

**WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION**

Form #8

Do Not Mark In This Box
Filing Date

FILED
JUN 7 4 20 PM '00

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

Effective Date

NOTICE OF AN EMERGENCY AMENDMENT TO AN EMERGENCY RULE

AGENCY: Alcohol Beverage Control Commissioner TITLE NUMBER: 175

DATE EMERGENCY RULE WAS ORIGINALLY FILED: May 1, 2000

FIRST EMERGENCY AMENDMENT TO AN EXISTING RULE: YES X NO

SECOND EMERGENCY AMENDMENT TO AN EXISTING RULE: YES NO X

DATE OF FIRST EMERGENCY AMENDMENT: June 7, 2000

SERIES NUMBER OF RULE: 7

TITLE OF RULE: Licensing of Exotic Entertainment Facilities

THE ATTACHED IS AN EMERGENCY AMENDMENT TO AN EXISTING EMERGENCY RULE. THIS EMERGENCY AMENDMENT BECOMES EFFECTIVE AFTER APPROVAL BY SECRETARY OF STATE OR 42ND DAY AFTER FILING, WHICHEVER OCCURS FIRST.

THE FACTS AND CIRCUMSTANCES CONSTITUTING THE EMERGENCY AMENDMENT ARE AS FOLLOWS:

See Page 2.

Use additional sheets if necessary


Authorized Signature

SCANNED

**Alcohol Beverage Control Commissioner
Proposed Emergency Legislative Rule
TITLE 175, SERIES 7
Licensing of Exotic Entertainment Facilities
NOTICE OF AN EMERGENCY AMENDMENT TO AN EMERGENCY RULE**

Page 2

**THE FACTS AND CIRCUMSTANCES CONSTITUTING THE EMERGENCY
AMENDMENT ARE AS FOLLOWS:**

An ABCC adopted emergency legislative rule was filed in the Secretary of State's office on May 1, 2000, and on June 2, 2000 the Secretary of State advised the Alcohol Beverage Control Commissioner that the proposed rule, as submitted, contained three areas of concern for which it would disapprove the proposed rule. This disapproval would be based upon a determination by the Secretary of State that, as to those areas of concern, the ABCC's statutory authority had been exceeded. Thereafter, the ABCC agreed to amend the proposed rule: (1) by removing all references to "modified-exotic entertainment"; (2) by removing all references to the use of "Visual Displays" on licensed premises; and (3) by removing the words "Violate any reasonable rule of the commissioner" from subsection 5.9 of the proposed emergency rule. The Secretary of State agreed to accept the making of these amendments as constituting a correction of the deficiencies with which it had concern.

**WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION**

Form #7

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Filing Date

FILED

MAY 1 3 35 PM '00

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

Effective Date

NOTICE OF AN EMERGENCY RULE

AGENCY: Alcohol Beverage Control Commission TITLE NUMBER: 175

CITE AUTHORITY: W. Va. Code §§29A-3-15 & 60-4-23(h)

EMERGENCY AMENDMENT TO AN EXISTING RULE: YES NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: 7

TITLE OF RULE BEING PROPOSED: Licensing of Exotic Entertainment Facilities

THE ABOVE RULE IS BEING FILED AS AN EMERGENCY RULE TO BECOME EFFECTIVE AFTER APPROVAL BY SECRETARY OF STATE OR 42ND DAY AFTER FILING, WHICHEVER OCCURS FIRST.

THE FACTS AND CIRCUMSTANCES CONSTITUTING THE EMERGENCY ARE AS FOLLOWS:

Use additional sheets if necessary


Authorized Signature

STATE OF WEST VIRGINIA
ALCOHOL BEVERAGE CONTROL COMMISSION

TITLE 175 - SERIES 7

**STATEMENT OF FACTS AND
CIRCUMSTANCES CONSTITUTING THE EMERGENCY**

The Legislative Rule filed herein, as an emergency rule, had to become effective before it could complete the full legislative cycle.

This rule explains and clarifies the impact of Enrolled Committee Substitute For Senate Bill No. 415 which was enacted on March 11, 2000 and made effective from passage. The main thrust of this Act is to require the Alcohol Beverage Control Commissioner to regulate and license exotic entertainment in a manner to place a prohibition on any additional exotic entertainment facilities in the State after July 1, 2000. The Act also makes the operation of unlicensed exotic entertainment facilities a criminal offense.

The Legislature mandated that an Emergency Legislative Rule has to be filed by the Commissioner on or before May 1, 2000 and that the Commissioner has to propose a legislative rule therefore for consideration by the Legislature prior to December 31, 2000.

Applications for an Exotic Entertainment Facility have to be submitted to the Commissioner on or before July 1, 2000, and, thereafter no such application may be received by the Commissioner.

The short time frame within which the licensing procedure has to be accomplished necessitates the filing of an emergency legislative rule.



EMERGENCY RULE QUESTIONNAIRE

DATE: May 1, 2000

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: (Agency Name, Address & Phone No.) Alcohol Beverage Control Commission

322 70th Street, S.E.

Charleston, WV 25304

EMERGENCY RULE TITLE: Licensing of Exotic Entertainment Facilities

1. Date of filing May 1, 2000

2. Statutory authority for promulgating emergency rule:
W. Va. Code §§60-4-23(h) & 29A-3-15

3. Date of filing of proposed legislative rule: _____

4. Does the emergency rule adopt new language or does it amend or appeal a current legislative rule? Adopts new language

5. Has the same or similar emergency rule previously been filed and expired?
No

6. State, with particularity, those facts and circumstances which make the emergency rule necessary for the **immediate** preservation of public peace, health, safety or welfare.
None. Legislation mandated the filing of an emergency rule on or before May 1, 2000 in Enrolled Committee Substitute For Senate Bill 451.

7. If the emergency rule was promulgated in order to comply with a time limit established by the Code or federal statute or regulation, cite the Code provision, federal statute or regulation and time limit established therein.

W Va Code § 60-4-23(h) mandates that Emergency Legislative Rule has to be filed on
or

before May 1, 2000.

8. State, with particularity, those facts and circumstances which make the emergency rule necessary to prevent substantial harm to the public interest.

None.



QUESTIONNAIRE

(Please include a copy of this form with each filing of your rule: Notice of Public Hearing or Comment Period; Proposed Rule, and if needed, Emergency and Modified Rule.)

DATE: May 1, 2000

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: (Agency Name, Address & Phone No.) Alcohol Beverage Control Commission
Department of Tax & Revenue, 322 70th Street, S. E.
Charleston, WV 25304
Telephone (304)558-2481

LEGISLATIVE RULE TITLE: Title 175 - Series 7. Licensing of Exotic
Entertainment Facilities

1. Authorizing statute(s) citation W. Va. Code §§60-4-23(h) and 29A-3-1, et seq.

2. a. Date filed in State Register with Notice of Hearing or Public Comment Period:
May 5, 2000

- b. What other notice, including advertising, did you give of the hearing?
Class II Legal Advertisement in the Charleston Gazette and the
Charleston Daily Mail. Announcements during public meetings of
the state retail liquor licensing board. Press releases.
Reporters interviews with ABC Commissioner Donald L. Stemple.
ABCC web site: www.state.wv.us/abcc

- c. Date of Public Hearing(s) *or* Public Comment Period ended:
June 1, 2000

- d. Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments.

Attached _____ No comments received _____

e. Date you filed in State Register the agency approved proposed Legislative Rule following public hearing: (be exact)

f. Name, title, address and phone/fax/e-mail numbers of agency person(s) to receive all *written correspondence* regarding this rule: (Please type)

Gene Hal Williams, West Virginia Alcohol Beverage Control

Commission, 322 70th Street, S.E., Charleston, WV 25304.

