DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, CO 80202	
IMPAIRED PROFESSIONAL DIVERSION PROGRAM d/b/a COLORADO NURSE HEALTH PROGRAM, Plaintiff, v. COLORADO DEPARTMENT OF REGULATORY AGENCIES, Defendant.	▲ **COURT USE ONLY** ▲
JOHN W. SUTHERS, Attorney General LINDA S. COMER, Senior Litigation Counsel* 1525 Sherman Street, 7th Floor Denver, CO 80203 303-866-5513 Registration Number: 11267 *Counsel of Record	Case No.: 08 CV 4924 Div.: 2

DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION AND PRIORITY SETTING

Comes now the Defendant, by and through counsel, and submits its response to Plaintiff’s Motion for Preliminary Mandatory Injunction.

I. CNHP’s Motion for Preliminary Injunction Should Be Denied Because the Relief Requested Is Inconsistent with the Purpose of a Preliminary Injunction.

The purpose of a preliminary injunction is to preserve the status quo and protect rights pending the final determination of a case on its merits. *McLean v. Farmers Highline Canal and Reservoir Co*., 98 P.16 (Colo. 1908), *Rathke v. McFarlane,* 648 P.2d 648 (Colo. 1982). CNHP is not seeking temporary or preliminary orders to preserve the status quo but a ruling on the merits of the underlying action. Rather than preserving the status quo, CNHP is seeking to change the status quo. CNHP seeks relief that is not available in the underlying

complaint: reinstatement of RFP SJN 0801, award of the contract to CNHP, and recovery of funds claimed to be due and owing (which is not at issue in the appeal of final agency action), and asserts a claim that is not asserted in the underlying complaint (equitable estoppel claim). Thus, the relief requested in CNHP's motion is inconsistent with the purposes of a preliminary injunction.

Further, the power of the courts to order executive agencies to take any action is extremely limited. Injunctive relief is generally not available against an administrative agency performing its delegated duties. *Department of Transportation v. Auslander*, 94 P.3d 1239, 1243-1244 (Colo.App.2004). *See also Jones v. Colorado State Board of Chiropratic Examiners,* 874 P.2d 493 (Colo.App.1994).

> Because injunctive relief against a branch of government constitutes a form of judicial interference, courts are generally reluctant to grant such relief. Such judicial deference is based on the doctrine of separation of powers which serves to restrain one government branch from usurping or restraining the proper exercise of the powers of another branch. Injunctive relief against a branch of government should be granted sparingly and with full conviction on the part of the trial court of its urgent necessity.

Board of County Commissioners of Eagle County v. Fixed Based Operators, 930 P.2d 464, 467-468 (Colo.App.1997). DORA had the duty to obtain a vender to provide the services required by statute through a competitive bidding process. DORA was performing its duties in issuing Requests for Proposal (RFP) and selecting a vender in accordance with the RFP. Here, CNHP is seeking a mandatory preliminary injunction ordering DORA to reinstate the award of the nurse diversion program to CNHP, execute a contract with CNHP, and fund the contract with moneys allegedly held by DORA for the benefit of CNHP. Implicit in this is an order to terminate the existing contract with PAS, as both contracts cannot be funded. Therefore, this court should exercise judicial restraint and deny the motion for preliminary injunction.

The injunction should be denied because CNHP had an avenue to obtain a stay of the issuance of a contract to Peer Assistance Services (PAS) under the Administrative Procedure Act, C.R.S. § 24-4-106 (APA) and failed to do so. Pursuant to section (5), an aggrieved party may seek a postponement of agency action pending judicial review upon application to the agency or the reviewing court and a finding that irreparable injury would otherwise result. Such relief requires the posting of security, and CNHP will likely argue that it lacked the funds to pursue this remedy and that DORA failed to give it notice of its right to appeal under the APA. However, the latter argument is undermined by the inclusion of a review pursuant to the APA in the underlying complaint. There is no provision in the APA that requires DORA to advise a represented party of its rights under the statute. It is obvious from the record that CNHP has been represented by counsel throughout the proceedings giving rise to the underlying complaint. Thus, the failure of DORA to expressly advise

CNHP of its right to appeal the denial of the protest of the award to PAS does not excuse CNHP from seeking emergency relief under the APA prior to the execution of the contract with PAS.

II. CNHP's Motion for Preliminary Injunction Should Be Denied Because It Has Not Met the Prerequisites for the Issuance of a Preliminary Injunction.

