter from a municipal authority with its application.

Puget Sound's cross motion for summary judgment is denied.

I. PROCEDURAL HISTORY

1.1 In November 2007, DaVita filed an application for a certificate of need to establish a 21-station kidney dialysis facility in Snohomish County Planning Area 2, to be located in Everett. At the same time, Puget Sound filed an application for a certificate of need to establish a 12-station dialysis facility, also in Everett.

² DaVita is a for-profit corporation providing dialysis services in 42 states and the District of Columbia, including 18 kidney dialysis facilities in the State of Washington.

³ Puget Sound is a not-for-profit corporation that owns and operates four dialysis facilities in Washington State.

1.2 The Program treated the two applications as competing applications subject to Cycle 4 concurrent review under RCW 70.38.115(7), WAC 246-310-120, and WAC 245-310-280(3).⁴

1.3 The Program's review of the applications commenced on February 19, 2008.⁵

1.4 On July 18, 2008, the Program issued its Evaluation of the applications, granting a certificate of necessity to DaVita and denying Puget Sound's application.

1.5 On August 12, 2008, Puget Sound requested an adjudicative proceeding to appeal the Program's denial of Puget Sound's application.

1.6 On October 13, 2008, the Presiding Officer granted DaVita intervenor status in the adjudicative proceeding.

1.7 On December 11, 2008, DaVita filed its motion for summary judgment. Puget Sound responded opposing the motion, and filed its own cross motion for summary judgment on January 21, 2009. DaVita filed a reply on February 5, 2009. The Program responded in support of DaVita's motion on February 6, 2008.

II. FINDINGS OF FACT

A. Puget Sound

2.1 Puget Sound's expected capital cost for its proposed 12-station dialysis center in Everett, Washington, is \$5,489,000 which is to be 80 percent debt financed.⁶

⁴ RCW 70.38.115(7) reads in part: Concurrent review is for the purpose of comparative analysis and evaluation of competing or similar projects in order to determine which of the projects may best meet identified needs. WAC 246-310-120 specifies time lines and procedures employed for concurrent review.

⁵ DaVita motion for summary judgment, Beaulaurier Declaration, Exhibit 1, Program Evaluation (Program Evaluation), p. 5.

The proposed dialysis facility includes a ground floor parking garage and a second floor office.⁷

2.2 Puget Sound's expected revenues for the years 2010 through 2012, the first three full years of operation, are respectively: \$2,325,774; \$2,532,818; and \$2,677,146.⁸

2.3 Based on these expected revenues for the first three full years of operation, the Puget Sound Everett facility will suffer a net loss each of those years of \$273,009; \$254,287; and \$249,012.⁹

2.4 There is no projection to indicate when the Puget Sound Everett facility would experience a profit.

2.5 On April 21, 2008, Puget Sound reduced the amount of capital cost for its proposed Everett facility from \$5,489,000 to \$1,749,521.¹⁰

2.6 The deadline for amendments to applications under concurrent review is 30 days after the commencement of the review of the applications.

WAC 246-310-100(6)(b)(i).

2.7 The Program's review of the applications in this proceeding commenced on February 19, 2008.¹¹

⁶ Id. p. 14.

⁷ Id.

⁸ Id., p. 12.

⁹ Id.

¹⁰ See Puget Sound response to DaVita motion, Grimm Declaration (Grimm Declaration), Exhibit A.

¹¹ Id., p.5.

2.8 The deadline for amendments to applications in this proceeding was March 19, 2008.

B. DaVita

2.9 DaVita's expected capital cost for its proposed 21-station Everett dialysis center is \$1,877,862, including \$1,020,000 for leasehold improvements.¹²

2.10 DaVita will fund the project from its capital expenditure budget, and will require no financing. DaVita's consolidated financial statements show that funds are available to finance the project.¹³

2.11 DaVita's Everett facility is expected to turn a profit each year from 2010 through 2012. The projected net profit amounts are: \$466,244; \$1,087,357; and \$1,492,190 for each of the years, respectively.¹⁴

2.12 With its application, DaVita provided a draft lease and a warranty from the Lessor of the property site that the site was zoned to allow for the operation of a dialysis center.¹⁵

2.13 DaVita provided an executed copy of an agreement with Dr. Fadi Najjar to serve as Medical Director of the Everett facility.

2.14 With regard to DaVita's compliance with licensing requirements, in January 2007, the Department undertook a survey of quality of care compliance history

¹² Id., p. 4.

¹³ Id., p. 17.

¹⁴ Id., p. 13.

