

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

In the Matter of:	)	
	)	Docket No. 03-06-C-2005CN
	)	
OVERLAKE HOSPITAL MEDICAL	)	FINDINGS OF FACT,
CENTER, a Washington non-profit	)	CONCLUSIONS OF LAW
Corporation; and KING COUNTY	)	AND FINAL ORDER
PUBLIC HOSPITAL DISTRICT NO. 2,	)	
dba EVERGREEN HEALTHCARE,	)	
a Washington Public Hospital District,	)	
	)	
Petitioners.	)	
_____	)	

**APPEARANCES:**

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

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

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

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

**PRESIDING OFFICER:** John F. Kuntz, Health Law Judge

The Presiding Officer, through authority delegated to him by the Secretary of Health, conducted a hearing on January 8 – 9, 2004. The Presiding Officer reversed and remanded the analysis to the Program to recalculate the open heart surgery

FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND FINAL ORDER

forecast methodology according to WAC 246-310-261(4). Following recalculation the Program moved for entry of a final order denying the application based on the remand analysis. Affirmed.

## **ISSUES**

Did the Program correctly calculate current capacity in step one of the open-heart surgery need methodology in the remand analysis?

Is there a projected need for additional open heart surgery/percutaneous transluminal coronary angioplasty services in health service area 1 in the 2006 service year?

## **SUMMARY OF DECISION**

The Program correctly calculated the need forecast methodology in its remand analysis as required by chapter 70.38 RCW and WAC 246-310-261. Under the remand analysis the need forecast calculation shows that there is a surplus of open heart surgery need in health service area 1 for the 2006 service year. Given that surplus, the Petitioners' joint application should be denied.

## **PROCEDURAL HISTORY**

On August 30, 2002, Overlake Hospital Medical Center and Evergreen Healthcare (the Petitioners) filed a joint application for a certificate of need to establish open-heart surgery (OHS) and nonemergent percutaneous transluminal coronary angioplasty (PTCA) services at the Evergreen Healthcare facility. The Program denied the joint application on May 27, 2003, and the Petitioners appealed. A hearing was scheduled for January 7 – 9, 2004.<sup>1</sup>

---

<sup>1</sup> The first day of the hearing (January 7<sup>th</sup>) was cancelled due to inclement weather.

Swedish Health Services requested intervention, and an order granting limited intervention was issued under RCW 70.38.005(10). Prehearing Order No. 1. The Intervenor's motion to consolidate the Overlake/Evergreen and Good Samaritan matters was denied. Prehearing Order No. 5. The Program moved to: (1) remand the decision to correct errors made in applying the OHS/PTCA methodology; and (2) for summary judgment. These motions were also denied. Prehearing Order Nos. 6 and 8.

The hearing was conducted on January 8 – 9, 2004. The parties agreed to incorporate the Good Samaritan exhibits into the hearing record. See Findings of Fact, Conclusions of Law and Order of Remand (the Remand Order), pages 5 – 8. The parties further agreed to incorporate the Good Samaritan hearing record into the present matter. The parties were permitted to submit closing briefs in lieu of closing argument. Posthearing Order No. 1. The hearing record was closed May 3, 2004.

On August 20, 2004, the Presiding Officer issued the Remand Order and reversed and remanded the Program's determination denying the Petitioners application for failing to perform its methodology calculations under WAC 246-310-261. The Program moved for entry of a final order based on its Remand Evaluation of the Joint Certificate of Need Application (the Remand Analysis) on September 16, 2004. The Remand Analysis is admitted. Exhibit 47<sup>2</sup>. As of the date of this order, no responsive pleadings were received from the Petitioners or Intervenor.

//////////

//////////

---

<sup>2</sup> The Remand Analysis is based upon the same application record used in the initial analysis.

## EVIDENCE AND ARGUMENTS

The Petitioners filed a joint application to develop and manage an open-heart surgery and elective intervention program at the Evergreen Hospital Medical Center (Evergreen). Overlake Hospital Medical Center (Overlake) had previously begun operation of its own open-heart surgery and elective intervention program in November 1986. Evergreen would be the legal operator of the facility, but the Petitioners would establish a new legal entity, the Eastside Cardiac Care Alliance (ECCA) that would ultimately enter into an agreement with Overlake and Evergreen. Under that agreement ECCA would be responsible for the day-to-day operation of a single open-heart program operating at the two facilities. The Petitioners anticipated joint management would include medical staffing, policies and procedures, quality assurance, professional education and community outreach. To support this goal Overlake and Evergreen entered into a Memorandum of Understanding.

