

and participate as a full party, I decline to exercise such discretion and am limiting Mat-Su Regional's participation to that of an amicus for the following reasons:

- This case was referred to the Office of Administrative Hearings (OAH) after 2 AAC 64.180 took effect.³
- The referral was not contingent upon an agreement to use procedures that excluded OAH's own 2 AAC Chapter 64 regulations. Thus, 2 AAC 64.180 applies.⁴
- OAH's authority to allow intervention under 2 AAC 64.180(a) is limited to those cases in which an applicable statute or regulation provides for intervention.
- One purpose of that limit was to ensure that OAH did not overreach its mandate to develop *procedural* regulations, instead creating substantive rights that neither the legislature nor the agency with regulatory authority over the subject matter saw fit to create.
- If the department had intended to allow participation as a full party by persons who do not otherwise have the ability to appeal a certificate of need-related decision, it could have adopted a regulation providing for intervention, but it did not.
- Under circumstances such as in this appeal, if the administrative law judge were to permit a person to intervene in the absence of clear statutory or regulatory authority to do so, that would effectively make the intervenor a private attorney general, with the ability to pursue in the administrative appeal and through appeal to the courts what is for all practical purposes an enforcement action, and would thereby take the decision about who will represent the public interest in such actions away from lawmakers and regulatory agencies.

In sum, neither the lawmakers who enacted the certificate of need statutes, nor the regulatory agency charged with implementing them, decided that private parties should be able to assume the agency's role in determining whether a particular facility must apply for a certificate of need. Mat-Su Regional can play a role in this appeal, by providing information and making witnesses available to the department's counsel, just as it played the role of concerned citizen-competitor in initiating the inquiry about whether IAP's facility should be required to

³ The OAH regulations in 2 AAC Chapter 64 took effect July 2, 2006; the appeal was referred on October 20, 2006.

⁴ See 2 AAC 64.100(b)(3) (indicating that OAH's regulations apply to voluntary referrals unless a referral agreement between the referring agency and the chief administrative law judge provides otherwise).

obtain a certificate of need. In addition, Mat-Su Regional will be allowed to file amicus briefs as described above. It will not, however, be allowed to intervene as a party.

DATED this 16th day of November, 2006.

By: Signed
Terry L. Thurbon
Chief Administrative Law Judge

The undersigned certifies that on November ____, 2006, this order was distributed to the following: Peter Gruenstein, counsel for Imaging Associates of Providence; Stacie Kraly, Assistant Attorney General; Michael Spaan, counsel for Mat-Su Regional Medical Center. A courtesy copy was sent to Elmer Lindstrom, Office of the Commissioner.

Kim Rechin

[This document has been modified to conform to the technical standards for publication.]