

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

In the Matter of the South Anchorage)
Ambulatory Surgery Center Joint Venture) OAH No. 06-0152-DHS
_____)

NOTICE TRANSMITTING COMMISSIONER'S DECISION

Attached is the decision by the Commissioner of the Department of Health and Social Services in this matter. The decision includes a remand to department staff. Though the remand is effective immediately, under AS 44.62.520(a)(3) the effectiveness of the decision as a whole is stayed until **October 13, 2007**. Unless the commissioner issues a different final decision and order following from the remand prior to October 13, 2007, the attached decision and order will become final on that date, at which point the parties' rights to request reconsideration by filing a petition under AS 44.62.540 and to appeal to the superior court under AS 44.62.560 will attach, regardless of whether an additional notice concerning finality of the decision and order is distributed.

Further filings in this matter, including the report required under the remand, and any petition for reconsideration must be sent to the following address:

Office of Administrative Hearings
Attn. Commissioner of Dept. of Health & Social Services
P.O. Box 110231
Juneau, Alaska 99811-0231

At the same time, the filing party must send a copy of the filing or petition to the opposing party's legal counsel.

DATED this 5th day of July, 2007.

By: Neil Roberts
Neil Roberts
Office of Administrative Hearings

The undersigned certifies that this date an exact copy of the foregoing was provided to the following individuals:

Peter Gruenstein
Stacie Kraly, AAG
S. Rose
Emer Lindstrom (Courtesy Copy)
Signature Neil Roberts Date 7/05/07
via Email - Hard copy to follow by 1st class mail.

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DECISION AND ORDER

Pursuant to AS 44.64.060(e)(2)(3) & (5), I enter the following decision and order in the matter of the South Anchorage Ambulatory Surgery Center Joint Venture's appeal of my previous denial of its application for a certificate of need:

(1) the findings and conclusions in the May 24, 2007 proposed decision and order are hereby adopted, except as provided in (2) and (3) below;

(2) the conclusion in part III.B.2.i of the proposed decision and order that an exception can be allowed under 7 AAC 07.025 to use of the standard methodology for calculating need for general surgery services, and the interpretation of 7 AAC 07.025(b) embodied in that conclusion, are rejected for the reasons specified below;

(3) the conclusion in part III.B.3 of the proposed decision and order that a remand to the department's certificate of need staff is not the best remedy in this case is rejected for the reasons below;

(4) this matter is remanded to the department's certificate of need staff, which shall

(a) recalculate the need for additional general surgery operating rooms using the standard methodology but excluding from both the supply and demand projections such operating rooms, and the data on procedures performed in those rooms, as are unsuitable for general surgery,

(b) collect such additional information on existing and authorized future operating rooms as is necessary to perform the recalculation of need,

(c) evaluate whether one or more methodologies (including a trend analysis) other than the standard methodology would predict future need for general surgery services as well or better than the standard methodology such that it/they should be added to the approved methodologies in the *Alaska Certificate of Need Review Standards and Methodologies* document, and

(d) report to me in writing within 90 days after issuance of this decision and order the results of the recalculation and evaluation, and include recommendations on whether

(i) the joint venture's application to construct an ambulatory surgery center in South Anchorage should be approved in light of the recalculation using the standard methodology,

(ii) other methodologies should be approved for determining future need for general surgery services, and

(iii) the department's regulation would have to be amended (and if so, how) to allow use of such other methodologies in general and with regard to the joint venture's application;

(5) if within 45 days after issuance of this decision and order the department's certificate of need staff determines that the level of cooperation from facilities is insufficient to determine whether those facilities' operating rooms are suitable for general surgery, this matter is returned to the administrative law judge under AS 44.64.060(e)(2) for the limited purpose of issuing subpoenas and, if necessary, conducting a supplemental hearing to gather necessary information from uncooperative facilities and make appropriate findings;

(6) this decision and order shall become final for all purposes, including further appeals, 100 days after its issuance if I have not by then issued a final decision on the staff's recommendation required by (4)(d) above.

