Arch A. Moore, Jr.
Governor

David K. Heydinger, M.D.
Director

1986 APR 18 PM 4:29

State of West Virginia

DEPARTMENT OF HEALTH
CHARLESTON 25305

NOTICE OF EMERGENCY LEGISLATIVE RULE

AGENCY: Health Department
NEW RULES: _____ AMENDMENT TO EXISTING RULE: X
RULE TITLE, SERIES #: Hospital Licensure, 16-5B, Series I

The above emergency legislative rule has been adopted by the West Virginia Board of Health and shall be effective from the date filed with the Secretary of State. This emergency legislative rule is also being filed with the Legislative Rule-Making Review Committee.

The facts and circumstances constituting the emergency are as follows:

The West Virginia State Legislature, in the opening passage of the statute authorizing this rule, declared that "a crisis in health care costs exists." W. Va. Code § 16-5B-6a. The Legislature declared further that "one important approach to deal with this crisis is to have widespread citizen participation in hospital decision making and that many hospitals in West Virginia exclude from their boards important categories of consumers ...." The Legislature found that nonprofit hospitals "are so crucial in health planning and development that it is necessary to require consumer representatives on their boards of directors."

The crisis in health care costs has not abated. Prompt enforcement of this law by the promulgation of appropriate rules is necessary to effect the Legislature's clear intent and for the immediate preservation of the public welfare. In the absence of emergency rules, another year will pass in which crucial health planning and development decisions made by hospital boards may lack sufficient consumer input. Clearly, in view of the Legislature's findings, such delay would cause substantial harm to the public interest.

The Legislature mandated that all affected hospitals achieve compliance with the requirements of the law by July 1, 1984. Promulgation of the rule has been held in abeyance pending the outcome of Federal court challenges to the statute. The United States Court of Appeals for the Fourth Circuit has just issued a ruling upholding the statute, on February 27, 1986. Consequently, no reason exists to continue to defer action. Immediate promulgation of this rule is necessary to measure compliance with the July 1, 1984 time limitation established in the W. Va. Code.

Promulgation of this rule on an emergency basis is also necessary to provide uniform and clear guidance to hospitals on how to comply with the law and to citizens, the Director of Health, and the courts on how to enforce it. The statute requires that hospital boards of directors include representation of certain categories of consumers, specifically, small businesses, organized labor, elderly persons and persons whose income is less than the national median income. The law does not further define these categories; the rule does. One court challenge has been filed already, asserting that a particular hospital's board does not contain sufficient representation from the above four categories. Unless clarifying rules are promulgated, multiple interpretations of the statute may result, making compliance all the more difficult and thwarting the objective of the law. Based on the sense of urgency voiced by the Legislature, any continued impediment to involvement of consumers in the effort to contain health care costs would cause substantial harm to the public interest of the citizens of West Virginia.

David K. Heydinger, M.D.
Director of Health

WEST VIRGINIA LEGISLATIVE RULES
BOARD OF HEALTH

Chapter 16-5B
Series I
(1983)

Subject: Hospital Licensure

Section 1. General

1.1. Scope - These legislative rules establish rules and procedures for the licensing of hospitals.

1.2. Authority - These legislative rules are issued under the authority of and are related to Chapter 16, Article 5B, Section 1 et seq. of the West Virginia Code of 1931, as amended.

1.3. Filing Date - These legislative rules were promulgated on the 20th day of November, 1968 and were filed on the 26th day of November, 1968 in the secretary of state's office.

1.4. Effective Date - These legislative rules became effective on the 1st day of January, 1968.

1.5. Refiling Date - These legislative rules were refiled pursuant to Chapter 29A, Article 2, Section 5 of the West Virginia Code of 1931, as amended, on the 30th day of December, 1982.

Section 2. Application and Enforcement

2.1. Application - These legislative rules shall apply to every person, partnership, association, corporation or any local governmental unit or any division, department, board or agency thereof which shall operate or apply to operate a hospital as defined in these rules and in Chapter 16, Article 5B of the West Virginia Code of 1931, as amended, except as herein specified.

EMERGENCY AMENDMENT OF
WEST VIRGINIA LEGISLATIVE RULES

BOARD OF HEALTH

FILED

1986 APR 18 PM 4: 30

Chapter 16-5B
Series I
1986

Subject: Hospital Licensure

Note: The amendment applies only to Section 7 of the present rule and only that Section is presented herein. Subsections 7.2.2 through 7.2.9 are to be added to the current rule; strikethrough/underlining is not used.

Section 7. Administration of the Hospital

7.1. Scope - The governing body, owner or board of trustees is the highest authority responsible for the management and control of the entire institution including employment of a hospital administrator and appointment of medical staff. The administrator is responsible for the direction and control of the hospital operation in accordance with policies established by the governing authority. The medical staff is responsible for the quality of medical care provided and for submitting reports on the quality of this care to the governing board of the hospital at frequent intervals.

7.2. Governing Authority

7.2.1. There shall be a governing authority legally and morally responsible for the management and control of the hospital. In the discharge of its duties, the governing authority places responsibility for the care of patients upon the medical staff. It is responsible for the establishment of policies.

a. The governing authority shall adopt and amend bylaws which shall require that body to:

(1) Appoint members to the medical staff;

(2) Approve the bylaws and regulations of the medical staff;

(3) Define the committees of the governing authority and the functions and responsibilities thereof;

(4) Develop and maintain suitable formal liaison with the medical staff by means of a joint conference committee;

(5) Appoint a full time qualified administrator and delegate to him executive authority and responsibility; and

(6) Provide for the proper control of all assets and funds, including annual audits thereof.

b. Minutes of all meetings of the governing authority and of its committees, including a record of attendance, shall be recorded, signed and retained in the hospital as a permanent record.

c. The governing authority shall be responsible for providing a safe physical plant equipped and staffed to maintain adequate facilities and services for hospital patients.

7.2.2. Applicable hospitals shall have boards of directors representative of the communities they serve. The boards of directors of applicable hospitals shall designate at least forty percent of their voting members as consumer representatives with an equal portion of such representatives in the four consumer categories of small business representatives, organized labor members, elderly persons and persons whose income is less than the national median income, except if when 0.40 is multiplied by the number of the voting members, the product, when rounded to the next higher whole number, is not a multiple of four, then the number of representatives in the consumer categories may be unequal, provided that the number of representatives in any consumer category is only one consumer in excess of the number of consumers in any other consumer category.

As used in subsections 7.2.2. through 7.2.9.:

a. "Applicable hospitals" means all nonprofit hospitals, whether governed by an in-state or out-of-state board of directors, and all hospitals owned by a county, city or other political subdivision of the State of West Virginia except for psychiatric hospitals operated by comprehensive community mental health centers and mental retardation facilities which are otherwise subject to a governing board composition criterion of the department of health.

b. "Board of directors" or "board" means the voting members of the governing authority of an applicable hospital, or if a religious organization holds a hospital license, means the hospital board established by the religious organization.

c. "Communities" means the four population groupings which are composed of all members of the general public who meet the definitions of small business representatives, organized labor members, elderly persons, or persons whose income is less than the national median income, irrespective of place of residence within or without the State.

d. "Consumer representative" means a member of an applicable hospital's board of directors who has been designated as such by the board by virtue of qualifying as a person from one of the four consumer categories, and such person is not a member of management of the applicable hospital nor a member of management of one of its related organizations.

e. "Elderly persons" means persons who are sixty years of age or older.

f. "Family" means a group of two or more persons related by blood, marriage or adoption who reside together.

g. "Member of management" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or

responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connnection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgement.

h. "Organized labor members" means members of organized labor unions covered by the National Labor Relations Act, the Railroad Labor Act or other federal labor acts.

i. "Persons whose income is less than the national median income" means (1) individuals whose gross family income is less than the national median family income, or (2) individuals whose gross personal income is less than the national median income of unrelated individuals. The director of health shall establish and periodically revise national median family income figures for families and unrelated individuals after consideration of Bureau of Census Current Population Reports, Consumer Income, Series P-60.

j. "Principal stockholder" means any person who beneficially owns, holds or has the power to vote ten percent or more of any class of securities issued by a corporation.

k. "Small business representatives" means officers, directors, general partners, sole owner or principal stockholders of any activity subject to business taxation, which activity employs fewer than one-hundred full-time employees or which had gross annual receipts of less than four million dollars, based on 1984 dollars, in its last fiscal year.

l. "Unrelated individuals" means persons fifteen years old and over (other than inmates of institutions) who are not living with any person related to them by blood, marriage or adoption.

7.2.3. After the effective date of this rule, all applicable hospitals shall include in their next application for hospital licensure a list of the voting members of its board of directors who have been designated as: (1) consumer representatives; and (2) such members who are women, members of racial minorities, or who are handicapped. No member of the board of directors shall be designated by the hospital in more than one consumer representative classification. Within ninety days of the effective date of these rules, all applicable hospitals shall either be in compliance with Section 7.2 or shall have on file with the department of health an accepted plan of correction for coming into compliance with Section 7.2. Thereafter, 1) such information shall be provided annually to the department in the applicable hospital's license application, and 2) a license shall not be issued unless the composition of an applicable hospital's board of directors is in conformance with Section 7.2 or a plan of correction has been accepted; except, a license shall not be withheld for noncompliance with this regulation in the case of the corporation defined in West Virginia Code Chapter 18, Article 11-C, Section 1, Subdivision (d) or in the case of Cabell County General Hospital as its board of directors exists under the authority of Chapter 157 of the Acts of the Legislature, regular session, 1945 and Chapter 166 of the Acts of the Legislature, regular session, 1947.

7.2.4. An applicable hospital may change the designation of its consumer representatives from one category to another by filing with the department of health.

7.2.5. If a person designated as a consumer representative on an applicable hospital's board of directors ceases to meet the definition of a consumer representative, then the person may retain his or her designation until the end of his or her term or until the next license application is submitted for the applicable hospital, whichever occurs first.

7.2.6 a. Each applicable hospital shall maintain a file containing affidavits by its consumer representatives as to their consumer category. The affidavits shall be in a form approved by the department of health.

b. If a hospital's designation of a consumer representative is selected for verification or is the subject of a complaint received by the department of health, upon request from the department of health, the consumer representative will be required to provide the department with copies of the following which are applicable to document his or her consumer designation:

(1) Small business representatives - The business financial statement, workers' compensation filing or other evidence of business size acceptable to the department of health.

(2) Organized labor members - Written verification of membership from the union.

(3) Elderly persons - Birth certificate, driver's license or other evidence of age acceptable to the department.

(4) Persons whose income is less than the national median income - Copy of the signature pages of federal income tax returns or an affidavit that the filing of such returns with the federal government was not required.

c. If the consumer representative designation of a board member of an applicable hospital is selected for verification or if the consumer representative designation of a board member of an applicable hospital is the subject of a complaint and if, upon request by the department of health, the consumer representative does not provide adequate documentation to justify such designation, and if the board member has not been replaced before the then current license for the hospital is no longer in effect, the department may deem the hospital out of compliance with Section 7.2.2.

7.2.7. Each applicable hospital shall also maintain a file which shall contain the procedure established by the board of directors to assure the consideration of women, racial minorities and the handicapped in the selection of consumer representative board members and documentation that such procedure has been followed, except no such file is required to be maintained by the corporation defined in West Virginia Code Chapter eighteen, Article eleven-C, Section one, Subdivision (d) or by Cabell County General Hospital as its board of directors exists under the authority of Chapter 157 of the Acts

of the Legislature, regular session, 1945 and Chapter 166 of the Acts of the Legislature, regular session, 1947.

7.2.8. In no event shall a board of directors of an applicable hospital be required to be composed of more consumer representatives than are necessary to achieve forty percent of the voting members of the board, regardless of the number of hospitals for which the board is the governing authority.

7.2.9. To the extent that any provisions of the charter or by-laws of an applicable hospital regarding board member qualifications are in conflict with the requirements of these regulations, such provisions are null and void for purposes of complying with these regulations.

7.3. Hospital Administrator - A hospital administrator qualified by education and experience shall be responsible at all times for directing, coordinating and supervising the administration of the hospital and for carrying out the policies of the governing authority and the rules and regulations of the medical staff. The administrator shall serve in an administrative liaison capacity between the medical staff and the governing authority.

KEN HECHLER
Secretary of State

MARY P. RATLIFF
Deputy Secretary of State

BARBARA STARCHER
Deputy Secretary of State

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STATE OF WEST VIRGINIA
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Charleston 25305

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VIRGINIA SKEEN
Special Assistant

(Plus all the volunteer help we can get)

May 29, 1986

NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

AGENCY: Department of Health

RULE: Series 12 Hospital Licensure; Amendment to Section 7 "Administration of the Hospital."

DATE FILED AS AN EMERGENCY RULE: April 18, 1986

DECISION NO. 4-86

Following review under WV Code 29A-3-15a, it is the decision of the Secretary of State that the above emergency rule be disapproved. A copy of the complete decision with required findings is available from this office.

FILED
1986 MAY 29 AM 11:44
OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

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Secretary of State

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DECISION — Emergency Rule Decision (ERD 4-86)

AGENCY: Department of Health
RULE: Series 12 Hospital Licensure; Amendment to Section 7 "Administration of the Hospital."
DATE FILED AS AN EMERGENCY RULE: April 18, 1986

par. 1 The Department of Health has filed as an emergency rule an amendment to their Series 12 rule titled Hospital Licensure. The amendment is to Section 7 "Administration of the Hospital;" which in part governs the responsibilities for the governing body, owner or board of trustees of the hospital.

par. 2 The amendment is to clarify the application of WV Code 16-5B-6a requiring consumer representation on hospital boards.

par. 3 West Virginia Code 29A-3-15A requires the Secretary of State to review all emergency rules filed after March 8, 1986. This review requires the Secretary of State to determine if the agency filing such emergency rule 1) has complied with the procedures for adopting an emergency rule; 2) exceeded the scope of its statutory authority in promulgating the emergency rule; or 3) can show that an emergency exists justifying the promulgation of an emergency rule.

par. 4 Following review, the Secretary of State shall issue a decision as to whether or not such emergency rule should be disapproved [29A-3-15a(a)].

par. 5 (A) Procedural Compliance: WV Code 29A-3-15 permits an agency to adopt, amend or repeal, without hearing, any legislative rule by filing such rule, along with a statement of the circumstances constituting the emergency, with the Secretary of State and forthwith with the Legislative Rule-Making Review Committee (LRMRC).

par. 6 If an agency has accomplished the above two required filings with the appropriate supporting documents by the time the ERD is issued or the expiration of the forty-two day review period, whichever is sooner, the Secretary of State shall rule in favor of procedural compliance.

par. 7 The Department of Health has filed this emergency rule with supporting documents with the Secretary of State on April 18, 1986 and with the LRMRC prior to the issuance of this decision. It is, therefore, the determination of the Secretary of State that the Department of Health has complied with the procedural requirements of WV Code 29A-3-15.

par. 8 (B) Statutory Authority: WV Code 16-5B-6a reads:

§16-5B-6a. Consumer majorities on hospital boards of directors.

(a) The legislature declares that a crisis in health care costs exists, that one important approach to deal with this crisis is to have widespread citizen participation in hospital decision making and that many hospitals in West Virginia exclude from their boards important categories of consumers, including small businesses, organized labor, elderly persons and lower-income consumers. The legislature further declares that nonprofit hospitals receive such major revenue from public sources and are so crucial in health planning and development that it is necessary to require consumer representatives on their boards of directors. Therefore, the legislature determines that nonprofit hospitals and hospitals owned by local governments should have boards of directors representative of the communities they serve.
(b) As used in this section, "applicable hospitals" means all nonprofit hospitals and all hospitals owned by a county, city or other political subdivision of the State of West Virginia.
(c) At least forty percent of the boards of directors of applicable hospitals shall, on or before the first day of July, one thousand nine hundred eighty-four, be composed of an equal portion of consumer representatives from each of the following four categories: Small businesses, organized labor, elderly persons and persons whose income is less than the national median income. Special consideration shall be made to select women, racial minorities and handicapped persons.
(d) The provisions of this section may be enforced by the director of health, or by any citizen of the county wherein any offending hospital is located, by the filing of an action at law in the circuit court of such county. (1983, c. 99.)

par. 9. WV Code 16-1-7 reads in part:

§16-1-7. Promulgation of rules and regulations; references to board to mean director of health.

