

**STATE OF WASHINGTON
DEPARTMENT OF HEALTH
OFFICE OF PROFESSIONAL STANDARDS**

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| In re the Certificate of Need Applications) | |
| of:) | Docket No. 99-05-C-1076CN |
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| QUALICENTERS, INC.,) | CORRECTED FINDINGS OF FACT, |
|) | CONCLUSIONS OF LAW, |
| Applicant.) | AND FINAL ORDER |
| _____) | |

A settlement presentation in this matter was conducted by Senior Health Law Judge Eric B. Schmidt, Presiding Officer for the Department of Health, on April 19, 2001. Lori K. Nomura and Andrea D. Axel, Attorneys at Law, represent QualiCenters, Inc. (the Applicant). Richard A. McCartan, Assistant Attorney General, represents the Certificate of Need Program of the Department of Health (the Program). Stephen I. Pentz, Attorney at Law, represents Sacred Heart Medical Center (the Intervenor). Following the settlement presentation, the Presiding Officer issues the following:

I. FINDINGS OF FACT

1.1 On May 28, 1999, the Applicant filed an Application for Adjudicative Proceeding to review the Program's April 30, 1999, decisions to deny certificates of need to the Applicant to establish kidney disease treatment centers in North Spokane and Spokane Valley, Washington.

1.2 On June 8, 1999, the Adjudicative Clerk Office issued a Scheduling Order/Notice of Hearing, which scheduled a prehearing conference for October 20, 1999, and a hearing for November 30 through December 3, 1999.

1.3 Following notices of scheduling conflicts from both the Applicant and the Program, on June 24, 1999, the Adjudicative Clerk Office issued an Amended Scheduling Order/Notice of Hearing, which left the prehearing conference scheduled for October 20, 1999, and rescheduled the hearing to December 14, 1999.

1.4 On July 8, 1999, the Applicant, on its behalf and on behalf of the Program, filed a request to schedule additional hearing dates.

1.5 On July 9, 1999, Sacred Heart Medical Center filed a Petition for Intervention in this matter.

1.6 On July 19, 1999, the Presiding Officer issued Prehearing Order No. 1, which rescheduled the prehearing conference to December 14, 1999, and the hearing dates to February 8-11, 2000.

1.7 On August 2, 1999, the Presiding Officer issued Prehearing Order No. 2, which granted the petition for intervention.

1.8 On November 24, 1999, the Program and the Applicant filed a motion to continue the prehearing conference and other deadlines because a tentative settlement had been reached.

1.9 On December 13, 1999, the Presiding Officer issued Prehearing Order No. 3, which continued the prehearing conference to January 19, 2000.

1.10 On January 7, 2000, the Program and the Applicant orally moved for a continuance of the prehearing conference and hearing dates because details of the settlement were still be resolved. The Intervenor did not object to a continuance.

1.11 On January 10, 2000, the Presiding Officer issued Prehearing Order No. 4, which continued the prehearing conference to March 10, 2000, and the hearing dates to March 20-24, 2000.

1.12 On March 3, 2000, the Program filed a letter requesting a status conference. During a telephonic conference on March 6, 2000, the Program and the Applicant informed the Presiding Officer that they were close to completing a settlement agreement. A discussion regarding a timetable for the settlement presentation was then conducted.

1.13 On March 8, 2000, the Presiding Officer issued Prehearing Order No. 5, which set forth the process for a public hearing on the settlement agreement, pursuant to RCW 70.38.115(10)(c), and for a presentation of the settlement agreement to the Presiding Officer in the event the Program determined the Applicants had satisfied the required criteria for issuance of a certificate of need. Prehearing Order No. 5, also continued the hearing dates to July 5 through 7, 2000.

1.14 On June 28, 2000, the Program filed a letter requesting a continuance of the hearing dates and a scheduling conference. During a telephonic conference on June 29, 2000, the parties agreed to schedule hearing dates in the event the settlement discussions fail.

1.15 On July 6, 2000, the Presiding Officer issued Prehearing Order No. 6, which continued the hearing dates to October 11 to 13, 2000.