Open heart surgery and percutaneous transluminal coronary angioplasty (PTCA) services are “tertiary health services”, which are specialized services that meet complicated medical needs of people and require sufficient patient volume to optimize provider effectiveness, quality of service and improved outcome of care.

RCW 70.38.025(14). To establish a tertiary health service requires the individual must apply for a certificate of need. RCW 70.38.105(4)(f); WAC 246-310-020(1)(d)(i)(E).

Open heart surgery procedures utilize a heart-lung bypass machine.

WAC 246-310-261. Those procedures do not include organ transplantation. To perform nonemergent PTCA services an institution must have an established on-site

OHS program capable of performing emergency open heart surgery.

WAC 246-310-262. Open heart surgery and PTCA applications must also meet the general certificate of need requirements under WAC 246-310-210 through 246-310-240.

WAC 246-310-261(2).

To assist potential applicants, the Program calculates an open hearing surgery need forecast using a seven step methodology. WAC 246-310-261(4). The forecast methodology calculates need using known open heart surgery volumes in the identified service area for a three year period prior to the application and calculates a current capacity figure based on that information. Relevant information is obtained from a data base containing information on all surgeries reported by all hospitals within the state (the Comprehensive Hospital Abstract Reporting System (CHARS)). Open heart surgery codes or diagnostic related groupings (DRG 104 - 109<sup>3</sup>) identify the relevant open heart surgery groupings. The CHARS data from the relevant three year period is used in forecasting open heart surgery service needs for four years after the concurrent review process (for example, a 1992 review forecasts 1996 need). WAC 246-310-261(4)(a) – (g); WAC 246-310-261(5)(c).

In the original analysis the Program projected a net need of 492 OHS procedures for the 2006 forecast year. The projected net need exceeded the 250 OHS minimum volume figure which indicated at least one additional open heart surgery program was needed. The Program did not deny the Petitioners application on that basis. Rather,

---

<sup>3</sup> WAC 246-310-261(5)(e) specifies only diagnostic related groupings identified in DRG 104 – 108 are to be considered for open heart surgery purposes. While not specifically set forth in subsection (5)(e), the parties did not contest the inclusion of DRG 109 in the OHS code grouping.

the Program's denial decision was based on the Petitioners failure to comply with WAC 246-310-261(3)(c), which provides no new program shall be established which will reduce an existing program below the 250 minimum volume standard.

In the remand analysis the Program recalculated the open heart surgery need forecast projection to be consistent with the remand order. The Remand Analysis, page 6. This corrected analysis calculated current capacity using the "highest hospital" method and incorporated the estimated 255 open heart surgery procedures from Northwest Hospital's assumed volume. Completion of the calculation revealed a negative number or produced a finding of a surplus of open heart surgery volume in the 2006 forecast year. The Remand Analysis, page 7. As there was a surplus, and because the Petitioners application did not meet the criteria for an exception under WAC 246-310-261(4)(g), the Program determined there was no need for an additional OHS program in health service area 1 through year 2006. The Remand Analysis, page 7. Having determined that no increased OHS need existed, the Program did not review whether the Petitioners project complied with the WAC 246-310-261(3) standards. The Remand Analysis, page 8. The Program determined the Petitioners joint application to establish PTCA services was not consistent with the WAC 246-310-262 criteria, given that there would not be any on site OHS program.

### **LEGAL ANALYSIS**

The Department of Health implements the certificate of need program.

RCW 70.38.105. The program seeks to control costs by ensuring better utilization of existing health services and health care providers wishing to establish or expand

services must obtain a certificate of need. *St. Joseph Hospital and Health Care Center v. Department of Health*, 125 Wn.2d 733, 735 – 736 (1995). To obtain an OHS certificate of need an applicant must comply with the need methodology requirements under WAC 246-310-261(4), standards under WAC 246-310-261(3) and the general need requirements under WAC 246-310-210 through 246-310-240. WAC 246-310-261(2).

The certificate of need adjudicative proceeding does not supplant the review process but ensures that the procedural and substantive rights of the parties have been preserved and that the factual record supports the Program's analysis and decision. *See Ear, Nose, Throat and Plastic Surgery Associates*, Docket No. 00-09-C-1037CN (April 17, 2001), Prehearing Order No. 6, at 8. The matter was remanded to the Program to recalculate the need methodology using the correct current capacity definition under WAC 246-310-261(5)(b) and including the assumed volume of Northwest Hospital (a new program approved by the Program in the course of review and approval of the Petitioners application) under WAC 246-310-261(4)(a) and (d).