The prerequisites for the issuance of a preliminary injunction pursuant to Rule 65 C.R.C.P. are:

a) a reasonable probability of success on the merits;

b) a danger of real, immediate, and irreparable injury which may be prevented by injunctive relief;

c) that there is no plain, speedy, and adequate remedy at law;

d) that the granting of a preliminary injunction will not disserve the public interest;

e) that the balance of equities favors the injunction; and

f) that the injunction will preserve the status quo pending a trial on the merits.

Rathke, supra, at 653-54 (internal citations omitted).

A. Plaintiff does not have a reasonable probability of success on the merits

Plaintiff's underlying complaint contains two claims for judicial review of final agency action. The final agency action at issue is the denial of Plaintiff's protest of the award of a contract to provide a nursing peer assistance program or nurse alternative to discipline program to Peer Assistance Services, Inc. The first claim for relief appears to be predicated on the State Procurement Code, C.R.S. § 24-109-205, and the second claim alleges that the award of the contract to PAS was in violation of the Administrative Procedure Act, C.R.S § 24-4-106. The claims are procedurally inconsistent and mutually exclusive, as judicial review under the Procurement Code is trial de novo*,* and the review under the Administrative Procedure Act is limited to record review pursuant to C.R.S.§ 24-4-106(6). Further, C.R.S. § 24-109-205 specifically states that the provisions of CRS § 24-4-106 do not apply to an appeal pursuant to that statute. CNHP cannot pursue both in the underlying action. DORA contends CNHP's only avenue of appeal is pursuant to the APA. The relevant facts are set out in DORA's Counterclaim for Temporary Restraining Order and Preliminary Injunction and are incorporated herein by reference.

1. The Contract at issue is not subject to the Procurement Code

A state contract is subject to the Procurement Code only if it is publicly funded. C.R.S. 24-101-105(1). The contract at issue is exempt from the Procurement Code, as it not publicly funded. The legislature makes no appropriations to fund the impaired nurses program. The funds come from the registration fees paid by the nurse licensees. The monies do not enter the state treasury and are not controlled by a state agency. The funds to support the program are administered by a private entity, the National Council of State Boards of Nursing. The Requests for Proposal ("RFP") state up front that the solicitation is exempt from the Procurement Code. *See* Exhibit 4 to Derozier affidavit, Exhibit 1 to Plaintiff's Motion for Preliminary Injunction, and Exhibit 3 to Defendant's Counterclaim for Temporary Restraining Order and Preliminary Injunction. All the other health care professional peer assistance programs are funded the same way and the contracts to provide those services are also exempt from the Procurement Code. *See* informal Attorney General Opinion attached hereto as Exhibit 1 and letter from Procurement Analyst Lorraine C. Burger, attached hereto as Exhibit 2.

The fact that competitive bidding is required in reenacted C.R.S. § 12-38-131(3)(a) does not convert the contract into a publicly funded one. The funding source remains the same. However, the requirement for competitive bidding necessitated a change in the solicitation procedure. The Defendant can hardly be faulted for looking to the Procurement Code for guidance, as the competitive bid process is described and defined in the Procurement Code. See letter of Rico Munn, Executive Director of the Department of Regulatory Agencies, to CNHP's counsel dated June 4, 2008, Exhibit No. 23 to Marjorie Derozier affidavit, Exhibit 1 to Plaintiff's motion for preliminary injunction. The incorporation of some of the provisions of the Procurement Code in the Requests for Proposal was reasonable and prudent but does not alter the funding status of the contract. Because the contract at issue is not subject to the Procurement Code, CNHP is not entitled to an appeal and trial de novo pursuant to C.R.S § 24-109-205 and has no chance of success on the merits of an appeal under the Procurement Code.

Even if this court accepts CNHP's argument that the Procurement Code is applicable, that does not improve the likelihood of success on the merits. RFP SJN 0801 clearly states that it may be cancelled at any time if it is in DORA's best interests. Thus CNHP was on notice of possible cancellation at any time when it submitted its proposal to RFP SJN 0801. CNHP had the opportunity to submit questions to DORA regarding the contents of the RFP but elected not to do so. (The procurement file for RFP SJN 0801 contains questions from PAS but none from CNHP.) The terms of the RFP are contractual in nature, and CNHP accepted the cancellation terms when it submitted its proposal in response to RFP SJN 0801.

