STATE OF WASHINGTON
DEPARTMENT OF HEALTH
OFFICE OF THE
SECRETARY

In Re: EVALUATIONS DATED FEBRUARY 26, 2013 FOR THE FOLLOWING CERTIFICATE OF NEED APPLICATIONS PROPOSING TO ADD DIALYSIS STATION CAPACITY TO KING COUNTY PLANNING AREA #9: (1) NORTHWEST KIDNEY CENTERS 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.	Case No. M2013-364 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL ORDER

This matter has come before the Review Officer on delegation by the Secretary of Health for administrative review of Northwest Kidney Centers' (NKC) Petition for Administrative Review (Petition) pertaining to two decisions issued in this case: Prehearing Order No. 3: Order on Summary Judgment (PHO) dated November 5, 2013 and the Findings of Fact, Conclusions of Law, and Initial Order (Initial Order) dated April 14, 2014.

NKC requests reversal of the PHO and Initial Order. The PHO upheld the Department of Health Certificate of Need (CN) Program's (Program) decision to deny NKC's application for a certificate of need to add 11 dialysis kidney stations to its 28

station facility in Renton.

DaVita, Inc. (DaVita) also applied for a certificate of need to establish an 11 station kidney dialysis facility in Renton.[1] The Initial Order, issued following a hearing on this matter, approved DaVita's application. Both the Program and DaVita request that the PHO and the Initial Order be upheld. The Program filed a Memorandum Opposing Petition for Administrative Review and DaVita filed a Response to NKC's Petition for Administrative review. DaVita also requests that the Review Officer affirm the Presiding Officer's conclusions that DaVita adequately explained the decrease in landlord hard costs (*See* Initial Order 11).

Based on a review of the record[2], the Review Officer affirms the PHO and the Initial Order. NKC's Petition provides no basis for reversing either the PHO or Initial Order issued in this case.[3] Along with the Review Officer's Consideration, Section One, this Final Order adopts and incorporates below Findings of Fact and Conclusions of Law from the Initial Order.[4]

I. REVIEW OFFICER'S CONSIDERATION

1.1 The Secretary has jurisdiction over the subject matter of this case. Chapter 70.38 RCW.

1.2 The Petition and responses were timely filed. WAC 246-10-701. The initial order was served upon the parties on April 14, 2014. NKC's Petition for Administrative

[1] The Program reviewed DaVita's and NKC's applications for a certificate of need concurrently since they proposed adding stations to the same planning area.
[2] Including the Petition for Review, the Program's and DaVita's responses to the Petition, the Application Record, the Administrative Record, Prehearing Order No. 3, the Initial Order, the hearing transcript, and post-hearing briefs.
[3] NKC has also requested oral argument on review. Finding no reason for oral argument on review, this request is denied and the decision is made based on the record, which includes extensive briefing.
[4] The Initial Order's Summary of Proceedings is also adopted, but not incorporated below.

Review was filed on May 7, 2014, within 21 days of service of the initial order. The Program's response was filed on May 17, 2014, within 20 days of the petition. DaVita's response was filed on May 27, 2014, within 20 days of the petition.

1.3 The Secretary is authorized to designate a Review Officer to review initial orders and to enter final orders. RCW 43.70.740. The Review Officer has all the decision-making power that the Review Officer would have had to decide and enter the final order had the reviewing officer presided over the hearing." RCW 34.05.464(4).

PreHearing Order No. 3

1.4 Prehearing Order No. 3 (PHO) properly affirmed the Program's denial of NKC's application to add 11 kidney dialysis stations to its Renton facility. The Program denied NKC's application because it failed to account for the construction costs associated with the project resulting in the Program being unable to determine whether NKC's application met the financial feasibility criteria under WAC 246-310-220, and in turn, the cost containment criteria under WAC 246-310-240.

In its Petition, NKC requests that the PHO be reversed arguing that NKC was not required to report the construction costs of its project, and if it was required to do so, the Program had a mandatory obligation to request this information under WAC 246-310-090(2).

