

STATE OF WASHINGTON
DEPARTMENT OF HEALTH
ADJUDICATIVE SERVICE UNIT

In the Matter of:

DAVITA CERTIFICATE OF NEED
APPLICATIONS TO ESTABLISH
NEW KIDNEY DIALYSIS FACILITIES
IN PLANNING AREAS KING 10 AND
PIERCE 4,

DAVITA HEALTHCARE PARTNERS
INC.,

Petitioner.

Master Case No. M2017-349

PREHEARING ORDER NO. 3:
ORDER ON MOTIONS FOR
SUMMARY JUDGMENT AND
MOTION FOR STAY; INITIAL ORDER

APPEARANCES:

Petitioner: DaVita HealthCare Partners Inc. (DaVita), by
Perkins Coie LLP, per
Brian W. Grimm and Lauren W. Staniar, Attorneys at Law

Intervenor: Northwest Kidney Centers, Inc. (NWK), by
Davis Wright Tremaine LLP, per
Brad Fisher, Rebecca J. Francis, and Miriam R. J. Swedlow, Attorneys at Law

Department of Health Certificate of Need Program (Program), by
Office of the Attorney General, per
Janis Snoey, Assistant Attorney General

PRESIDING OFFICER: Matthew R. Herington, Health Law Judge

DaVita HealthCare Partners Inc. (DaVita) filed a Motion for Summary Judgment; Northwest Kidney Centers Inc. (NWK) and the Program both filed Cross Motions for Summary Judgment. DaVita also filed a Motion to Stay the Program's consideration of NWK's pending Certificate of Need applications. DaVita's Motion for Summary

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Judgment DENIED. Cross Motions for Summary Judgment GRANTED. DaVita's Motion to Stay DENIED.

I. PROCEDURAL HISTORY AND FINDINGS OF FACT

1.1 The state of Washington is divided up into planning areas for purposes of determining kidney dialysis need.¹ See WAC 246-310-280(8). Pursuant to WAC 246-310-284, the Department of Health annually calculates the projected kidney dialysis station need for each planning area.

1.2 Pursuant to WAC 246-310-282, the Program evaluates kidney dialysis Certificate of Need (CN) facility applications during four annual concurrent review cycles.² Prospective applicants must first submit letters of intent. The letters of intent for a concurrent review during Kidney Dialysis Facility Cycle 1 are due from the first working day through the last working day of January of each year. The receipt of the initial application is then due from the first working day through the last working day of February of each year.

1.3 Prior to May 17, 2011, the Program had permitted CN applicants to submit more than one proposal in a single CN application. On May 17, 2011, the Program posted a notice to the CN listserv that it would no longer continue to do so. The

¹ WAC 246-310-280(8) and (12) specifies that both "[p]lanning area" and "[s]ervice area" mean an individual geographic area designated by the department for which kidney dialysis station need projections are calculated.

² A "certificate of need" is a written authorization for a person to implement a proposal for one or more undertakings. See WAC 246-310-010(11).

Program also has this notice posted on its website.³ There is no dispute about the fact that both NWKC and DaVita were aware of the Program's position.

1.4 On March 29, 2016, the Program posted to the Program's website the numeric need methodology it used to estimate the future kidney dialysis station need in the King 10 and Pierce 4 planning areas. The Program also sent announcements to the Department of Health's Certificate of Need-Kidney Dialysis listserv indicating that the methodology had been posted.

1.5 Utilizing its numeric need methodology, the Program calculated that there was a need for nine stations in the King 10 planning area and 10 stations in the Pierce 4 planning area.

1.6 On January 31, 2017, NWKC submitted three letters of intent to establish new kidney dialysis treatment stations in the King 10 planning area and three letters of intent to establish new kidney dialysis treatment stations in the Pierce 4 planning area. DaVita also submitted three letters of intent to establish new kidney dialysis treatment stations in the King 10 planning area and three letters of intent to establish new kidney dialysis treatment stations in the Pierce 4 planning area.

1.7 In each of its letters of intent for the King 10 planning area, NWKC proposed adding nine stations to an existing facility. In each of its letters of intent for the Pierce 4 planning area, NWKC proposed establishing a new 10 station facility in the Pierce 4 planning area.

³ Exhibit M attached to Declaration of Janis Sigman.