Further, the Procurement Code does not allow the relief requested by Plaintiff in its motion for preliminary injunction. CNHP is asking this court to set aside the contract award to Peer Assistance Services ("PAS"), thereby cancelling an existing contract. CNHP is also asking that the contract be awarded to it. This relief is not available in a judicial review pursuant to the Procurement Code. Pursuant to C.R.S. § 24-109-104, the exclusive remedy available to an unsuccessful bidder who prevails on a protest or judicial appeal is an award of its reasonable costs incurred in connection with the solicitation, including bid preparation cost. Thus, if the Procurement Code applies, this court cannot award the relief requested by Plaintiff, and the motion for preliminary injunction must be denied.

2. Plaintiff does not have a reasonable probability of success on its appeal pursuant to the Administrative Procedure Act

With respect to the appeal of the agency action pursuant to the Administrative Procedure Act, CNHP has a heavy burden. Administrative proceedings are accorded a presumption of validity and regularity, and all reasonable doubts as to the correctness of administrative rulings must be resolved in favor of the agency. *Wildwood Child and Adult Care Program, Inc. v. Colorado Department of Public Health and Environment,* 985 P.2d 654, (Colo.App.1999). Agency action must be affirmed unless the court finds that the agency exceeded its constitutional or statutory authority, made an erroneous interpretation of law, acted in an arbitrary and capricious manner, or made a determination that is unsupported by the evidence in the record. C.R.S. § 24-4-106(7), *id.* The standard of review for agency action pursuant to the Administrative Procedure Act is reasonableness. Under this standard, a court must ensure that the agency action is the product of reasoned decision-making and fairly defensible in light of the data considered by the agency at the time the action or decision was made. However, the court may not substitute its judgment for that of the agency. *Brown v. Colorado Ltd. Gaming Control Commission,* 1 P.3d 175 (Colo.App.1999), *Colorado Ground Water Com'n v. Eagle Peak Farm, Ltd.,* 919 P.2d 212 (Colo. 1996). An agency's construction of its own governing statute is entitled to great weight. *Mile High Greyhound Park, Inc. v. Colorado,* 12 P.3d 351 (Colo.App.2000).

CNHP bases its APA appeal on DORA's alleged failures to comply with the provisions of C.R.S. § 12-38-131 and provisions of the Procurement Code. CNHP claims DORA violated subsection 3(a) of C.R.S.§ 12-38-131 because it included some but not all of the procedural and substantive requirements of the Procurement Code in the RFP process. That assumes DORA was legally required to follow the Procurement Code in its entirety, which DORA disputes. As set forth in section II A 1 of this response, this argument lacks merit, as the requirement of competitive bidding did not change the method of funding and does not make the contract at issue subject to the Procurement Code.

CNHP claims C.R.S. § 24-103-202(7) requires that a contract be tendered with reasonable promptness. That is not what it says. It says the written notice of the award shall be given with reasonable promptness. CNHP is not challenging the timeliness of the notice of intent to award a contract to CNHP for RFP SJN 0801, only the timing of the issuance of the contract pursuant to the notice. The RFP was issued on August 7, 2007, with a proposal submission deadline of September 7, 2008. The notice of intent to award was issued six to seven weeks later, on October 22, 2007. Thus, according to CNHP, a six-week gap between the receipt of the proposal and the notice of intent to award is reasonable promptness under the statute. The award letter went out on October 22, 2007, and the notice of cancellation of RFP SJN 0801 was dated January 7, 2008, a period of approximately ten weeks with three intervening holidays. CNHP did not wait for months as implied in its motion. It is common knowledge that state contracts take time. The scope of work to be incorporated into the contract had to be drafted to comply with the statutory changes. The drafting of a state contract and the approval process take time. A period of slightly over two months is not unreasonable, given the intervening holidays and the need to comply with new statutory language. Further, CNHP was compensated for its services during that time and beyond. See affidavit of Mark Merrill, attached hereto as Exhibit 3. Plaintiff has stated no facts to support an intentional delay or bad faith in the drafting of the contract.

CNHP claims DORA violated the Procurement Code because the cancellation of RFP 0801 cannot possibly be considered to be in DORA's best interests. The cancellation of RFP SJN 0801 is not properly before this court. CNHP waived any claimed right to challenge the cancellation of RFP SJN 0801 by submitting a bid in response to RFP SJN 0803. Waiver can be demonstrated by a party engaging in conduct that manifests its intent to relinquish a right or is inconsistent with its assertion. *Ross v. Old Republic Insurance Co.,* 134 P.3d 505 (Colo.App.2006). The final agency action under review is the denial of CNHP's protest of the award of a contract to PAS pursuant to RFP SJN 0803.