The state board of health shall have the power to promulgate such rules and regulations, in accordance with the provisions of chapter twenty-nine-A [29A-1-1 et seq.] of the code, as are necessary and proper to effectuate the purposes of this chapter and prevent the circumvention and evasion thereof:

par. 10 Although WV Code 16-5B-6a does not expressly direct or authorize rule making WV Code 16-1-7 and existing case law recognizes implied rule making authority as cited in the following examples: State Human Rights Commission v. Pauley, 212 SE 2d. 77; State v. Bunner 27 SE 2d. 823; State ex rel. Carman v. Sims, 115 SE 2d. 140 and State ex rel. Callahan v. West Virginia Civil Service Commission, 273 SE 2d. 72.

par. 11. It is the determination of the Secretary of State that the Department of Health has not exceeded its statutory authority by amending its Series 12 rule.

par. 12 (C) Emergency: WV Code 25A-3-15(g) defines "emergency" as follows:

(g) For the purposes of this section, an emergency exists when the promulgation of a rule is necessary for the immediate preservation of the public peace, health, safety or welfare or is necessary to comply with a time limitation established by this code or by a federal statute or regulation or to prevent substantial harm to the public interest.

par. 13 There are essentially three classes of emergency broadly presented with the above provision: 1) immediate preservation; 2) time limitation; and 3) substantial harm. An agency need only document to the satisfaction of the Secretary of State that there exists a nexus between the proposal and the circumstances creating at least one of the above three emergency categories.

par. 14 The Department of Health claims that this proposal is for "the immediate preservation of the public welfare and to prevent substantial harm to the public interest and to 'measure compliance with the July 1, 1984, time limitation established in the W. Va. Code.'" (Notice of Emergency Rule filed April 18, 1986)

par. 15 The circumstances and facts constituting the emergency as presented by the Department of Health, are as follows:

The West Virginia Legislature, in the opening passage of the statute authorizing this rule declared that "a crisis in health care costs exists." W. Va. Code §16-5B-6a. The Legislature declared further that "one important approach to deal with this crisis is to have widespread citizen participation in hospital decision making and that many hospitals in West Virginia exclude from their boards important categories of consumers. . . ." The Legislature found that nonprofit hospitals "are so crucial in health planning and development that it is necessary to require consumer representatives on their boards of directors."

The crisis in health care costs has not abated. Prompt enforcement of this law by the promulgation of appropriate rules is necessary to effect the Legislature's clear intent and for the immediate preservation of the public welfare. In the absence of emergency rules, another year will pass in which crucial health planning and development decisions made by hospital boards may lack sufficient consumer input. Clearly, in view of the Legislature's findings, such delay would cause substantial harm to the public interest.

The Legislature mandated that all affected hospitals achieve compliance with the requirements of the law by July 1, 1984. Promulgation of the rule has been held in abeyance pending the outcome of Federal court challenges to the statute. The United States Court of Appeals for the Fourth Circuit has just issued a ruling upholding the statute, on February 27, 1986. Consequently, no reason exists to continue to defer action. Immediate promulgation of this rule is necessary to measure compliance with the July 1, 1984 time limitation established in the W. Va. Code.

Promulgation of this rule on an emergency basis is also necessary to provide uniform and clear guidance to hospitals on how to comply with the law and to citizens, the Director of Health, and the courts on how to enforce it. The statute requires that hospital boards of directors include representation of certain categories of consumers, specifically, small businesses, organized labor, elderly persons and persons whose income is less than the national median income. The law does not further define these categories; the rule does. Once court challenge has been filed already, asserting that a particular hospital's board does not contain sufficient representation from the above four categories. Unless clarifying rules are promulgated, multiple interpretations of the statute may result, making compliance all the more difficult and thwarting the objective of the law. Based on the sense of urgency voiced by the Legislature, any continued impediment to involvement of consumers in the effort to contain health care costs would cause substantial harm to the public interest of the citizens of West Virginia. (Notice of Emergency Rule filed April 18, 1986.)

par. 16 With regard to the time limitation, it is difficult for this office to view a July 1, 1984 effective date for the statute, passed March 9, 1983, as a "deadline" for adoption of the rule. The Health Department could have followed the entire rule making process and presented this rule before the 1984 Legislature, the 1985 Legislature or the 1986 Legislature, but failed to do so. The defense that delay was warranted by the filing for judicial review of the statute, which occurred 15 months after the law passed the Legislature, is not sufficient. No court held up the application of the law and there was sufficient time to present this rule to the 1984 Legislature for an effective date to match the July 1, 1984 effective date of the Act.

par. 17 The Department of Health's claim that the Legislature has previously declared that this rule is an emergency rule due to the statutory language announcing that "a crisis in health care cost exists" [WV Code 16-5B-6a(a)] does not convince this office. To claim that this statement constitutes a blanket approval of any rule which may be held out as abating health care cost is stretching legislative intent to the point of legislative acquiescence.

par. 18 Within the comments received the the law offices of Spilman, Thomas, Battle and Klostermeyer, representing Appalachian Regional Healthcare, Inc., dated May 23, 1986, they cite an Op. Attorney General (December 18, 1978) construing the term "emergency". This opinion does not weigh greatly in favor of rejection since the Legislature has since defined "emergency" within statute. [29A-3-15(g)]

par. 19 The quotations from Professor Neely's treatise on West Virginia Administrative Law §4.20 (Supp. 1983) presented in the above letter do deserve some deference. The criteria that harm must be substantial is convincing. The Department of Health does not claim that the statute can not stand and be enforceable without the rule bows to the finding that the harm is not substantial. The harm the Department fears is multiple interpretations. This is a future inconvenience, if it indeed occurs, and one that can be mitigated through an interpretive rule if the Department chooses.

par. 20. It is curious, however, that this rule was introduced as a legislative rule and not as an interpretive rule, which could be lawfully adopted through the APA within 60 days. If its effect is to merely guide compliance or to establish the conditions for the exercise of agency discretion, it would fall within the definition of interpretive rule found in WV Code 29-1-2(3).

par. 21 However, the Department has chosen to designate this rule as legislative. The WV APA requires a thorough review of legislative rules before they can acquire the force of law. The legislature in 1982 and 1985 restricted the use of emergency rule making with the intent, as this office views it, of curbing agency abuse of emergency rule adoption.

par. 22 There exists limited case law on emergency rule making, especially state emergency rule making. The only parallel is within the Federal APA exemption from notice and hearing found within 5 U.S.C.A §553. Here a federal agency may be fully exempt from the federal rule making requirements for "good cause." Good cause is defined as impracticable, unnecessary, or contrary to the public interest. [§553(b)(B)] Although the APA does not define those terms, both the Senate and House Reports provide definitions for impracticable-situations where the proper execution of agency functions would be unavoidably prevented if rule making procedures were followed (HR Rep. No. 79-1980, N. 65 supra). As stated in par. 19 this would not occur.

par. 23 Federal case law may also be helpful as a parallel. The United States Court of Appeals, District of Columbia Circuit ruled on §553 that exceptions "will be narrowly construed and only reluctantly countenanced." [American Federation of Government Emp. v. Blouk, 655 F. 2d. 1153 (1981)]

par. 24 Given the statements filed by the Department and counsel for the Appalachian Regional Healthcare, Inc., as well as the limited case law and parallel conditions within the Federal APA and other sources and the option of the Department to curtail compliance problems within an interpretive rule, this office can not approve this filing as an emergency rule.

par. 25 It should be made clear that WV Code 25A-3-15A does not authorize the Secretary of State to rule on the wisdom of any rule in accomplishing the intent of that agency's statutes and this decision does not stand as a disagreement with the hope of the Legislature or the Department as to the benefit of more consumer representation on hospital boards.

par. 26 This decision shall be cited as Emergency Rule Decision 4-86 or ERD 4-86 and may be cited as precedent. This decision is available from the Secretary of State's office and has been filed with the Department of Health, the Attorney General and the Legislative Rule Making Review Committee.

Ken Hechler

KEN HECHLER
Secretary of State

FILED IN THE OFFICE OF
THE SECRETARY OF STATE

Entered THIS DATE May 29, 1986
ADMINISTRATIVE LAW DIVISION

Arch A. Moore, Jr.
Governor

David K. Heydinger, M.D.
Director

State of West Virginia

DEPARTMENT OF HEALTH
CHARLESTON 25305

MEMORANDUM

TO: Richard O. Hartman, Director
Administrative Law Division
Office of the Secretary of State

FROM: Kay Howard, Director
Regulatory Services Division

DATE: April 24, 1986

SUBJECT: Additional Comments Relating to Amendments to the Hospital Licensure Rule, West Virginia Board of Health Legislative Rules, Chapter 16-5B, Series I - Emergency and Regular Filing

---

Attached for your information are copies of two letters of comment regarding the above-titled rule which were received by the Board of Health at the regular meeting held on April 18, 1986.

trk

cc + enc: Larry Arnold
Charles Garlow
John J. Jarrell
David Lambert

OFFICE OF HEALTH PLANNING & EVALUATION
REGULATORY SERVICES DIVISION
1800 WASHINGTON STREET, EAST CHARLESTON, WEST VIRGINIA 25305 TELEPHONE (304) 348-3223

Arch A. Moore, Jr.
Governor

David K. Heydinger, M.D.
Director

State of West Virginia

DEPARTMENT OF HEALTH
CHARLESTON 25305

MEMORANDUM

TO: Debra A. Graham, Associate Counsel
Legislative Rule-Making Review Committee

FROM: Kay Howard, Director
Regulatory Services Division

DATE: April 24, 1986

SUBJECT: Additional Comments Relating to Amendments to the Hospital Licensure Rule, West Virginia Board of Health Legislative Rules, Chapter 16-5B, Series I - Emergency and Regular Filing

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cc + enc: Larry Arnold
Charles Garlow
John J. Jarrell
David Lambert

WEST VIRGINIA HOSPITAL ASSOCIATION

The West Virginia Hospital Association is pleased to comment on additional revisions to the proposed amendments of West Virginia Legislative Rules Chapter 16-5B, Series 1 (1986). Our objections are respectively directed to the West Virginia Board of Health meeting on April 18, 1986.

TIME ALLOWED FOR INITIAL COMPLIANCE

A continuing concern centers around rule 7.2.3. Recent changes in this proposed rule intensified rather than decreased the difficulty of obtaining individual hospital compliance.

In our earlier written comments relative to compliance time, we advised the Board as follows:

> "Section 7.2.3 of the redraft contains ..... provisions which should be modified, the first of which is the 30 day time compliance period. We believe that a 30 day time limit is unrealistic, and suggest that hospitals should have 90 days after the effective date of the regulations to comply. This additional time period would allow individual acute care health facilities time in which to modify corporate by-laws and to devote careful consideration to the mandated representation scheme."

adopted

3422 Pennsylvania Avenue Charleston, West Virginia 25302 (304) 345-9842

In respect to these comments, the proposed regulations were changed to allow a period for initial compliance to "be extended from 30 to 90 days."

The most recent proposed regulations presented to the Board today obliterate any meaningful time to allow hospitals to comply with board composition requirements. Section 7.2.3 as presented today states:

> "After the effective date of this rule, all applicable hospitals shall include in their application for hospital licensure a list of the voting members of its Board of Directors who have been designated as consumer representatives; and two such members who are women, members of racial minorities, or who are handicapped."

The effect of this modification is to require hospitals to comply immediately with the proposed regulations.

Although paragraph 7.2.9 would attempt to indicate that the corporate charter or by-laws of applicable hospital are of no moment, it is again respectfully suggested that a sufficient period of time be allowed for the hospitals to make necessary changes in their corporate by-laws as appropriate.

Additionally, it should not be expected that hospitals comply with proposed regulations 7.2.6a and following without a compliance time period which is reasonable and adequate.

THE LICENSURE REQUIREMENT IS NOT WITHIN INTENT OF THE LEGISLATURE

A continuing objection to 7.2.3 is the unnecessary and unwarranted action of denial of licensure to any hospital not in compliance with Board mandated composition.

Nothing in the statute passed by the legislature (§16-5B-6a) commands compliance through the licensure process. Because the legislature indicated an exclusive enforecement remedy at §16-5B-6a (d) by the Director of Health or any appropriate citizen "filing ..... an action at law" (emphasis supplied), the licensure compliance process is viewed as an unauthorized remedy which is on a collision course with clear intent of the West Virginia Legislature. Serious consideration should therefore be given to removing annual licensure as a compliance modality. Removing this provision from the redraft regulations ensures all parties that the state agency has not improperly exceeded its authority while preserving the enforcement power of the Director of Health and/or any appropriate citizen through an action filed in a county circuit court.

Respectfully submitted,

Kenneth M. Rutledge
President

KMR/elm

April 18, 1986

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April 22, 1986

Ken Hechler
Secretary of State
State Capitol Complex
Charleston, WV 25305

HAND-DELIVERED

Re: West Virginia Board of Health's Emergency Filing of Legislative Rules to Implement Mandatory Hospital Board Composition Law, W.Va. Code § 16-5B-6a

Dear Mr. Hechler:

I am writing on behalf of Appalachian Regional Healthcare, Inc. ("ARH"), formerly Appalachian Regional Hospitals, Inc., to request an opportunity to file written comments with your office with regard to the above-referenced matter.

ARH is a private, non-profit corporation organized and existing pursuant to the laws of the Commonwealth of Kentucky, which owns and operates ten hospitals located in Kentucky, West Virginia, and Virginia.

On April 18, 1986, ARH attended a meeting of the West Virginia Board of Health ("Board"), at which the Board, over ARH's and other's objections, authorized the emergency filing with your office of legislative rules to implement the mandatory hospital board composition law, W.Va. Code § 16-5B-6a.

As you are aware, Senate Bill No. 434, which was enacted during the West Virginia Legislature's 1986 Regular Session, requires your office to review rules which are filed with your office on an emergency basis within forty-two days of their filing in order to determine, inter alia, whether an emergency actually exists justifying such emergency filing.

ARH very strongly believes that no emergency actually exists justifying the filing of these rules on an emergency basis, and respectfully requests that your office afford ARH an opportunity to file written comments with your office in

connection therewith prior to your office's rendering any determination on this issue.

If you should have any questions or comments regarding this matter, please contact me at the address or telephone number set forth above.

Very truly yours,

Robert J. O'Neil
Special Counsel for Appalachian
Regional Healthcare, Inc.

RJO/gh

cc: David T. Enlow, Esquire
General Counsel for
Appalachian Regional
Healthcare, Inc.

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April 17, 1986

Board Member
West Virginia Board of Health
Charleston, West Virginia

RE: Proposed Rules for Consumer Representatives to Non-Profit Hospital Governing Boards

Dear Board Member:

As Counsel for Appalachian Regional Healthcare, Inc. (formerly Appalachian Regional Hospitals, Inc. and referred to herein as "ARH") I, along with West Virginia Counsel, have been asked to present ARH's position on the proposed rules to the Board.

ARH is a Kentucky non-profit corporation that owns and operates ten (10) hospitals, two (2) of which are located in West Virginia at Beckley (licensed for 221 beds plus CON approval for 30 substance abuse beds) and Man (licensed for 82 beds). ARH is governed by a 33 member Board of Trustees. ARH also has 821 licensed beds in Kentucky and 67 licensed beds in Virginia. Accordingly the West Virginia beds comprise approximately 27% of all ARH licensed beds.

ARH has the following comments about the proposed rules:

IT IS NOT NECESSARY TO ADOPT THE RULES AS EMERGENCY REGULATIONS.

§ 29-A-3-15(g) defines when an emergency exists that would allow adoption as emergency regulations. The statute provides an emergency exists when the "rule is necessary for the immediate preservation of the public peace, health, safety or welfare" or is necessary to comply with a time limitation established by the code" or "to prevent substantial harm to the public interest."

What emergency exists? This law was enacted in 1983 and to be effective July 1, 1984 without any regulations. What emergency exists to compel the adoption as emergency regulations? The economic impact statement filed with the proposed regulations shows no economic impact upon the state or the public even though the statute supposedly provides a remedy for increasing health care costs.

IT IS NOT NECESSARY TO TIE COMPLIANCE WITH THE STATUTE TO LICENSURE.

The statute itself has its own enforcement provisions. § 16-5B-6f provides as follows:

> The provisions of this section may be enforced by the director of health, or by any citizen of the county wherein any offending hospital is located, by the filing of an action at law in the circuit court of such county.

Accordingly, a mechanism for enforcement was adopted by the legislature and no additional enforcement need be added by way of licensure.

THE PROPOSED REGULATION SHOULD PROVIDE TIME FOR COMPLIANCE.

In the past this has been addressed by several parties. Especially if the regulation is to be immediately implemented should there be a time for compliance.

THE PROPOSED REGULATION IS TOO INTRUSIVE.

The regulation intrudes on the personal lives of persons who serve in their capacity as Hospital Trustees. This is especially true when tax returns, made confidential by Federal Law, must be disclosed in order to prove compliance.