Telephone 304/558-2481 Extension 206; Fax 304/558-0081.

E-mail: gwilliams@abcc.state.wv.us.

g. **IF DIFFERENT FROM ITEM 'f'**, please give Name, title, address and phone number(s) of agency person(s) who wrote and/or has responsibility for the contents of this rule: (Please type)

3. If the statute under which you promulgated the submitted rules requires certain findings and determinations to be made as a condition precedent to their promulgation:

a. Give the date upon which you filed in the State Register a notice of the time and place of a hearing for the taking of evidence and a general description of the issues to be decided.

N/A

b. Date of hearing or comment period:

N/A

c. On what date did you file in the State Register the findings and determinations required together with the reasons therefor?

N/A

d. Attach findings and determinations and reasons:

Attached N/A

□
APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: TITLE 175 -SERIES 7

Type of Rule: Legislative Interpretive Procedural

Agency: WV Alcohol Beverage Control Adm.

Address: 322 70th St. SE

Charleston, WV 25304

1. Effect of Proposed rule:

	ANNUAL FISCAL YEAR				
	INCREASE	DECREASE	CURRENT	NEXT	THEREAFTER
ESTIMATED TOTAL COST			\$15,000	-0-	-0-
PERSONAL SERVICES			-0-	-0-	-0-
CURRENT EXPENSE			-0-	-0-	-0-
REPAIRS & ALTERATIONS			-0-	-0-	-0-
EQUIPMENT			-0-	-0-	-0-
OTHER			-0-	-0-	-0-

2. Explanation of Above Estimates:
Contracted Attorney cost of preparation of Emergency Legislative Rule.

3. Objectives of These Rules:
a. To permit the Commissioner, ABCA, to issue Exotic Entertainment licenses to ABCA clubs in WV and to control that activity. b. To collect license fees of approximately \$180,000 annually.

4. Explanation of Overall Economic Impact of Proposed Rule:

A. Economic Impact on State Government:

\$180,000. income in license fees.

B. Economic Impact on Political Subdivisions; Specific Industries; Specific Groups of Citizens:

None

C. Economic Impact on Citizens/Public at Large.

None

Date: April 28, 2000

Signature of Agency Head or Authorized Representative:

Ronald L. Stemple

FILED
Jun 7 4 20 PM '00
OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

**WEST VIRGINIA LEGISLATIVE RULE
ALCOHOL BEVERAGE CONTROL COMMISSION**

TITLE 175 - SERIES 7

LICENSING OF EXOTIC ENTERTAINMENT FACILITIES

§175.7.1. General.

1.1. Scope. This emergency legislative rule explains and clarifies certain powers and duties of the Alcohol Beverage Control Commissioner relating to the licensing of commercial facilities where exotic entertainment will be permitted and controlled as set forth in Enrolled Committee Substitute For Senate Bill No. 415 which was passed, effective from passage, on March 11, 2000.

1.2. Authority. - This emergency legislative rule is promulgated under the authority of W. Va. Code §§60-4-23(h) and 29A-3-15.

1.3. Filing Date. -

1.4. Effective Date. -

1.5. Type of rule. - This rule is an emergency legislative rule as defined in W.Va. Code §29A-3-15.

1.6. Citation. - This emergency rule may be cited as 175 C.S.R. - 7, § _____ (2000).

§175.7.2. Definitions.

As used in this rule and unless the context clearly requires a different meaning, the following terms shall have the meaning ascribed herein, and shall apply in the singular and in the plural.

2.1. "Alcoholic liquor" means alcohol, beer, including barley beer, wine, including barley wine, and distilled spirits, and any liquid or solid capable of being used as a beverage, but does not include wine with an alcohol content of fourteen percent (14%) or less by volume, nonintoxicating beer or nonintoxicating beverages.

2.2. "Applicant" means a person applying for a license to be issued by the commissioner if the applicant qualifies for the grant of a license to permit the operation of a commercial facility where lawful exotic entertainment is permitted.

2.3. "Beer" means any beverage obtained by the fermentation of barley, malt, hops, or any other similar product or substitute, and containing more alcohol than that of nonintoxicating beer.

2.4. "Code" means the official Code of West Virginia, one thousand nine hundred thirty-one, as amended.

2.5. "Commissioner," "Alcohol Beverage Control Commissioner," or "ABCC" means the West Virginia Alcohol Beverage Control Commissioner or his or her delegate.

2.6. "Distilled spirits" means ethyl alcohol, ethanol or spirits, or wine, including all dilutions and mixtures thereof, from whatever source or by whatever process produced, for beverage use and includes, but is not limited to, natural spirits, whiskey, brandy, rum, gin, vodka, cordials and liqueurs. Any alcoholic beverage containing more than 24% of alcohol by volume shall be deemed to be distilled spirits.

2.7. "Exotic entertainment" means live nude dancing, nude service personnel or live nude entertainment, and "nude" means any state of undress in which male or female genitalia or female breasts are exposed.

2.8. "Fortified wine" means any wine to which brandy or other alcohol has been added and includes dessert wines, which are not fortified, and any wine containing greater than fourteen percent (14%) alcohol by volume.

2.9. "Intoxicated" means having one's faculties impaired by alcohol or other drugs to the point where physical or mental control or both are markedly diminished.

2.10. "Licensee" means: (1) a person who has been granted a license by the Alcohol Beverage Control Commissioner to operate a private club facility where exotic entertainment is permitted or offered; and (2) a person who operated an unlicensed facility where exotic entertainment was offered on March 11, 2000, who has been granted a license to operate the facility where exotic entertainment will be offered, and who will not offer alcoholic liquors for sale in the premises unless and until the licensee obtains a private club license.

2.11. "Limited exotic entertainment facility" means an exotic entertainment license issued by the commissioner to an unlicensed person who on March 11, 2000 offered exotic entertainment in the facility and who will not offer alcoholic liquors for sale in the premises unless the appropriate licenses are obtained from the commissioner.

2.12. "Market zone" means the geographical area designated as such by the Retail Liquor Licensing Board for the purpose of issuing retail liquor licenses.

2.13. "Nonintoxicating beer" means any beverage, obtained by the fermentation of barley, malt, hops, or similar products or substitute and containing at least one-half of one percent (.5%) alcohol by volume, but not more than four and two-tenths percent (4.2%) of alcohol by weight, or six percent (6%) by volume, whichever is greater.

2.14. "Person" means and includes any individual, firm, association, company, partnership, limited partnership, corporation, limited liability company, joint-stock company, club, agency, syndicate, limited liability company or voluntary association.

2.15. "Places set apart for traditional family-oriented naturism" means family nudist parks, clubs and resorts chartered by the American association for nude recreation or the naturism society, including all of their appurtenant business components, and also including places temporarily in use for traditional family-oriented naturist activities.

2.16. "Public place" means any place, building or conveyance to which the public has, or is permitted to have access, including, but not limited to establishments that provide lodging and/or sell food for consumption on or off the premises, and any highway, street, lane, park or place of public resort or amusement; provided, that the term "public place" shall not mean or include any of the above-named places or any portion or portions thereof which qualify and are licensed by the commissioner to sell alcoholic liquors for consumption on the premises.