In the event this court determines the cancellation of RFP SJN 0801 is properly before it, the claims of CNHP are without merit. Presumably, DORA is in the best position to determine what is in its own best interests. DORA determined RFP SJN 0801 was flawed because it did not correctly identify the population to be served. That is an obvious fundamental flaw that justifies the cancellation of the RFP. New licensees pay into the program as a condition of licensure and are entitled to receive services provided by the diversion program. See Exhibit 3, Merrill affidavit. CNHP claims C.R.S. § 12-38-131 only allows program fees to be collected from renewal applicants, despite the statutory requirement that fees be paid as "a condition of licensure" in subsection (1). According to CNHP, the omission of the new applicant population was not a valid reason to cancel RFP SJN 0801 because the new applicants do not pay into the program. This is somewhat disingenuous, because CNHP had been servicing new applicants as part of the program for many years, and a portion of its compensation was derived from new applicant fees. The

statute may be somewhat ambiguous, but DORA's interpretation is reasonable and thus is entitled to deference.

CNHP claims it was the low bidder on RFP SJN 0801 and thus cancellation could not be in DORA's best interests. That is not true. PAS was the low bidder. CNHP's bid was based only on State Board of Nursing funding. In contrast, PAS's bid was based on State Board of Nursing funding and solicited matching funds from sources outside the State Board of Nursing. The overall cost of its proposal was higher than CNHP's, but the amount of funding required from the State Board of Nursing was lower. *See* CNHP bid in response to RFP 0801, attached hereto as Exhibit 4, and PAS bid in response to RFP SJN 0801, attached hereto as Exhibit 5. CNHP is defeated by its own argument. A lower bid is obviously in DORA's best interest.

CNHP also claims that DORA violated the Procurement Code procedures for competitive sealed proposals by allowing PAS access to confidential portions of CNHP's proposal in response to RFP SJN 0801, after the notice of intent to award was sent out. This argument fails for a number of reasons. First, CNHP did not follow the procedures specified in the RFP for the designation and determination of confidential information. *See* section 1.12 of RFP SJN 0801, Exhibit 1 to DORA's counterclaim for injunctive relief (also Exhibit 4 to Derozier affidavit), and Munn letter denying protest of award of RFP SJN 0803 to PAS, Exhibit 22 to Derozier affidavit. CNHP did not submit a written request for confidentiality with its proposal, stating specifically what elements of the proposal were to be considered confidential and the statutory basis for the request. Thus, the purchasing office had no obligation to make a written determination of the validity of a request. Any confidential proprietary information had to be readily identified, marked and separated/packaged from the rest of the proposal. The RFP clearly stated that the proposal and proposal price information will not be considered confidential and proprietary, and the commingling of confidential and non-confidential information is not accepted.

Despite this pronouncement, CNHP filed its proposal's price information in a sealed envelope with its statement of revenue and expenses. Assuming the statement of revenue and expenses could be considered confidential, confidentiality was waived by failure to comply with the RFP requirements. Of note, CNHP has not disclosed in its motion that it was allowed access to PAS's bid and financials for RFP SJN 0801 prior to submitting its bid on RFP SJN 0803. Therefore, PAS was not given an unfair advantage in its submission in response to RFP SJN 0803. Contrary to CNHP's contention, PAS's bid on State Board of Nursing Funds on RFP SJN 0803 was not lower than its bid on those funds in RFP SJN 0801. See PAS bid on 0803, attached hereto as Exhibit 6.

CNHP claims the scoring for RFP SJN 0803 was profoundly flawed because PAS copied CNHP's responses to the technical requirements of RFP 0801. When the responses to

4.1.a of the technical requirements are compared, there is no evidence of copying of the substantive responses, although there is some similarity in the format. The same is true with respect to the PAS's responses to 4.1.b, 4.1.c and 4.1.d., etc. The forms allegedly copied by PAS after review of CNHP's proposal for RFP SJN 0801 were included in PAS's response to RFP SJN 0801. If the forms were copied from CNHP, it was not because DORA allowed PAS access to CNHP's proposal.