¹⁵ Id., p. 13; See also Grimm Declaration, Exhibit E, and Beaulaurier Declaration, Exhibits 4 and 6.

of the licensing agencies in 42 states where DaVita operates.¹⁶ The survey showed that in three of 28 states that responded, DaVita's licensing deficiencies resulted in enforcement action.¹⁷ For the state of Washington, the Department of Health's Office of Health Care Survey performed more than 32 compliance surveys related to DaVita facilities. Where non-compliance issues were identified, DaVita submitted plans of correction.¹⁸

2.15 With regard to DaVita's charity care policy, DaVita provided its current admission and indigent care policy that would apply to the Everett facility.¹⁹ DaVita's revenue projections indicate that the Everett facility will serve Medicare and Medicaid eligible patients.²⁰ DaVita's Pro Forma income statements include a revenue deduction line item associated with the provision of charity care.²¹

III. CONCLUSIONS OF LAW

A. DAVITA'S MOTION FOR SUMMARY JUDGMENT

1. What is the legal standard for deciding a summary judgment motion?

3.1 Administrative tribunals are authorized to rule by summary judgment.²²

Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is

¹⁶ Id., p. 21.

¹⁷ Id.

¹⁸ Id., p. 22.

¹⁹ Id., pp. 10-11.

²⁰ Id.

²¹ Id.

²² *ASARCO v. Air Quality Coalition*, 92 Wn2d 685 (1979).

no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law.²³

3.2 A material fact is one upon which the outcome of the litigation depends.²⁴ Summary judgment is not proper if reasonable minds could draw a different conclusion from undisputed facts, or if all of the facts necessary to determine the issues are not present.²⁵ In ruling on a motion for summary judgment a court must consider “[a]ll facts and reasonable inferences ... in the light most favorable to the nonmoving party, and all questions of law are reviewed de novo.”²⁶

3.3 Puget Sound incorrectly claims that to be successful in its motion for summary judgment, DaVita must show that there is no set of facts that could be brought forward at hearing to demonstrate that Puget Sound's application does not meet the criteria for a certificate of need.²⁷

3.4 Under CR 56, DaVita has the initial burden of showing that there is no dispute as to any issue of material fact. *Hiatt v. Walker Chevrolet Co.*, 120 Wn.2d 57, 66, 837 P.2d 618 (1992). DaVita may make this showing by filing affidavits and other supporting documentation along with the motion for summary judgment. The burden then shifts to Puget Sound, as the non-moving party, to respond with specific facts that

²³ Civil Rule (CR) 56(c).

²⁴ *Tran v. State Farm Fire & Casualty Co.*, 136 Wn.2d 214, 223 (1998).

²⁵ *Id* at 223.

²⁶ *Sundquist Homes v. Snohomish PUD#1*, 140 Wn.2d 403, 406 (2000) (citations omitted).

²⁷ Puget Sound's response to DaVita motion p. 11 .

sufficiently rebut the moving party's contentions and show that there is a genuine issue of fact for trial. *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986); *Dombrosky v. Farmers Insurance Co.* 84 Wn. App. 245, 253, 928 P.2d 1127 (1996).

2. Is Puget Sound's April 21, 2008 Submission an untimely amendment to its application?

3.5 WAC 246-310-100 governs amendments to applications and provides:

- (1) The following changes to an application may be considered by the department an amendment of an application:
- (a) The addition of a new service or elimination of a service included in the original application
 - (b) The expansion or reduction of a service included in the original application.
 - (c) An increase in the bed capacity.
 - (d) *A change in the capital cost of the project or the method of financing the project.*
 - (e) A significant change in the rationale used to justify the project.
 - (f) A change in the applicant.

...

- (5) *An application for expedited or regular review may be changed during the screening period or the public comment period.*

...

- (6) *An application for concurrent review may be amended according to the following provisions:*
- (a) *The department shall determine when an application has been amended.*
 - (b) *An amendment may be made through the first forty-five days of the concurrent review process.*
When the department determines an applicant has amended an application, the review period for all applications reviewed concurrently shall be extended by a single thirty-day period.

(i) *During the first 30 days an applicant may amend an application one or more times.*

...

(c) Any information submitted after the amendment period which has not been requested in writing by the department shall be returned to the person submitting the information and shall not be considered in the review of the application.

(emphasis added)

3.6 Puget Sound's April 21, 2008 submission to the Program, purporting to clarify its application, was in fact an untimely amendment to the application.²⁸

3.7 The April 21, 2008 submission reduced significantly the capital costs of the Puget Sound project from \$5,489,000 to \$1,749,521, and thus falls into the category of amendment identified in WAC 246-310-100(1)(d) - a change in the capital cost of the project.

3.8 The Program has discretion to call such a change an "amendment." WAC 246-310-100(6)(a). The substantial nature of the change proposed by Puget Sound and its impact on the overall review of the application support a determination that Puget Sound's reduction in the capital cost of the Everett project constituted an amendment to its application.