IF LICENSURE IS USED TO ENFORCE THE STATUTE, THE DEPARTMENT OF HEALTH MAY BE REQUIRED TO CLOSE HOSPITALS.

The matter of the constutionality of the statute remains an issue and is to be appealed to the United States Supreme Court.

Because of the status of this matter being in the Courts, the Board by adopting regulations merely adds to the potential for additional litigation.

A neutral posture awaiting final decision will avoid the possible closing, through licensure denial, of the two ARH Hospitals, which have provided the following charity care and care written off as bad debt. Such charity for the following periods is shown below:

Fiscal Year 1983 - 1984	Beckley	Man
Charity	$1,011,551	$ 488,141
Bad Debt	$ 890,300	$ 618,583
	$1,901,851	$1,106,724

Fiscal Year 1984 - 1985

Charity	$ 683,627	$ 729,995
Bad Debt	805,200	743,878
	$1,488,827	$1,473,873

8 months of 1985 - 1985

Charity	$1,400,000	$ 220,000
Bad Debt	$ 462,000	$ 359,000
	$1,862,000	$ 579,000

For the period June 1, 1979 through February 1, 1986, there is presented below the charity and bad debt for the two (2) West Virginia hospitals:

	Beckley	Man
Charity	$ 5,269,429	$1,207,528
Bad Debt	$ 5,867,602	$2,292,218
	$11,137,031	$3,499,746
TOTAL	$14,636,777.00	

One must necessarily ask whether the loss of the ARH hospitals through licensure enforcement will carry out the purpose of the statute to reduce the crisis in health care costs. Who will come forward and provide this $14,636,777.00 free care if ARH's license is not renewed?

Very truly yours,

David T. Enlow

DTE:psw

STATE OF WEST VIRGINIA
OFFICE OF THE ATTORNEY GENERAL
CHARLESTON 25305

May 29, 1986

CHARLIE BROWN
ATTORNEY GENERAL

The Honorable Ken Hechler
Secretary of State
State Capitol
Charleston, West Virginia 25305

Re: West Virginia Board of Health's Emergency Filing of Legislative Rules to Implement WV Code §16-5B-6a

Dear Secretary Hechler:

While the justification for the emergency filing of the above-referenced rules is clearly detailed in the Notice of Emergency Legislative Rule previously filed with your office, I, as counsel to the Director of the West Virginia Department of Health, felt that it might be useful to provide a response to the arguments raised by counsel for Appalachian Regional Healthcare, Inc. (ARH) in their May 23, 1986 letter to you. Please consider these comments in your deliberations on the emergency nature of this rule filing.

ARH's background summary is factually accurate except for the implication suggested in that summary that the West Virginia Board of Health deliberately avoided the West Virginia Legislature by issuing emergency regulations, as is more fully discussed under Point 4 infra. ARH's conclusion that these background facts and circumstances do not constitute an emergency is what must be examined.

1. The Legislature has determined that a crisis exists.

While various parties can argue over the definition of an emergency, what set of facts and circumstances constitute an emergency, as it is used in West Virginia Code §29A-3-15a, this problem has already been resolved in this situation by the West Virginia Legislature. The West Virginia Legislature investigated and determined that "a crisis in health care costs exists" and wrote that factual determination into the law. West Virginia Code §16-5B-6a (a). It is not the place of the West Virginia Board of Health, ARH, or even the Secretary of State to substitute their judgment of what constitutes an emergency in the face of such a clear mandate from the West Virginia Legislature.

ARH's only response is that this crisis has abated. ARH cites two figures to suggest that health care costs have not increased as rapidly as they used to increase. But this does not mean that the Legislature believes that the crisis has abated. If the Legislature believed that the crisis had disappeared, surely the Legislature would have abolished or modified the language in the 1984, 1985 or 1986 regular sessions of the West Virginia Legislature. Given this opportunity to do so, and the failure of the West Virginia Legislature so to act, one must conclude that the West Virginia Legislature still believes that a crisis continues to exist.

If ARH believes that no emergency exists, that argument and factual representations should most properly be raised with the Legislature. It is inappropriate for ARH to attempt to establish the non-existence of a health care crisis by facts alluded to in written comments to your office. ARH should request the Legislature to hold hearings on this matter and submit their alleged facts to open scrutiny, so that the Legislature, after due consideration, can decide if they wish to change their previous determination that a crisis exists.

If you, as Secretary of State, do determine that the West Virginia Legislature has not been clear, as to whether an emergency exists, there is a provision in West Virginia Code ¢29A-3-15a(c) for a process by which you may hold a hearing at which factual representations could be investigated. This would be a preferable process of fact-finding as opposed to accepting the truth of facts alleged by counsel for ARH in written comments or as alleged by this author.

In fact, if such a hearing were held and you had an opportunity to look at the empirical data, you might well find that there is cause for alarm on all sides. West Virginia has just endured the nation's most frightening medical malpractice insurance crisis, a crisis which doubtless will result in a continuation of sky rocketing liability insurance premiums, which in turn will mean ever higher costs for patients. No one can say with certainty what the cause is for this insurance crunch. Some argue that we have an increasingly litigious society which means more paid claims. Others say there are more lawsuits because hospitals and doctors are seen as being cold, uncaring, charging too much, and getting too rich, and thus deserve to be sued. If this perception, right or wrong, can be dispelled, if only partially, by the immediate presence of consumer representatives on the boards of directors of hospitals, it may help to avert this portion of the health care crisis.

While ARH is correct that overall hospitals costs in West Virginia have only increased 4.8% in 1985, the Health Care Cost Review Authority data also suggest that it is true that the average charge per day for a typical patient, a more appropriate figure for comparison, has increased more rapidly than that on a statewide basis. Health Care Cost Review Authority reports indicate that individual hospitals, with costs out of line with the state average figures, have filed average charge per day rate increase requests of 40% and 31% in FY 1986. Thus, one might conclude that the crisis in health care costs has not abated for the patients at these hospitals.

One area that is frequently seen as a source of enormous cost increases is the purchase of beneficial but extremely expensive machinery such as CAT scans. It is to contain these costs that the Legislature enacted West Virginia Code ¢16-2D-1 et seq, the Certificate of Need Act. Boards of directors of hospitals decide whether or not to buy this expensive machinery or other facilities that may affect patient costs. Consumer representatives on these boards are urgently needed to provide the consumer perspective in this area quickly before these costs exacerbate the crisis in health care costs.

Any review of the health care cost situation by your office might well conclude that the West Virginia Legislature is correct; there is a crisis in health care costs and that crisis is continuing.

2. This emergency rule is necessary to provide guidance to hospitals on how to comply with the law in order to avoid further court challenges and delays.

ARH's response to this argument is that the federal District Court and Fourth Circuit Court of Appeals rejected this argument in American Hospital Association v. Hansbarger. In fact these courts did no such thing.

What those two courts did do is reject the plaintiff hospitals contention that the law was so vague as to rise to the level of being unconstitutional. Those courts both rightly held that the law is not unconstitutionally vague in violation of the due process clause U.S. Constitution Amendment 14. See AHA v. Hansbarger, 600 F. Supp 465 at 478.

To argue that this holding of the court means that the West Virginia Board of Health need not provide guidance to hospitals in an effort to avoid unnecessary and delaying litigation is to attempt to put words into the mouth of the court.

The West Virginia Board of Health is well advised to endeavor to avoid any delaying lawsuits by issuing clarifying rules in order to promptly enforce this law and address the health care crisis.

3. Promulgation of the rule has been held in abeyance by court challenges. Immediate promulgation is needed.

ARH's response to this justification presented by the West Virginia Board of Health consists of two points.

(A) The law contains no requirement that rules be promulgated to implement this provision. While ARH is correct that this law could be enforced without regulations, as argued in the Board's second justification, supra, regulations will help to ensure prompt and uniform enforcement to meet this emergency in health care costs. The fact that the law does not command the promulgation of regulations does not mean that such regulations are prohibited, unnecessary or undesirable. These regulations are not mandatory, but they are needed. The West Virginia Board of Health could, and will if these emergency rules are voided, enforce the law without regulation, but that enforcement will be much more difficult and time consuming without the regulations. These difficulties will impede the prompt and uniform implementation of this law.

(B) ARH also contends that the court challenge to this law has not ended, and thus, one presumes, ARH would suggest that this is a reason to continue to defer action. ARH has indicated that the American Hospital Association (AHA) intends to seek a writ of certiorari from the U.S. Supreme Court in this case. If AHA does so intend, they must do so within the time limit specified by Rule 11 of the Rules of the United States Supreme Court. That rule specifies that an appeal to the U.S. Supreme Court is on time if filed and docketed within 90 days of the entry of judgment, which was February 27, 1986. Ninety days from that date is May 28, 1986. There is a provision for an extension of time for good cause shown. However, it appears that the regular time limit for such an appeal has run out as of May 28, 1986 and no petition to the U.S. Supreme Court has been filed and docketed. No good cause for failure to timely file is readily apparent. It

seems that American Hospital Association's intentions to appeal have not been acted on and that no appeal will be taken to the U.S. Supreme Court.

Even if American Hospital Association were to file such an appeal, the West Virginia Board of Health represents that such an appeal would most likely be unsuccessful, given the ringing denunciation of A.H.A.'s arguments by the District Court, "To argue [as plaintiffs argue]...is beyond imagination." American Hospital Association vs. Hansbarger, 600 F. Supp 465 at 479. The United States Court of Appeals for the Fourth Circuit apparently so thoroughly agreed with the "well reasoned opinion" of the district court, to quote the Court of Appeals, that they affirmed that lower court's opinion in a mere one and one-half page opinion. The West Virginia Board of Health thus concludes that this issue has been thoroughly litigated and the likelihood of a successful appeal is small. There is thus no reason to await further guidance from the judiciary, since two very clear opinions have already been rendered.

4. The Board's failure to act earlier is not inconsistent with their position that an emergency exists.

ARH's last argument is that the West Virginia Board of Health cannot claim that an emergency exists because the Board has taken so long to promulgate these rules. ARH is certainly correct in stating that the Board could have submitted these rules to the West Virginia Legislature for approval during the 1984, 1985 and 1986 regular sessions. However, the Board chose not to do so, and also chose not to issue these rules on an emergency basis in any one of these years, not because the crisis in health care costs had disappeared and not because the Board sought to avoid review by the West Virginia Legislature, but rather because the constitutionality of this law, West Virginia Code §16-5B-6a, was being challenged in the federal courts, by hospitals such as ARH. It is entirely proper for a state agency to grant the deference and respect due the federal judiciary by deferring enforcement action while a constitutional appeal is pending. The Board's delay in enforcement was due solely to the lawsuit and appeal filed by the hospitals and associations.

Even if the Board might have acted more promptly to enforce this law by issuing regulations earlier or to enforce the law on July 1, 1984 with or without regulations, the Board cannot make up for this short coming by further delay, which is what ARH is in essence seeking by opposing these emergency rules. The Board acted as quickly as they deemed possible by issuing these emergency rules within a month and a half of the U.S. Court of Appeals decision.

The Board hopes to continue to act with all due speed and consistent with the mandate of the West Virginia Legislature to proceed on an emergency basis in this health care crisis. The Board urges you, Mr. Hechler, to assist by approving these rules and rejecting the arguments raised by ARH.

Very truly yours,

Charles Garlow

Charles Garlow
Assistant Attorney General

CG/tp

May 27, 1986

The Honorable Ken Hechler
Secretary of State
State Capitol
Charleston, West Virginia 25305

Re: WV Board of Health's Emergency Filing of Legislative Rules to Implement WV Code §16-5B-6a

Dear Secretary Hechler:

While the justification for the emergency filing of the above-referenced rules is clearly detailed in the Notice of Emergency Legislative Rule previously filed with your office, I felt that it might be useful to provide a response to the arguments raised by counsel for Appalachian Regional Healthcare, Inc. (ARH) in their May 23, 1986 letter to you. Please consider these comments in your deliberations on the emergency nature of this rule filing.

ARH's background summary is unobjectionable for the most part. Their conclusion that these background facts and circumstances do not constitute an emergency is what must be examined.

1. The Legislature has determined that a crisis exists.

While various parties can argue over the definition of an emergency, what set of facts and circumstances constitute an emergency, this problem has already been resolved in this situation by the Legislature. The WV Legislature investigated and determined that "a crisis in health care costs exists" and wrote that factual determination into the law. WV Code §16-5B-6a (a). It is not the place of the WV Board of Health, ARH, or even the Secretary of State to substitute their judgment of what constitutes an emergency in the face of such a clear mandate from the WV Legislature.

ARH's only response is that this crisis has not abated. They cite two figures to suggest that health care costs have not increased as rapidly as they used to increase. But this does not mean that the Legislature believes that the crisis has abated. If the Legislature believed that the crisis has disappeared, surely the Legislature would have abolished or modified the language in the 1984, 1985 or 1986 regular sessions of the WV Legislature. Given this opportunity to do so, and the failure of the WV Legislature so to act, one must conclude that the WV Legislature still believes that a crisis continues to exist.

In fact, if one looks at empirical data, there is cause for alarm on all sides. WV has just endured the nation's most frightening medical malpractice insurance crisis, a crisis which doubtless will result in a continuation of sky rocketing liability insurance premiums, which in turn will mean ever higher costs for patients. No one can say with certainty what the cause is for this insurance crunch. Some argue that we have an increasingly litigious society which means more paid claims. Others say there are more lawsuits because hospitals and doctors are seen as being cold, uncaring, charging too much, and getting too rich, and thus deserve to be sued. If this perception, right or wrong, can be dispelled, if only partially, by the immediate presence of consumer representative on the boards of directors of hospitals, it may help to avert this portion of the health care crisis.

While ARH is correct that overall hospital costs may only be increasing at 4.8% per year in WV hospitals, that is most due to decreased utilization of hospitals, a policy by which hospitals endeavor to discharge patients as soon as possible. That means fewer patients in hospital beds must pay for the same or similar overhead, resulting in increased costs per patient. The impact on the individual patient is getting worse. The appropriate figure to look at, thus, is not overall hospital costs but the average charge per day for a typical patient.

Secondly, some individual hospitals costs are out of line with the overall WV figures. In 1985, hospital costs for all hospitals may only have increased 4.8%, but rate increase requests of 40% and 31% are being requested by some WV hospitals in FY 1986. The crisis in health care costs has not abated for the patients at these hospitals.

One area that is frequently seen as a source of enormous cost increases is the purchase of beneficial but extremely expensive machinery such as CAT scans. It is to contain these costs that the Legislature enacted WV Code §16-2D-1 et seq, the Certificate of Need Act. Boards of directors of hospitals decide whether or not to buy this expensive machinery or other facilities that may affect patient costs. Consumer representatives on these boards are urgently needed to provide the consumer perspective in this area quickly before these costs exacerbate the crisis in health care costs.

The WV Legislature is correct. There is a crisis in health care costs and that crisis is continuing.

2. This emergency rule is necessary to provide guidance to hospitals on how to comply with the law in order to avoid further court challenges and delays.

ARH's response to this argument is that the federal District Court and Fourth Circuit Court of Appeals rejected this argument in American Hospital Association v. Hansbarger. In fact these courts did no such thing.

What those two courts did do is reject the plaintiff hospitals contention that the law was so vague as to rise to the level of being unconstitutional. Those courts both rightly held that the law is not unconstitutionally vague in violation of the due process clause U.S. Constitution Amendment 14. See AHA v. Hansbarger, 600 F. Supp 465 at 478.

To argue that this holding of the court means that the WV Board of Health need not provide guidance to hospitals in an effort to avoid unnecessary and delaying litigation is to attempt to put words into the mouth of the court. "To argue [as plaintiff argue]... is beyond imagination," to quote the District Court at another point. AHA v. Hansbarger 600 F. Supp 465 at 479.

If in fact ARH and other hospitals are as litigious as they appear to be, contesting this law and its rules at every step of the proceeding, then the WV Board of Health is well advised to endeavor to avoid any delaying lawsuits by issuing clarifying rules in order to promptly enforce this law and address the health care crisis.

3. Promulgation of the rule has been held in abeyance by court challenges. Immediate promulgation is needed.

ARH's response to this justification presented by the WV Board of Health consists of two points.