2.17. "Private club" means any corporation, limited liability company or unincorporated association which either:

2.17.1. Belongs to or is affiliated with a nationally recognized fraternal or veterans organization, which is operated exclusively for the benefit of its members, which pays no part of its income to its shareholders or individual members, which owns or leases a building or other premises such as vessels, parks, airports, to which club, are admitted only duly elected or approved dues paying members in good standing of such corporation or association and their guests while in the company of a member and to which club the general public is not admitted, and which club maintains in said building or on said premises a suitable kitchen and dining facility with related equipment for serving food to members and their guests; or

2.17.2. Is a nonprofit social club, that is operated exclusively for the benefit of its members, which pays no part of its income to its shareholders or individual members, which owns or leases a building or other premises, to which club are admitted only duly elected or approved dues paying members in good standing of such corporation or association and their guests while in the company of a member and to which club the general public is not admitted, and which club maintains in said building, or on said premises, a suitable kitchen and dining facility with related equipment for serving food to members and their guests; or

2.17.3. Is organized and operated for legitimate purposes, that has at least one hundred (100) duly elected or approved dues paying members in good standing, which owns or leases a building or other premises, including any vessel licensed or approved by any federal agency to carry or accommodate passengers on navigable waters of this State, to which club are admitted only duly elected or approved dues paying members in good standing of such corporation or association and their guests while in the company of a member and to which club the general public is not admitted, and which club maintains in said building or on said premises a suitable

kitchen and dining facility with related equipment and employs a sufficient number of persons for serving meals to members and their guests; or

2.17.4. Is organized for legitimate purposes and owns or leases a building or other limited premises in any state, county or municipal park or at any airport, in which building or premises a club has been established, to which club are admitted only duly elected and approved dues paying members in good standing and their guests while in the company of a member and to which club the general public is not admitted, and which maintains in connection with said club a suitable kitchen and dining facility and related equipment and employs a sufficient number of persons for serving meals in said club to said members and their guests.

2.18. "Record" means any manner of recording from which a transcript can be made.

2.19. "Retail liquor store," means the establishment where the private club is authorized to purchase alcoholic liquors. Such retail liquor store must be licensed to sell alcoholic liquors to the public in West Virginia by the commissioner as authorized by either W.Va. Code §60-3-1, *et seq.*, or W.Va. Code §60-3A-1, *et seq.*

2.20. "Sale" means any transfer, exchange of goods or services, in exchange for money, currency, checks, credit cards or barter in any manner or by any means, for a consideration, and shall include all sales made by a principal, proprietor, agent or employee.

2.21. "Selling" includes solicitation or receipt of orders, possession for sale, and possession with intent to sell.

2.22. "Wine" means any beverage obtained by the fermentation of the natural content of fruits, or other agricultural products, containing sugar and includes, but is not limited to, still wines, champagne and other sparkling wines, carbonated wines, imitation wines, vermouth, cider, perry, sake, or other similar beverages offered for sale or sold as wines containing not less than seven percent (7%) nor more than twenty-four percent (24%) alcohol by volume.

§175.7.3. Licensure.

3.1. It shall be unlawful for any person to operate a commercial facility where exotic entertainment is permitted unless such person has been granted a license by the commissioner authorizing such activity.

3.2. Any person, who was operating a commercial facility where exotic entertainment was offered on March 11, 2000, may apply to the commissioner for a license to operate a facility where lawful exotic entertainment will be permitted on and after July 1, 2000. Applications must be filed with the commissioner on or before July 1, 2000, and no application may be received by the commissioner after July 1, 2000.

3.2.1. Persons who had a private club license on March 11, 2000 and were in good standing with the Alcohol Beverage Control Commissioner and had a Floor Plan in their ABCC

license file which indicated the stage(s) and dressing rooms used by exotic dancers on March 11, 2000 shall prepare a sworn affidavit by its president or its principal owner that the foregoing facts are true relative to their/its club and that exotic entertainment dancers performed in the club on March 11, 2000. This affidavit must be submitted with the application for a license to operate an exotic entertainment facility.

3.2.2. Persons who were unlicensed by the ABCC on March 11, 2000 but want to apply for a license to operate an exotic entertainment facility shall prepare a sworn affidavit by its President, or its principal owner, setting forth that they were operating a commercial facility by name of _____ located at _____ (Street address) _____ (City or Town and Zip Code) _____ (Telephone number) where exotic entertainment was offered on March 11, 2000. This affidavit shall state the types of licenses, if any, which were purchased from a municipality; the name(s) of all individuals who have a 20% interest, or more, in the enterprise, their addresses and telephone numbers, their criminal arrests, if any, during the last ten years, the charges made against them and if they were convicted and whether they served any jail time or time in a penitentiary. The affidavit shall state the West Virginia Tax Department Identification Number assigned to the _____ (Name of the business) _____. The affidavit shall state the West Virginia Consumers Sales Tax Identification Number assigned to the applicant and the West Virginia Business Franchise Tax Identification Number assigned to the applicant. The principal owner of the business will complete a West Virginia State Tax Commissioner Form WV-ARI-0011, "Authorization to Release Information" [A copy of this Form will be sent to applicants along with other necessary documents]. The affidavit shall state when the enterprise began its operation in West Virginia and state the details of each location where it has operated an exotic entertainment facility in this or any other state.

3.3. Licensees must have appropriate licenses in order to purchase, keep, sell, serve, dispense or purchase for use in a licensed facility any alcoholic liquor, wine or nonintoxicating beer;

3.4. Each applicant for licensure which does not possess a Private Club License will be required to apply for and obtain a Private Club License from the commissioner in order to have the legal ability to purchase, keep, sell, serve, dispense or purchase for use in a licensed exotic entertainment facility any alcoholic liquor, wine or nonintoxicating beer. Such applicants shall submit an application for a private club license with its application for a license to operate a commercial facility offering exotic entertainment. A private club license will only be issued to a corporation, limited liability company or an unincorporated association. An applicant qualified to apply for a license under the provisions of subsection 3.2.2 of this rule may apply for a limited exotic entertainment facility license without applying for a private club license.

3.5. License application. The application for a license to operate an exotic entertainment facility, with or without a private club license, shall include the following:

3.5.1. The name of the applicant.

3.5.2. The place at which such applicant will conduct its operations, whether the same is owned or leased by applicant; and if leased, from whom, giving names and addresses of all lessors.

3.5.3. If the applicant be an unincorporated association, the names and addresses of members of its governing board.

3.5.4. If the applicant be a corporation, the names and addresses of its officers and directors. If such person be a limited liability company, the names and addresses of the members and managers.

3.5.5. A Floor Plan indicating the size and nature of the dining and kitchen facilities operated by applicant and the specific measurements of all rooms and bar areas used in the conduct of the club's operations will be prepared which will also indicate all areas where a stage is located for performances of exotic entertainment, and of the area where dressing rooms are provided for the exotic entertainers. Labels will be placed on each room shown on the Floor Plan which will identify the use of each room. No rooms will have doors except for rest rooms, supply room, dressing room(s) exit door(s) and entrance doors. Locations of all rest rooms, entrances and exits are also to be indicated. The Floor Plan will be prepared in duplicate copies and submitted with the application, one copy of which will be returned to the applicant after it is approved by the commissioner, and it shall be kept on the licensed premises.

3.5.6. Arrest record, if any, of the applicant and if the applicant be a corporation or association, the arrest record, if any, of the officers, directors, employees and the manager or steward including disposition of same. (All applicants will be checked through the Criminal Identification Bureau of the State Police).

3.5.7. Residence of applicants. - No licenses shall be given to any applicant who has been a resident of West Virginia for a period of less than two (2) years. If the applicant be a corporation, the directors and/or officers of the corporation are not required to be West Virginia residents so long as the on-site manager has been a resident of the state for a period of not less than two (2) years. If the applicant be an association, the same would apply unless a majority of the founders or governing board have been residents for a period of two (2) years. If the applicant be a limited liability company or corporation, the members and/or managers of the company are not required to be West Virginia residents so long as the on-site manager has been a resident of the state for a period of not less than two (2) years.