1.8 For the stations in the King 10 planning area, NWKC's letters of intent proposed projects with the following capital expenditures: \$1,289,956; \$1,622,215; and \$1,800,659. For the facility in the Pierce 4 planning area, NWKC's letters of intent proposed projects with the following capital expenditures: \$2,242,165; \$2,820,560; and \$3,130,822.

1.9 In its letters of intent, DaVita proposed establishing an 11 station facility in the King 10 planning area, and a 13 station facility in the Pierce 4 planning area.

1.10 For the 11 station facility in the King 10 planning area, DaVita's letters of intent proposed projects with the following capital expenditures: \$2,312,361; \$2,627,684; and \$2,943,005. For the 13 station facility in the Pierce 4 planning area, DaVita's letters of intent proposed projects with the following capital expenditure: \$2,157,438; \$2,451,634; and \$2,745,830.

1.11 Within three business days from receipt of the letters of intent, the Program posted the letters of intent on its website.

1.12 By the last working day of February 2017, both DaVita and NWKC submitted one CN application each for the King 10 planning area and one CN application each for the Pierce 4 planning area. Consistent with its letters of intent, NWKC proposed adding nine stations in the King 10 planning area and establishing 10 stations in the Pierce 4 planning area. In contrast, DaVita asked the Program to consider two alternative proposals for the King 10 planning area and two alternative proposals for the Pierce 4 planning area. In the King 10 planning area, DaVita

proposed establishing either an 11 station facility or, in the alternative, a nine station facility. In the Pierce 4 planning area, DaVita proposed establishing either a 13 station facility or, in the alternative, a 10 station facility.

1.13 In its King 10 application, NWKC projected that its capital costs would be \$1,699,127. In its Pierce 4 application, NWKC projected that its capital costs would be \$2,179,918.

1.14 In its King 10 application, DaVita projected that its capital costs would be \$2,722,920 for the 11 station facility and \$2,688,045 for the 9 station facility. In its Pierce 4 application, DaVita projected that its capital costs would be \$2,526,636 for the 13 station facility, and \$2,475,036 for the 10 station facility.

1.15 On March 2, 2017, the Program analyst assigned by the Program to review the applications sent letters to DaVita and NWKC indicating that the applications would be reviewed under the concurrent review schedule outlined in WAC 246-310-282(1), and that he would "screen the applications for completeness."⁴

1.16 On March 10, 2017, the Program returned both of DaVita's applications to DaVita. Along with the applications, the Program provided cover letters from Janis Sigman, Certificate of Need Program Manager. In the cover letters, Ms. Sigman pointed out that DaVita had proposed alternative projects in its applications for both planning areas. Ms. Sigman also noted that the estimated costs of the projects had changed from the costs indicated in the letters of intent. As a result, Ms. Sigman

⁴ Exhibit L attached to Declaration of Janis Sigman.

indicated that the Program considered DaVita's applications to be proposing projects that were "significantly different" than the projects proposed in DaVita's letters of intent.⁵ Relying on WAC 246-310-080(3), the cover letters further indicated that DaVita's applications would instead be considered as new letters of intent. Given that the deadline for prospective applicants to submit letters of intent under the first 2017 concurrent review cycle had passed, the Program indicated it was returning DaVita's applications.

1.17 Through its legal counsel, DaVita subsequently asked the CN Program to reconsider its determination to return the applications. However, the CN Program stood by its decision.

1.18 After returning DaVita's applications, the Program proceeded with non-concurrent review of NWKC's applications pursuant to WAC 246-310-282(5).

1.19 On March 30, 2017, DaVita filed an Application for Adjudicative Proceeding.

1.20 On May 1, 2017, the Adjudicative Service Unit issued a Corrected Scheduling Order/Notice of Hearing, which set the motion cutoff date for August 14, 2017.⁶

1.21 Also on May 1, 2017, DaVita filed a Motion to Stay Effect of CN Program's March 10, 2017, Decision Pending Presiding Officer Review. DaVita contends that a

⁵ Exhibit N attached to Declaration of Janis Sigman

⁶ A Scheduling Order/Notice of Hearing was first sent out on April 14, 2017.

stay is appropriate because: (1) the undersigned Presiding Officer has authority to stay the effect of the CN Program's decision pending review; and (2) the undersigned Presiding Officer should exercise his authority to grant a stay.