(A) The law contains no requirement that rules be promulgated to implement this provision. While ARH is correct that this law could be enforced without regulations, as argued in the Board's second justification, supra, regulations will help to ensure prompt enforcement to meet this emergency in health care costs. If ARH's argument is accepted, no emergency regulations would ever be accepted because enforcement could be accomplished under the authority of the underlying statute. Take for example, the WV Attorney General's emergency flood regulations controlling the activities of certain home repair contractors in order to protect consumers from unscrupulous contractors, which have historically plagued our state in the wake of floods. This regulation, promulgated in November 1985, was issued in response to a situation that everyone could agree was an emergency. Yet, theoretically the WV Attorney General could have accomplished his goal under the rubric of the general language of the WV Consumer Credit and Protection Act, WV Code §46A-6-104, which prohibits unfair and deceptive acts. The Attorney General could have done so, but he would no doubt have met much greater resistance from the regulated industry and would no doubt have faced more court challenges to his interpretation of the statute without clarifying regulations that have the force and effect of law. Similarly, the WV Board of Health could, and will if these emergency rules are voided, enforce the law without regulation, but that enforcement will be much more difficult and time consuming without the regulations. These difficulties will impede the prompt implementation of this law.

(B) ARH also contends that the court challenge to this law has not ended, and thus, one presumes, ARH would suggest that this is a reason to continue to defer action. ARH has indicated that the American Hospital Association (AHA) intends to seek a writ of certiorari from the U.S. Supreme Court in this case. If AHA does so intend, they must do so within the time limit specified by Rule 11 of the Rules of the United States Supreme Court. That rule specifies that an appeal to the U.S. Supreme Court is on time if filed and docketed within 90 days of the entry of judgment, which was February 27, 1986. Ninety days from that date is May 28, 1986. There is a provision for an extension of time for good cause shown. However, it appears that the regular time limit for such an appeal has run out as of May 28, 1986 and no petition to the U.S. Supreme Court has been filed and docketed. No good cause for failure to timely file is readily apparent. It

seems that American Hospital Association's intentions to appeal have not been acted on and that no appeal will be taken to the U.S. Supreme Court.

Even if A.H.A. were to file such an appeal, the WV Board of Health represents that such an appeal would most likely be unsuccessful, given the ringing denunciation of A.H.A.'s arguments by the District Court, as quoted earlier. The United States Court of Appeals for the Fourth Circuit apparently so thoroughly agreed with the "well reasoned opinion" of the district court, to quote the Court of Appeals, that they affirmed that lower court's opinion in a mere one and one-half page opinion. The WV Board of ~~Medicine~~ Health thus concludes that this issue has been thoroughly litigated and there is no reason to further await the guidance of the judiciary, since two very clear opinions have already been rendered.

4. The Board's failure to act earlier is not inconsistent with their position that an emergency exists.

ARH's last argument is that the WV Board of ~~Medicare~~ Health cannot claim that an emergency exists because the Board has taken so long to promulgate these rules. ARH is certainly correct in stating that the Board could have submitted these rules to the WV Legislature for approval during the 1984, 1985 and 1986 regular sessions. However, the Board chose not to do so, and also chose not to issue these rules on an emergency basis in any one of these years, not because the crisis in health care costs had disappeared, but rather because the constitutionality of this law, WV Code §16-5B-6a was being challenged in the federal courts, by hospitals such as ARH. It is entirely proper for a state agency to grant the deference and respect due the federal judiciary by deferring enforcement action while a constitutional appeal is pending. Thus, it appears ironic that ARH would raise this argument when it was hospital associations and other hospitals like ARH that caused this delay by filing their lawsuit. It should be noted that they filed this lawsuit over a year after passage and just before the effective date in an attempt, the Board contends, to delay the enforcement of this law to the maximum extent.

Even if the Board were to be adjudged remiss in its duty to enforce this law by issuing regulations earlier or to enforce the law on July 1, 1984 with or without regulations, the Board cannot make up for these sins of omission by further delay, which is what ARH is in essence seeking by opposing these emergency rules. The Board acted as quickly as they deemed possible by issuing these emergency rules within a month and a half of the U.S. Court of Appeals decision.

The Board hopes to continue to act with all due speed and consistent with the mandate of the WV Legislature to proceed on an emergency basis in this health care crisis. The Board urges you, Mr. Hechler, to assist by approving these rules and rejecting the arguments raised by ARH.

Sincerely,

Charles Garlow
Assistant Attorney General

CG/tp

LAW OFFICES

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May 23, 1986

Ken Hechler
Secretary of State
State Capitol Complex
Charleston, WV 25305

HAND-DELIVERED

Re: West Virginia Board of Health's Promulgation of Emergency Rules to Implement Mandatory Hospital Board Composition Law, W.Va. Code § 16-5B-6a

Dear Mr. Hechler:

We are writing on behalf of Appalachian Regional Healthcare, Inc. ("ARH") to provide you with ARH's objections to the West Virginia Board of Health's ("Board's") promulgation of emergency rules to implement the mandatory hospital board composition law, W.Va. Code § 16-5B-6a.

I. STATEMENT OF RELEVANT FACTS

A. Statutory Background

During its 1983 regular session, the West Virginia Legislature enacted the mandatory hospital board composition law.

In short, this law requires that on or before July 1, 1984, at least forty percent of the boards of directors of all non-profit and local governmental hospitals must be composed of an equal proportion of consumer representatives from small businesses, organized labor, elderly persons, and persons whose income is less than the national median income. This law also requires that special consideration must be made to select women, racial minorities, and handicapped persons. This law further provides that the Director of the West Virginia Department of Health ("Director") or any citizen of the county in which an offending hospital is located may enforce this law by filing an action in the circuit court of such county.

The purpose of this law is to contain hospital costs.

This law provides in its entirety as follows:

(a) The legislature declares that a crisis in health care costs exists, that one important approach to deal with this crisis is to have widespread citizen participation in hospital decision making and that many hospitals in West Virginia exclude from their boards important categories of consumers, including small businesses, organized labor, elderly persons and lower-income consumers. The legislature further declares that nonprofit hospitals receive such major revenue from public sources and are so crucial in health planning and development that it is necessary to require consumer representatives on their boards of directors. Therefore, the legislature determines that nonprofit hospitals and hospitals owned by local governments should have boards of directors representative of the communities they serve.

(b) As used in this section, "applicable hospitals" means all nonprofit hospitals and all hospitals owned by a county, city or other political subdivision of the State of West Virginia.

(c) At least forty percent of the boards of directors of applicable hospitals shall, on or before the first day of July, one thousand nine hundred eighty-four, be composed of an equal portion of consumer representatives from each of the following four categories: Small businesses, organized labor, elderly persons and persons whose income is less than the national median income. Special consideration shall be made to select women, racial minorities and handicapped persons.

(d) The provisions of this section may be enforced by the director of health, or by any citizen of the county wherein any

offending hospital is located, by the filing of an action at law in the circuit court of such county.

W.Va. Code § 16-5B-6 authorizes the Director to suspend or revoke a hospital's license for violating this law, and W.Va. Code § 16-5B-11 provides that any person, partnership, association, or corporation may be fined up to five hundred dollars and imprisoned for up to ninety days for violating this law.

B. American Hospital Association v. Hansbarger

On June 25, 1984, five days prior to the effective date of this law, the American Hospital Association, The Catholic Health Association of the United States, the West Virginia Hospital Association, and five individual West Virginia hospitals filed an action against the Director in the United States District Court for the Northern District of West Virginia ("District Court") to declare this law to be unconstitutional.

On December 18, 1984, the District Court held this law to be constitutional.

On January 10, 1985, the plaintiff associations and hospitals appealed the District Court's decision to the United States Court of Appeals for the Fourth Circuit ("Fourth Circuit").

On February 27, 1986, the Fourth Circuit affirmed the decision of the District Court.

In the April 5, 1986 edition of Hospitals magazine, the American Hospital Association indicated that it intends to petition the United States Supreme Court for a writ of certiorari.

C. Rules

On December 20, 1984, two days after the District Court held the mandatory board composition law to be constitu-

tional, the Board issued proposed legislative rules to implement this law.

On January 21, 1985, the Board conducted a hearing to receive public comment on these rules.

Thereafter, the Board did not make any attempt to submit these rules to the Legislature for approval during the Legislature's 1985 regular session.

Subsequent to the Legislature's 1985 regular session, on April 12, 1985, the Board issued a second draft of these rules.

On May 24, 1985, the Board conducted a meeting at which it decided not to promulgate these rules on an emergency basis. Rather, the Board decided to prepare a third draft of these rules, to conduct a hearing to receive public comment on this third draft, and to submit this third draft, with any amendments, to the Legislature for approval during the Legislature's 1986 regular session.

Subsequent to its May 24, 1985 meeting, the Board issued a third draft of these rules.

On November 15, 1985, the Board conducted a hearing to receive public comment on this third draft.

Thereafter, the Board did not make any attempt to submit these rules to the Legislature during the Legislature's 1986 regular session.

Approximately one month after the Legislature's 1986 regular session, on April 18, 1986, the Board conducted a meeting at which it approved the promulgation of the third draft of these rules on an emergency basis.

On that same date, the Board filed the third draft of these rules with your office in the form of an "Emergency Amendment of West Virginia Legislative Rules." The Board also filed a "Notice of Emergency Legislative Rule" with your office which sets forth the alleged "facts and circumstances constituting the emergency" justifying the promulgation of these rules on an emergency basis.

II. STANDARDS FOR FILING EMERGENCY RULES

A state agency in West Virginia may promulgate emergency rules only if an emergency actually exists justifying the promulgation of such rules. W.Va. Code § 29A-3-15(a).

Pursuant to W.Va. Code § 29A-3-15(g), an emergency actually exists justifying the promulgation of such rules only if "the promulgation of [such rules] is necessary for the immediate preservation of the public peace, health, safety or welfare or is necessary to comply with a time limitation established by this code or by a federal statute or regulation or to prevent substantial harm to the public interest."

The West Virginia Attorney General and Professor Alfred S. Neely, IV have both attempted to clarify when an emergency actually exists justifying the promulgation of emergency rules.

In Op. Att'y Gen. (Dec. 18, 1978), the Attorney General construed the term "emergency" as used in a precursor to W.Va. Code § 29A-3-15 as follows: "The word 'emergency' is defined as 'an unforeseen combination of circumstances or the resulting state that calls for immediate action . . . a pressing need . . . .'"

In his treatise on West Virginia Administrative Law, Professor Neely construed the provisions of a precursor to W.Va. Code § 29A-3-15(g) as follows:

> If emergency action is to be taken for the preservation of the public peace, health, safety or welfare, it must be justified as necessary for the immediate preservation of these interests. Preservation of somewhat future interest is to be conducted through normal rule-making procedures. Furthermore, if emergency action is to be taken to prevent harm to the public interest, it must be justified on the ground that the impending harm is substantial. The statutory language provides a clear indication of the Legislature's intent that emergency rule making is not to be undertaken casually and without real and significant justification. Neely, Adminis-

trative Law in West Virginia, § 4.20 (Supp. 1983).

III. DISCUSSION

As stated above, the "Notice of Emergency Legislative Rule" which the Board filed with your office on April 18, 1986 sets forth the facts and circumstances which the Board alleges constitutes the emergency justifying the promulgation of these rules on an emergency basis.

This "Notice" states:

> The facts and circumstances constituting the emergency are as follows:
>
> The West Virginia State Legislature, in the opening passage of the statute authorizing this rule, declared that a "crisis in health care costs exists." W.Va. Code § 16-5B-6a. The Legislature declared further that "one important approach to deal with this crisis is to have widespread citizen participation in hospital decision making and that many hospitals in West Virginia exclude from their boards important categories of consumers . . . ." The Legislature found that nonprofit hospitals "are so crucial in health planning and development that it is necessary to require consumer representatives on their boards of directors."
>
> The crisis in health care costs has not abated. Prompt enforcement of this law by the promulgation of appropriate rules is necessary to effect the Legislature's clear intent and for the immediate preservation of the public welfare. In the absence of emergency rules, another year will pass in which crucial health planning and development decisions made by hospital boards may lack sufficient consumer input. Clearly, in view of the Legislature's findings, such

delay would cause substantial harm to the public interest.

The Legislature mandated that all affected hospitals achieve compliance with the requirements of the law by July 1, 1984. Promulgation of the rule has been held in abeyance pending the outcome of the Federal court challenges to the statute. The United States Court of Appeals for the Fourth Circuit has just issued a ruling upholding the statute, on February 27, 1986. Consequently, no reason exists to continue to defer action. Immediate promulgation of this rule is necessary to measure compliance with the July 1, 1984 time limitation established in the W. Va. Code.

Promulgation of this rule on an emergency basis is also necessary to provide uniform and clear guidance to hospitals on how to comply with the law and to citizens, the Director of Health, and the courts on how to enforce it. The statute requires that hospital boards of directors include representation of certain categories of consumers, specifically, small businesses, organized labor, elderly persons and persons whose income is less than the national median income. The law does not further define these categories; the rule does. One court challenge has been filed already, asserting that a particular hospital's board does not contain sufficient representation from the above four categories. Unless clarifying rules are promulgated, multiple interpretations of the statute may result, making compliance all the more difficult and thwarting the objective of the law. Based on the sense of urgency voiced by the Legislature, any continued impediment to involvement of consumers in the effort to contain health care costs would cause substantial harm to the public interest of the citizens of West Virginia.

With all due respect to the Board, these facts and circumstances do not constitute an emergency justifying the promulgation of these rules on an emergency basis pursuant to W.Va. Code § 29A-3-15(g).

As stated above, W.Va. Code § 29A-3-15(g) provides that an emergency actually exists justifying the promulgation of rules on an emergency basis only if the promulgation of such rules is necessary (1) for the immediate preservation of the public peace, health, safety, or welfare; (2) to prevent substantial harm to the public interest; or (3) to comply with a time limitation established by this Code or by a federal statute or regulation. None of these prerequisites is met by these rules.

In its "Notice," the Board states that the promulgation of these rules is necessary for the immediate preservation of the public welfare and to prevent substantial harm to the public interest because "The crisis in health care cost has not abated." This statement is incorrect. Since the enactment of this law, numerous federal and state programs, including the Medicare Program's prospective payment system, the West Virginia Health Care Cost Review Authority's rate review system, and the West Virginia Medical Institute's professional review organization activities, have substantially abated hospital costs. In fact, today one hundred percent of a hospital's rates are established and contained by federal and state programs. To illustrate the extent to which hospital costs have been abated, in hospitals' fiscal years ending in 1982, the year immediately prior to the enactment of this law, hospital costs in West Virginia increased by 17.21%. By comparison, in hospitals' fiscal years ending in 1985, hospital costs in West Virginia increased by only 4.8%.*

In its "Notice," the Board also states that the promulgation of these rules is necessary to prevent substantial harm to the public interest because the "Promulgation of this rule on an emergency basis is also necessary to provide uniform and clear guidance to hospitals on how to comply with the law

*Statistics provided by the West Virginia Health Care Cost Review Authority. Statistics provided by the West Virginia Health Care Cost Review Authority for hospitals' fiscal years ending in 1985 based in part on projected data.

and to citizens, the Director of Health, and the courts on how to enforce it." Both the District Court and the Fourth Circuit in American Hospital Association v. Hansbarger rejected this argument. Specifically, in American Hospital Association v. Hansbarger, the plaintiff associations and hospitals claimed that this law was not sufficiently clear to advise hospitals on how to comply with this law, and complained that the Director had not promulgated rules to provide hospitals with some clear guidance on how to comply. Both the District Court and the Fourth Circuit held that this law on its face provides sufficiently clear guidance to hospitals on how to comply.

In its "Notice," the Board also states that the promulgation of these rules is necessary to comply with a time limitation established by the West Virginia Code. The Board states that the "Promulgation of the rule has been held in abeyance pending the outcome of the Federal court challenges to the statute. The United States Court of Appeals for the Fourth Circuit has just issued a ruling upholding the statute, on February 27, 1986. Consequently, no reason exists to continue to defer action. Immediate promulgation of this rule is necessary to measure compliance with the July 1, 1984 time limitation established by the W.Va. Code." This statement is incorrect for two reasons. First, W.Va. Code § 16-5B-6a contains no requirement whatsoever that rules must be promulgated on or before July 1, 1984 or on or before any other date to implement its provisions. Second, the federal court challenge to this law has not ended. As stated above, at least one of the plaintiff associations in American Hospital Association v. Hansbarger intends to petition the United States Supreme Court for a writ of certiorari.

The Board also is in no position to claim that an emergency exists justifying the promulgation of these rules on an emergency basis in light of the Board's failure to promulgate these rules prior to 1986. As stated above, this law was enacted in 1983, and has been in effect since July 1, 1984. The Board has had three opportunities to submit these rules to the Legislature for approval, during the Legislature's 1984, 1985, and 1986 regular sessions. The Board, however, deliberately chose not to make any submissions. The Board's claim that an emergency exists is especially disingenuous when the Board's promulgation of these emergency rules on April 18, 1986 occurred approximately one month after the Legislature's 1986 regular session, during which the Board could have

submitted these rules to the Legislature for approval.