3.9 The deadline for amendments to the applications in this case was March 19, 2008.

3.10 Puget Sound failed to file its amendment until April 21, 2008, over one month past the deadline.

²⁸ See Grimm Declaration, Exhibits A and B.

3.11 Puget Sound erroneously argues that its amendment was merely a clarification of its application. Puget Sound claims that the April 21, 2008 reduction in capital costs merely identified what portion of its project costs were appropriately associated with the actual kidney treatment center, and thus subject to certificate of need review. Puget Sound asserts only those treatment center costs, rather than the parking and office space costs, may be considered by the Program in reviewing the applications. Puget Sound ignores the clear language of the rule that identifies changes to capital costs as amendments and that requires amendments to concurrently reviewed applications to be made within 30 days of the commencement of review.

3.12 Puget Sound further contends that the cost pertaining solely to the dialysis portion of the application was included in its original application, and that it should have been clear to the Program that only the lesser amount related to the dialysis portion of the application equaled Puget Sound's true project cost. Puget Sound contends that if the dialysis-related capital cost was not clear, the Program should have requested a cost breakdown during the screening period. Puget Sound is incorrect in suggesting that the Program should somehow have understood that the total capital cost in the application was not the cost Puget Sound actually proposed. Puget Sound's letter of intent and application plainly represented the estimated capital expenditure for the project as \$5,934,000.²⁹ As an applicant, moreover an experienced applicant,

²⁹ Second Declaration of Beaulaurier in Support of DaVita Motion, Exhibit 9, cover page, p. 5, Exhibits 6, (p. 9), 7, and 8.

Puget Sound bears the burden of establishing that its application meets all applicable criteria. WAC 246-310-606. Puget Sound's original application identified total capital costs of \$5,489,000, and it was not until April 21, 2008, that Puget Sound indicated they might be anything less than that.

3.13 Puget Sound asserts that allowing consideration of its untimely amendment creates no prejudice to DaVita because DaVita could have filed rebuttal comments during the rebuttal period, or because DaVita could rebut the comments in this adjudicative proceeding. Puget Sound misses the point that the public comment period is the opportunity for applicants to comment on each other's applications. The rebuttal period is the opportunity to respond to those comments. When an applicant files significant amendments to an application at the close of the public comment period, it prevents meaningful rebuttal comment and prejudices the Program's ability to review applications in a timely way. Moreover, such untimely changes lend themselves to the prospect of "gaming" the review system.

3.14 Puget Sound contends that under requirements for de novo review, the Presiding Officer in this adjudicative proceeding may consider Puget Sound's April 21, 2008 amendment. Puget Sound ignores the Washington Supreme Court ruling in *University of Washington Med. Ctr. V. Washington State Dept of Health*, 164 Wn.2d 95, 187 P.3d 243 (2008) (*UWMC*) that establishes the Department's de novo review as a type of review, not an evidentiary standard. Moreover, the *UWMC* court found that a request for an adjudicative hearing does not begin the application

process all over again. *UWMC* at 104. Nothing in *UWMC* requires the Presiding Officer to admit or consider evidence that did not meet application deadlines. *Id.*

3. Is Puget Sound's application financially feasible under WAC 246-310-220(1)?

3.15 Under WAC 246-310-200(1), the criteria for review of all applications, including those under concurrent review, are:

- (a) Whether the proposed project is needed;
- (b) Whether the proposed project will foster containment of the costs of health care;
- (c) Whether the proposed project is financially feasible; and
- (d) Whether the proposed project will meet the criteria for structure and process of care identified in WAC 246-310-230.

3.16 WAC 246-310-220(1) addresses WAC 246-310-200(c) by providing that a project's financial feasibility depends on whether: "The immediate and long-range capital and operating costs of the project can be met."

3.17 Puget Sound argues that its proposed dialysis project meets this criteria because it will be profitable all three of the first three years of operation.³⁰ Puget Sound's profitability analysis is based on the consolidated operations of Puget Sound Kidney Centers.³¹ Puget Sound states that "with the project included in its operations PSKC will make money in every one of the first three years of operation of the facility."³²

3.18 Puget Sound incorrectly contends that there is nothing in

³⁰ Puget Sound response to DaVita motion, pp. 13-14.

³¹ *Id.*

³² *Id.*

WAC 246-310-220(1) that requires the stand-alone project to show profitability and that the profitability of the consolidated enterprise is sufficient.