3.5.8. A statement of purpose or purposes for which the club is organized (social, recreation, benevolent, charitable, fraternal or profit).

3.5.9. How long the club has been in existence prior to the date of the application.

3.5.10. What national organization it is affiliated with, if any, and the date of affiliation and nature thereof.

3.5.11. Number of employees.

3.5.12. Number of members of the applicant.

3.5.13. West Virginia consumers sales tax identification number.

3.5.14. West Virginia business franchise tax number.

3.5.15. West Virginia Health Department permit number to operate a restaurant.

3.5.16. Type of license applied for.

3.5.17. Application shall only be made on ABCC Form No. 192. This form must be completed in its entirety and failure to complete all questions thereon shall constitute grounds for refusal to grant a license.

3.5.18. Is the applicant the holder of a federal gambling stamp.

3.5.19. Is the applicant the holder of a retail liquor dealer special tax stamp.

3.6. Refusal of license.

3.6.1. No license shall be issued by the commissioner to any club:

3.6.1.a. That is located on any college campus, State university campus or branch thereof.

3.6.1.b. That is the holder of a federal gambling stamp or whose manager or employee is a holder of a federal gambling stamp.

3.6.1.c. That discriminates against any person or groups subject to the provisions of W.Va. Code §60-7-2(a)(1) and W.Va. Code §60-7-2(a)(2). A license cannot be refused based on discrimination.

3.6.1.d. That submits an application for license that contains any false statement, and any statement found to be false after granting of said license shall be grounds for revocation or suspension of said license.

3.6.1.e. That is not a bona fide private club of good reputation in the community in which it operates. For purposes of making such a determination, the commissioner shall take into consideration whether the ownership and management of the private club will involve suitable persons and whether the premises to be used by the private club is a suitable place.

3.6.2. For purposes of this rule, the commissioner shall refuse to grant any license if he or she has reasonable cause to believe, as indicated by documented evidence that the applicant,

or any officer, director or manager thereof, or shareholder owning twenty percent (20%) or more of its capital stock, beneficial or otherwise, or other person conducting or managing the affairs of the applicant or of the proposed licensed premises, in whole or part:

3.6.2.a. Is not twenty-one (21) years of age or older;

3.6.2.b. Has been convicted of a felony or other crime involving moral turpitude, and upon such conviction the applicant will not be eligible for licensure within five (5) years next preceding successful completion of all conditions of probation, discharge from parole supervision or expiration of sentence;

3.6.2.c. Has been convicted of violating any alcoholic liquor laws, rules or regulations, or any beer laws, rules or regulations of any state or the United States, and upon such conviction the applicant shall not be eligible for licensure within five (5) years next preceding successful completion of all conditions of probation, discharge from parole supervision or expiration of sentence;

3.6.2.d. Has had any license revoked under the alcoholic liquor laws, rules or regulations, or the beer laws, rules or regulations of any state or the United States within five (5) years next preceding the filing date of the application;

3.6.2.e. Is not the legitimate owner of the business proposed to be licensed, or other persons have ownership interests in the business, which have not been disclosed;

3.6.2.f. Is a person to whom alcoholic beverages may not be sold under the provisions of W. Va. Code §60-1-1 *et seq.*;

3.6.2.g. Has been adjudicated an incompetent;

3.6.2.h. Is an officer or employee of the Alcohol Beverage Control Commissioner of West Virginia; or

3.6.2.i. Is violating or allowing the violation of any provision of W.Va. Code §§60-1-1, *et seq.*, 61-1-1, *et seq.*, or 11-16-1, *et seq.*, in its establishment at the time its application for a license is pending or at any time during either the current licensed period or the immediately preceding licensing period.

3.6.2.j. Is not a person of good moral character or repute;

3.6.2.k. Has maintained a noisy, loud, disorderly or unsanitary establishment;

3.6.2.l. Has demonstrated, either by his or her police record or by his or her record as a former licensee under W. Va. Code §11-16-1, *et seq.*, or §60-1-1, *et seq.*, a lack of respect for law and order, generally, or for the laws and rules governing the sale and distribution of alcoholic beverages or nonintoxicating beer;

3.6.2.m. Has the general reputation of drinking alcoholic beverages or nonintoxicating beer to excess, or is addicted to the use of controlled substances;

3.6.2.n. Has misrepresented a material fact in applying to the commissioner for a license.

3.6.3. No license shall be issued by the commissioner to a private club if the place to be occupied by the applicant:

3.6.3.a. Does not conform to the requirements of applicable laws of the State with respect to sanitation, health, construction or equipment, or to any similar requirements established by the rules of the commissioner.

3.6.3.b. Is so located that violations of W.Va. Code §60-1-1, *et seq.*, or of the rules of the commissioner, or the laws of this State relating to peace and good order would result from the issuance of such license and operation by the applicant.

3.6.3.c. Is so situated with respect to any church, hospital, school, college or university, public or private playground or other similar recreational facilities, or any state, local or federal government-operated facility, that the operation of such place under the license will adversely affect or interfere with normal, orderly conduct of the affairs of such facilities or institutions.

3.6.3.d. Is so situated with respect to any residence or residential area that its operation will adversely affect real property values or substantially interfere with the usual quietude and tranquility of the residential area.

3.6.4. The commissioner may refuse to issue a license if he or she has reasonable ground to believe that the number of licenses existent in the locality is such that the issuance of an additional license would be detrimental to the interests, morals, safety or welfare of the public, and, in reaching his or her conclusion in this respect, the commissioner may consider the character, population and number of similar licensees in the particular town, city or county and the immediate neighborhood concerned, and the effect which a new license may have on such town, city, county or neighborhood in conforming with the purposes of the Alcohol Beverage Control Act.

3.6.5. In the process of determining whether or not the license should be issued, the commissioner must investigate the accuracy of all allegations that could lead to a denial of the license. If it should appear that the applicant is a bona fide private club, which meets all of the statutory criteria for issuance of an exotic entertainment license, of good reputation in which it shall operate and there is no false statement contained in such application, the commissioner will issue a private club license and an exotic entertainment license to the applicant.

3.7. Annual license fee. - The annual fee for licenses issued under the provisions of W.Va. Code §60-4-23(h), shall be as follows:

3.7.1. For a fraternal or veterans organization or a nonprofit social club, seven hundred fifty dollars (\$750.00).

3.7.2. For a private club, one thousand dollars (\$1,000.00) if determined by the commissioner that such private club has less than one thousand (1,000) members and two thousand five hundred dollars (\$2,500.00) if such private club has one thousand (1,000) or more members. The fee for any license issued following the first day of January of any year, to expire on the thirtieth day of June of each year, will be one half (½) of that previously prescribed.

3.7.3. For an Exotic Entertainment Facility, three thousand dollars (\$3,000.00); and for a Limited-Exotic Entertainment Facility, three thousand dollars (\$3,000.00). If any of these facilities are located in a municipality, it shall issue a municipality license and may impose a license fee not in excess of the State license fee.

3.7.4. Such fees shall be payable to the West Virginia Alcohol Beverage Control Commissioner by certified check, cashier's check or money order and must accompany the application.

3.8. Bond. - No license will be issued until the applicant has executed a bond in the penal sum of five thousand dollars (\$5,000.00), payable to the State of West Virginia. The surety on the bond shall be executed by a corporate surety authorized to transact business in the State of West Virginia, which bond will be conditioned on the payment of all fees prescribed by law and on the faithful performance of, and compliance with the provisions of W.Va. Code § 60-7-1, *et seq.*, and this rule duly promulgated thereunder, and the same shall be done on Alcohol Beverage Control Commissioner's Form No. 193.

