

**BEFORE THE STATE OF ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON
REFERRAL BY THE COMMISSIONER OF THE DEPARTMENT OF HEALTH AND
SOCIAL SERVICES**

In the Matter of

Providence Health System Alaska.)
_____)

) OAH No. 06-0152-DHS
)

SOUTH ANCHORAGE AMBULATORY SURGERY CENTER
JOINT VENTURE PRE-HEARING BRIEF

BACKGROUND

Appellant South Anchorage Ambulatory Surgery Center Joint Venture hereby respectfully submits its pre-hearing brief.¹

The present appeal involves denial of a Certificate of Need ("CON") application brought by a joint venture consisting of Providence Alaska Medical Center and nine physicians – six orthopedic surgeons and three pain management physicians. The proposal is for a facility in South Anchorage that would provide orthopedic surgery and pain management services. The facility would consist of six Class "C" operating rooms capable of accommodating general anesthesia and other equipment essential for standard orthopedic day-surgery such as for shoulder, knee and spine repairs.

¹ Susan Humphrey-Barnett, Area Operations Administrator of Providence Health System – Alaska, filed the instant appeal of Commissioner Jackson's decision denying the Certificate of Need on February 15, 2006 on behalf of "Providence Alaska Medical Center and the nine physicians in the joint venture or the Ambulatory Surgery Center in South Anchorage." Although the appeal was subsequently captioned "In the Matter of Providence Health System Alaska," appellant will variously refer to itself in this and other pleadings as "South Anchorage Ambulatory Surgery Center," as "ASC JV," or as the "Joint Venture."

The ASC JV letter of intent was filed on November 22, 2004. Ex. 2 (State's Discovery, p. 147). Subsequent to a request for additional information from the Department of Health and Social Services ("DHSS"), the CON application was submitted on May 5, 2005. Ex. 3 (State's Discovery, pp. 1-31). After various delays for various reasons, the public hearing on the CON application was not held until more than seven-and-one-half months later, on December 21, 2005. The staff review of the CON application, recommending denial, was publicly filed on January 6, 2006. Ex. 4 (State's Discovery, pp. 227-245). The Commissioner's decision of denial was made on January 19, 2006. Ex. 5 (State's Discovery, pp. 68-69).

During the more than eight-and-one-half months between the submission of the ASC JV CON application and the denial of the application, DHSS made requests for additional information; competing applications were submitted and then subsequently withdrawn; and DHSS adopted new CON regulations that substantially changed the methodology used in considering the ASC JV application.

As is evident from the three DHSS depositions submitted by the JV (Shelby Larsen, David Pierce and Alice Rarig), DHSS's review of the JV CON was deficient on a number of bases, including the following:

- The data relied upon, particularly with respect to the supply of operating rooms, was inadequate;
- DHSS did not understand, and thus failed to consider, differences in the class of operating rooms, such differences being potentially critical to consideration of the application;

- DHSS fundamentally failed to understand the nature of the proposed ASC JV;
- DHSS ignored the statutory mandate requiring it to consider issues involving quality, accessibility, and availability;
- DHSS misinterpreted the “general surgery services standards and methodology” that it recently adopted; and
- DHSS utilized a methodological formula that produced an obviously suspect (and absurd) result, which caused it to utilize an alternative, more sophisticated formula that produced a more rational result, and then ignored the more rational result.

STATUTORY/REGULATORY CON CONSTRUCT

AS 18.07.041 sets forth the standard of review for CON applications:

The department shall grant a sponsor a certificate of need or modify a certificate of need that authorizes beds other than nursing home beds or that is for a health care facility other than a nursing home if the **availability** and **quality** of existing health care resources or the **accessibility** to those resources is less than the current or projected requirement for health services required to maintain the **good health** of citizens of this state.

Emphasis added.

7 AAC 07.025. Standards for obtaining a certificate of need (a) To be approved by the commissioner under 7 AAC 07.070, a certificate of need application must

- (1) meet the applicable requirements of AS 18.07 and this chapter;
- (2) meet the standards and use the methodologies set out in the department’s document entitled *Alaska Certificate of Need Review Standards and Methodologies*, dated December 9, 2005, and adopted by reference; and
- (3) be submitted in accordance with 7 ACC 07.040.

(b) The department will recommend to the commissioner that an exception to one or more of the standards adopted by reference in (a)(2) of this section be

allowed if an applicant shows to the department's satisfaction that the availability, quality, or accessibility of existing healthcare services creates an unreasonable barrier to services in the service area. In recommending that an exception be allowed under this subsection, the department will document the applicant's allegations.

On December 9, 2005, new CON "review standards and methodologies" became effective. Those review standards contained a more formula-driven review standard for general surgery services than prior standards. See Ex. 6 at 30.