1.16 On October 4, 2000, the Applicant filed a request for continuance of the

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hearing dates to allow additional time to consider new information and to continue settlement discussions. The request stated the Program agreed to the continuance.

1.17 On October 9, 2000, the Presiding Officer issued Prehearing Order No. 7, which struck the prehearing conference and hearing dates and scheduled a telephonic status conference for December 18, 2000.

1.18 On October 24, 2000, the Program filed a motion to strike the provisions of Prehearing Order No. 5, as they relate to the settlement presentation process.

1.19 On November 16, 2001, the Presiding Officer issued Prehearing Order No. 8, which modified but did not strike the provisions of Prehearing Order No. 5 as they relate to the settlement presentation process.

1.20 During a telephonic conference on December 18, 2000, the Program and the Applicant stated that a notice of proposed settlement agreement was sent to the Intervenor in mid-November 2000, that the Intervenor had been granted until January 5, 2001, to respond to the proposed settlement agreement, and that the Applicant would be granted until January 19, 2001, to reply to the Intervenor's response. The Intervenor was not available for the telephonic conference. The Program estimated it would complete its written analysis of the Intervenor's response and the Applicant's reply by mid-February 2001, but conditioned that estimate on the scope of the Intervenor's response. The parties agreed to continue the status conference until after the Intervenor's response and the Applicant's reply had been received.

1.21 On December 21, 2000, the Presiding Officer issued Prehearing Order No. 9, which scheduled a status conference for January 31, 2001.

1.22 During the status conference on January 31, 2001, the Program reported it had received the Intervenor's response and the Applicant's reply and estimated it would complete its written analysis by March 16, 2001. The parties agreed to tentatively schedule a date for presentation of the settlement agreement, should the Program conclude that it wishes to enter into the settlement agreement.

1.22 On February 5, 2001, the Presiding Officer issued Prehearing Order No. 10, which scheduled the settlement presentation for April 5, 2001.

1.23 By request of the Program, and by agreement of the Applicant and the Intervenor, the settlement presentation was rescheduled for April 19, 2001.

1.24 On March 15, 2001, pursuant to paragraph 3.7 of Prehearing Order No. 8, the Program filed its settlement evaluations, in which it concluded the Applicant's settlement proposal meets the criteria for issuance of certificates of need for kidney disease treatment centers in North Spokane and Spokane Valley, Washington.

1.25 On April 18, 2001, pursuant to paragraph 3.9 of Prehearing Order No. 8, the Intervenor filed its Comments on Proposed Settlement.

1.26 On April 18, 2001, pursuant to paragraph 3.9 of Prehearing Order No. 8, the Applicant filed its Comments in Support of Proposed Settlement.

1.27 On April 19, 2001, pursuant to paragraph 3.9 of Prehearing Order No. 8, the Program and the Applicant filed the additional documentation submitted by the Applicant during the settlement process, the evidence and comments submitted by the Intervenor, and the rebuttal evidence submitted by the Applicant.

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1.28 A settlement presentation was held on April 19, 2001. The Applicant and the Program argued for adoption of the settlement agreement, and a dismissal of the adjudicative proceeding requested by the Applicants. The Intervenor argued for rejection of the settlement agreement on a number of grounds, which are addressed below.

II. CONCLUSIONS OF LAW

2.1 RCW 70.38.115(10)(c) provides the right for qualified entities to comment on a proposed settlement between an applicant and the Program.

2.2 The Intervenor, and other similarly qualified facilities and organizations under RCW 70.38.115(10)(b), were provided the right to comment on the settlement agreement between the Applicant and the Program. The Intervenor commented on the settlement agreement during the settlement process.

2.3 The Presiding Officer makes the determination of whether the settlement agreement should be accepted by the Department. WAC 246-10-405(5).