3.9. License not transferable. - A private club license issued under the provision of this rule will be valid only for the organization named to conduct a private club on the premises thereon described, and is not transferable.

3.9.1. Although the private club license is not transferable, the exotic entertainment facility license may be sold, assigned or otherwise transferred with the prior written approval of the commissioner.

3.9.2. A merger of an exotic entertainment licensee or the sale of more than fifty percent of the outstanding stock of or partnership interests in the licensee will be deemed to be a sale, assignment or transfer of a license.

3.9.3. A license can not be transferred to another location, except to another location in the county of original licensure.

3.9.4. If a transferee is otherwise qualified for a license, the transferee may apply for reissuance of the transferor's license.

3.9.5. The transferee cannot engage in business until such time as application is made for issuance of a private club license, and the commissioner issues such a license to the transferee.

3.10. License application form. - The application for license to sell alcoholic liquors by private clubs, ABCC Form No. 192 is available from the West Virginia ABCC office.

§175.7.4. Operation of Private Club and Exotic Entertainment Facility.

4.1. Sale to members and guests. - No licensee is authorized to sell alcoholic liquor or nonintoxicating beer for consumption on the premises of said licensee except to its members and their guests, while in the company of a member, and said alcoholic liquors must have been purchased from a retail liquor store licensee. No open container or mixed drink, including nonintoxicating beer and wine, may be carried into or out of a private club or any premises licensed by the commissioner.

4.2. Age for purchase of alcoholic beverages. - No licensee shall sell any alcoholic beverage or nonintoxicating beer to individuals below the age of twenty-one (21) years. The licensee must require proof of age by way of at least one (1) of three (3) documents certifying the age of the individual, one (1) shall be a valid driver's license, chauffeur's license or Department of Motor Vehicles identification card showing that the holder is at least twenty-one (21) years of age. The following are considered to be valid proofs of age:

4.2.1. A valid West Virginia driver's license showing that the holder is at least twenty-one (21) years of age.

4.2.2. A valid West Virginia chauffeur's license showing that the holder is at least twenty-one (21) years of age.

4.2.3. A West Virginia Department of Motor Vehicles identification card showing that the holder is at least twenty-one (21) years of age.

4.2.4. A driver's license from another state may be accepted if there is no indication or evidence that the license has been altered.

4.2.5. Any other valid means of satisfactory proof with a picture I.D. showing the individual to be at least twenty-one (21) years of age.

The failure to produce satisfactory proof of age upon demand entitles the licensee to refuse to sell alcoholic beverages to the individual and to refuse to admit him/her into the club.

4.3. Age of manager. - No licensee whose manager is under the age of twenty-one (21) years shall be eligible for license.

4.4. Inspection. - The licensee shall at reasonable times permit the immediate inspection of the licensed premises by the commissioner, in order to ensure that the laws and rules of the State of West Virginia are enforced. Upon the presentation of credentials the licensee will allow the commissioner immediate access to the licensed premises, and there shall be no occasion for delay in the conduct of such inspection. No licensee shall personally or by an agent or employee hinder or interfere with an inspection of the licensed premises nor shall any licensee allow patrons or others to hinder or interfere with the inspection. Any evidence of a violation found during an inspection will be seized and impounded by the commissioner and shall be admissible into evidence to prove such violation.

4.5. Door marker and posting license. - Each licensee shall have at the main entrance to its private club facility in letters no higher than six (6) inches, a statement "ABCC License No. _____." The licenses granted under W.Va. Code §60-7-1, *et seq.*, and this rule must be kept posted in a conspicuous place in the club premises.

4.6. Licensee's purchases of alcoholic liquors. - After the granting of a private club license, each holder shall purchase alcoholic liquors for resale from a retail liquor store. A private club may purchase alcoholic liquors only from the retail liquor store in whose market zone it is located or from a retail liquor store located in a market zone that is contiguous to the market zone in which the private club is located. Upon a showing of good cause to the commissioner, a private club will be authorized to purchase alcoholic liquors from any retail liquor store within the State.

4.7. Hours for sale of alcoholic beverages. - No licensee shall sell, give or dispense alcoholic liquor or nonintoxicating beer, or permit the consumption thereof, on any licensed premises or in any rooms directly connected therewith between the hours of three o'clock a.m. (3:00 a.m.) and one o'clock p.m. (1:00 p.m.) on any Sunday; nor shall any licensee sell, give or dispense alcoholic liquors or nonintoxicating beer, or permit the consumption thereof, on any licensed premises or in any rooms directly connected therewith, between the hours of three-thirty o'clock a.m. (3:30 a.m.) and seven o'clock a.m. (7:00 a.m.) on any weekday.

4.8. Hours of operation. - The licensed premises of all private clubs shall be closed for operation and cleared of all persons, including employees, thirty (30) minutes after the hours of sale of alcoholic liquors and nonintoxicating beer have expired. Licensed premises shall not be occupied by persons any sooner than one-half (½) hour prior to the hours of sale of alcoholic liquors and nonintoxicating beer; provided that the licensed premise may be open for food sales at nine o'clock a.m. (9:00 a.m.) on any Sunday.

4.9. Cessation of entertainment. - All entertainment, both live and mechanical, the latter to include juke boxes, shall cease and abate on the licensed premises one-half (½) hour prior to the expiration of the hours for sale of alcoholic liquors and nonintoxicating beer.

4.10. Entranceway. - During the hours for sale of alcoholic liquors and nonintoxicating beer, all doors to and from the licensed premises shall be closed except for the ingress and egress of the members and their guests.

4.11. Suitability of kitchen and dining facilities.

4.11.1. Prior to the issuance of a private club license, all kitchen and dining facilities are to be checked by agents or employees of the commissioner for their suitability in serving food to their members and their guests. Equipment in the kitchen shall be capable of preparing a freshly cooked meal on the licensed premises. In addition, licensees shall have at least enough food to serve one fourth (1/4) the number of seats in the private club at any one (1) time.

4.11.2. A suitable kitchen shall contain equipment as follows:

4.11.2.a. One (1) range with oven and no fewer than two (2) burners, or a microwave oven which has a variable control and a separate range with two (2) burners;

4.11.2.b. One (1) sink with hot and cold running water;

4.11.2.c. One cold storage unit or refrigerator at least 17 (seventeen) cubic feet in size; and

4.11.2.d. Cooking utensils and pots and pans sufficient for preparation of the required meals.

4.11.3. A suitable dining facility shall include the following: Plates (other than of paper or similar construction), metal knives, forks and spoons, and drinking glasses and cups, in sufficient quantities to serve no fewer meals than one fourth (1/4) the number of seats in the club.

4.11.4. A meal may consist of one (1) item or any combination of items. For example, fresh, canned and packaged chili, soup, spaghetti, fresh salad, fresh or prepackaged sandwiches, freshly prepared meats and vegetables and TV dinners are acceptable or items which, by themselves, do not qualify as adequate are packaged potato chips and similar products; packaged crackers; packaged nuts; packaged desserts (fruit pies, cakes, cookies, etc.); and bar sausages and similar products. The key word in the definition of meals is preparation.

4.11.5. Meals shall be available from opening of the club until closing. Limited menus will be acceptable after ten o'clock p.m. (10:00 p.m.). Cold sandwiches which can be made in advance and refrigerated for use after ten o'clock p.m. (10:00 p.m.) is one example of an acceptable limited menu.