DISCUSSION

For various reasons, DHSS's review of the South Anchorage Ambulatory Surgery Center Joint Venture Certificate of Need application was chaotic and misinformed. The application was opposed by several competitive entities (for obvious reasons). A couple of those entities submitted competing applications, and later withdrew them; the effect – intended or otherwise – was to delay consideration of JV's CON. During the course of the application, the standards for review were substantially changed, and new methodologies adopted (with little or no notice to the JV as to the effect on its application). Significant staff changes were made at DHSS. Most notably, Alice Rarig was assigned for the first time as the principal staff person primarily responsible for DHSS's review of the instant CON. (Rarig deposition, p. 9, l. 5-14.) Ms. Rarig learned that DHSS did not even have reliable data on the number of operating rooms available in the Anchorage area; indeed, just days before the staff analysis of the CON application was published she was still scrambling to determine the relevant number. (Rarig deposition, p. 97, l. 12 – p. 98, l. 1) Neither Ms. Rarig (nor any other involved DHSS employee) ever did understand prior to consideration of the CON application that there were different classifications of

operating rooms (“ORs”), or that they were not all compatible with the ASC JV’s needs. (Rarig deposition, p. 31, l. 4-7; Pierce deposition, p. 32, l. 5-13; Larsen deposition, p. 15, l. 10-15) Ms. Rarig had virtually no understanding of the nature of the surgeries to be performed by the Joint Venture. (Rarig deposition, pp. 31-42) She understood her task to be purely quantitative (Rarig deposition, p. 15, l. 16-20), and did not consider any of the qualitative criteria required by AS 18.07.041.

Ms. Rarig was more statistically adept than her predecessor, David Pierce, and when she applied the new formula recently adopted by DHSS (Ex. 6 at 30) it produced a suspect result; indeed, it showed that over a seven year period there would only be a need for one more day-surgery OR in Anchorage.² So Ms. Rarig applied an alternative and superior “regression” analysis that better accounted for trends than the standard methodology that produced suspect results. DHSS published it in the CON staff analysis (Ex. 4, p. 11 column P),³ and then ignored it.

At the hearing the JV will present several of its physicians who will testify about the quality, accessibility and availability issues that were never considered by DHSS prior to the Commissioner’s denial of the application. The court will hear about the real world of day-surgery as it presently exists in Anchorage, both the difficulties and inefficiencies of scheduling orthopedic out-patient surgery at present. The physicians will testify about the advantages – both to patients and physicians – of a dedicated day-surgery operation. Those advantages

² Rarig deposition, p. 70, l. 7 – p. 71, l. 16; Ex. 4, p. iii.

³ The chart on p. 11 of Ex. 4 shows that by the year 2011 – which is five years from the projected date of completion of the proposed project – there will be a need for 3.5 additional ambulatory ORs, as contrasted to a surplus of 7.4 ORs using the standard methodology calculations.

include, for the patients, less exposure to infections, shorter surgeries, more appropriate use of anesthesia, more and better coordination between pain physicians and surgeons, lower costs, more reliability in scheduling, better teamwork and greater patient convenience.

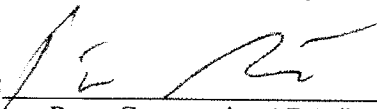
Despite the statutory mandate, none of those factors was considered by DHSS in its analysis.

In order to facilitate comprehension, the Joint Venture respectfully suggests that the court read the three DHSS depositions in the order in which they were taken: Shelby Larsen, David Pierce and Alice Rarig. The JV further respectfully asks the court to review those depositions on DVD so that the court can evaluate demeanor. The court can quickly review the 30(b)(6) depositions in any order, as the pertinent testimony is summarized in Ex. 1.

The parties have stipulated that the exhibits marked in any of the depositions are admitted. The parties have further agreed that they need not pre-mark any documents provided during the course of discovery that they intend to offer at the hearing.

DATED this 14 day of August, 2006, at Anchorage, Alaska.

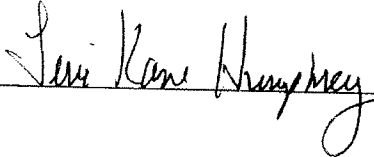
GRUENSTEIN & HICKEY
Attorneys for Providence Health System – Washington

By: 
Peter Gruenstein, ABA #7910079

Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by ~~mail~~ *email* ~~facsimile~~ this *12* day of August, 2006, on:

Stacie Kraly, Assistant Attorney General
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Center Joint Venture Pre-Hearing Brief
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STATE OF ALASKA
DEPARTMENT OF HEALTH AND SOCIAL SERVICES



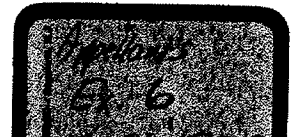
ALASKA CERTIFICATE OF NEED
REVIEW STANDARDS AND METHODOLOGIES



December 9, 2005

Frank H. Murkowski
Governor

Karleen K. Jackson
Commissioner



VIII. Surgical Care: Review Standards and Methodology

A. General Surgery Services

Review Standards

After determining whether an applicant has met the general review standards in Section I of this document, the department will apply the following service-specific review standard in its evaluation of an application for a certificate of need for general surgery services: The applicant demonstrates need in accordance with the following review methodology.