IV. CONCLUSION

On the basis of the foregoing, ARH respectfully requests you to determine that no emergency actually exists justifying the filing of these rules on an emergency basis.

If you should have any questions or comments regarding any of the foregoing, please feel free to contact Robert J. O'Neil at the address or telephone set forth above or David T. Enlow at 300 First Federal Plaza, Lexington, Kentucky 40507 or (606) 255-3371.

Very truly yours,

Robert J. O'Neil
Special Counsel for Appalachian
Regional Healthcare, Inc.

David T. Enlow RJO
David T. Enlow
General Counsel for Appalachian
Regional Healthcare, Inc.

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d with its plans unless the Secretary of itional publication is unnecessary or ng to that effect must be served on the , and filed in the State Register. The ys may then order the publication e sees fit. If the Governor does not issue y proceed with its original plans.[184]

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particular limitation is that the statute or's order "shall be effective until and ll otherwise provide." [185] At best this us. At worst it raises the spectre of ne of separation of powers. Considering e in relation to the APA and its rule is statutory backwater of the 1982 ve suffered by deletion of this proviso. t likely to bring about the downfall of

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other reasons, is the provision which te their published rules "only to those request a copy . . ." and not "in any ave not requested a copy." [187] This is irement that an 'agency may print or e number of copies of any rule that it will be requested by members of the

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e for the purpose of controlling cost, it hey themselves are not without cost, re. The State, its Legislature and its

agencies have an interest in public awareness of the public's rights and obligations under the law, and agency rules are a part of the law. To prohibit discretionary distribution of agency rules except to persons who request them is to deprive the agency of the opportunity to reach those persons who may have the greater need for awareness of the agency's rules.

Admittedly such persons could obtain this information from the State Register, but this is not sufficient reason to foreclose alternative means of notice of final rules. The result is a restriction on an agency's decision that greater public awareness of its rules is necessary and can best be accomplished by wider distribution of its rules than to those who read the Register or request a copy from the agency. This is a cost which hopefully was balanced against the costs of unsolicited distribution; hopefully the Legislature will reassess the balance at an early opportunity.

§ 4.20. Extraordinary Circumstances and Emergency Rule Making.

The 1982 amendments simultaneously preserve and reshape the concept of emergency rule making. All rules, whether legislative, interpretative or procedural, may be the subject of emergency rule making.[189]

189. W. VA. CODE § 29A-3-15(a).

A useful development is the addition of statutory guidance concerning what constitutes an emergency justifying invocation of emergency rule-making procedures. The 1976 amendments were deficient in this respect. The statute now provides:

> [A]n emergency exists when the promulgation of a rule is necessary for the immediate preservation of the public peace, health, safety or welfare or is necessary to comply with a time limitation established by this Code or by a federal statute or regulation or to prevent substantial harm to the public interest.[190]

Admittedly much of this statutory language is sweeping and susceptible to conflicting views and interpretations. Nevertheless, there are certain key words which signal the Leg-

islature's intent. If emergency action is to be taken for the preservation of the public peace, health, safety or welfare, it must be justified as necessary for the immediate preservation of these interests. Preservation of somewhat future interests is to be conducted through normal rule-making procedures. Furthermore, if emergency action is to be taken to prevent harm to the public interest, it must be justified on the ground that the impending harm is substantial. The statutory language provides a clear indication of the Legislature's intent that emergency rule making is not to be undertaken casually and without real and significant justification.

190. W. VA. CODE § 29A-3-15(e). The language "necessary for the immediate preservation of the public peace, health, safety or welfare . . ." represents a revival of the language of the original 1964 West Virginia Administrative Procedure Act. Principal Volume, App. B, § 29A-3-5.

Any risk that an agency would be tempted to abuse the emergency rule-making process in an attempt to avoid or delay normal rule-making procedures is anticipated in the 1982 amendments. The statute provides explicitly that:

> The provisions of this section shall not be used to avoid or evade any provision of this article or any other provisions of this Code, including any provisions for legislative review and approval of proposed rules. Any emergency rule promulgated for any such purpose may be contested in a judicial proceeding before a court of competent jurisdiction.[191]

Thus, suspected abuse of the emergency rule-making provisions is subject to immediate review in the courts. It does not appear to be necessary to wait until threatened application of the emergency rule. This should not be taken, however, as an indication that one must challenge the validity of an emergency rule on these grounds immediately or forego the opportunity to raise the issue. Avoidance or evasion of normal rule-making procedures could be raised in a declaratory judgment action on the validity of the rule,[192] or in an agency adjudicatory proceeding instituted in reliance upon the rule in question.

191. W. VA. CODE § 29A-3-15(c).

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192. *See generally* § 4.30, this Supplement *infra* for a discussion of § 29A-4-2 and declaratory judgment actions on the validity of rules.

There is a significant advantage in the judicial review provision in the emergency rule section. Declaratory judgment actions are not available to anyone. The rule must interfere, or threaten to interfere, with the legal rights or privileges of the plaintiff in a declaratory judgment. In contrast, an action under the emergency rule provision is subject only to the quite liberal general requirements for standing.[193] Naturally if the agency has elected to institute a contested case against specific persons to enforce its rule, there is no question of standing; such persons would be fully entitled to raise the issue.

193. *See generally* Principal Volume, § 6.01; and § 6.01, this Supplement *infra*.

Review of emergency rule making is not confined to review of alleged avoidance or evasion by an agency. The rules themselves and the process by which they were promulgated are subject to both judicial and legislative review. These present opportunities for further controls over emergency rule making.

The Legislative Rule-Making Review Committee[194] is authorized to review any emergency rule. In the process it is entitled to consider "(1) whether the agency has exceeded the scope of its statutory authority in promulgating the emergency rule; (2) whether there exists an emergency justifying the promulgation of such rule; and (3) whether the rule was promulgated in compliance with the requirements and prohibitions . . ."[195] in § 29A-3-15.

194. *See* § 4.21, this Supplement *infra*.
195. W. VA. CODE § 29A-3-15(d).

Should the Committee find that an agency has failed to satisfy one or more of these conditions, its determination has no immediate or binding consequences. It is authorized only to make such recommendations to the agency or the Legislature "as it may deem proper."[196] Yet in the face of adverse Committee findings and recommendations, the politically prudent and sensitive agency is not likely to disregard the recommendations of the Committee without some deliberation.

196. W. VA. CODE § 29A-3-15(d).

Emergency rules also are subject to the traditional forms of judicial review applicable to any rule.[197] Generally the process and scope of judicial review with respect to emergency rules will be comparable to those for other rules.[198] However, in one important respect the 1982 amendments establish that judicial inclinations to exercise an independent rather than limited scope of review are justified.

197. *See* Principal Volume, § 4.31; and § 4.31, this Supplement *infra*.

198. *See* Principal Volume, § 4.31; and § 4.31 *infra*. this Supplement concerning the scope of judicial review.

An agency is permitted to amend or repeal a legislative rule "which by law has been specifically authorized by the legislature . . . ." [199] But "the circumstances constituting the emergency requiring such amendment or repeal shall be stated with particularity and be subject to de novo review by any court having original jurisdiction of an action challenging their validity." [200] As a result the reviewing court is entitled to make an independent determination and judgment concerning the existence of an emergency satisfying the terms of the statute. It need not defer to the agency's expertise. It is not limited to determining whether the agency's declaration of an emergency is reasonable, even if the court might not have reached the same conclusion. Under de novo review the court is entitled to determine whether it believes that agency reached the correct result and may reject the agency's conclusion even though the agency's choice is not unreasonable. The result is a much more intrusive form of judicial review over emergency rule making. This is consistent with the demonstrated legislative concern that emergency rule making not be abused.

199. W. VA. CODE § 29A-3-15(a).

200. *Id.*

The procedures for promulgation of emergency rules allow for expeditious rule making. An agency need not hold any hearing prior to its action.[201] In the context of rule making this means that neither an oral hearing nor paper "hearing" need be held prior to taking effect of the rule. The emergency rule will become

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effective immediately upon filing in the State Register.[202] The emergency rule itself must be accompanied by "a statement of the facts and circumstances constituting the emergency. . . ." [203] Special care must be taken to assure that this is done "with particularity" if amendment or repeal of a legislative rule authorized by the Legislature is involved.[204] The agency must also file fifteen copies of the rule and accompanying statements "forthwith" with the Legislative Rule-Making Review Committee.

201. W. VA. CODE § 29A-3-15(a).
202. *Id.*
203. *Id.*
204. *Id.*

An emergency legislative rule will normally be effective for one hundred eighty days following filing in the State Register.[205] If an expiration date of less than one hundred eighty days is specified by the agency in a notice filed in the State Register, that date will mark the termination of the emergency rule.[206]

205. W. VA. CODE § 29A-3-15(a).
206. *Id.*

It is also possible that a legislative rule will be effective for more than one hundred eighty days. An agency may extend the effectiveness of its emergency legislative rule for as much as an additional one hundred eighty day period by filing a notice of the extension in the State Register; however, it may do so only if each of the following four conditions are satisfied.

> (1) Such notice of extension is filed not more than ten days prior to the date on which such emergency rule is otherwise scheduled to expire;
> (2) The agency has, within ninety days following the filing of the emergency rule in the state register, initiated rule-making procedures for permission to promulgate a regular legislative rule to replace such emergency rule;
> (3) The legislature has not authorized or directed promulgation of an authorized legislative rule dealing with substantially the same subject matter since such emergency rule was first promulgated; and
> (4) The legislature has not, by law, disapproved such emergency rule.[207]

Under this approach there is no question of an opportunity for tacking of multiple emergency periods. The statute allows a single additional one hundred eighty day period.

207. W. VA. CODE § 29A-3-15(b).

The statute also contains one other somewhat cryptic exception to the general proposition that an emergency rule will be effective for only one hundred eighty days or less. In addition to the exception for extensions there is an exception "as provided in subsection . . . (e). . . ." [208] Subsection (e) describes the circumstances in which the existence of an emergency may be declared. It says nothing directly concerning the length of time an emergency legislative rule is valid. It does, however, provide that an emergency exists when "necessary to comply with a time limitation established by this Code or a federal statute or regulation. . . ." Conceivably an emergency rule would have to be made effective for more than one hundred eighty days at the outset in order to satisfy the prescribed time limitation. It is just as plausible that something is amiss in the APA provision. This point merits clarification.

208. W. VA. CODE § 29A-3-15(a).

Nothing has been said to this point concerning the duration of emergency interpretative and procedural rules because the APA provision does not address the matter. This is neither particularly surprising nor untoward. Rules of this nature are not subject to the same measure of scrutiny and review as legislative rules.[209] Actually, in light of the limited effect and purpose of procedural and interpretative rules,[210] it is difficult to envision an emergency so compelling as to require immediate effectiveness of such rules. Nevertheless, clarification of the statute on this point is in order. Until such time it would seem prudent if an agency promulgating an emergency interpretative or procedural rule were to initiate normal rule-making procedures as quickly as possible and to complete the process in not more than one hundred eighty days.

209. *See generally* §§ 4.17 to 4.19, this Supplement *supra* and §§ 4.21 to 4.24, this Supplement *infra*.

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9, this Supplement *supra* and §§ 4.21 to 4.24.

210. *See* §§ 4.36 to 4.37, this Supplement *infra*.

§ 4.21. The Legislative Rule-Making Review Committee of the West Virginia Legislature.

Notwithstanding the decision of the Supreme Court of Appeals in *State ex rel. Barker v. Manchin,* [211] the Legislative Rule-Making Review Committee has survived as an institution as a consequence of the 1982 amendments to the Administrative Procedure Act. However, it is no longer a statutory body; [212] today it is a joint committee of the Legislature.[213] Nevertheless, it retains its original composition, and the provisions concerning its funding, staffing and meetings are unchanged.[214] The substantive changes lie in the area of the Committee's function and authority.

The Committee no longer has dispositive control over the effectiveness of agency rules. It cannot approve or disapprove today. That responsibility has been retained by the full Legislature. Yet the Committee's responsibilities remain substantial. Under the 1982 amendments the purpose of the Committee is "to review all legislative rules of the several agencies and such other rules as the committee deems appropriate." [215]

211. *See* § 2.01, this Supplement *supra* and § 4.25, this Supplement *infra* for discussions of the case and its implications.

212. *See* § 29A-3-11(a), Principal Volume, App. A.

213. W. VA. CODE § 29A-3-10(a). The change in the status of the Committee from statutory body to joint legislative committee may have been intended to emphasize the subordinate legislative quality of the Committee and thus immunize it from the kind of challenge raised in State *ex rel.* Barker v. Manchin. *See* § 2.01, this Supplement *supra* and § 4.25, this Supplement *infra*.

214. W. VA. CODE § 29A-3-10(a). The 1982 amendments did add an express provision authorizing the Committee to adopt its own rules of procedure. *Id.* § 29A-3-10(b).

215. *Id.* § 29A-3-10(a).

§ 4.22. Rule Making Subject to Legislative Review.

For various reasons some rule-making activities may be exempt from the legislative review process.[216] The principal lines of demarcation for rules not otherwise exempt are drawn by the new definitions of legislative, interpretive and procedural

APPENDIX A

COMPARATIVE SUMMARY OF THE MAY 1983 ORDER (1 TO 45 RATIO) AND THE THREE ALTERNATIVE POST STAFFING PLANS PRESENTED AT THE JULY 1984 HEARING *

Floor	Floor Capacity	May 1983 Order (1 to 45 Ratio)			Sheriff's Plan			Cox Plan			Benton/Stoughton Plan		
Shift		Day	Eve	Nte	Day	Eve	Nte	Day	Eve	Nte	Day	Eve	Nte
Central Jail													
Two	N.A.**	5	5	5	3(0)	3(0)	3(0)	5(1)	5(1)	5(1)	5(1)	5(1)	5(1)
Three	192	4	4	4	4(0)	4(0)	4(0)	4(*)	4(*)	4(*)	5(*)	5(*)	3(*)
Four	247	6	6	6	5(1)	5(1)	5(1)	6(1)	6(1)	5(1)	9(1)	9(1)	7(1)
Five	452	11	11	11	5(0)	5(0)	5(0)	6(1)	6(1)	5(1)	9(1)	9(1)	7(1)
Six	367	9	9	9	5(1)	5(1)	5(1)	6(1)	6(1)	5(*)	9(1)	9(1)	7(*)
Seven	367	9	9	9	5(0)	5(0)	5(1)	6(1)	6(1)	5(1)	9(1)	9(1)	7(1)
Eight	367	9	9	9	5(1)	5(1)	5(1)	6(1)	6(1)	5(*)	9(1)	9(1)	7(*)
Nine	295	7	7	7	5(0)	5(1)	5(1)	6(1)	6(1)	5(1)	9(1)	9(1)	7(1)
Ten	367	9	9	9	5(0)	5(0)	5(0)	6(1)	6(1)	5(1)	9(1)	9(1)	7(1)
Eleven	367	9	9	9	5(1)	5(1)	5(1)	6(1)	6(1)	5(1)	9(1)	9(1)	7(1)
Twelve	403	9	9	9	5(0)	5(0)	5(1)	6(1)	6(1)	5(*)	9(1)	9(1)	7(*)
Detention Center													
One +/- 333		8	8	8	4(0)	4(0)	4(1)	6(1)	6(1)	5(1)	9(1)	9(1)	7(1)
Two +/- 333		8	8	8	4(1)	4(0)	4(0)	7(*)	7(*)	5(*)	9(*)	9(*)	7(*)
Three +/- 333		8	8	8	5(0)	5(1)	5(1)	7(1)	7(1)	5(1)	9(1)	9(1)	7(1)
Total Capacity	4423	111	111	111	65(5)	65(6)	65(9)	83(12)	83(12)	69(9)	118(12)	118(12)	92(9)
TOTAL 1-SHIFT POSTS		333			195(20)			235(33)			328(33)		

* Sergeant Posts in Parenthesis

** Not Available

Plaintiffs' Exhibit 103 at 5; Defendant's Exhibits 44 at 29–31; Defendant's Exhibits 49 and 50

AMERICAN HOSPITAL ASSOCIATION, a private, non-profit corporation, West Virginia Hospital Association, a private, non-profit corporation, Stonewall Jackson Memorial Hospital Company, a private, non-profit, charitable corporation, Charles Town General Hospital, a private, non-profit, charitable corporation, Sistersville General Hospital, a city hospital, Wheeling Hospital, Inc., a private, non-profit, charitable corporation, and the Catholic Health Association Of the United States, a private, non-profit corporation, Plaintiffs,

v.