3.19 WAC 246-310-220(1) provides that the determination of financial feasibility shall be based on "the immediate and long-range capital and operating costs of the project." (emphasis added). Similarly, subcriteria (2) and (3) of that subsection of the rule refer to the "project," not to the overall financial status of the parent company. This is not ambiguous language and may be given its plain meaning. Financial feasibility must be judged on a per project basis. Puget Sound's originally filed financial information shows a net loss for the first three years that ranges from a low of \$249,000 in the third year to a high of \$273,009 in the first year. Puget Sound does not dispute this.³³

3.20 Puget Sound has failed to provide any specific information demonstrating that there is any genuine issue of material fact, and as a matter of law, it is found that Puget Sound's Everett dialysis project fails to meet the financial feasibility criteria of WAC 246-310-220(1).³⁴

4. Does Puget Sound meet the financial feasibility criteria in WAC 246-310-220(2)?

³³ Program Evaluation, p. 12.

³⁴ Puget Sound appears to contend that because they met the financial feasibility criteria under WAC 246-310-220(2) (costs will not create unreasonable impact on cost of health care) and WAC 246-310-220(3) (appropriate financing) (Program Evaluation, pp. 15 and 17), it cannot have failed to meet the cost containment criteria under 240(1). Puget Sound's argument is not entirely clear, but the fact that Puget Sound meets some aspects of the financial feasibility requirement does not preclude a finding that it failed to otherwise meet the criteria as a whole.

3.21 WAC 246-310-220(2) further fleshes out the financial feasibility criteria, requiring a determination that “the costs of the project will probably not result in an unreasonable impact on the costs and charges for health services.”

3.22 Puget Sound claims that its commercial rate is \$500 per treatment, compared to DaVita’s per treatment cost for commercial payers of \$1,152.75,³⁵ and thus Puget Sound’s project will have less of an impact on the costs and charges for dialysis. Puget Sound does not provide any information as to how it calculated DaVita’s per treatment cost for commercial payers, beyond the bare statement contained in Puget Sound’s April 21, 2008 comments. Puget Sound’s unsupported allegation regarding DaVita’s commercial rate is rejected.

3.23 Puget Sound further argues that in the Program Evaluation it was found that Puget Sound had met this criteria. Puget Sound’s argument is without merit. The financial information Puget Sound submitted with its application showed that 80 percent of the project’s total cost of \$5,489,000 would be debt financed.³⁶ The remaining portion of the cost would come from Puget Sound’s assets. Puget Sound’s assets would also have to cover the interest payments of approximately \$325,000 per year on the debt financed portion of the cost.³⁷ These costs, balanced against the fact that the

³⁵ Puget Sound response to DaVita motion, p. 23.

³⁶ Program Evaluation, p. 14.

³⁷ Id.

Puget Sound project would not be profitable during any of the first three years of operation, create serious doubt that Puget Sound's project "will probably not result in an unreasonable impact on the costs and charges for health services."

3.24 Puget Sound has failed to raise any issue of material fact regarding its failure to meet the financial feasibility criteria in WAC 246-310-220(2) and it is found as a matter of law that Puget Sound fails to meet this criteria.

5. Does Puget Sound's application meet the structure and process (quality) of care criteria under WAC 246-310-230(4)?

3.25 WAC 246-310-230(4) assists in determining whether a project will enhance quality and access to care under review criteria WAC 246-310-200(d). WAC 246-310-230(4) requires consideration of whether the project will promote continuity in the provision of health care, not resulting in an unwarranted fragmentation of services, and have an appropriate relationship to the service area's existing health care system. Puget Sound contends that because the Everett dialysis project will be profitable based on the overall financial health of the consolidated enterprise, the stability and long-term operation of the project cannot be in doubt.

3.26 As concluded above, Puget Sound has failed to show that the Everett project is financially feasible under a stand-alone analysis. It is undisputed that Puget Sound's Everett project will not be profitable for at least the first three years of its operation. This alone is sufficient to support a conclusion that Puget Sound's proposed facility will not be viable in the long run, thus causing fragmentation in the provision of dialysis services.

3.27 Puget Sound has failed to provide any specific information demonstrating that there is any genuine issue of material fact, and as a matter of law it is found that Puget Sound's Everett dialysis project fails to meet the structure and quality of care criteria of WAC 246-310-230(4).

6. Does Puget Sound's application meet the cost containment criteria in WAC 246-310-240(1)?

3.28 WAC 246-310-240(1) fleshes out the review criteria in WAC 246-310-200 (1)(b) as to whether a project fosters cost containment. It provides that "superior alternatives, in terms of cost, efficiency, or effectiveness, are not available or practicable."

3.29 Puget Sound argues that it is improper to conclude that because of its failure to meet the financial feasibility criteria and the structure and process of care criteria, an applicant is deemed to fail the cost containment criteria in WAC 246-310-240(1). Puget Sound contends that this provision requires a separate finding whether a project is the superior alternative in terms of cost, efficiency, and effectiveness.