2.4 The Intervenor raised a number of objections to the acceptance of the settlement agreement between the Applicant and the Program. First, the Intervenor contends that its recent filing of Applications for Adjudicative Proceeding, seeking to challenge the decisions of the Program in their settlement evaluations, renders this proceeding moot. The Intervenor contends it has a right to such an adjudicative proceeding as a competing service provider, pursuant to RCW 34.05.422(1)(b) and In re the Certificate of Need Application of Ear, Nose, Throat and Plastic Surgery Associates, P.S., Docket No. 00-09-C-1037CN, Prehearing Order No. 2, paragraph 2.16 (January 19, 2001). However, in that decision and in prior decisions regarding

competing service providers, the Presiding Officer has ruled that such a right to an adjudicative proceeding arises upon the granting of a certificate of need. The Department has not yet issued certificates of need to the Applicant, and therefore the Presiding Officer concludes the Intervenor's Applications for Adjudicative Proceeding are premature. As the applications were prematurely filed, the Presiding Officer concludes they cannot moot this settlement presentation.

2.5 The Intervenor further requested that this settlement proceeding be stayed pending the adjudicative proceedings described above. Because the Presiding Officer has concluded the Applications for Adjudicative Proceeding are premature, the Presiding Officer concludes the Intervenor's request for stay should be denied without prejudice.

2.6 During the settlement presentation, the Program and the Applicant moved to dismiss the Intervenor's Applications for Adjudicative Proceeding as premature. The Presiding Officer concludes that the motions to dismiss were not properly before him during the settlement presentation, and declines to address them.

2.7 The Intervenor argued the settlement agreement should not be accepted because the Program had not filed the additional documentation submitted by the Applicant during the settlement process, the evidence and comments submitted by the Intervenor, and the rebuttal evidence submitted by the Applicant, pursuant to paragraph 3.9 of Prehearing Order No. 8. However, the Program and the Applicant have now filed those documents, rendering the Intervenor's objection moot.

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2.8 The Intervenor contends the settlement presentation is a de novo proceeding, and therefore the evidence should not be limited to that presented during the certificate of need review and settlement process. The Presiding Officer concludes the settlement presentation is not a de novo proceeding, as that term is used in RCW 70.38.115(10)(a) and WAC 246-310-610.

2.9 The Intervenor contends the Program should have been required to obtain and evaluate data on the current need for the Applicant's proposed centers. The Program and the Applicant respond that because the initial certificate of need analysis concluded the Applicant had established the requisite need for the centers, they were not required to include that issue in their settlement discussions and agreement. The Presiding Officer agrees with the Program and the Applicant that because need was not a reason for the denial of the Applicant's original application, there was no requirement to include the need issue in their settlement process and there was no requirement to revisit the need issue with updated information.

2.10 The Intervenor contends the Program did not adequately evaluate its comments on the proposed settlement because the Program simply agreed with the Applicant's responses to the comments. The Presiding Officer concludes that although not optimal, the Program's adoption of the Applicant's responses was adequate consideration and analysis of the Intervenor's comments to the proposed settlement.

2.11 Having considered the materials submitted by the Program, the Applicant, and the Intervenor, and having considered the arguments of the parties, the Presiding Officer concludes the Applicant has demonstrated it satisfies the required criteria for the

issuance of a certificate of need to establish kidney disease treatment centers in North Spokane and Spokane Valley, Washington.

III. ORDER

Based on the above Findings of Fact and Conclusions of Law, it is hereby ORDERED that:

3.1 The settlement agreement submitted by the Program and the Applicant is ACCEPTED. The Department shall issue certificates of need to the Applicant for the establishment of establish kidney disease treatment centers in North Spokane and Spokane Valley.

3.2 The Intervenor's request to stay issuance of the certificates of need is DENIED WITHOUT PREJUDICE.

3.3 The Program's and the Applicant's motion to dismiss the Intervenor's Applications for Adjudicative Proceeding is not properly before the Presiding Officer and is not addressed at this time.

3.4 Upon the issuance of the certificates of need by the Department, the Applicant's Application for Adjudicative Proceeding shall be DISMISSED.

Proceedings for judicial review may be instituted by filing a petition in superior court in accordance with the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. The petition for judicial review must be filed within 30 days after service of this Order, as provided in RCW 34.05.542.

“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).

DATED THIS 4th DAY OF JUNE, 2001.

/s/
ERIC B. SCHMIDT, Senior Health Law Judge
Presiding Officer

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| FOR INTERNAL USE ONLY: (Internal tracking numbers) Program No. 99-07-257CON |
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