L. Clark HANSBARGER, Director of the West Virginia Department of Health, Defendant.

Civ. A. No. 84–0144–C(K).

United States District Court, N.D. West Virginia.

Dec. 18, 1984.

Hospital associations and nonprofit and local governmental hospitals sought

declaration that West Virginia statute requiring that at least 40 percent of boards of directors of all nonprofit and local governmental hospitals be composed of equal proportion of consumer representatives from certain groups was unconstitutional and was preempted by federal labor law. The District Court, Kidd, J., held that: (1) the statute did not violate the equal protection clause; (2) the statute did not violate right of association guaranteed to members of religious society which operated a nonprofit hospital; (3) the statute was not preempted by federal labor laws; (4) the statute did not violate the due process clause; (5) the statute was not in violation of provisions of the West Virginia Constitution relating to uniformity of laws regarding creation and incorporation of certain classes of corporations and governing rights of stockholders to vote for directors; and (6) the statute was not in violation of the contracts clause of the Federal Constitution.

Judgment accordingly.

1. Civil Rights ⇐69

West Virginia statute which requires that at least 40 percent of boards of directors of all nonprofit and local governmental hospitals be composed of an equal proportion of consumer representatives from small businesses, organized labor, elderly persons, and persons whose income is less than the national median income and that special consideration be made to select women, racial minorities and handicapped persons for such positions is enforceable by injunction obtained in action at law as set forth in the statute. W.Va.Code, 16–5B–6a, 16–5B–6a(d).

2. Statutes ⇐223.2

There is no conflict between West Virginia statute providing for enforcement of statute which requires at least 40 percent of boards of directors of all nonprofit and local governmental hospitals to be composed of equal proportion of consumer representatives from certain groups, statute providing for penalty for violation of the 40 percent requirement, and statute authorizing director of West Virginia Department of Health to suspend or revoke license of a nonprofit or local governmental hospital for violation of the requirement. W.Va. Code, 16–5B–6(1), 16–5B–6a, 16–5B–6a(d), 16–5B–11.

3. Constitutional Law ⇐213.1(1)

If state legislation challenged as violative of the equal protection clause creates suspect classification or impinges upon fundamental right based upon inherently suspect criteria, proper standard of review is strict scrutiny, and there must be some showing of compelling state interest and that means chosen to achieve that purpose is the least restrictive alternative; if no suspect classification exists, or there is no infringement of a fundamental right, then appropriate standard is rational basis test, under which there must be some showing that the classification is rationally related to a legitimate state purpose. U.S.C.A. Const.Amend. 14.

4. Constitutional Law ⇐240(1)

West Virginia statute requiring at least 40 percent of boards of directors of all nonprofit and local governmental hospitals to be composed of equal proportion of consumer representatives from small businesses, organized labor, elderly persons, and persons whose income is less than the national median income, and requiring that special consideration be made to select women, racial minorities and handicapped persons is an economic regulation whose impingement was not so fundamental as to justify protections of strict judicial scrutiny for purpose of equal protection analysis. W.Va.Code, 16–5B–6a; U.S.C.A. Const. Amend. 14.

5. Constitutional Law ⇐240(1)
Hospitals ⇐3

Rational basis existed for West Virginia to not apply statute, requiring at least 40

percent of boards of directors of all nonprofit and local governmental hospitals to be composed of equal proportion of consumer representatives from certain groups, to profit and state-owned hospitals, since local government hospitals receive appropriations from political subdivisions of the state and nonprofit hospitals receive favorable tax status, and since state hospitals were governed by state, and thus, the statute did not violate the equal protection clause. W.Va.Code, 16–5B–6a; U.S.C.A. Const.Amend. 14.

6. Hospitals ⇐3

West Virginia statute which requires at least 40 percent of boards of directors of all nonprofit and local governmental hospitals to be composed of equal proportion of consumer representatives from certain groups would only require consumer representatives on local board of directors of hospital operated by a religious order and would not be applicable to the religious order or its governing body. W.Va.Code, 16–5B–6a.

7. Constitutional Law ⇐91
Hospitals ⇐3

West Virginia statute requiring at least 40 percent of boards of directors of all nonprofit and local governmental hospitals to be composed of equal proportion of consumer representatives from certain groups did not violate right of association guaranteed to religious society which operated a nonprofit hospital. W.Va.Code, 16–5B–6a; U.S.C.A. Const.Amends. 1, 14.

8. Labor Relations ⇐45

West Virginia statute requiring that at least 40 percent of boards of directors of all nonprofit and local governmental hospitals be composed of equal proportion of consumer representatives from small businesses, organized labor, elderly persons, and persons whose income is less than national median income was not preempted by federal labor laws by fact that a labor representative would sit on an employer's board of directors, since the statute failed to interfere with the employer and employee relationship protected by the National Labor Relations Act. W.Va.Code, 16–5B–6a; National Labor Relations Act, §§ 1 et seq., 8(a), as amended, 29 U.S.C.A. §§ 151 et seq., 158(a).

9. Constitutional Law ⇐296(1)
Hospitals ⇐3

West Virginia statute requiring at least 40 percent of boards of directors of all nonprofit and local governmental hospitals to be composed of equal proportion of consumer representatives from small businesses, organized labor, elderly persons, and persons whose income is less than national median income had rational relationship to containment of hospital costs, and thus, was not unreasonable, arbitrary or capricious in violation of the due process clause. W.Va.Code, 16–5B–6a; U.S.C.A. Const.Amend. 14.

10. Constitutional Law ⇐296(1)
Hospitals ⇐3

West Virginia statute requiring at least 40 percent of boards of directors of all nonprofit and local governmental hospitals to be composed of equal proportion of consumer representatives from small businesses, organized labor, elderly persons, and persons whose income is less than national median income did not restrict ability of hospitals to maintain effective governance and to discharge their legal responsibility to quality as well as cost efficient health care, and thus, was not an arbitrary and unreasonable restriction in violation of the due process clause. W.Va.Code, 16–5B–6a; U.S.C.A. Const.Amend. 14.

11. Eminent Domain ⇐2(1)

A "taking" occurs in the ordinary sense when government controls a person's use of property so tightly that, although some uses remain to the owner, the property's value has been virtually destroyed. U.S.C.A. Const.Amends. 5, 14.

See publication Words and Phrases for other judicial constructions and definitions.

12. Constitutional Law ⇐280

Requirement of West Virginia statute that at least 40 percent of boards of directors of all nonprofit and local government hospitals be composed of equal proportion of consumer representatives from small businesses, organized labor, elderly persons, and persons whose income is less than national median income did not constitute a taking of property of religious society, which operated a nonprofit hospital, in violation of the due process clause. W.Va. Code, 16–5B–6a; U.S.C.A. Const.Amend. 14.

13. Constitutional Law ⇐251.4

Under the due process clause, a law is void if it is so vague that individuals of common intelligence must necessarily guess at its meaning and differ as to its application. U.S.C.A. Const.Amend. 14.

14. Constitutional Law ⇐251.4
Hospitals ⇐3

West Virginia statute requiring at least 40 percent of boards of directors of all nonprofit and local governmental hospitals to be composed of equal proportion of consumer representatives from small businesses, organized labor, elderly persons, and persons whose income is less than national median income and requiring special consideration for selection of women, racial minorities and handicapped persons was not vague, ambiguous, or overbroad in violation of the due process clause. W.Va. Code, 16–5B–6a; U.S.C.A. Const.Amend. 14.

15. Statutes ⇐80(1)

Provision of West Virginia Constitution requiring the legislature to provide for organizations of all corporations to be created, by general laws, uniform as to the class to which they relate, and prohibiting creation of a corporation by special law does not prevent the legislature from passing laws which regulate specialized areas of business conducted by various corporations. W.Va. Const. Art. 11, § 1.

16. Statutes ⇐80(1)

Provision of West Virginia Constitution requiring legislature to provide for organization of all corporations to be created, by general laws, uniform as to class to which they relate, and prohibiting creation of a corporation by special law only requires uniform laws regarding the creation and incorporation of certain classes of corporation, i.e., nonprofit, profit, etc. W.Va. Const. Art. 11, § 1.

17. Corporations ⇐15

West Virginia statute requiring that at least 40 percent of boards of directors of all nonprofit and local governmental hospitals be composed of equal proportion of consumer representatives from small businesses, organized labor, elderly persons, and persons whose income is less than national median income, and requiring special consideration for selection of women, racial minorities, and handicapped persons did not prevent the "stockholders" of religious society which operated a nonprofit hospital from selecting or voting for individuals they felt were capable and qualified to serve as directors, and thus, did not violate state constitutional provision governing rights of stockholders to vote for directors. W.Va.Const. Art. 11, §§ 1, 4; W.Va.Code, 16–5B–6a.

18. Constitutional Law ⇐154(2)

A charter of a private corporation is a contract and is entitled to protection under the contracts clause. U.S.C.A. Const. Art. 1, § 10, cl. 1.

19. Constitutional Law ⇐154(2)

A legislature may, without impairing contractual obligations, impose new burdens upon corporations, in addition to those contained in the charter, which are in the public interest and safety; legislation which in effect only regulates manner in which franchises of a corporation are to be exercised and that do not interfere substantially with object of the grant conferred by its charter do not impair the contract. U.S. C.A. Const. Art. 1, § 10, cl. 1.

20. Constitutional Law ⇐115

In determining whether a statute is in conflict with the contracts clause, court must determine whether the law has worked a substantial impairment of the contractual relationship, and in determining whether state law seriously impairs the contract, the court must look to the nature of the business or industry. U.S.C.A. Const. Art. 1, § 10, cl. 1.

21. Constitutional Law ⇐154(2)
Hospitals ⇐3

West Virginia statute requiring that at least 40 percent of boards of directors of all nonprofit and local government hospitals be composed of equal proportion of consumer representatives from small businesses, organized labor, elderly persons, and persons whose income is less than national median income and requiring special consideration for selection of women, racial minorities, and handicapped persons was not in violation of the contracts clause. W.Va.Code, 16-5B-6a; U.S.C.A. Const. Art. 1, § 10, cl. 1.

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Chauncey H. Browning, Jr., Atty. Gen., Charleston, W.Va., for defendant.

OPINION

KIDD, District Judge.

Jurisdiction of this Court is predicated upon 28 U.S.C. § 1331 and 28 U.S.C. § 1343. The plaintiffs seek a declaratory judgment pursuant to 28 U.S.C. § 2201 that W.Va.Code § 16-5B-6a is unconstitutional and is an interference with collective bargaining rights between plaintiffs and their employees, which is an area pre-empted by federal labor law.

Plaintiff American Hospital Association is a private, non-profit corporation organized and existing under the laws of the State of Illinois, having and maintaining its principal office and place of business in Chicago, Illinois, and having as members thereof individual non-profit and local governmental hospitals located throughout West Virginia, including plaintiffs Stonewall Jackson Memorial Hospital Company, Charles Town General Hospital, Weirton Medical Center, Inc., Sistersville General Hospital, and Wheeling Hospital, Inc. Plaintiff West Virginia Hospital Association is a private, non-profit corporation organized and existing under the laws of the State of West Virginia, having and maintaining its principal office and place of business in Charleston, West Virginia, and having as members thereof individual non-profit and local governmental hospitals located throughout West Virginia, including plaintiffs Stonewall Jackson Memorial Hospital Company, Charles Town General Hospital, Weirton Medical Center, Inc., Sistersville General Hospital and Wheeling Hospital, Inc. Plaintiff Stonewall Jackson Memorial Hospital Company is a private, non-profit, charitable corporation organized and existing under the laws of the State of West Virginia, having and maintaining its principal office and place of business at Weston, West Virginia, and owns and operates a seventy (70) bed hospital located in Weston, West Virginia. Plaintiff Charles Town General Hospital is a private, non-profit, charitable corporation organized and existing under the laws of the State of West Virginia, ha and maintaining its principal office and place of business at Ranson, West Virginia, and owns and operates a one hundred fourteen (114) bed hospital, known as Jefferson Memorial Hospital, located in Ranson, West Virginia. Plaintiff Weirton Medical Center, Inc. is a private, non-profit, charitable corporation organized and existing under the laws of the State of West Virginia, having and maintaining its principal office and place of business at Weirton, West Virginia, and owns and op-

erates a two hundred sixty-five (265) bed hospital located in Weirton, West Virginia. Plaintiff Sistersville General Hospital is a local governmental hospital organized and existing under the laws of the State of West Virginia and the ordinances of the City of Sistersville, having and maintaining its principal office and place of business at Sistersville, West Virginia, and owns and operates a thirty-two (32) bed hospital located in Sistersville, West Virginia. Plaintiff Wheeling Hospital, Inc., is a private, non-profit, charitable corporation organized and existing under the laws of the State of West Virginia, having and maintaining its principal office and place of business at Wheeling, West Virginia, and owns and operates a two hundred seventy-six (276) bed hospital located in Wheeling, West Virginia. Plaintiff The Catholic Health Association of the United States is a private, non-profit corporation organized and existing under the laws of the State of Missouri, having and maintaining its principal office and place of business in St. Louis, Missouri, and having as members thereof religious institutes, more commonly referred to as religious orders of nuns, which own, operate and sponsor certain non-profit hospitals located throughout West Virginia and which appoint the respective directors of said hospitals. Defendant L. Clark Hansbarger is the Director of the West Virginia Department of Health and in such capacity is one of the individuals who may enforce the provisions of W.Va.Code § 16–5B–6a.

The plaintiffs, American Hospital Association, et al., filed this civil action on June 25, 1984, seeking declaratory and injunctive relief against the State of West Virginia and the Commissioner of Health, L. Clark Hansbarger. The complaint seeks a judgment declaring W.Va.Code § 16–5B–6a (hereinafter "the Act") unconstitutional. Plaintiffs also seek injunctive relief prohibiting the defendant from enforcing the Act. Defendant answered, *inter alia*, that the Act is not unconstitutional and therefore plaintiffs should be denied all relief.

A hearing was conducted on plaintiffs' motion for a temporary restraining order on June 24, 1984. On June 26, 1984, the Court by memorandum opinion denied plaintiffs' motion for a temporary restraining order. On July 16 and 17, 1984, the parties appeared before the Court for argument on plaintiffs' motion for a preliminary injunction. On July 24, 1984, the Court entered its order directing the parties to file their findings of fact and memoranda of law on or before July 20, 1984, and any reply brief on or before August 6, 1984. On September 20, 1984, the Court entered its opinion and order denying plaintiffs' motion for a preliminary injunction. On November 8, 1984, the Court entered its order, pursuant to stipulation of the parties, consolidating the trial of this action with the previous hearing on plaintiffs' motion for a preliminary injunction; that the motions and memoranda filed in connection with the plaintiffs' motion for a preliminary injunction be and the same hereby are submitted for the trial of this action, and that no further briefs, witnesses, or evidence be submitted in connection with the trial of this action.

This matter has been fully briefed and has been submitted to the Court for decision.

Plaintiffs challenge the Act on several grounds: (1) that the Act violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution; (2) that the Act violates the Freedom of Association guaranteed to the Sisters of the Pallottine Missionary Society by the First and Fourteenth Amendments of the United States Constitution; (3) that W.Va. Code 16–5B–6a is pre-empted by the Federal Labor Laws; (4) that the Act violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution; (5) that the Act violates Section 1, Article XI of the West Virginia Constitution; (6) that the Act violates Section 4, Article XI of the West Virginia Constitution; and (7) that the Act violates the Contracts Clause of the United States Constitution. The Court will address the issues in the order just stated.

W.Va.Code § 16–5B–6a requires that on or before July 1, 1984, at least forty percent (40%) of the board of directors of all non-profit and local governmental hospitals located in West Virginia must be composed of an equal proportion of "consumer representatives" from "[s]mall businesses, organized labor, elderly persons, and persons whose income is less than the national median income" and that "[s]pecial consideration shall be made to select women, racial minorities and handicapped persons" for such positions and authorizes defendant Hansbarger and private citizens to enforce its provisions. The entire text of W.Va. Code 16–5B–6a is as follows:

(a) The legislature declares that a crisis in health care costs exists, and that one important approach to deal with this crisis is to have widespread citizen participation in hospital decision-making, and that many hospitals in West Virginia exclude from their boards important categories of consumers, including small businesses, organized labor, elderly persons and lower-income consumers. The legislature further declares that non-profit hospitals receive such major revenue from public sources and are so crucial in health planning and development that it is necessary to require consumer representatives on their boards of directors. Therefore, the legislature determines that non-profit hospitals and hospitals owned by local governments should have boards of directors representative of the communities they serve.