3.30 Puget Sound's argument is unpersuasive. Cost, efficiency, and effectiveness are inextricably linked to a project's financial feasibility and structure and process of care. Financial feasibility concerns itself with the costs and profitability of a project, and thus "cost" is clearly a part of the consideration related to that criteria. The profitability of a project over time is intrinsic to whether it will be able to effectively and efficiently continue to provide access of care over the long term, avoiding fragmentation

of necessary services. Nothing in the cost containment section of rule precludes a comparison that takes into consideration whether either applicant has failed to meet the financial feasibility and structure and process of care criteria.

3.31 Puget Sound further contends that its application is the superior alternative under WAC 246-310-240(1) because its commercial rates are significantly lower than DaVita's. Puget Sound contends that its commercial rates are \$500 per treatment. Puget Sound also apparently contends that DaVita's per treatment cost for commercial payers is \$1,152.75.³⁸

3.32 As discussed above, it is unclear how Puget Sound calculated the \$1,52.75 DaVita per treatment charge. The only per treatment figure based on DaVita's application shows that DaVita's net patient revenue per treatment based on its projected revenues and expenses for the first three years of operation ranges from \$240.42 to \$253.69.³⁹ This compares with Puget Sound's net patient revenue per treatment for each of the first three years of \$262.41.⁴⁰

3.33 Puget Sound's unsupported allegation that DaVita's commercial rates are higher than Puget Sound's rates is insufficient to raise a genuine issue of material fact that its application is superior alternative to DaVita's under WAC 246-310-240(1).

³⁸ Puget Sound Response to DaVita motion, p.23.

³⁹ Program Evaluation, p. 13.

⁴⁰ Id. p. 12.

3.34 Puget Sound has failed to provide any specific information demonstrating that there is any genuine issue of material fact, and as a matter of law, it is found that Puget Sound's Everett dialysis project fails to meet the cost containment criteria of WAC 246-310-240(1) based on its failure to satisfy the financial feasibility and structure and process of care criteria discussed above.⁴¹

7. Must DaVita's motion be denied because it failed to provide sufficient evidence to support a grant of the certificate of need?

3.35 In response to DaVita's motion, Puget Sound contends there are numerous deficiencies in DaVita's application which should cause the application to be denied or which would require a hearing on the merits. These issues implicate several of the certificate of need criteria, and will be addressed according to the criteria under which they fall.

a. Did DaVita fail to meet financial feasibility criteria in WAC 236-310-220?

i. Zoning (WAC 236-310-220(1))

3.36 This criteria addresses capital costs and operating expenses. Whether an applicant has sufficient site control over the project location is part of the review under this criteria because it involves zoning, lease or purchase agreements, and rent, or financing costs.

3.37 Puget Sound argues that DaVita's application must be denied because DaVita failed to supply a letter from a municipal authority confirming the zoning for the

⁴¹ Because DaVita's application is the superior alternative of the two applications, application of the tie breaker provisions in WAC 246-310-288 is unnecessary.

proposed dialysis site, as required in the part of the Program's application form associated with this issue.

3.38 The Program's application form is intended to elicit material from the applicants that will assist the Program in determining whether they have met the criteria for a certificate of need. RCW 70.38.115(6) and WAC 246-310-090. The application form is general in nature, and is used for all types of certificate of need applications. The form itself does not constitute an absolute rule as to what kind of information the Program will need to evaluate specific types of certificate of need applications. For example, the Program does not require dialysis applicants to submit every item required on the application form, e.g., pro forma balance sheets.⁴²

3.39 The project description portion of the application⁴³ looks for "documentation that the proposed site may be used for the proposed project." Subsequent language on the form suggests that applicants can satisfy this requirement by supplying a zoning letter from a municipal authority. However, the primary goal of the application is to determine whether applicants have adequate site control to build and operate the proposed facility over the long term. This goal can be met by other types of assurances from applicants.

3.40 To satisfy the site control criteria, DaVita submitted the Lessor's warranty that the leased premises could be used for a dialysis facility under applicable laws,

⁴² In Re: Certificate of Need Concurrent Review Decision on the DaVita and FMC Applications to Establish Kidney Dialysis Centers in Richland and Kennewick, Benton County, Master Case No. M2008-118433, Program Evaluation filed July 11, 2008, p. 23.

⁴³ Grimm Declaration Exhibit D, p. 7.

including zoning laws, as well as the Lessor's representation that the use of the premises to operate a dialysis clinic would not violate applicable laws.⁴⁴ DaVita also supplied zoning information from the City of Everett.⁴⁵

3.41 DaVita's lease information provides sufficient reliable evidence to assure that the zoning for the project site is appropriate, and that DaVita has adequate site control.

