

Title 65 Series 32  
Department of Health  
West Virginia Health Care Authority  
CERTIFICATE OF NEED

**Summary of Public Comments:**

**Comment**

§65-32-3.1 fails to incorporate the limiting language in W. Va. Code §16-2D-8 regarding exemptions in W. Va. Code §16-2D-9, §16-2D-10, and §16-2D-11. It is recommended the Proposed Rule be amended to track the language of the statute more closely.

**Response**

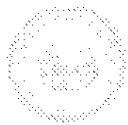
The Department has reviewed this comment and finds clarification is needed; therefore, some changes were made.

**Comment**

§65-32-20 is overly broad and does not incorporate the exemptions contained in W. Va. Code §16-2D-9, §16-2D-10, and §16-2D-11. It is recommended the introductory sentence of §65-32-20.1 be amended to include the language of exemptions.

**Response**

The Department has reviewed this comment and finds clarification is needed; therefore, some changes were made.



Robertson, April L <april.l.robertson@wv.gov>

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## Comments to Proposed Certificate of Need Rule, Title 65, Series 32

1 message

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Loy, Stacie <stacie.loy@dinsmore.com>

Thu, Jun 15, 2023 at 1:47 PM

To: "April.L.robertson@wv.gov" <April.L.robertson@wv.gov>

Cc: "Rice, Jill Cranston" <jill.rice@dinsmore.com>, "Motes, Lauren" <Lauren.Motes@dinsmore.com>

Ms. Robertson,

Please see the attached comments to the Proposed Certificate of Need Rule, Title 65, Series 32 on behalf of Appalachian Regional Healthcare, Inc. d/b/a Beckley ARH Hospital.

A hard copy will be hand-delivered to you today as well.

Thank you.

- Stacie Loy

**Dinsmore**

Stacie L. Loy

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
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June 15, 2023

***VIA HAND-DELIVERY & ELECTRONIC MAIL***

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West Virginia Department of  
Health & Human Resources  
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[April.L.robertson@wv.gov](mailto:April.L.robertson@wv.gov)

**Re: Comments to Proposed Certificate of Need Rule  
Title 65, Series 32**

Dear Ms. Robertson:

These comments to the Proposed Rule, W. Va. Code R. § 65-32-1 *et seq.*, relating to the Certificate of Need program and its administration by the West Virginia Health Care Authority are submitted on behalf of Appalachian Regional Healthcare, Inc. d/b/a Beckley ARH Hospital (“BARH”). BARH is an acute care facility located in Beckley, Raleigh County with 173 licensed beds (including 60 psychiatric beds) and a Level IV Trauma Center Emergency Room.

BARH is continually working to add new physicians and services to better serve the residents of Raleigh County and the surrounding communities in Southern West Virginia. This includes its efforts to grow its cardiac program. Recently, in March 2023, the West Virginia Health Care Authority approved BARH’s Application for a Certificate of Need to initiate elective therapeutic cardiac catheterization services.

BARH offers the following comments because the Proposed Rule does not incorporate the exemptions for hospital services the Legislature intended with its adoption of the new Certificate of Need law. BARH offers them in an effort to ensure the objectives of Senate Bill 613 (2023) are adequately considered and embodied in the Proposed Rule.

1. ***Proposed § 65-32-3.1. Certificate of Need Requirements.*** This section as currently written reiterates the requirements of W. Va. Code § 16-2D-8 without setting forth the exemptions contained in W. Va. Code §§ 16-2D-9, 10, or 11. In fact, § 16-2D-8 specifically states, “[e]xcept as provided in § 16-2D-9, § 16-2D-10, and § 16-2D-11 of this code, the following proposed health

services may not be acquired, offered, or developed within this state except upon approval of and receipt of a certificate of need as provided by this article. . . .”

Proposed Rule § 65-32-3.1, however, fails to incorporate this limiting language. As currently written, it states, “[a] new health service as defined by W. Va. Code § 16-2D-8 may not be acquired, offered, or developed within this state unless the Authority has issued a certificate of need for the new health service.” This is overly broad and impermissibly encompasses more than its legislative counterpart. In other words, absent the limiting language, there is an inconsistency between the statute and the Rule that should be cured with an amendment to the Proposed Rule before it is finalized.