(b) As used in this section, "applicable hospitals" means all non-profit hospitals and all hospitals owned by a county, city or other political subdivision of the State of West Virginia.

(c) At least 40 percent of the boards of directors of applicable hospitals shall, on or before the first day of July, 1984, be composed of an equal proportion of consumer representatives from each of the following four categories: Small businesses, organized labor, elderly persons and persons whose income is less than the national median income. Special consideration shall be made to select women, racial minorities and handicapped persons.

(d) The provisions of this section may be enforced by the director of health, or by any citizen of the county wherein any offending hospital is located, by the filing of an action at law in the circuit court of such county.[1]

[1] West Virginia Code 16–5B–6a is enforceable by injunction obtained in an action at law as set forth by W.Va.Code 16–5B–6a(d) above. Plaintiffs further argue that W.Va.Code 16–5B–6a may be enforced pursuant to W.Va.Code 16–5B–6a(d) which provides:

> The provisions of this section may be enforced by the director of health, or by any citizen of the county wherein any offending hospital is located, by the filing of an action at law in the circuit court of such county.

The defendants argue that W.Va.Code 16–5B–11 does not apply and that the exclusive remedy for violation of W.Va.Code 16–5B is by W.Va.Code 16–5B–6a(d).

[2] It is clear that the Legislature's intent was to give the Director of Health or any citizen of such county the authority to seek injunctive relief against any offending hospital for violation of this section. Further, there is no conflict between W.Va. Code § 16–5B–6a(d) and W.Va.Code § 16–5B–11 and W.Va.Code § 16–5B–6(1). W.Va.Code § 16–5B–11 provides that any person, association, corporation, or local governmental agency violating W.Va.Code § 16–5B–6a shall be fined up to five hundred dollars ($500) or imprisoned for up to ninety (90) days or both. W.Va.Code § 16–5B–6(1) authorizes defendant Hansbarger in his capacity as Director of the West Virginia Department of Health to

1. During the 1984 regular session of the West Virginia Legislature, separate bills were introduced in the House of Delegates (H.B. 1805) and the Senate (Senate Bill No. 556) to repeal Section 6a of Article 5B in its entirety, which bills were unsuccessful, thereby leaving intact its effective date of July 1, 1984.

suspend or revoke the license of a non-profit or local governmental hospital for violation of W.Va.Code § 16–5B–6a. Testimony reveals that no administrative rules and regulations have been promulgated to implement, administer or interpret W.Va. Code § 16–5B–6a.

I. EQUAL PROTECTION CLAUSE

Plaintiff alleges in Count One of its complaint that the Act is unconstitutional because it does not apply uniformly with respect to the class of all non-profit corporations in the State of West Virginia, more specifically being limited in its applicability by its terms to all non-profit corporations owning and operating hospitals in the State of West Virginia, and the classification attempted by such statute bears no rational relationship to any legitimate interest of the State of West Virginia. This claim is based upon the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and Section 1, Article XI of the Constitution of West Virginia. The Fourteenth Amendment of the United States Constitution provides, in part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Plaintiffs argue that the Act employs a classification of non-profit and local governmental hospitals on one hand and for-profit and state owned hospitals on the other hand in order to achieve its stated purpose of dealing with health care costs. Further, the plaintiffs argue that such classification bears upon the members of the Sisters of the Pallottine Missionary Society's fundamental right of Freedom of Association.

The Act declares that "a crisis in health care costs exists, that one important approach to deal with this crisis is to have widespread participation in hospital decision making ..." Under the Act, at least forty percent (40%) of boards of directors of all non-profit and local governmental hospitals located in West Virginia must be composed of an equal proportion of consumer representatives from small business, organized labor, elderly persons, and persons whose income is less than the national median income. The Act also provides that special consideration must be given to women, racial minorities, and handicapped persons. The legislature enacted W.Va. Code § 16–5B–6a with the goal of curbing the rising costs of health care within the state by giving greater citizen participation in hospital decision making. It is the hope and intent of the Legislature that greater citizen participation on the boards of non-profit and local government supported hospitals will result in greater scrutiny over the cost of health care in the state. Since the Act does not apply to profit and state owned hospitals, as opposed to non-profit and local government hospitals, the Court must determine if the classifications in the Act are reasonable in light of the Act's purpose. In *Eisenstadt v. Baird*, 405 U.S. 438, 446, 92 S.Ct. 1029, 1034, 31 L.Ed.2d 349, the United States Supreme Court referred to *Reed v. Reed*, 404 U.S. 71, 75–76, 92 S.Ct. 251, 253–254, 30 L.Ed.2d 225 (1972), which held:

> In applying that clause, this Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. *Barbier v. Connolly*, 113 U.S. 27 [5 S.Ct. 357, 28 L.Ed. 923] (1885); *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61 [31 S.Ct. 337, 55 L.Ed. 369] (1911); *Railway Express Agency v. New York*, 336 U.S. 106 [69 S.Ct. 463, 93 L.Ed. 533] (1949); *McDonald v. Board of Election Commissioners*, 394 U.S. 802 [89 S.Ct. 1404, 22 L.Ed.2d 739] (1969). The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification "must be

reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 [40 S.Ct. 560, 561, 64 L.Ed. 989] (1920).

[3] The Court, in equal protection analysis, must look to the classification or interest involved. *Dunn v. Blumstein*, 405 U.S. 330, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972). Whenever a state act is being challenged as violative of the Equal Protection Clause, the Court must look to one of two constitutional tests. If the legislation creates a suspect classification or impinges upon a fundamental right based upon inherently suspect criteria, then the proper standard of review is strict scrutiny. There must be some showing of a compelling state interest and that the means chosen to achieve that purpose is the least restrictive alternative to meet the standards of strict scrutiny. *San Antonio School District v. Rodriguez*, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1972). If no suspect classification exists, or there is no infringement of a fundamental right, then the appropriate standard is the rational basis test. Under the rational basis standard there must be some showing that the classification is rationally related to a legitimate state purpose. *Eisenstadt v. Baird*, 405 U.S. 438, 92 S.Ct. 1029, 31 L.Ed.2d 349 (1972).

[4] Plaintiffs have a heavy burden. Clearly W.Va.Code 16–5B–6a is an economic regulation. Indeed, the purpose set forth in the Act states specifically that the Legislature's intent in passing such legislation is to attempt to control the rising costs of health care. *See Pollard v. Cockrell*, 578 F.2d 1002, 1012 (5th Cir.1978); *See also Allied Stores v. Bowers*, 358 U.S. 522, 530, 79 S.Ct. 437, 442, 3 L.Ed.2d 480 (1959) and *West Virginia Manufacturers Association v. United Steelworkers of America, et al*, 714 F.2d 308 (4th Cir.1983). The Court declines to declare that W.Va.Code 16–5B–6a is an impingement so fundamental that it justifies the protections of strict judicial scrutiny.

[5] In applying W.Va.Code 16–5B–6a, the West Virginia Legislature distinguished between making the Act applicable to non-profit and local government hospitals and not applying the Act to profit and state owned hospitals. Local government hospitals receive their appropriations from political subdivisions of the state. Non-profit hospitals receive a favorable tax status which is clearly a benefit. Indeed, the recognition as a non-profit organization under the tax laws is an indirect grant of public monies or considered as an indirect donation by the public at large:

> When the Government grants exemptions or allows deductions all taxpayers are effected: the very fact of the exemption or deduction for the donor means that other taxpayers can be said to be indirect and vicarious "donors". Charitable exemptions are justified on the basis that the exempt entity confers a public benefit—a benefit which the society or the community may not itself choose or be able to provide or which supplements and advances the work of public institutions already supported by tax revenues....

Bob Jones University v. United States, 461 U.S. 574, 591, 103 S.Ct. 2017, 2028, 76 L.Ed.2d 157 (1983). There is recognition that organizations are entitled to preferential treatment and tax benefits because they provide a benefit to society. *Bob Jones University v. United States, supra.* Clearly, non-profit hospitals are conferred an advantageous benefit which for-profit hospitals do not receive. Further, W.Va. Code 16–5B–6a does not apply to state hospitals because state hospitals are governed by the director of health and the state rather than a board of directors.

Courts have traditionally exercised judicial restraint to legislative judgment regarding public purpose or purposes based upon the general good. The Court has given great deference to the Legislature's judgment and finds that the Legislature's enactment of W.Va.Code 16–5B–6a has a

rational basis. "The Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all." *Dandridge v. Williams*, 397 U.S. 471, 486, 90 S.Ct. 1153, 1162, 25 L.Ed.2d 491 (1970).

Freedom of Association

The next issue is whether W.Va.Code 16–5B–6a violates the right of association guaranteed to the Sisters of the Pallottine Missionary Society by the First and Fourteenth Amendments of the United States Constitution. The plaintiff, Pallottine Missionary Society, is a religious society of the Roman Catholic Church and is organized as a corporation under the laws of West Virginia. The Pallottine Missionary Society, hereinafter referred to as "the Society", owns and operates St. Joseph's Hospital, in Buckhannon, West Virginia. The Society argues that the Act requiring consumer representation on the boards of non-profit hospitals infringes upon their First Amendment right of Freedom of Association.

[6] The Society is a corporation with a board of governors and provincial council which oversees its operations. St. Joseph's Hospital is not a separate corporation from the Society but is property of the Society and subject to control of the provincial council. However, St. Joseph's Hospital does have its own local board of directors whose members are appointed by the provincial council. The provincial council, composed only of Sisters of the Society, retains the power to approve or disapprove all major actions of the local board. The by-laws of St. Joseph's Hospital local board of directors requires that at least seventy percent (70%) of the local board be members of the Society of Sisters. The Society argues that they are uncertain whether W.Va.Code 16–5B–6a requires consumer representatives on its provincial council or on the local board of St. Joseph's Hospital, or both.

The Act provides that consumer representatives be placed upon "the boards of directors of applicable hospitals." Clearly, the goal is to give greater access and input into the decision making process of hospital boards in hopes of curbing the rising costs of health care. The Sisters of the Pallottine Missionary Society is a religious order of nuns of the Roman Catholic Faith whose purpose is to foster the ideals and beliefs of the Roman Catholic Faith. While the Society may have title and possession over certain hospitals, their primary purpose is the fostering of religious principles protected by the First Amendment. Indeed, the operation of a hospital would seem to be secondary to their religious obligations though the two are very compatible. It is difficult for this Court to believe that the Legislature intended to require consumer representatives on the board of directors of religious orders. The constitutionality of such legislation would be very questionable. Looking to the purpose and the plain language of the Act it appears to the Court that the Act would only require consumer representatives on the local board of directors of the hospital and the Act would not be applicable to the religious society or its governing board.

[7] In *Roberts v. United States Jaycees*, — U.S. ——, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984), the Court held that:

> ... we have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.

However, the court recognized that the right to associate is not absolute:

> The right to associate for expressive purposes is not, however, absolute. Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas that cannot be achieved through means significantly less restrictive of associational freedoms.

Roberts v. United States Jaycees, supra. In the Jaycees case the issue concerns discriminatory policies regarding membership

in a young men's civic and service organization. In the present instance the issue concerns the membership of a non-profit hospital board operated by a religious order rather than membership in the religious order or its governing body. The plaintiffs entered an area which is highly regulated and were aware of the regulatory system when they entered the health services area. Further, the main purpose for operating a hospital is to provide health care. While the operation of a hospital and the right to exercise one's religious beliefs or vocation may be compatible, the primary purpose of operating a hospital is to provide health services to the public. The Act does not require Catholic hospitals to alter their creed or beliefs, nor does it prevent them from excluding individuals with ideologies or philosophies different from those of its existing members. *Roberts v. United States Jaycees, ibid.* Indeed, testimony revealed that the plaintiffs do not exclude members of the categories set forth in the Act and that some board members of Catholic Hospitals qualify in at least one or more categories set forth in the statute. Testimony of Sister Mary Diane Bushee revealed that St. Joseph's Hospital had developed a plan to comply with the Act but had not implemented such plan because of the pending litigation. (Tr. 248)

The Court recognizes a difference between the First Amendment right of a religious society to associate for the advancement of its beliefs and ideas and the operation of a hospital. Clearly, the operation of a hospital, pursuant to the corporate laws of the state, is not essential to the expression or advocation of one's religious beliefs.

Labor Law Pre-emption

[8] The plaintiffs argue that the Act is pre-empted by federal labor laws. The United States Supreme Court described the doctrine of pre-emption as it applies to the Labor Management Relations Act in *Belknap, Inc. v. Hale*, 463 U.S. 491, 103 S.Ct. 3172, 77 L.Ed.2d 798 (1983).

Our cases have announced two doctrines for determining whether state regulations or causes of action are preempted by the NLRA. Under the first, set out in *San Diego Building Trades Council v. Garmen*, 359 US 236, 3 L Ed 2d 775, 79 S Ct 773 (1959), state regulations and causes of action are presumptively preempted if they concern conduct that is actually or arguably either prohibited or protected by the Act. Id., at 245, 3 L Ed 2d 775, 79 S Ct 773. The state regulation or cause of action may, however, be sustained if the behavior to be regulated is behavior that is of only peripheral concern to the federal law or touches interests deeply rooted in local feeling and responsibility. In such cases, the state's interest in controlling or remedying the effects of the conduct is balanced against both the interference with the Board's ability to adjudicate the controversies committed to it by the Act . . . and the risk that the state will sanction conduct that the Act protects. The second preemption doctrine, set out in *Machinists v Wisconsin Employment Relations Commission*, 427 US 132, 49 L Ed 2d 396, 96 S Ct 2548 (1976), proscribes state regulation and state-law causes of actions concerning conduct that Congress intended to be left unregulated

. . . .

The plaintiffs argue that the Act's requirement of a labor representative on a hospital board of directors would disturb the balance of power between labor and management. Some of the plaintiff hospitals recognize certain unions as bargaining representatives for their employees. Therefore, the plaintiffs contend that any board member who is also a member of the hospital union would have a conflict of interest. Further, that such a board member (union representative) would have access to confidential financial information and strategy of the board. Plaintiffs point to the conflicting fiduciary duties a board member has to the hospital and to a labor organization. They also point out that a labor member could be fined, be expelled from his labor union, or have his/her retirement benefits jeopardized by not supporting labor's position.

The Court finds that Garmen pre-emption is not applicable to the Act. The Act fails to interfere with the employer and employee relationship protected by the National Labor Relations Act.

The Act provides that consumer representatives be selected on an equal proportion from four categories, one of which is organized labor. It does not require that such labor representative be affiliated with the hospital's bargaining unit to serve on the board of directors. Such labor representative could be selected from a labor organization which has no affiliation with the hospital. However, even in those instances where the labor representative on the board of directors is a member of this labor organization which represents the hospital's bargaining unit, there would not be a conflict under 29 U.S.C. 158(a) and thus no case for pre-emption under the Belknap standards. *Belknap, Inc. v. Hale*, 463 U.S. 591, 103 S.Ct. 3172, 77 L.Ed.2d 798 (1983).

On Page 3 of their memoranda of law (June 15, 1984), the plaintiffs cite *Anchorage Community Hospital, Inc.*, 225 NLRB 575 (1976), wherein the National Labor Relations Board held that there was no immediate danger of a conflict of interest in violation of 18(a)(2) where members of the teamsters union held positions on the hospital's board of trustees and executive committee. The plaintiffs attempt to distinguish between *Anchorage* and the present matter by arguing that the former was a voluntary association while the latter is a mandatory one. It would seem to make little difference whether labor representation was voluntary or mandatory since the crux of the issue is whether a conflict exists by a labor representative sitting on an employer's board of directors.

There is always a potential for conflict of interest with anyone who serves on the board of any corporation. There may be businessmen or vendors who do business with a hospital and who may also serve the hospital board. Like any board member who has a conflict, a labor representative sitting on a board of directors should stand aside when issues are taken up regarding his/her labor organization. Further, where a board member, whether a labor member or businessman, is placed in a position of a possible conflict of interest and breach of fiduciary responsibility then that board member should withdraw from the decision making process on that issue. The Court is of the opinion that this issue is not pre-empted by federal labor laws.

Due Process Clause

The plaintiffs argue that the Act is (1) unreasonable, arbitrary and capricious because it bears no real relationship to hospital cost containment control; (2) unreasonably and arbitrarily restricts the ability of hospitals to discharge their legal responsibility to quality as well as cost efficient health care; and (3) takes the Sisters of the Pallottine Missionary Society's property without compensation; and (4) is vague, ambiguous, and overbroad. The Court will address these issues in the order presented.