3.42 Puget Sound further contends that a September 23, 2008 Order on Summary Judgment in a certificate of need case⁴⁶ requires that an applicant must provide the information requested by the application form or be denied. However, the prior certificate of need orders are not precedential unless they are designated significant decisions. The September 23, 2008 Order has not been so designated. Nevertheless, the Order nowhere makes such a ruling. Rather, the Order makes clear, by citing WAC 246-310-090, that the goal of the application and review process is to elicit sufficient information to allow the Department to decide whether an application meets certificate of need criteria. Order at 19, 25-26.

3.43 Puget Sound has provided no specific information that the zoning of DaVita's proposed site will impede or prevent the use of the site for purposes of a dialysis facility. Puget Sound has failed to show that there is a genuine issue of material fact as to the zoning of DaVita's proposed site.

⁴⁴ Beaulaurier Declaration, Exhibit 4, DaVita Draft Lease, Section 6.

⁴⁵ Beaulaurier Declaration, Exhibit 6.

⁴⁶ Order on Summary Judgment in Docket Nos. 07-12-C-202CN, 08-01-C-2008CN, 08-01-2009CN, and 08-01-2010CN, September 23, 2008 (September 23, 2008 Order).

ii. Draft lease

3.44 Lease arrangements are considered under the review criteria for financial feasibility related to site control. Puget Sound argues that under the Project Description section of the application form an applicant must demonstrate it has a sufficient interest in the site of the proposed facility to permit continued operations over time.

3.45 The application form defines sufficient interest as: a) clear legal title to the proposed site; b) a lease for five years (for hospitals or rehab facilities; c) a lease for one year, renewable for five years (for free standing dialysis units); or d) a legally enforceable agreement to give such title or lease.⁴⁷

3.46 Puget Sound contends that the lease DaVita submitted is an unsigned contract that has no legal effect or validity. RCW 19.36.010. Puget Sound asserts that such a document cannot demonstrate that DaVita has a sufficient interest in the site to satisfy the site control criteria.

3.47 DaVita's draft lease⁴⁸ is a document consisting of more than 40 detailed paragraphs governing the relationship between the lessor, Everett 4 Corners, LLC and the lessee, Total Renal Care, Inc. The document provides that the lease shall be effective upon execution (Paragraph 1.1); that the lease shall be for a term of ten years (Paragraph 1.2); that every aspect of the charge for rent is fully identified (Paragraphs 2 to 3.2); and that the lease may be renewed for three additional five year periods

⁴⁷ Grimm Declaration, Exhibit D, p. 7.

⁴⁸ Grimm Declaration, Exhibit E.

(Paragraph 4). In short, the lease covers, in detail, every aspect of a commercial lease agreement specific to the site DaVita proposes to use.

3.48 DaVita's draft lease offers considerable assurance that the parties intend to execute a lease agreement, and have, in fact, already spent significant time negotiating the terms of the agreement. As with zoning, the primary purpose of the site control portion of the application form is to obtain information that shows the certificate of need criteria are met. DaVita's draft lease provides that type of information with regard to site control.

3.49 Puget Sound further asserts that applicants and developers can execute leases with contingencies that state the lease is not effective unless a certificate of need is actually granted. Puget Sound points out that this type of contingency is written into Paragraph 1 of the draft lease.

3.50 Puget Sound is correct that the draft lease contains such a provision, but taking the draft lease as a whole, this fact alone is not enough to support a finding that there is any genuine issue of material fact as to DaVita's site control under the draft lease. In any event, DaVita must provide an executed copy of the lease to commence operations under the certificate of need.

iii. Value of leased building

3.51 Puget Sound contends that DaVita understated its capital costs by the amount equal to the value of the building it will lease to house the Everett dialysis facility. Puget Sound argues that under WAC 246-310-010, DaVita should have

included the building shell's value as well as the \$1,020,000 in leasehold improvement costs as part of its capital expenditures.

3.52 WAC 246-310-010 defines capital expenditures to include situations "where a person makes an acquisition under lease or comparable arrangement."