These review standards for general surgery services do not apply to (1) open-heart surgery subject to the standards in B of this section; (2) surgery suites dedicated to C-sections and other birth-related surgeries; or (3) surgery suites dedicated to LASIK or other eye surgery.

Review Methodology

The department will use the following formula to determine need for general surgery capacity:

► **STEP ONE:** Determine the projected general surgery caseload using the formula:

$$C = P \times \text{GSUR}$$

C (caseload) = the number of general surgery cases projected for the fifth year from the project implementation date. Cases refer to patients who may have one or more surgical procedures during a particular visit to the operating room. If the patient returns at a later date for additional services, the next visit will count as an additional case.

P (projected population) = the official state projected population in the fifth year following implementation of the project

GSUR (general surgery use rate) = defined as the average number of general surgery cases provided over the preceding three years per 1,000 (persons)

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**SOUTH ANCHORAGE AMBULATORY SURGERY CENTER
JOINT VENTURE'S WITNESS LIST**

Appellant, South Anchorage Ambulatory Surgery Center Joint Venture, hereby
submits its list of witnesses who will be called to testify at the hearing herein:

Thomas Vasileff, M.D.
Anchorage Fracture and Orthopedic Clinic
3260 Providence Dr., Suite 200
Anchorage, AK 99508
907-563-3145

Dr. Vasileff is an orthopedic surgeon and a member of the proposed joint venture who will
testify as to his practice and the benefits to his patients that would accrue from the operation of
the proposed joint venture.

Richard McEvoy, M.D.
Anchorage Fracture and Orthopedic Clinic
3260 Providence Dr., Suite 200
Anchorage, AK 99508
907-563-3145

Dr. McEvoy is an orthopedic surgeon and a member of the proposed joint venture who will
testify as to his practice and the benefits to his patients that would accrue from the operation of
the proposed joint venture.

Gregory Polston, M.D.
Advanced Medical Centers of Alaska
1917 Abbott Rd., Suite 100
Anchorage, AK 99507
907-248-2741

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South Anchorage Ambulatory Surgery Center
Joint Venture's Witness List
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Dr. Polston is an anesthesiologist specializing in pain management and a member of the proposed joint venture who will testify as to his practice and the benefits to his patients that would accrue from the operation of the proposed joint venture.

Jeremy Hayes, Assistant Administrator
Advanced Medical Centers of Alaska
1917 Abbott Rd., Suite 100
Anchorage, AK 99507
907-248-2741

Mr. Hayes will testify regarding the benefits of ambulatory surgery centers, health care trends, and the operation of Advanced Pain Centers of Alaska.

Susan Humphrey-Barnett, Area Operation
Providence Health System – Alaska
c/o Peter Gruenstein, Esq.
Gruenstein & Hickey
1029 W. 3rd Ave., Suite 510
Anchorage, AK 99501
907-258-4338

Ms. Humphrey-Barnett is the principal Providence Health System representative to the proposed joint venture and will testify concerning the formation, purpose, operation of and need for the proposed joint venture.

Colleen Bridge, R.N., Assistant Administrator of Affiliations and Partnerships

Gary Welch, R.N., Assistant Chief Nurse
Providence Health System – Alaska
c/o Peter Gruenstein, Esq.
Gruenstein & Hickey
1029 W. 3rd Ave., Suite 510
Anchorage, AK 99501
907-258-4338

Ms. Bridge and/or Mr. Welch and/or another qualified witness will testify concerning the present and historical use of Providence Alaska Medical Center operating rooms, particularly in relationship to orthopedic surgery, and will offer background evidence regarding the proposed joint venture.

Oliver Scott Goldsmith, Ph.D.
University of Alaska
3211 Providence Dr.
Anchorage, AK 99508
907-786-7710

Dr. Goldsmith is an expert economist and will testify concerning the statistical analyses and methodologies employed by DHSS in regard to the instant CON .

Alice Rarig
Alaska Department of Health and Social Services
c/o Stacie Kraly, Esq.
Department of Law
Box 110300
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See deposition.

David Pierce
Alaska Department of Health and Social Services
c/o Stacie Kraly, Esq.
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Box 110300
Juneau, AK 99801-0300
907-465-3600

See deposition.

Shelby Larsen
Alaska Department of Health and Social Services
c/o Stacie Kraly, Esq.
Department of Law
Box 110300
Juneau, AK 99801-0300
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See deposition.

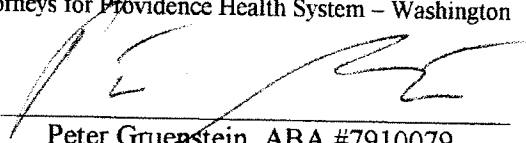
Rebuttal witnesses as necessary

Any witness listed on Alaska Department of Health and Social Services' witness list

Any witness necessary to address any new evidence raised at the hearing

DATED this 10 day of August, 2006, at Anchorage, Alaska.

GRUENSTEIN & HICKEY
Attorneys for Providence Health System - Washington

By: 
Peter Gruenstein, ABA #7910079

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Page 4

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Jim Kane Humphrey

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