The Program issued a Remand Analysis on September 16, 2004 and moved for issuance of a final order based on need calculations consistent with the remand order. The Program's remand need methodology calculations determined no additional OHS need existed for the 2006 forecast year. Having found the Petitioners application did not meet the open heart surgery need threshold, no further analysis is required. Without meeting the open heart surgery requirement, the application fails to meet the PTCA requirement.

Based on a careful review of the record, the Presiding Officer enters the following:

## **I. FINDINGS OF FACT**

1.1 The Petitioners filed a joint application to establish open heart surgery and percutaneous transluminal coronary angioplasty services in Health Service Area 1 in August 2002.

1.2 The Program reviewed the information contained in the application record. Exhibit 36. The Program issued a written analysis denying the Petitioners application on May 27, 2003. In its analysis the Program found additional OHS need existed for the health service area and did not deny the application on that basis. The Program denied the application because granting the Petitioners application would reduce an existing OHS facility below the minimum 250 OHS standard set by regulation.

1.3 The Petitioners appealed the Program's denial decision on June 24, 2003. A hearing on that appeal was convened on January 8 – 9, 2004. The parties submitted post hearing briefs in lieu of closing argument.

1.4 Following the hearing a Findings of Fact, Conclusions of Law and Order of Remand (the Remand Order) was issued on August 20, 2004. The Remand Order reversed the Program's determination denying the Petitioners application and remanded the analysis to the Program to recalculate the forecast need methodology.

1.5 The Program moved for issuance of a final order based upon its Remand Analysis on September 16, 2004. The Program's remand analysis calculation found that surplus OHS capacity existed for the 2006 forecast year and because of that



excess need no additional OHS facilities were required in the health service area under WAC 246-310-261(4).

1.6 Upon determining the Petitioners application failed to meet the WAC 246-310-261(4) need requirement, the Program did not examine whether the application met the WAC 246-310-261(3) standard requirements.

1.7 Given that the Petitioners application failed to meet the threshold need determination, the PTCA application also fails under WAC 246-310-262.

1.8 Neither the Petitioners nor the Intervenor contested the Program's motion or the Remand Analysis.

## **II. CONCLUSIONS OF LAW**

2.1 The Department is responsible for managing the certificate of need chapter under chapter 70.38 RCW. WAC 246-310-010. An applicant denied a certificate of need has the right to an adjudicative proceeding. RCW 34.05.413(2); WAC 246-310-610(1). To be granted a certificate of need an OHS applicant shall meet the standards in [WAC 246-310-261] in addition to the applicable review criteria in WAC 246-310-210 through WAC 246-310-240. WAC 246-310-261(2).

2.2 The burden of proof in certificate of need cases is preponderance of the evidence. WAC 246-10-606. In all cases involving an application for licensure, the application shall establish that it meets all applicable criteria. WAC 246-10-606. Evidence should be the kind upon which reasonably prudent persons are accustomed to rely in the conduct of their affairs. RCW 34.05.452(1); WAC 246-10-606.

2.3 The Petitioners filed a joint certificate of need application to establish OHS/PTCA services in health service area 1. In its initial analysis the Program determined sufficient need existed in the 2006 year for at least one OHS facility and did not deny the Petitioners application on this basis. The Program did deny the Petitioners application on the grounds that granting the application would reduce an existing OHS program below the 250 OHS minimum volume as prohibited under WAC 246-310-261(3)(c).

2.4 The Petitioners appealed the Program's denial decision. Following a hearing on that issue, the Presiding Officer concluded the Program incorrectly calculated OHS need forecast methodology. The Program's denial decision was reversed and remanded to the Program to conduct calculations in accordance with WAC 246-310-261(4). A Remand Analysis was issued September 16, 2004 and the Program moved for issuance of a final order based on that analysis. Neither the Petitioners nor the Intervenor filed responsive pleadings regarding the Program's motion.

2.5 After reviewing the Program's calculations in the Remand Analysis the Presiding Officer concludes the remand calculations comply with the WAC 246-310-261(4) requirements and surplus OHS need exists for the 2006 forecast year. Having failed to meet the threshold need requirement, the Petitioners open heart surgery application must fail.

////////////////////////////////

////////////////////////////////



The petition must state the specific grounds upon which reconsideration is requested and the relief requested. The petition for reconsideration is considered denied 20 days after the petition is filed if the Adjudicative Service Unit 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 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, however, the 30-day period will begin to run upon the resolution of that petition. RCW 34.05.470(3).

The order remains in effect even if a petition for reconsideration or petition for review is filed. "Filing" means actual receipt of the document by the Adjudicative Service Unit. 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).