3.53 Puget Sound offers no evidence that Davita intends to acquire the building it is leasing, and it is only through such an acquisition that Davita would be required to include the value of the leased building as a capital expenditure. Puget Sound has provided no specific information that would show there is a genuine issue of material fact as to Davita's capital expenditures related to its building lease.

iv. Inaccurate revenue projections

3.54 Puget Sound contends that DaVita's projected revenues for 2010 and 2011 are overstated. Puget Sound argues that according to comments made by its counsel on April 21, 2008, DaVita projects revenues of \$3,313,763 for 2010 and \$5,022,110 for 2011.⁴⁹ But when Puget Sound multiplies the number of dialysis treatments DaVita projects for each year (11,844 for 2010 and 16,642 for 2011) times the reimbursements from payer sources, DaVita's actual revenues for each year would be much lower - \$2,310,652 and \$3,246,770 respectively. Puget Sound contends that these lower revenues would cause DaVita's Everett facility to operate at a loss for both those years, instead of at a profit as DaVita's application identifies.

⁴⁹ Grimm Declaration, Exhibit A, Grimm public comments, April 21, 2008, p. 3.

3.55 Puget Sound's arguments are ill-founded. Puget Sound provided no detail demonstrating how Puget Sound calculated DaVita's projected revenue shortfalls. It is unclear which per-treatment costs Puget Sound used to come up with DaVita's operating losses. Puget Sound raises no genuine issue of material fact with regard to DaVita's projected revenues.

v. Method of financing (220(2) and (3))

3.56 WAC 246-310-220(2) and (3) require a consideration of the impact of a project's costs on charges and costs of health care services. Puget Sound claims in its April 21, 2008 comments, that the method of financing used to support each project makes a difference as to the impact on the amount charged for each "unit of service."⁵⁰ Puget Sound claims that because its project is financed with a 30-year fixed note, resulting in a payment of \$9,680 per month, its method of financing would have less of an impact on costs passed on to patients or third party payers than DaVita's rent cost of \$16,400 per month with annual escalations.⁵¹

3.57 Puget Sound neglects to consider that DaVita's project is not going to be financed, but rather is being paid for out of DaVita's reserves.⁵² In any event, as determined above, Puget Sound's financial projections show that its project is not financially feasible because it will lose money in each of the first three years of

⁵⁰ Id., p. 3-4.

⁵¹ Id.

⁵² Program Evaluation, p. 17.

operation and conceivably beyond. In light of this finding, Puget Sound's argument that its financing costs are less than DaVita's lease costs is irrelevant.

b. Did DaVita fail to meet the structure and process of care criteria in WAC 236-310-230?

i. Lack of transfer agreements

3.58 Puget Sound contends that DaVita's lack of patient transfer agreements with hospital facilities means that DaVita fails the criteria in WAC 246-310-230(2), which requires proposed services to have appropriate relationships with ancillary and support services.

3.59 DaVita supplied a draft patient transfer agreement with its application.⁵³ Puget Sound offers no evidence to show that DaVita will be unable to execute a transfer agreement with a local hospital prior to commencing operations. Puget Sound raises no genuine issue of material fact with regard to DaVita's relationships with ancillary and support services.

ii. Licensing compliance

3.60 As part of the structure and process of care criteria, an applicant's compliance with licensing regulations is considered. Puget Sound alleges that DaVita has had licensing problems in other states and has even been shut down, rendering DaVita unfit for a grant of a certificate of need.

3.61 DaVita is a provider of dialysis services at over 1,300 outpatient centers located in 42 states including the state of Washington. In January 2007, the

⁵³ Id., p. 20.

Department undertook a survey of quality of care compliance history of the licensing agencies in the 42 states where DaVita operates.⁵⁴ Of the 28 states responding to the survey, ten indicated significant non-compliance in the past three years. With the exception of three facilities in three states, none of the deficiencies resulted in enforcement action or fines.⁵⁵

3.62 For the state of Washington, since January 2000, the Department of Health's Office of Health Care Survey has completed more than 32 compliance surveys for facilities owned or operated by DaVita. While non-compliance of a minor nature appeared in all the surveys, DaVita had submitted and implemented acceptable plans of correction.⁵⁶

3.63 Given the scope of DaVita's operations, DaVita's compliance record is sufficient to support the conclusion that it operates in a lawful manner. Puget Sound can point to no evidence that in the state of Washington, DaVita has a history of non-compliance that would warrant denial of DaVita's application in this case. Puget Sound raises no genuine issue of material fact that DaVita fails to comply with licensing requirements.

iii. Interest of nephrologists

3.64 Puget Sound contends that DaVita fails to meet the quality of care criteria because of a lack of interest on the part of nephrologists to send patients to DaVita.

⁵⁴ Id., p. 21-22.

⁵⁵ Id.

⁵⁶ Id.