4.12. Age of membership. - No licensee shall admit to membership any individual below the age of twenty-one (21) years. No individual below the age of twenty-one (21) years, except for a performing exotic entertainer who is eighteen years of age or older, shall be permitted on the licensed premises of a licensee on any day on which any exotic entertainment is offered therein.

4.13. Lighting of licensed premises. - The interior of all licensed premises shall be adequately lighted at all times while the licensee is conducting business or has employees on such premises.

4.14. Purchase and delivery of alcoholic beverages.

4.14.1. Retail Liquor Stores Payments For Purchases. - When a duly licensed private club purchases alcoholic liquors from a retail liquor store authorized by W.Va. Code §60-3A-1, *et seq.*, money orders, certified checks, cashier's checks and traveler's checks and cash are acceptable for payment of a purchase. In addition, a personal check from a duly licensed private club will be treated as cash if a guaranty bond issued from a bonding company licensed to do business in West Virginia is posted in advance with the commissioner in a sum sufficient to bond the total amount of such purchase(s); provided that such purchase(s) do not exceed the total of the bond and in this regard, purchases, insofar as the bond is concerned shall be treated as cumulative until such time as the check or checks clear and be honored by the bank upon which the check is drawn.

4.14.1.a. A duly licensed private club may, in addition to the method provided above, purchase by personal check if there is posted in advance with the commissioner, a line of credit issued by a duly organized national or State banking institution; provided that such purchase(s) not exceed the total of the posted line of credit and in this regard, purchases, insofar as the line of credit is concerned, shall be treated as cumulative until such time as the check or checks shall clear and be honored by the making bank or the bank upon which the check or checks are drawn.

4.14.1.b. Application for the purpose of purchasing by personal check when guaranteed by a guaranty bond or line of credit shall be obtainable from the commissioner at his office in Charleston, West Virginia.

4.14.1.c. In the event that any check is returned for insufficient funds then, the commissioner shall notify the bonding company or bank issuing the line of credit and make demand for payment and, they shall be charged a handling fee of five dollars (\$5.00), such sum to be charged in addition to the amount shown due on the face of the subject check or checks.

4.14.2. Credit by retail liquor stores to private clubs forbidden. W.Va. Code §60-3A-1, *et seq.* - A retail liquor store is authorized to establish its policy of the instruments allowed to be utilized for payment of purchases by a duly licensed private club. No credit may be extended by the retail liquor store to the duly licensed private club.

4.14.3. A duly licensed private club may, by contract approved by the commissioner, receive deliveries of alcoholic liquor from a retail liquor store. For the purposes of this activity the provisions of W. Va. Code §60-6-12 and §60-6-13 are not applicable.

§175.7.5. Violations.

5.1. Prohibited acts. No licensee, nor any agent, employee or member thereof, shall on such licensee's premise:

5.1.1. Sell, or offer for sale, any alcoholic liquor, or nonintoxicating beer other than from the original package or container.

5.1.2. Insofar as these activities are prohibited by law, authorize or permit any disturbance of the peace, or any obscene, lewd, immoral or improper entertainment, conduct or practice.

5.1.3. Sell, give away or permit the sale of, gift to, consumption of or the procurement of any alcoholic liquors or nonintoxicating beer, for any person under the age of twenty-one (21) years, any mental incompetent, or person who is visibly physically incapacitated due to the consumption of alcoholic liquor or nonintoxicating beer, or the use of any controlled substance as specified in W.Va. Code §60-1-1, *et seq.*

5.1.4. Permit the consumption by, or serve to, on the licensed premises, any alcoholic liquors or nonintoxicating beer, to any person under the age of twenty-one (21) years.

5.1.5. With the intent to defraud, alter, change, or misrepresent the quality, quantity or brand name of any alcoholic liquor or nonintoxicating beer.

5.2. No licensee shall locate and maintain Massage Tables and/or a Hot Tub in or on any licensed premises or in any rooms directly connected therewith or accessible from inside the licensed premises. No employee or entertainer will give any patron a massage within the licensee's premises. Hot Tubs and Massage Tables will be removed from a licensee's premises no later than July 1, 2000.

5.3. No licensee, nor any agent, employee or member thereof, shall, outside of the licensee's premises, advertise in any news media or other means, the fact that alcoholic liquors or nonintoxicating beer may be purchased at the private club.

5.4. No licensee, nor any agent, servant or employee of said licensee, may at any time violate any of the foregoing provisions. Any violation by said licensee, agent, servant or employee shall be grounds for revocation or suspension of its private club license, or placing the licensee on probation for not more than one year, and imposing a monetary penalty not to exceed one thousand dollars for each violation committed by a licensee, an agent of the licensee, a servant of the licensee, an employee of the licensee, and by any entertainer performing on a licensee's premises.

5.5. Any holder of a private club license who has its license suspended shall cease and desist from any and all operation as a private club during the period of suspension.

5.6. Guidelines for exotic entertainers:

5.6.1. Exotic entertainers performing live nude dancing must have arrived on stage in a non-nude state and be apart and separate from patrons while disrobing and performing live

nude dancing. At the conclusion of the live nude dancing, the entertainer shall return to a non-nude state before leaving the stage and going to the dressing room.

5.6.2. There can be no physical contact during a performance between the entertainers and the patrons or employees of the club. This means no patron or employee may touch an entertainer, and no entertainer may touch a patron or an employee of the club.

5.6.3 Actions by the entertainers anywhere on a licensee's premises may not include the actual accomplishment of any sexual acts, which would include, but not be limited to: sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation, or any sexual acts which are prohibited by law.

5.6.4. All acts during which entertainers are nude will take place on stage, and there shall be only one nude entertainer on the stage at a time. Upon leaving the stage, entertainers must go directly to the assigned dressing room where he or she must dress adequately by covering himself or herself prior to mingling among patrons and other employees.

5.6.5. No licensee nor employee or agent of licensee shall engage in or permit, on the licensed premises, any person to perform acts of or acts which constitute or simulate:

5.6.5.a. Sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation, or any sexual acts which are prohibited by law.

5.6.6. No licensee shall on the licensed premises: encourage, or permit any person on the licensed premises to touch, caress, or fondle the breast, buttocks, anus or genitals of an exotic entertainer.

5.7. Unlawful acts: It is unlawful for any licensee, or agent, employee or member thereof, on such licensee's premises to:

5.7.1. Allow a person under the age of eighteen years to perform as an exotic entertainer;

5.7.2. Allow persons under twenty-one years, except a performing exotic entertainer, to be in the premises on any day on which any exotic entertainment is offered therein;

5.7.3. Sell or offer for sale any alcoholic liquors other than from the original package or container;

5.7.4. Authorize or permit any disturbance of the peace; obscene, lewd, immoral or improper entertainment, conduct or practice, gambling or any slot machine, multiple coin console machine, multiple coin console slot machine or device in the nature of a slot machine;

5.7.5. Sell, give away or permit the sale of, gift to or the procurement of any nonintoxicating beer, wine or alcoholic liquors for or to, or permit the consumption of

nonintoxicating beer, wine or alcoholic liquors on the licensee's premises, by any person less than twenty-one years of age;

5.7.6. Sell, give away or permit the sale of, gift to or the procurement of any nonintoxicating beer, wine or alcoholic liquors, for or to any person known to be deemed legally incompetent, or for or to any person who is physically incapacitated due to consumption of nonintoxicating beer, wine or alcoholic liquor or the use of drugs;

5.7.7. Sell, give or dispense nonintoxicating beer, wine or alcoholic liquors in or on any licensed premises or in any rooms directly connected therewith, between the hours of three o'clock a.m. and one o'clock p.m. on any Sunday;