Department's Intent Regarding Exceptions Under 7 AAC 07.025. In adopting the exception language in 7 AAC 07.025(b), the department did not intend to allow exceptions to methodologies prescribed in the December 9, 2005 *Alaska Certificate of Need Review Standards and Methodologies* document incorporated by reference in the regulation. The text of the exceptions regulation itself (7 AAC 07.025(b)) allows exceptions only to "standards." Though the "Review Standards" paragraph under the General Surgery Services subpart, read literally, may suggest that the prescribed methodology is part of the standard, and thus that an exception to it can be made, the department's intent was and is to use (and require applicants to use) the prescribed methodology without exception.

The incorporated Standards and Methodologies document presently contains only one methodology for determining need for general surgery services. Over time, more methodologies

might be authorized for this or other service categories. To construe methodologies as indistinguishable from standards would be inconsistent with the possibility of multiple methodologies for a single standard. Use of the word “methodology” in the “Review Standards” paragraph, and even seemingly interchangeable use of words like “standards,” “methodologies” and “considerations” elsewhere in the document, should not be allowed to thwart the department’s intent. The Standards and Methodologies document was written by non-lawyers, for non-lawyers. Unlike the language of the 7 AAC 07 regulations themselves, the language of the incorporated technical document was not subjected to the same rigor as is applied to review of proposed regulations.

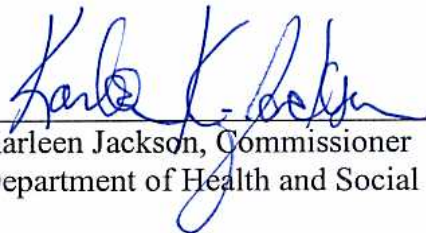
For these reasons, I conclude that the “Review Standard” in the General Surgery Services section of the Standards and Methodologies document does not itself contain a “methodology” for which a 7 AAC 07.025(b) exception can be allowed. Rather, the methodology prescribed under the heading “Review Methodology” (the so-called “standard methodology”) is the only methodology presently available for use in determining need for general surgery services.

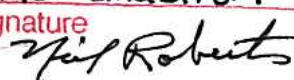
Remand on Suitability of Operating Rooms for General Surgery. The evidence brought out during the hearing showed that some of the operating rooms included in the staff’s calculation of need are not suitable for general surgery. For instance, while an endoscopic procedure could be performed in any class of operating room, a room designed specifically for endoscopic procedures may be too small or ill-equipped for many other general surgery procedures. The record developed by the parties through the hearing process, however, did not provide all of the information needed to definitively rule in or out each of the operating rooms staff included in its calculations.

The proposed decision concluded that a remand to answer such questions would not provide a better remedy than allowing a 7 AAC 07.025(b) exception to the methodology. Since I have rejected the proposed decision’s conclusion that such an exception is available, I am remanding this matter to the certificate of need staff to recalculate projected need with the unsuitable operating rooms excluded from the calculation on both the supply and demand sides. That is, if a particular operating room is found to be too small or otherwise unsuitable for general surgery, it will not be counted in the projection of future capacity and the number of procedures performed in that room during the three preceding years will not be counted when projecting future demand for surgery services.

The record shows that depositions were taken from representatives of several facilities to gather facts that might bear upon the suitability of the rooms at those facilities for general surgery procedures, but that some facilities may not have cooperated in the hearing-related information gathering effort. The department's certificate of need staff is instructed to try to work with facilities that previously have been non-responsive to requests for information, in an effort to fill information gaps. Facilities that do not cooperate may risk being barred from challenging certificate of need decisions with which they disagree.¹ If cooperation is not forthcoming within 45 days from the date of this order, staff is instructed to inform the administrative law judge and the joint venture of the need to resort to the additional proceedings described in paragraph (5) above.

DATED this 5th day of JULY, 2007.

By: 
Karleen Jackson, Commissioner
Department of Health and Social Services

The undersigned certifies that this date an exact copy of the foregoing was provided to the following individuals: Via Email - Hard copy to follow by 1ST CLASS MAIL
Peter Gruenstein
Stacie Kraly, AAG
S. Rose
Emer Lindstrom (Courtsey Copy)
Signature  Date 7/05/07

¹ If a person does not meaningfully participate in the administrative processes leading to an agency authorization of an activity, that person may be barred from objecting to the agency's authorization. *See, e.g., Trustees for Alaska v. State*, 865 P.2d 745, 748 (Alaska 1993) (citing the U.S. Supreme Court's meaningful participation rule from *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 (1978) when discussing whether interest group could raise an issue before the court).