CNHP is simply in error in its criticism of the scoring of the management section of RFP SJN 0803. The rater score sheets have four different categories for evaluation. The maximum score for each category is four, and the maximum final numerical score is 16. Each score sheet has an overall score that is derived form the ratings on the individual items that are components of the category (the average of the individual scores). See score sheets for vender number 2 on RFP SJN 0803, attached hereto as Exhibit 7. In its motion, CNHP identifies the management section as 5.1.1. The management section is actually 5.3.3. Section A of 5.3.3 asks the offerror how it will meet the requirements set out in section 4.2, the technical section. Section 4.2 has subparts a-e. Section A scores the individual components and B-D are evaluated in the overall score. Sections B-D are not omitted or excluded from the scoring.

CNHP claims RFP SJN 0803 requested less information than RFP SJN 0801. That is not true. The scope of work was expanded from two pages to four pages, and the reporting requirements were increased. The population to be served was expanded to include new nurse applicants, and a more detailed numerical rating system was put in place. The evaluators were given more detailed information regarding the evaluation process, and more financial information was required of the bidders.

3. **CNHP cannot succeed on its claim of equitable estoppel**

CNHP's claim that DORA is estopped from rescinding the award of RFP SJN 0801 is without merit. First, equitable estoppel is not asserted as a claim for relief in the underlying complaint and second, the cancellation of RFP 0801 is not properly before the court. CNHP claims DORA intentionally misled it about the status of the contract for RFP SJN 0801, induced it to rely on the award of the contract by issuance of the Notice of Intent to Award, made misrepresentations as to the status of the contract and concealed material facts. These allegations make this an equitable estoppel claim, rather than a promissory estoppel claim. A claim for equitable estoppel is based on misstatements of fact or other misrepresentation by a government agency or its employees. *Allen Homesite Group v. Colorado Water Quality Control Commission* 19 P.3d 32, (Colo.App.2000).

CNHP asserts that equitable estoppel has been applied and upheld against governmental entities in order to prevent manifest injustice. The only case cited by CNHP in

support of this contention is *Jones v. City of Aurora*, 772 P.2d 645 (Colo.App.1988). That is an oversimplification of the law. A party generally cannot state a claim for relief under a theory of equitable estoppel against a governmental entity acting in its governmental capacity. *Boeheim v. Indus. Claim Appeals Office,* 23 P.3d 1247 (Colo.App.2001).

More recent cases hold that equitable estoppel is a tort claim or a claim that could be asserted in tort and thus is barred by the Governmental Immunity Act. *Board of County Commissioners of Summit County v. DeLozier*, 917 P.2d 714 (Colo. 1996), *Allen Homesites Group, supra, Robinson v. Colorado State Lottery Division,* 179 P.3d 998 (Colo. 2008). In determining whether a claim lies in tort or could lie in tort, the court must consider both the nature of the injury and the relief sought. "When the injury arises either out of conduct that is tortious in nature or out of the breach of a duty recognized in tort law and when the relief seeks to compensate the plaintiff for that injury , the claim likely lies in tort or could lie in tort for the purposes of the CGIA." *Id.,* 1004. When a claim could arise both in tort and contract, it is barred by the Governmental Immunity Act. *Id.,* 1005. A claim based on allegations of misrepresentations of fact is clearly based in tort. CNHP claims it was injured by the misrepresentations, presumably of some employee of DORA although not identified, and hired new staff based on the assurances of a contract. The nature of the injury is economic and the relief sought is also economic.

CNHP may seek to avoid the governmental immunity bar by labeling the claim as one based on promissory estoppel. However, it cannot prove it justifiably relied on a promise of a contract for RFP SJN 0801. CNHP implies that the notice of intent to award was a promise to award a contract to CNHP; however, the notice clearly states that the successful bidder has no property rights until a contract is signed. See Notice of Intent to Award, Exhibit 10 to Derozier affidavit. Given this warning, CNHP cannot prevail on a claim for promissory estoppel or prove it was justified in hiring any additional staff or taking any other action to its detriment prior to the execution of a contract. Further, CNHP has provided no proof of detrimental reliance other than vague allegations of hiring additional staff with no supporting documentation. The fact that Plaintiff continued to provide services through June 30, 2008 is not an example of detrimental reliance, as Plaintiff received full payment for the services it provided through June 30, 2008, in accordance with the budget it submitted to the State Board of Nursing. CNHP never had a written contract during its thirteen years of service. It was paid pursuant to the annual budget it submitted to the Board of Nursing. See Exhibit 3, affidavit of Mark Merrill dated July 25, 2008.