Puget Sound bases this on a lack of letters from doctors or hospitals included with the DaVita application.⁵⁷ This “negative” evidence is not sufficient to show “lack of interest.” Puget Sound’s unsupported allegations are insufficient to raise a genuine issue of material fact.

iv. Pirating staff

3.65 Puget Sound also alleges that DaVita has engaged in the “pirating of staff from Puget Sound.” Puget Sound states that it has “received reports” that DaVita contacted nephrologists in the area inviting them to join DaVita and to leave Puget Sound.⁵⁸ Even if DaVita did contact area nephrologists to invite them to join them at their proposed dialysis facility, it is not clear that this constitutes “pirating” or is in any way improper. The hearsay allegation alone is insufficient to raise a genuine issue of material fact.

v. Medical Director

3.66 DaVita plans to hire Dr. Fadi Najjar as Medical Director of its new facility. Puget Sound contends that because he lives in Oregon, it is doubtful he will be able to provide service that would meet the quality of care criteria.

3.67 There is no requirement as to where a facility’s Medical Director must live. Given the nature of certain professional work and the ease of travel today, employees often live some distance from their places of employment. Dr. Najjar’s place of

⁵⁷ Grimm Declaration, Exhibit A, p. 4.

⁵⁸ Id.

residence alone is of no consequence in determining whether DaVita meets the quality of care criteria.

vi. Charity care

3.68 Puget Sound alleges that DaVita has refused to provide charity care, but Puget Sound provides no specific instances when DaVita has done so.

3.69 With its application, DaVita submitted a copy of its current admission and indigent care policies that would be used at the new Everett dialysis facility. DaVita's admission policy provides that any patient with end stage renal disease will be accepted for treatment. Moreover, DaVita showed that it currently provides services to Medicare and Medicaid eligible patients at its existing facilities, and intends to provide such services at the Everett facility.⁵⁹ DaVita's anticipated revenue projections show that a large percentage of its revenues will come from Medicare and Medicaid patients.⁶⁰ Finally, DaVita's financial statements provide for deductions from revenue attributable to charity care.

3.70 Puget Sound has failed to raise an issue of genuine material fact as to DaVita's provision of charity care.

3.71 Based on these Findings of Fact and Conclusions of Law, DaVita's motion for summary judgment should be granted.

B. PUGET SOUND'S CROSS MOTION FOR SUMMARY JUDGMENT

1. Conclusions of Law

⁵⁹ Program Evaluation, p. 10.

⁶⁰ Id., p. 16.

3.72 The legal standards governing motions for summary judgment contained in Conclusions of Law 3.1 through 3.4 apply to Puget Sound's cross motion for summary judgment.

3.73 Puget Sound has the initial burden of showing there is a dispute as to an issue of material fact. DaVita must then respond with specific facts that sufficiently rebut the moving party's contentions.

3.74 In its cross motion for summary judgment, Puget Sound contends that it should be granted a certificate of need based on the reduced project costs submitted in the late-filed amendment to its application.

3.75 This issue is addressed in the above Findings of Fact above and in Conclusions of Law 2.5 through 2.14 pertaining to DaVita's Motion. DaVita has demonstrated that Puget Sound failed to file a timely amendment to Puget Sound's application and failed to meet financial feasibility, cost containment, and structure and process (quality) of care criteria. Puget Sound has not shown that there is any genuine issue of material fact as to these issues.

3.76 Based on these findings and conclusions, Puget Sound's cross motion for summary judgment should be denied.

III. ORDER

It is ordered that DaVita's motion for summary judgment is GRANTED and Puget Sound's cross motion for summary judgment is DENIED.

Dated this ___ day of April, 2009.

_____/s/_____
THEODORA M. MACE, Health Law Judge
Presiding Officer

NOTICE TO PARTIES

This order is subject to the reporting requirements of RCW 18.130.110, Section 1128E of the Social Security Act, and any other applicable interstate or national reporting requirements. If discipline is taken, it must be reported to the Healthcare Integrity Protection Data Bank.

Either party may file a petition for reconsideration. RCW 34.05.461(3); 34.05.470. The petition must be filed within 10 days of service of this order with:

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

and a copy must be sent to:

Certificate of Need Program
P.O. Box 47852
Olympia, WA 98504-7852

The petition must state the specific grounds for reconsideration and what relief is requested. WAC 246-11-580. The petition is denied if the Presiding Officer does not respond in writing within 20 days of the filing of the petition.

CORRECTED
FINDINGS OF FACT
CONCLUSIONS OF LAW
AND FINAL ORDER ON
SUMMARY JUDGMENT

A petition for judicial review must be filed and served within 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 above 30-day period does not start until the petition is resolved. RCW 34.05.470(3).

The order is in effect while a petition for reconsideration or review is filed. "Filing" means actual receipt of the document by the Adjudicative Service Unit. RCW 34.05.010(6). This order is "served" the day it is deposited in the United States mail. RCW 34.05.010(19).

For more information, visit our website at <http://www.doh.wa.gov/hearings>