1.22 On May 8, 2017, DaVita filed a Motion for Summary Judgment with the Adjudicative Service Unit. DaVita contends summary judgment is appropriate in this matter because: (1) there are no disputed issues of material fact; (2) the Program's decision to return DaVita's applications was contrary to WAC 246-310-080; and (3) the Program's decision to return DaVita's applications was contrary to Program policy.

1.23 On May 12, 2017, the Program filed a response to the Motion to Stay. The Program agrees that the undersigned Presiding Officer has authority to grant a stay. However, the Program argues that: (1) DaVita is not likely to prevail in the underlying proceeding; (2) DaVita will not suffer irreparable harm if a stay is not granted; and (3) the public interest would be better served by refusing to accept applications that are significantly different than previously submitted letters of intent.

1.24 On May 12, 2017, NWKC also filed a response to the Motion to Stay. NWKC argues that: (1) DaVita's applications were correctly rejected by the Program; and (2) DaVita's Motion to Stay is an attempt to upend the status quo and delay needed kidney dialysis stations.

1.25 On May 19, 2017, NWKC filed a Response to DaVita's Motion for Summary Judgment, along with a Cross Motion for Summary Judgment. NWKC argues that DaVita's Motion for Summary Judgment should be denied, and NWKC's Cross

Motion for Summary Judgment should be granted because: (1) the material facts necessary to affirm the Program's actions are undisputed; (2) the Program correctly interpreted and applied the plain language of WAC 246-310-080; and (3) the Program's interpretation of WAC 246-310-080 is consistent with its policy of disallowing multiple proposals in an application.

1.26 On May 19, 2017, the Program also filed a Response to DaVita's Motion for Summary Judgment, along with its own Cross Motion for Summary Judgment. The Program argues that: (1) there are no genuine issues of material fact; (2) its decision was consistent with WAC 246-310-080 and the applicable CN law governing kidney dialysis concurrent review; and (3) the Program's decision was consistent with Program policy.

1.27 On May 19, 2017, DaVita filed a Reply reiterating its arguments in support of the Motion to Stay.

1.28 On May 26, 2017, DaVita filed a Reply reiterating its argument in support of its Motion for Summary Judgment; DaVita also requested oral argument on its two Motions.

1.29 On June 2, 2017, NWKC filed a Reply in support of its Cross Motion for Summary Judgment, reiterating its arguments.

1.30 On June 5, 2017, DaVita filed a Sur-Reply to NWKC's June 2, 2017, Reply. DaVita argued that Appendix A attached to NWKC's Reply was not properly disclosed and should either: (1) be stricken; or (2) be given no weight.⁷

1.31 On June 8, 2017, oral argument (via telephone) was heard on the pending motions.

1.32 The Program has an unwritten policy that it does not consider a letter of interest and an application to be "significantly different" when there is less than 12 percent difference in the projected total capital expenditure between the letter of interest and the application, unless other factors are present contributing to a difference.⁸

1.33 Prior to May 17, 2011, the Program had permitted CN applicants to submit more than one proposal in a single CN application. On May 17, 2011, the Program posted a notice to the CN listserv that it would no longer continue to do so. The Program also has this notice posted on its website.⁹

1.34 The Program has continued to permit CN proposals that are to be implemented in phases. This allows applicants to propose implementing a large project by completing smaller segments of the project rather than all at once. However, the

⁷ Appendix A is a letter purported to be from DaVita's former attorney. Consideration of the document is not necessary for ruling on the instant motions, and it is given no weight.

⁸ Declaration of Janis Sigman.

⁹ Exhibit M attached to Declaration of Janis Sigman.

Program has generally not permitted kidney dialysis proposals to be implemented in phases.

1.35 The Program did recently allow applications with phased proposals for the Pierce 5 planning area, due to need for an unusually large number of stations. This information was communicated to the CN listserv on March 29, 2016.¹⁰

1.36 In the instant case, DaVita has not proposed a phased project.

II. CONCLUSIONS OF LAW

2.1 The Department of Health is authorized and directed to implement the CN program. RCW 70.38.105(1). Kidney dialysis treatment centers are health care facilities that require a CN. WAC 246-310-284.

2.2 The Presiding Officer shall rule on motions. WAC 246-10-403(1).

Motions for Summary Judgment

2.3 An administrative agency may employ summary procedures, and may enter an order summarily disposing of a matter if there is no genuine issue of material fact. *Asarco v. Air Quality Coalition*, 92 Wn.2d 685, 697, 601 P.2d 501 (1979).