BARH, therefore, recommends amending this Proposed Rule to more closely track the language of the statute to read as follows:

**A new health service as defined by W. Va. Code § 16-2D-8 may not be acquired, offered, or developed within this state unless the Authority has issued a certificate of need for the new health service, subject to the exemptions in W. Va. Code §§ 16-2D-9, 16-2D-10, and 16-2D-11.**

2. *Proposed § 65-32-20. Addition of Health Services.* This section as proposed is overly broad and similarly does not incorporate the exemptions contained in W. Va. Code §§ 16-2D-9, 16-2D-10, or 16-2D-11. As written, the Proposed Rule incorporates only the private office practice exemption contained in W. Va. Code § 16-2D-10(5). Specifically, this proposed section states in pertinent part:

*§ 62-32-20. Addition of Health Services.*

*20.1. The following health services are subject to certificate of need review pursuant to section 8(b) of the statute: . . .*

*20.1.e. Providing fixed magnetic resonance imaging; except when criteria are met for exemption as provided for in W. Va. Code § 16-2D-10(5); . . .*

*20.1.i. Providing diagnostic imaging; except when criteria are met for exemption as provided for in W. Va. Code § 16-2D-10(5); . . .*

This proposed section strikes language requiring review of birthing centers and retains language requiring review of certain services such as, for example, radiation therapy at § 20.1.a, computed tomography at § 20.1.b, and cardiac surgery at § 20.1.d, among others. *See* §§ 20.1.e-v. However, proposed §§ 20.1.e and 20.1.i are the only proposed health services under this proposal to be subject to any exemptions. Specifically, the above language subjects “magnetic resonance imaging” and “diagnostic imaging” to the private office practice exemption set forth in W. Va. Code § 16-2D-10(5).

This is important because the Proposed Rule ignores the explicit statutory language providing that the addition of health services set forth in W. Va. Code § 8(a)(12) are altogether subject to all exemptions contained in W. Va. Code §§ W. Va. Code §§ 16-2D-9, 16-2D-10, and 16-2D-11. *See, e.g.,* W. Va. Code § 16-2D-10 (“Notwithstanding § 16-2D-8 of this code, a person may provide the following health services without obtaining a certificate of need or applying to the authority for approval. . .”). The Proposed Rule fails to contemplate the exemptions. Thus, by excluding these exemptions in the text of this Proposed Rule, the Rule would create an unnecessary conflict between it and the statute, if adopted as proposed.

Thus, to cure this defect in the Proposed Rule and to effect the Legislature’s intent, BARH recommends amending the introductory sentence of § 65-32-20.1 to read as follows:

**The following health services are subject to certificate of need review pursuant to section W. Va. Code § 16-2D-8(b), subject to the exemptions contained in W. Va. Code §§ 16-2D-9, 16-2D-10, and 16-2D-11.**

Adding this proposed language in § 65-32-20.1 would eliminate the need to add the proposed language to §§ 65-32-20.1.e and 65-32-20.1.i, relating to the private office practice exemptions because it contemplates that exemption (i.e., W. Va. Code § 16-2D-10(5)). Thus, it would be superfluous to reference it twice.

For your convenience, BARH’s proposed recommendations with strike-throughs and underscoring to the Proposed Rule are enclosed. Thank you for your consideration of these comments. Naturally, if you have any questions or need additional information of any kind, please contact Lauren Motes ([lauren.motes@dinsmore.com](mailto:lauren.motes@dinsmore.com)) or me.

Very truly yours,



Jill Cranston Rice  
*Counsel for Appalachian Regional Healthcare, Inc.  
d/b/a Beckley ARH Hospital*

Enclosure

cc: Lauren E. Motes (w/out Enc.; via Electronic Mail)

## Recommended Amendments

### § 65-32-3. Certificate of Need Requirements.

3.1. A new health service as defined by W. Va. Code § 16-2D-8 may not be acquired, offered, or developed within this state unless the Authority has issued a certificate of need for the new health service, subject to the exemptions in W. Va. Code §§ 16-2D-9, 16-2D-10, and 16-2D-11.

\* \* \*

### § 65-32-20. Addition of Health Services.

20.1. The following health services are subject to certificate of need review pursuant to W. Va. Code § 16-2D-8(b), subject to the exemptions contained in W. Va. Code §§ 16-2D-9, 16-2D-10, and 16-2D-11.

20.1.a. Providing radiation therapy;

20.1.b. Providing computed tomography;

20.1.c. Providing positron emission tomography;

20.1.d. Providing cardiac surgery;

20.1.e. Providing fixed magnetic resonance imaging; ~~except when criteria are met for exemption as provided for in W. Va. Code § 16-2D-10(5);~~

20.1.f. Providing comprehensive medical rehabilitation;

20.1.g. Establishing an ambulatory care center;

20.1.h. Establishing an ambulatory surgical center;

20.1.i. Providing diagnostic imaging; ~~except when criteria are met for exemption as provided for in W. Va. Code § 16-2D-10(5);~~

20.1.k. Constructing, developing, acquiring, or establishing of kidney disease treatment centers, including freestanding hemodialysis units;

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