B. Prevention of irreparable harm

It is unfortunate that CNHP has no other clients and thus may be forced to close its operations because it did not win the impaired nurse program contract. That is the result of the way CNHP chose to operate its business. It is obvious from the motion and the exhibits that CNHP knew since the 2007 legislative session and the proposed statutory changes that it

was likely to encounter competition for the award of the contract but apparently did not develop a contingency plan. It did not seek relief pursuant to the APA when a stay might have provided it relief. There is no evidence in the record of a request for a stay of the execution of the contract. The relief requested cannot be granted now. Any harm to the public can be prevented by CNHP honoring the releases for the client records.

C. CNHP had/has a plain, speedy and adequate remedy at law.

As discussed previously, CNHP had a remedy under the APA but failed to pursue it. CNHP asserted a claim for money damages in the underlying complaint which it voluntarily dismissed. Thus, it can hardly claim it had no plain, speedy and adequate remedy at law. *See Schrier v. University of Colorado*, 427 F.3d 1253, 1266-1267 (10th Cir., 2005).

D. The entry of a Preliminary Injunction will disserve the public interest

The risk to the public identified by CNHP can be prevented by its agreeing not to destroy any records pending the resolution of its appeal and by releasing records to a new, designated provider. There is absolutely no reason to destroy records pending the appeal. However, this is not the real issue. PAS has a valid enforceable contract to provide services to impaired nurses effective July 1, 2008. PAS is being paid to provide those services. DORA has no obligation to pay CNHP to continue to provide services during the pendency of the appeal but is obligated to pay PAS. The public is best served by not exposing DORA to conflicting obligations and exposing DORA to potential claims for breach of contract.

E. The balance of equities does not favor the entry of an Injunction

CNHP claims the equities are in its favor because DORA is holding money that is obligated to CNHP that can be used to fund CNHP's continued operations during the pendency of the appeal. DORA and the National Counsel of State Boards of Nursing are not holding funds earmarked or required to be distributed to CNHP. CNHP is no longer the statutory provider of the program. CNHP has always been paid pursuant to the budget it submits, not on how much money is collected. It has received that budget in its entirety. Money in the fund is obligated to the new program provider, PAS, who is providing services to the impaired nurse population.

F. Issuance of the Injunction will not preserve the status quo

The status quo is determined as of the date of the filing of the motion for preliminary injunction. The status quo is that PAS has a contract to provide the impaired nurse program and CNHP does not. The status quo is that the administering entity is obligated to pay PAS

from the impaired nurse fund. It has no obligation to pay CNHP. Issuance of the injunction will alter the status quo.

III. CNHP Is Required To Post a Bond.

Rule 65 C.R.C.P requires the posting of a bond. CNHP is not entitled to a nominal bond. If the court decides to issue a preliminary injunction and grant the relief requested, the bond must be sufficient to cover the additional financial costs. As set forth above, DORA is not holding any money that belongs to CNHP.

IV. CNHP Has Not Complied with the Provisions of Rule 121 § 1-15-C.R.F.P.

Rule 121 § 1-15 mandates that all motions shall contain a certificate of compliance with the duty to confer. CNHP's motion does not include the required certification or a statement as to why no conference occurred. The fact that a conference is unlikely to resolve the matter does not negate this affirmative duty. Thus, its motion for preliminary injunction should be denied.

Conclusion.

CNHP is not entitled to a trial de novo in the underlying case because the contract at issue is not subject to the Procurement Code. This motion is obviously an attempt to obtain a trial de novo on the merits of the underlying appeal of agency action and the cancellation of RFP SJN 0801. The relief requested in this motion is not consistent with purpose of a preliminary injunction. A preliminary injunction will not preserve the status quo, and CNHP does not have a reasonable probability of success on the merits of the underlying appeal.

Respectfully submitted this 25th day of July, 2008.

JOHN W. SUTHERS
Attorney General

E-filed pursuant to C.R.C.P. 121 1-26. A duly signed original is on file at the Colorado Department of Law.

/s/

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CERTIFICATE OF SERVICE

I do hereby certify that on the 25th day of July 2008, a copy of the foregoing **DEFENDANT'S RESPONSE TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION AND PRIORITY SETTING** was mailed, First Class U.S. postage prepaid, as follows:

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A duly signed original is on file at the Colorado Department of Law.

/s/_________________________________