There is no dispute that NKC failed to disclose the construction costs associated with the 11 stations in its CN application. NKC argues that the CN rules do not require NKC to report historical construction costs. NKC incurred the construction costs associated with the 11 stations in 2011 when it constructed the Renton Kidney Center

under a relocation project. The 2011 relocation project was approved without requiring a CN under WAC 246-30-289(2)(b).[5] NKC considers the 2011 construction of the Renton Kidney Center to be a separate project from its 2012 proposal to add 11 stations to the Renton facility.

The CN rules require an applicant to disclose construction costs associated with a project. Under the financial feasibility criteria, the Program evaluates whether "the cost of the project, including any construction costs, will probably not result in an unreasonable impact on the costs and charges for health care." WAC 246-310-220(2). Emphasis added. The CN rules define a project as all "undertaking proposed in a single certificate of need application or for which a single certificate of need is issued". WAC 246-310-010(46). "Undertaking" is defined as "any action subject to the provisions of chapter WAC 246-310." WAC 246-310-010(62). The CN project in this case is NKC's 2012 CN application to add 11 stations to its Renton facility. The construction costs of this project were reportable and required for the Program to evaluate NKC's compliance with WAC 246-310-22(2).

This approach is consistent with the Program's evaluation in a previous case involving NKC. In 2007, NKC submitted an application to add 13 stations to relocate its SeaTac facility. *See* Grimm Decl., Ex. 3 (CN Evaluation of NKC and DaVita's Applications to Add 13 Stations in King County, Sub-Service Area 4, dated November 1, 2007). The Program required NKC to disclose the construction costs associated with the proposed 13

[5] CN approval is not required if a facility relocates in the same planning area without adding additional stations. In this instance, NKC relocated its 28 station facility but built it for 41 stations allowing for future expansion. It is these additional stations for which NKC seeks a CN. The construction costs for the 11 stations have never been disclosed to the Program.

station expansion even though the stations had already been built as part of a relocation project. *See* Grimm Decl., Ex. 2, at 2.

1.5 WAC 246-310-090(2) does not impose a mandatory obligation on the Program to identify and request information missing from a CN application. The burden is on the CN applicant to submit the required information demonstrating compliance with the CN criteria. The rule in question requires the Program to screen an application "to determine whether the information provided in the application is complete and as explicit as is necessary for a certificate of need review." WAC 246-310-090(2). The Program did, in fact, ask NKC screening questions as required under WAC 246-310-090(2). Application Record (AR) 958-965. The Program is not required to correct a deficient application. As discussed above, NKC was required, but failed to include, the construction costs associated with its project under review.

Initial Order on Review

1.6 NKC's Petition argues for reversal of the Initial Order based on six arguments. First, NKC contends that DaVita underreported general and administrative (G & A) expenses, therefore failed to satisfy the financial feasibility criteria. As discussed below in paragraph 2.9, DaVita meets the financially feasibility criteria because DaVita's general and administrative (G & A) expenses demonstrate that its "immediate and long-range capital and operating costs of the project can be met." WAC 246-310-220(1).

NKC's argument is based on DaVita projecting a 5.3 percent G & A expense for its proposed Renton facility. AR 165; Transcript (TR) 152. NKC states that DaVita's pro forma underestimated the G & A expenses citing the 9.9 percent figure for G & A costs as

a percentage of net revenue reported in DaVita's 2011 form 10-K. At hearing, Mr. Bosh, Divisional Vice President for DaVita, testified that the G & A projection is typical when evaluating new projects. Hearing Transcript (TR) 151. Even if DaVita were to have used the 9.9 percent projection, the Program determined that the project would still be profitable by the third year as required under WAC 246-310-220(1). CON Program's Post-Hearing Response Brief 1-2.

1.7 Secondly, NKC's Petition contends that DaVita failed to disclose borrowing costs with its project, therefore failed the financial feasibility criteria. Under WAC 246-310-220(2), an applicant must disclose the cost of the project. At hearing, Mr. Bosh testified that the project would be financed through cash. TR 116. Therefore, DaVita was not required to report debt financing costs in its application.