5.7.8. Permit the consumption by, or serve to, on the licensed premises any nonintoxicating beer, wine or alcoholic liquors, covered by this rule, to any person who is less than twenty-one years of age;

5.7.9. With the intent to defraud, alter, change or misrepresent the quality, quantity or brand name of any alcoholic liquor;

5.7.10. Sell or offer for sale any alcoholic liquor to any person who is not a duly elected or approved dues paying member in good standing of said private club or a guest of such member;

5.7.11. Sell, offer for sale, give away, facilitate the use of or allow the use of carbon dioxide, cyclopropane, ethylene, helium or nitrous oxide for purposes of human consumption except as authorized by the commissioner;

5.7.12. Employ any person who is less than eighteen years of age in a position where the primary responsibility for such employment is to sell, furnish or give nonintoxicating beer, wine or alcoholic liquors to any person;

5.7.13. Employ any person who is between the ages of eighteen and twenty-one who is not directly supervised by a person aged twenty-one or over in a position where the primary responsibility for such employment is to sell, furnish or give nonintoxicating beer, wine or alcoholic liquors to any person; or

5.7.14. To advertise in any news media or other means, outside of the licensee's premises, the fact that alcoholic liquors may be purchased thereat; or

5.8. Any person who violates any of the foregoing provisions in section five of this rule is guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than one thousand dollars nor more than five thousand dollars, or imprisoned in the county jail for a period not to exceed one year, or both fined and imprisoned. In addition, the commissioner shall be authorized to invoke the provisions of W.Va. Code §60-7-13(a) against the persons who have violated any of the foregoing unlawful acts.

5.9. Public nuisance. - If it is determined by law that any club which is licensed pursuant to W. Va. §60-7-1 *et seq.*, and this rule, constitutes a public nuisance to any church, school, hospital, public institution or otherwise, then such license may be revoked or suspended, the same being at the sound discretion of the commissioner, until such nuisance is abated.

§175.7.6. Hearing and Appeal Procedure.

6.1. Order refusing license, suspending or revoking same. - If the commissioner refuses to issue a license or suspends or revokes a license, he or she shall make and enter an order to that effect and mail by certified mail, return receipt requested, a copy of the order to the licensee, or serve it as provided for the service of legal process in accordance with the West Virginia Rules of Civil Procedure.

6.2. Petition for hearing. - Any applicant or licensee, adversely affected by an order of the Commissioner, shall have the right to a hearing before the commissioner or a person designated by him or her as hearing examiner. A petition in writing requesting a hearing must be served upon the commissioner within ten (10) days following the receipt by the applicant or licensee of the order.

6.3. Petition requirements. - The petition for a hearing shall be in writing. An original and one (1) copy of the petition shall be served upon the commissioner. It shall be complete in itself so as to fully state the issues. No telegram, facsimile transmission, electronic mail, telephone call, letter or similar communication will be regarded as a petition. The petition must contain the following:

6.3.1. A clear and concise assignment of each error that the petitioner alleges to have been committed by the commissioner in the determination of a licensee's violation or denial of application for license, with each assignment of error being shown in separately numbered paragraphs.

6.3.2. A clear and concise statement of fact upon which the petitioner relies as sustaining its assignment of error.

6.3.3. A prayer setting forth the relief sought.

6.3.4. The signature of the petitioner or its officers signing such petition.

6.3.5. A verification by the petitioner.

6.4. Form for petition. - A petition for hearing shall be in the form set forth below.

PETITION FOR HEARING

To: West Virginia
Alcohol Beverage Control Commissioner

322 70th Street, S.E.
Charleston, WV 25304

(For Commission Use Only)

Docket No. _____
Date of Order of Suspension or Revocation
or Denial of Application for License: _____
Whether Suspension or Revocation
or Denial of Application for License _____

In the Matter of: Petitioner's Business Name _____
Petitioner's ABCC License No. _____
Address _____

The above named against whom you have issued an order of (Revocation or Suspension or Denial of Application for License), and in support of such petition avers as follows:

First: Your petitioner admits as true and correct all of the determinations made by the Commissioner and set forth in the above order and basis thereof, except the following: (Specify here each error which the petitioner alleges to have been made by the Commissioner.)

Second: (Set forth clear and concise statements of fact upon which the petitioner relies as sustaining the assignment of error.)

Wherefore, your petitioner prays (insert relief sought, i.e., this order be set aside).

State of _____)
Business Name _____)
SS Signature of Affiant _____)
County Of _____)

Title _____, being duly sworn according to law, deposes and says that the facts alleged in this petition, including any sheets attached hereto, are true and affiant is the petitioner or is duly authorized to represent the petitioner.

By: _____

Sworn to and subscribed before me this _____ day of _____, 20__ at _____.

Notary Public

My commission expires _____
Notary Public

6.5. Hearings. - cost deposit. - The person demanding a hearing shall give security for the cost of the hearing in the amount of three hundred dollars (\$300.00). The cost deposit will be advanced by certified check, cashier's check or money order and shall accompany the petition demanding a hearing.

6.6. Subpoenas and subpoenas duces tecum. - In all hearings held under W.Va. Code §60-7-1 *et seq.*, and this rule, the evidence of witnesses and the production of documentary evidence may be required through the use of subpoenas and subpoenas duces tecum. Such subpoenas or subpoenas duces tecum may be issued at the request of the Alcohol Beverage Control Commissioner or by the licensee, the same to be issued by either the Commissioner or his duly appointed hearing examiner.

6.6.1. Every such subpoena and/or subpoena duces tecum shall be served at least five (5) days before the return date thereof, either by personal service made by any person eighteen (18) years of age or older or by registered mail, but a return acknowledgment signed by the person to whom the subpoena or subpoena duces tecum is directed shall be required to prove service by registered or certified mail.

6.6.2. All subpoenas and subpoenas duces tecum will be issued in the name of the Alcohol Beverage Control Commissioner, but any party requesting their issuance must see that they are properly served. Service of subpoenas and subpoenas duces tecum issued at the insistence of the Alcohol Beverage Control Commissioner are to be the responsibility of the commissioner. Any person who serves any such subpoena or subpoena duces tecum is entitled to the same fee as sheriffs who serve witness subpoenas for the circuit courts of this State, and fees for the attendance and travel of witnesses shall be the same as for witnesses before the circuit courts of this State W.Va. Code §55-1-1 *et seq.*

6.6.3. All such fees shall be paid by the commissioner if the subpoena or subpoena duces tecum is issued, without the request of an interested party, at the insistence of the commissioner.

6.6.4. All such fees related to any subpoenas or subpoena duces tecum issued at the insistence of a licensee shall be paid by the licensee who asks that such subpoena or subpoena duces tecum be issued, out of the hearing deposit.

6.6.5. All requests by the licensee or the commissioner for subpoena and subpoena duces tecum shall be in writing and shall contain a statement acknowledging that the requesting party agrees to pay such fees.

6.6.6. Any person receiving a subpoena or subpoena duces tecum issued hereunder shall honor the same as though it was issued by a circuit court of the State, and shall appear as witness and/or produce such books, records or papers in response to the subpoena or subpoena duces tecum. In case of disobedience or neglect of any subpoena or subpoena duces tecum served on any person or the refusal of any witness to testify to any matter regarding which he or she may be lawfully interrogated, the circuit court of the county in which the hearing is being held or the judge thereof in vacation, upon application by the commissioner, shall compel obedience by

attachment proceedings for contempt as in the case of disobedience of the requirements of a subpoena or subpoena duces tecum issued from such circuit court or a refusal to testify therein.