2.4 Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). See also, *State Farm General Ins. Co. v. Emerson*, 102 Wn.2d 477 (1984). In a summary judgment motion, the moving party

¹⁰ Exhibit C attached to Declaration of Janis Sigman.

bears the initial burden of demonstrating there is no genuine dispute as to any material fact. *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). If the moving party meets its initial burden, the burden shifts to the non-moving party to set forth specific facts showing the existence of a genuine issue of material fact. *Id.* All facts submitted and all reasonable inferences from them must be viewed in the light most favorable to the non-moving party. *Id.* at 226.

2.5 The applicable regulations governing the Department of Health's Certificate of Need Program are found at Chapter 246-310 WAC. Pursuant to WAC 246-310-020(1)(e), the regulations apply to any increase in the number of dialysis stations in a kidney disease center service area. The regulations must not be read in isolation, but rather within the context of the regulatory and statutory scheme as a whole. See *Overlake Hosp. Ass'n v. Dep't of Health*, 170 Wn.2d 43, 51-52 (2010).

2.6 Pursuant to WAC 246-310-080(1), any person planning to propose an undertaking subject to certificate of need review shall submit a letter of intent. The letter of intent shall include the following information:

- (a) A description of the services proposed;
- (b) The estimated cost of the proposed project; and
- (c) An identification of the service area.

2.7 A letter of intent shall be valid for six months after the receipt of the letter by the Department. If the applicant does not submit an application for the project as described in the letter within this time frame, a new letter of intent shall be required

before the Department accepts an application. WAC 245-310-080(2). In the event that the application proposes a project that is significantly different than that proposed in the letter of intent, the Department shall consider the application the letter of intent and no further action shall be taken until the end of the thirty-day letter of intent period. WAC 246-310-080(3).

2.8 The Department reviews kidney dialysis facility applications using the concurrent review cycles outlined in WAC 246-310-282. Letters of intent are due from the first working day through the last working day of January of each year. DaVita timely filed its letters of intent by the last working day of January 2017.

2.9 DaVita correctly identified what service areas it intended to serve with its proposed projects.

2.10 The cost of a proposed project identified in a letter of intent is only to be an estimate of the proposed cost. Here, the proposed costs in the DaVita's applications differed by only a relatively small amount from the proposed costs in the letters of intent. Given the small differences between the estimated capital costs proposed in DaVita's letters of intent and in its applications, the projects are not significantly different for that reason alone.

2.11 It is indisputable that the purpose of a letter of intent is to notify others of a party's intent to act. See *Guarino v. Interactive Objects, Inc.* 12 Wn. App. 95 (2004). In the context of the CN application process for kidney dialysis stations, a description of the number of kidney dialysis stations sought is critical.

2.12 DaVita points to *Kadlec Reg'l Med. Ctr. v. Dep't of Health*, 177 Wn. App. 171 (2013) as providing support for its position that it should be allowed to include alternative station sizes in its applications. *Kadlec* involved a hospital seeking to increase its size by up to 114 beds. The hospital "...also submitted alternative proposals for 75 new beds and 55 new beds because it did not know whether the Department would use a high-growth or a medium-growth population forecast."¹¹ The CN Program approved the proposal for 55 beds; Kadlec consequently requested an adjudicative proceeding to seek 114 beds. A Department Health Law Judge (HLJ) subsequently dismissed the case, finding that Kadlec did not have a right to appeal, given that Kadlec had been awarded one of its requested options. The HLJ noted that "an applicant should not be permitted to circumvent the language in RCW 70.38.115(10)(a)¹² and WAC 246-310-610(1)¹³ by including several alternative approaches in the application process rather than making a clear declaration of its intent."¹⁴ On appeal, the Court of Appeals found that "Kadlec's application avoided an 'all or nothing' approach that risked inadequate services if a single large request were denied. It also avoided the opposite extreme of a series of small requests that would

¹¹ *Kadlec* at 173.

¹² Any applicant denied a certificate of need or whose certificate of need has been suspended or revoked has the right to an adjudicative proceeding. The proceeding is governed by chapter 34.05 RCW, the Administrative Procedure Act.

¹³ An applicant denied a certificate of need or a certificate holder whose certificate was suspended or revoked has the right to an adjudicative proceeding.