1.8 Third, NKC argues in its Petition that DaVita's application fails the financial feasibility criteria because it excluded operating expenses related to common area maintenance, taxes, and insurance from its pro forma. This issue is discussed below in paragraphs 2.15 – 2.16. An applicant is required to identify operating costs. WAC 246-310-220(1). Upon the Program's advice, DaVita excluded this information from its pro forma. The Program's witness testified that a CN applicant for a new dialysis facility has not typically included estimates for these related expenses. TR 22. Even had DaVita included such expenses, the Program determined that DaVita still shows a third year operating profit. TR 24-5.

1.9 Fourth, NKC asserts in its Petition that DaVita failed to identify the sources of revenue for its project because it did not breakdown its expected revenue by payor source

and the presiding officer erred in "concluding that an evaluation of the reasonableness of DaVita's pro forma revenue projections is only necessary in a concurrent review". Petition 18.

Under WAC 246-310-220(1), an applicant must show that the immediate and long-range capital and operating costs of the project can be met. This issue is addressed below in paragraphs 2.12 – 2.14, which detail how DaVita projected revenue in its pro forma by using a "blended" single reimbursement rate. The evidence shows how DaVita calculated revenue and DaVita's approach was reasonable and sufficient to show that DaVita would be profitable by the third year.

1.10 Fifth, NKC believes that if the department interprets WAC 246-310-220(2) as requiring NKC to disclose the construction costs associated with the 11 stations it sought to certify, then DaVita's application should also be denied for failure to disclose the original building costs for the shopping center in which DaVita planned to lease space. However, as discussed below in paragraphs 2.18 – 2.19, DaVita did not incur any of the original building construction costs of the existing shopping center. DaVita appropriately provided the costs of bringing the space that they were leasing up to dialysis center standards.

1.11 Lastly, NKC argues that DaVita's application should be denied because it failed to establish that there is a reasonable assurance that its project will be in conformance with applicable state licensing and Medicare requirements as required by WAC 246-310-230(3). This argument is addressed below in paragraphs 2.29 – 2.31.

II. FINDINGS OF FACT

2.1 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.

2.2 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"

2.3 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.[6]

2.4 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 NKC and it was already operating at the 4.8 in-center standard.

2.5 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

[6] 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 Program and NKC.

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 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.

2.6 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).

2.7 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"

2.8 WAC 246-310-220 requires DaVita's application to show 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.

2.9 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.

2.10 At hearing however, NKC questioned the reasonableness of DaVita's pro forma under WAC 246-310-220(1). NKC 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.

2.11 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).[7] Whereas Medicare and Medicaid reimburse providers of dialysis treatments on a fixed scale, reimbursement for private pay patients can vary.

2.12 NKC 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 NKC 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.

2.13 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

[7] 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).

amount times the total 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).

2.14 NKC 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 NKC. In a 2012 CN case,[8] NKC 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 show a profit by the third year. Under the WAC 246-310-220 analysis, DaVita's revenue projections are reasonable and show financial feasibility.

[8] 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) NKC 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).

2.15 NKC'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 NKC 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."

2.16 During the application process the 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[9]. This approach is consistent with many of the Program's decisions in past kidney dialysis applications. Transcript (TR) pages 23-24 (Karen Nidermayer testimony). Given that the 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

[9] 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.

statement. In this case, excluding the landlord expenses in its pro forma statement does not make DaVita's application "unreliable."

2.17 NKC 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.

2.18 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. NKC 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 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). NKC 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. NKC relies on the fact that it lost on summary judgment because it did not do so. *See* Prehearing Order No. 3.

2.19 However, the NKC and the DaVita dialysis projects differ in one key respect. In 2011, NKC relocated a CN-approved 28 station facility to a site in Renton. Pursuant to WAC 246-310-289(3)(b), the 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, NKC 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, NKC exceeded the scope of the relocation project.

2.20 When NKC 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 NKC 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.

2.21 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.

2.22 NKC contends 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, NKC 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. NKC thus questions the reliability of DaVita's $1,786,383 project amount.

2.23 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. NKC 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"

2.24 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.