6.7. Stay of suspension or revocation order. - The service of a petition for hearing upon the commissioner shall operate, other than herein provided, to suspend the execution of any revocation of suspension of a private club license with respect to which a hearing is being demanded except:

6.7.1. An order suspending a license for failure of said license to keep the bond, required by W. Va. Code §60-7-4 in full force and effect, and

6.7.2. A suspension or revocation order issued pursuant to Section 4.2. of this rule.

6.8. Hearing date. - The commissioner shall set a date for any hearing demanded and notify the person demanding the hearing of the date and time of the hearing.

6.9. Place of hearing. - Hearings will be held in Charleston, West Virginia, unless the commissioner determines otherwise.

6.10. Continuances. - Hearings will not be delayed by a motion for continuance, unless it is timely made and sets forth good and sufficient cause. Conflicting engagements of counsel or the employment of new counsel will never be regarded as good ground for a continuance, unless set forth in a motion filed promptly after the notice of hearing has been mailed, or unless extenuating circumstances are shown which the commissioner deems adequate.

6.11. Absence of petitioner, counsel or his representative. - The absence of the petitioner, his legal counsel or his representative at a hearing, after service of notice of time, place and date, shall not be the occasion for delay or continuance. The hearing shall proceed and the case be regarded as having been submitted for decision on the part of the absent petitioner or petitioners.

6.12. Hearing. - The Alcohol Beverage Control Commissioner may designate an examiner to conduct the hearing.

6.12.1. The petitioner may appear individually, or by legal counsel, or by duly authorized representative. In the absence of the petitioner, written evidence of a representative's agent's authority must be presented to the satisfaction of the commissioner.

6.12.2. The petitioner, his or her duly authorized representative or agent, may with the approval of the commissioner, waive the right to a hearing and agree to submit the case for decision upon the petition and record, with or without a written brief. Such waivers and agreements are to be in writing or upon the record.

6.13. Argument and briefs. - Petitioners will be given an opportunity for argument within the time limits fixed by the commissioner following submission of evidence. The commissioner

may accept briefs in lieu of argument. Briefs must be filed within ten (10) days after the hearing.

6.14. Evidence admissible at hearing. - The commissioner may admit any relevant evidence, except that he or she shall observe the rules of privilege recognized by law relating to communications and topics. A finding is to be supported by the kind of evidence commonly relied upon by reasonably prudent men in the conduct of their affairs, whether or not the evidence would be admissible before a jury. The commissioner may exclude any evidence, which is irrelevant, unduly repetitious, or lacking in substantial probative effect.

6.15. Record of proceedings. - There shall be a record made at all hearings held pursuant to W. Va. Code §60-7-1 *et seq.*, and this rule.

6.16. Commissioner's decision. - After the conclusion of the hearing or within ten (10) days of receipt of the transcript thereof, the person designated by the Commissioner as hearing examiner shall prepare a recommended decision supported by findings of fact and conclusions of law affirming, modifying or vacating the earlier order of the commissioner. Thereafter, the commissioner within ten (10) days of receipt of the recommended decision, shall either accept or reject the recommended decision. If he or she accepts the decision, he or she shall sign and acknowledge the same as his or her own after having reviewed the transcript and all exhibits attached and affixed thereto. If he or she rejects the decision, he or she shall within ten (10) days of receipt of the recommended decision prepare a decision setting forth his or her own findings of fact and conclusions of law. In either event, the order signed by the commissioner shall be final unless vacated or modified upon judicial review. A copy of the order shall be served upon each party to the hearing and attorneys of record, if any, in person or by registered or certified mail.

6.17. Appeal to circuit court. - An appeal may be taken by the applicant or licensee to the Circuit Court of Kanawha County, West Virginia, or the circuit court of the county in which the petitioner resides or does business, or with the judge thereof in vacation, if filed within thirty (30) days after the charge upon which the party received notice of the final order of the Alcohol Beverage Control Commissioner.

§175.7.7. Exemption.

7.1 Places set apart for traditional family-oriented naturism are exempt from the provisions of this section.

§175.7.8. Licensees subject to this emergency legislative rule are also subject to the rules and statutory provisions applicable to W. Va. Code §60-7-1, *et seq.*

Strip club law comes under fire

Judge questions whether state law is constitutional

By Lawrence Messina
larrym@wvgazette.com

West Virginia's new strip club law appears too unconstitutional to enforce, a federal judge ruled Tuesday.

U.S. District Judge Charles H. Haden II said a statewide chain of nude dance bars may remain open without obtaining the licenses mandated by the new law.

Papers filed in the case, meanwhile, show links between the clubs' listed owner and Frank and Linda Masiarczyk, the Calhoun County owners of a strip club empire who were convicted on federal tax evasion charges.

Following a morning hearing, Haden granted a request by R.W.B. Inc., a shell company for the clubs, to suspend the new law pending a final ruling on its constitutionality.

Haden ruled against state officials after concluding that the statute's vague language and its June 30 application deadline appear "constitutionally unacceptable."

Haden also cited prior court rulings which held nude dancing as "expressive conduct" protected by the "outer ambit" of the First Amendment. The First Amendment protects "even those whose expressive conduct may be distasteful and offensive to many," Haden's ruling said.

R.W.B. filed its petition June 30, the last day the new law allowed clubs to apply for "exotic entertainment facility" licenses. The new law requires strip club owners to meet residency and other requirements and pay an annual, \$3,000 fee for the license from the Alcohol Beverage Control Administration.

Several of the R.W.B. clubs operate as "juice bars" which do not sell alcohol but let patrons bring

their own. At least one provides free beer, with patrons paying for cups.

The ABCA alleges that such clubs are operating in a "gap in the law" because they were denied or otherwise lacked liquor licenses.

Court papers list Robert W. Balma, 68, as owner of the various clubs involved in the case, located in Morgantown, Parkersburg, Weirton, Elkins, Boursville and elsewhere.

Balma has told state officials that he has lived in West Virginia for nine years, but the officials allege Balma has been a Michigan resident for nearly all of his life. Balma has falsely stated his residency in his filings with the ABCA, officials allege.

Balma has testified in ABCA hearings that he took over several of the clubs from the Masiarczyks following their 1998 felony convictions.

Balma "did not want to be in the business, he was applying for the licenses only to re-coup money owed him by Mr. Masiarczyk," ABCA filings in the federal case said.

Balma has also testified that Frank Masiarczyk still has an ownership interest in the clubs, the ABCA filings said.

One filing quotes Balma as saying that if he sold a club for, say, \$100,000, then \$50,000 of the proceeds would have to go to Masiarczyk.

The ABCA argues that none of the R.W.B. clubs have filed a properly completed application under the new law, making its federal challenge premature.

The ABCA also says that at least two of the clubs lost their prior liquor licenses following undercover ABCA stings.

Melvin Bankhead, manager of the Morgantown club, was convicted of serving alcohol without a license after investigators bought both beer and mixed drinks there, the ABCA said. Officials seized 24 bottles of liquor and 433 cans of beer from the club, the filings said.

Another R.W.B. manager, Howard Hoover Jr. of the Elkins club, was also convicted after investigators obtained alcohol at that club, the ABCA said.

Such evidence shows that R.W.B. does not meet the new law's requirement that club operators be of "good moral character" and have a "good reputation in the community."

But Haden concluded that such "boundless terms" in the new law give the government too much discretion and unfair power.

Haden also targeted the law's June 30 application deadline, ruling it imposes a "a prior, permanent and unfair restraint on citizens wishing to engage in the constitutionally protected expression of nude dancing... at least for those individuals who may never be permitted to apply."

To contact staff writer Lawrence Messina, use e-mail or call 348-4869.