¹⁴ *Kadlec* at 178.

need to be approved at short intervals to keep up with need. The flexibility of Kadlec's approach directly served the purposes of the statute and was consistent with the recognition in RCW 34.05.419(1)(a) that an adjudicative application may be approved or denied in whole or in part."¹⁵

2.13 *Kadlec* is distinguishable from the instant case. First of all, *Kadlec* does not address WAC 246-310-080, and there is no holding in *Kadlec* related to letters of intent at all. In the instant case, however, the key issue to be decided is whether a prospective applicant may include in its application a proposal that had not been previously identified in a letter of intent.

2.14 Additionally, *Kadlec* did not involve CN applications for kidney disease treatment centers, as the facility at issue was a hospital. However, the regulatory framework for kidney dialysis is not the same for hospitals, which includes the use of concurrent review cycles outlined in WAC 246-310-806. These concurrent review cycles are clearly intended to provide a transparent review mechanism for the competitive process of applying for kidney dialysis stations. Allowing a prospective applicant to submit an application containing a different number of stations than indicated in a letter of intent would constitute an impermissible circumvention of the kidney dialysis regulatory framework. See *Overlake* at 52 ("If the meaning of a rule is plain and unambiguous on its face, then we are to give effect to that plain meaning.").

¹⁵ *Kadlec* at 179.

2.15 Finally, the Program published guidance indicating it would no longer evaluate applications with multiple proposals after its decision in *Kadlec*. Although not dispositive, it is an indication of Department policy.

2.16 A key principle of administrative law in Washington State is that “[a]gencies may not treat similar situations in different ways.” *Seattle Area Plumbers v. Wash. State Apprenticeship & Training Council*, 131 Wn. App. 862, 879 (2006). DaVita argues that the Program has a practice of accepting and reviewing CN applications that differ from previously submitted letters of intent by including smaller alternatives.

2.17 As noted *supra*, the Program’s policy since 2011 has been to reject applications with more than one proposal. Although the Program recently made an exception for the Pierce 5 area, that exception was to allow applications for phased projects. There is no evidence that DaVita intended to apply for a phased project in this case. The Program’s policy is consistent and compliant with core principles of administrative law.

2.18 The Department may convert the review of an application that was initially submitted under a concurrent review cycle to a regular review process if the Department determines that the application does not compete with another application. WAC 246-310-282(5). Here, the Program correctly converted the review of NWKC’s application to a regular review process.

2.19 There are no genuine issues of material fact, and the Program and NWKC are entitled to judgment as a matter of law.

Stay

2.20 Unless precluded by law, the agency may grant a stay, in whole or in part, or other temporary remedy. RCW 34.05.550(1). The Presiding Officer has the general authority to control the conduct of adjudicative proceedings. WAC 246-10-602.

2.21 The Administrative Procedure Act does not provide a specific standard for an agency granted stay. However, the Administrative Procedure Act does provide standards for judicial stay of agency actions at RCW 34.05.550(3):

- (3) If judicial relief is sought for a stay or other temporary remedy from agency action based on public health, safety, or welfare grounds the court shall not grant such relief unless the court finds that:
 - (a) The applicant is likely to prevail when the court finally disposes of the matter;
 - (b) Without relief the applicant will suffer irreparable injury;
 - (c) The grant of relief to the applicant will not substantially harm other parties to the proceedings; and
 - (d) The threat to the public health, safety, or welfare is not sufficiently serious to justify the agency action in the circumstances.

Such standards may be applied by analogy in the instant matter.

2.22 Here, DaVita's applications were not in compliance with its letters of intent and must be rejected by the Department. Consequently, the applicant is not "likely to prevail." As a result, the Motion to Stay is denied.

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 C.F.R. 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.

DECLARATION OF SERVICE BY MAIL

I declare that today I served a copy of this document upon the following parties of record:

BRIAN W. GRIMM AND LAUREN W. STANIAR, AND BRAD FISHER, REBECCA J. FRANCIS, AND MIRIAM R. J. SWEDLOW, ATTORNEYS AT LAW AND JANIS SNOEY, AAG by mailing a copy properly addressed with postage prepaid.

DATED AT OLYMPIA, WASHINGTON THIS ____ DAY OF JULY, 2017.

Adjudicative Service Unit

cc: JANIS SIGMAN

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

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