2.25 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.

2.26 WAC 246-310-230(2) requires that any kidney dialysis application show 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.

2.27 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.

2.28 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.

2.29 NKC 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 13 station, the existing patients continued to receive dialysis service 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.[10]

[10] NKC argued that the Program's agreement with DaVita regarding the phasing out of patients from the 13 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 Program. *See*

2.30 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 NKC Centers' Post-Hearing Brief, Appendix 0 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.

2.31 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 Findings of Fact 2.30; DaVita has two compliance issues out of 1600 facilities. DaVita's management of the Kent facility compliance issue does not preclude a finding that it meets the WAC 246-310-230(3) requirement.

2.32 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 it 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

Overtake 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.

will meet the WAC 246-310-230(4) requirements for those reasons.

2.33 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 2.24 through 2.26, DaVita shows it meets the WAC 246-31Oc230(5) requirements.

WAC 246-310-240 "Cost Containment"

2.34 The final criterion for analyzing the viability of DaVita's application is whether DaVita meets 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 WAC 246-310-220 financial feasibility finding to determine if DaVita meets the requirements.

2.35 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. NKC, 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 WAC 246-310-240(1) requirement.

2.36 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.

have adequate access to the proposed health services. WAC 246-310-210(2).

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

Financial Feasibility

3.6 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.

3.7 Based on Findings of Fact 2.8 through 2.17, DaVita meets the criteria under WAC 246-310-220(1):

3.8 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.

3.9 Based on Findings of Fact 2.18 through 2.20, DaVita meets the criteria under WAC 246-310-220(2).

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

3.11 Based on Findings of Fact 2.21 through 2.23, DaVita meets the criteria under WAC 246-310-220(3).

Structure and Process of Care

3.12 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.

3.13 Based on Findings of Fact 2.25, DaVita meets the criteria under WAC 246-310-230(1).

3.14 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.

3.15 Based on Findings of Fact 2.26 through 2.30, DaVita meets the criteria under WAC 246-310-230(2).

3.16 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.

3.17 Based on Findings of Fact 2.31, DaVita meets the criteria under WAC 246-310-230(3).

3.18 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.

3.19 Based on Findings of Fact 2.32, DaVita meets the criteria under WAC 246-310-230(4).

3.20 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.

3.21 Based on Findings of Fact 2.33, DaVita meets the criteria under WAC 246-310-230(5).

Cost Containment

3.22 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.

3.23 Based on Findings of Fact 2.35, DaVita meets the criteria under WAC 246-310-240(1).

3.24 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.

3.25 Based on Findings of Fact 2.36, DaVita meets the criteria under WAC 246-310-240(2)(a).

3.26 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.

3.27 Based on Findings of Fact 2.36, DaVita meets the criteria under WAC 246-310-240(2)(b).

IV. ORDER

Based on the foregoing Review Officer's Consideration, Findings of Fact, and Conclusions of Law:

4. 1 Pre-hearing Order No. 3 denying NKC's CN application is AFFIRMED.

4.2 DaVita's CN application to establish an 11 station kidney dialysis station in Renton, Washington (King County Planning Area #9) is GRANTED.

Dated this 1st day of October, 2014

JOHN WIESMAN, DrPH, MPH
SECRETARY OF HEALTH

By Kristin Peterson
REVIEW OFFICER

NOTICE TO PARTIES

Either Party may file a petition for reconsideration. RCW 34.05.461(3); RCW 34.05.470.

The petition must be filed within ten (10) days of service of this Order with:

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

and a copy must be sent to:

State of Washington Department of Health
Office of Legal Services
P.O. Box 47873
Olympia, WA 98504-7873

The petition must state the specific grounds upon which reconsideration is

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

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

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

Final Orders will be reported to the National Practitioner Data Bank (45 CFR Part 60) and elsewhere as provided by law. Final orders will be placed on the Department of Health's website, otherwise disseminated as required by the Public Records Act, (chapter 42.56 RCW) and the Uniform Disciplinary Act. RCW 18.130.10. All orders are public documents and may be released.