[9] Plaintiffs argue that the Act has no relationship to the containment of hospital costs. The Legislature passed this Act in hopes of curbing rising hospital costs. Certainly, there is a rational relationship between the operation of a hospital and its board of directors. In fact, the board of directors establish the policy and guidelines which ultimately determine the cost and quality of services to be provided by a hospital. The Legislature apparently was of the opinion that placing consumer representatives on hospital boards would allow the consumer a greater input into the overall operation of hospitals and ultimately result in closer scrutiny of financial operations. The Court gives great deference to the Legislature in this matter and is of the opinion that there is a relationship between the composition of hospital boards and the containment of hospital costs. The Court is of the opinion that it should not infringe upon the powers of the Legislature.

[10] The next issue concerns whether the Act restricts the ability of hospitals to maintain effective governance and to dis-

charge their legal responsibility to qualify as well as cost efficient health care. Plaintiffs contend that the Act's establishment of specified percentages for consumer representation on hospital boards without regard to qualification and commitment regarding the discharge of their duties constitutes an arbitrary and unreasonable restriction in violation of the Due Process Clause of the Fourteenth Amendment. There is no reason to believe that the average consumer is not qualified to serve as a hospital board member. The ultimate decision regarding the selection of individuals to serve on hospital boards rests solely upon the hospital itself. When selecting board members the hospital may continue to use the criteria and standards for selection of board members as it has done in the past. The only difference is that the hospital must now be sensitive to the four categories set forth in the Act. Certainly, there are individuals within those categories who would make excellent board members. In fact, testimony revealed that some members who are presently serving on hospital boards would come within one or more of the four categories set forth in the Act. The ultimate responsibility lies, as it has in the past, with the hospital to recruit and select only those individuals who would make good board members. For these reasons, the Court is of the opinion that this issue is without merit.

The plaintiffs have also raised the question of whether there is a taking of property without compensation. It is argued that there is a taking of the Sisters of the Pallottine Missionary Society's property without compensation and therefore in violation of the Due Process Clause of the Fourteenth Amendment.

[11] The Fourteenth Amendment of the United States Constitution provides that no person shall be deprived of his property without due process of law. However, it has been held that every governmental regulation of uses of private property was not a taking for public use. *Miller v. Schoene*, 276 U.S. 272, 277–80, 48 S.Ct. 246, 246–48, 72 L.Ed. 568 (1928). In *Troy Ltd. v. Renna*, 727 F.2d 287, 302 (3rd Cir.1984), it was held that "regulations of the use of private property frequently involve costs to the owner. They are nevertheless not deemed to be takings." Where there is a common exercise of regulatory power then courts have tended to sustain government action. *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 592–94, 82 S.Ct. 987, 988–990, 8 L.Ed.2d 130 (1962). In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413, 43 S.Ct. 158, 159, 67 L.Ed. 322 (1922), the court held that:

> [G]overnment regulation—by definition—involves the adjustment of rights for the public good. Often this adjustment curtails some potential for the use or economic exploitation of private property. To require compensation in all such circumstances would effectively compel the government to regulate by *purchase*. "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."

The court went on to indicate that "the greatest weight is given to the judgment of the legislature, but it always is open to interested parties to contend that the legislature has gone beyond its constitutional power." *Pennsylvania Coal Co. v. Mahon, supra*. A taking occurs in the ordinary sense when government controls a person's use of property so tightly that, although some uses remain to the owner, the property's value has been virtually destroyed. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413–14, 43 S.Ct. 158, 159–60, 67 L.Ed. 322 (1922). *See also Goldblatt v. Town of Hempstead*, 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962). In *Penn Central Transportation Company v. City of New York*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), the court set forth guidelines on determining when a taking has occurred:

> In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The eco-

nomic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. ... So, too, is the character of the governmental action. A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government ... than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

[12] The Act establishes certain guidelines or regulations for the common good in the hopes of containing health care costs. The regulated hospitals are either directly supported by the state or indirectly supported through certain tax exemptions. Irregardless of the method of financial support, non-profit and local government hospitals receive such benefits because of their commitment to public service. Clearly, the state has not appropriated or taken governing control of these hospitals. Hospitals, and the health field in general, have been a highly regulated field. The plaintiffs were aware of that fact when they entered the hospital business. The Act challenged here is a method or attempt to regulate hospital costs.

Void for Vagueness

[13] It has been alleged that the Act violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution because it is vague, ambiguous, and overbroad. As the Court has already stated, the Act is intended to regulate health care costs and as such is an economic regulation. Under due process a law is void if it is so vague that individuals "of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Construction Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926). Such indefiniteness violates due process when it fails to give individuals fair notice. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162, 92 S.Ct. 839, 843, 31 L.Ed.2d 110 (1972).

[14] The Act provides for four categories: small business, organized labor, elderly persons, and persons whose income is less than the national median income. Further, special consideration is to be given to women, racial minorities, and handicapped persons. Each of these terms have a common interpretation or meaning regarding which individuals would fit each category. Testimony of Bruce Carter indicated he had no problem determining who is a small business person (Tr. 278) and Sister Mary Diane Bushee had no problems with organized labor, elderly, or persons below the median income (Tr. 243). In fact, testimony revealed that certain members presently serving on hospital boards would come within these categories. Sister Bushee even testified that St. Joseph's had a contingency plan which she had reason to believe would comply with the Act. (Tr. 254) Based upon these facts the Court finds no basis for the plaintiffs' argument that the Act is vague, ambiguous, and overbroad.

Article XI of West Virginia Constitution

[15, 16] Plaintiffs contend that the Act violates Sections One and Four of the West Virginia Constitution. Section 1, Article XI provides:

> The legislature shall provide for the organization of all corporations hereafter to be created, by general laws, uniform as to the class to which they relate; but no corporation shall be created by special law: Provided, that nothing in this section contained, shall prevent the legislature from providing by special laws for the connection, by canal, of the waters of the Chesapeake with the Ohio river by line of the James river, Greenbrier, New river and Great Kanawha.

Plaintiffs argue that the Act imposes upon non-profit hospitals special requirements which are not uniformly applicable upon all non-profit corporations. The plaintiffs are attempting to argue that the Legislature, in passing W.Va.Code 16-5B-6a, unfairly

singled them out for different treatment. Article XI of the West Virginia Constitution does not prevent the Legislature from passing laws which regulate specialized areas of business conducted by various corporations. To argue that the Legislature may not pass legislation regulating activities of certain corporations without making such regulations uniformly apply to all members of a certain class of corporations is beyond imagination. Article XI Section 1 of the West Virginia Constitution only requires uniform laws regarding the creation and incorporation of certain classes of corporation, i.e.: non-profit, profit, et cetera.

[17] Article XI, Section 4, of the West Virginia Constitution provides:

> .... The legislature shall provide by law that every corporation, other than a banking institution, shall have power to issue one or more classes and series within classes of stock, with or without par value, with full, limited or no voting powers, and with preferences and special rights and qualifications, and that in all elections for directors or managers of incorporated companies, every stockholder holding stock having the right to vote for directors, shall have the right to vote, in person or by proxy, for the number of shares of stock owned by him, for as many persons as there are directors or managers to be elected, or to cumulate said shares, and give one candidate as many votes as the number of directors multiplied by the number of his shares of stock, shall equal, or to distribute them on the same principle among as many candidates as he shall think fit; and such directors or managers shall not be elected in any other manner.

The Act does not prevent the "stockholders", Sisters of Pallottine Missionary Society, from selecting or voting for individuals they feel are capable and qualified to serve as directors. Stockholders need only to consider the four categories set forth in the Act when selecting directors but may otherwise be discriminate in choosing individuals they wish to serve on such boards.

Contracts Clause

[18, 19] The Contracts Clause of the United States Constitution provides that "no state shall ... pass any ... law impairing the obligations of contracts." A charter of a private corporation is a contract and entitled to protection under the Contracts Clause. *Dartmouth College v. Woodward*, 4 Wheat (17 U.S.) 518, 4 L.Ed. 629 (1819). It has been further held that articles of incorporation organized and incorporated under the general laws of a state constitute a contract between the corporation and state. *Stanislaus County v. San Joaquin and Kings River Canal*, 192 U.S. 201, 24 S.Ct. 241, 48 L.Ed. 406 (1904). However, a legislature may, without impairing contractual obligations, impose new burdens upon corporations in addition to those contained in the charger, which are in the public interest and safety. *Union Bridge Co. v. U.S.*, 204 U.S. 364, 27 S.Ct. 367, 51 L.Ed. 523 (1907). Legislation which in effect only regulates the manner in which the franchises of a corporation are to be exercised and that do not interfere substantially with the object of the grant conferred by its charter do not impair the contract. *Pearsall v. Great Northern Railroad Co.*, 161 U.S. 646, 16 S.Ct. 705, 40 L.Ed. 838 (1896).

[20] The Court in determining whether the Act is in conflict with the contracts clause must determine whether the law has worked a substantial impairment of the contractual relationship. *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 103 S.Ct. 697, 704, 74 L.Ed.2d 569 (1983). In determining whether a state law seriously impairs the contract the Court must look to the nature of the business or industry.

> In determining the extent of the impairment, we are to consider whether the industry the complaining party has entered has been regulated in the past. *Allied Structural Steel Co. [v. Spannaus]*, 438 U.S. [234], at 242, n. 13, 98 S.Ct. [2716], at 2721, n. 13 [57 L.Ed.2d 727 (1978)], citing *Veix v. Sixth Ward*

Bldg. & Loan Ass'n, 310 U.S. 32, 38, 60 S.Ct. 792, 794–795, 84 L.Ed. 1061 (1940) ("When he purchased into an enterprise already regulated in the particular to which he now objects; he purchased subject to further legislation upon the same topic"). The Court long ago observed: "One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them." *Hudson Water Co. v. McCarter*, 209 U.S. 349, 357, 28 S.Ct. 529, 531, 52 L.Ed. 828 (1908)." *Energy Reserves*, 459 U.S. at 411, 103 S.Ct. at 705.

[21] Clearly, the health care industry is a highly regulated field and the plaintiffs were aware of that fact when they chose to enter the hospital business. Further, the Act does not prevent the stockholders from selecting those individuals they prefer as hospital board members. The Act only provides that in selecting such board members they be sensitive to select members who may represent certain areas. The hospitals covered by the Act are charitable organizations who operate to serve the public and receive certain tax advantages.

Conclusion

Functionally speaking, in the matters here addressed, we are speaking of power. The power but not the wisdom of the legislature. The power and the right of this Court to address the constitutional questions presented.

The police power of the state is vested solely in the legislature. The same is limited only by state and federal constitutional strictures. Such were not found.

And while the Court had the power to effect judicial strictures as contended, it had no such right. In such instances, judicial restraint is dictated.

On the basis of the testimony adduced at the hearing on plaintiffs' "Motion for Preliminary Injunction", the parties respective memorandums of law and reply, the Court finds that W.Va.Code 16–5B–6a does not violate the Constitution of the United States and the Constitution of the State of West Virginia.

Judgment shall be accordingly ORDERED.

Charles NELSON

v.

Ross MAGGIO, Jr., et al.

Civ. A. No. 84–2750.

United States District Court,
E.D. Louisiana.

Dec. 19, 1984.

On petition for habeas corpus relief, the District Court, Duplantier, J., held that without benefit of either a transcript of disputed part of petitioner's state court trial or of a state court resolution of factual issues, habeas proceedings would be stayed to give state court an opportunity to reopen state habeas proceeding and to conduct a hearing to resolve fact issues.

Order accordingly.

1. Habeas Corpus ⇐50

A state prisoner's habeas petition may, in some cases, be summarily dismissed if state asserts and proves that it has been prejudiced in its ability to controvert petitioner's allegations by unavailability of a transcript caused by unreasonable delay in filing of habeas petition. Rules Governing § 2254 Cases, Rule 9(a), 28 U.S.C.A. foll. § 2254.

2. Habeas Corpus ⇐50

State must make a particularized showing of prejudice caused by delay in order for state prisoner's habeas petition to be summarily dismissed because of its inability to controvert petitioner's allegations

statements for which the ordinary man might recover." *See* W. Prosser, *supra* at 717. It cannot be said that Nader relied on his confirmed reservation with Allegheny as a guarantee of passage.

The judgment for both compensatory and punitive damages is

Reversed.

STATE OF NEW JERSEY, DEPARTMENT OF ENVIRONMENTAL PROTECTION, Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and Douglas M. Costle, Administrator, Respondents,

State of Missouri, Environmental Improvement Division of the New Mexico Health and Environment Department, Department of Pollution Control and Ecology of the State of Arkansas, Department of Environmental Quality Engineering of the Commonwealth of Massachusetts, District of Columbia, State of Maine, W. Edward Wood, Director of Department of Environmental Management of the State of Rhode Island and Providence Plantations, Peter A. A. Berle, Commissioner of Environmental Conservation of the State of New York, State of Connecticut Department of Environmental Protection, The Agency of Environmental Conservation of the State of Vermont, State of Georgia, Department of Natural Resources, Division of Environmental Protection, City of New York, Intervenors.

No. 78-1392.

United States Court of Appeals, District of Columbia Circuit.

Argued April 14, 1980.

Decided June 30, 1980.

The State of New Jersey filed petition for review of rule promulgated by Administrator of Environmental Protection Agency, and several states were allowed to intervene. The Court of Appeals, McGowan, Circuit Judge, held that: (1) Administrator erred in declining to adhere to notice-and-comment requirements of Administrative Procedure Act section when promulgating rule listing nonattainment, attainment, and unclassifiable areas for photochemical oxidant pollution, where Administrator could have reconciled commands of Administrative Procedure Act and Clean Air Act by publishing designations submitted to him by states as proposed rules, and (2) provision for post hoc comment did not cure failure to follow requirements of Administrative Procedure Act section.

Ordered accordingly.

1. Health and Environment ⇐25.6(8)

Administrator of Environmental Protection Agency erred in declining to adhere to notice-and-comment requirements of Administrative Procedure Act section when promulgating rule listing nonattainment, attainment, and unclassifiable areas for photochemical oxidant pollution, where Administrator could have reconciled commands of Administrative Procedure Act and Clean Air Act by publishing designations submitted to him by states as proposed rules. Clean Air Act, §§ 101 et seq., 107(d) as amended 42 U.S.C.A. §§ 7401 et seq., 7407(d); 5 U.S.C.A. § 553.

2. Administrative Law and Procedure ⇐394, 400

Various exceptions to notice-and-comment provisions of Administrative Procedure Act section should be narrowly construed and only reluctantly countenanced. 5 U.S.C.A. § 553.

3. Administrative Law and Procedure ⇐408

Administrative Procedure Act subsection providing that required publication or service of substantive rule shall be made

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not less than 30 days before its effective date does not provide procedures alternative to notice and other public proceedings required by prior subsections of section. 5 U.S.C.A. § 553(b–d).

4. Health and Environment ⇐25.6(8)

EPA administrator's provision for post hoc comments concerning rule listing nonattainment, attainment, and unclassifiable areas for photochemical oxidant pollution did not cure his failure to follow notice-and-comment requirements of Administrative Procedure Act. Clean Air Act, §§ 101 et seq., 107(d) as amended 42 U.S.C.A. §§ 7401 et seq., 7407(d); 5 U.S.C.A. § 553.

Petition for Review of an Order of the Environmental Protection Agency.

Richard M. Hluchan, Deputy Atty. Gen., State of New Jersey, Trenton, N. J., for petitioner.

Ronald C. Hausmann, Atty., Dept. of Justice, Washington, D. C., with whom, James W. Moorman, Asst. Atty. Gen., Angus MacBeth, Deputy Asst. Atty. Gen., Donald Stever, Atty., Dept. of Justice, Washington, D. C., were on brief, for respondent.

David L. Williams, Asst. Atty. Gen., State of Arkansas, Little Rock, Ark., was on brief, for intervenor, Department of Pollution Control and Ecology, State of Arkansas.

Dan Summers, Asst. Atty. Gen., State of Missouri, Jefferson City, Mo., was on brief, for intervenor, State of Missouri.

Arthur K. Bolton, Atty. Gen., and Sarah Evans Lockwood, Staff Asst. Atty. Gen., State of Georgia, Atlanta, Ga., were on brief, for intervenor, State of Georgia, Department of Natural Resources, Division of Environmental Protection.

Francis X. Bellotti, Atty. Gen., and Francis S. Wright, Asst. Atty. Gen., State of Massachusetts, Boston, Mass., were on brief, for intervenor, The Department of Environmental Quality Engineering of the Commonwealth of Massachusetts.

James A. Sevinsky, Albany, N. Y., was on brief, for intervenor, Peter A. A. Berle, Commissioner of Environmental Conservation of the State of New York.

Richard F. Webb, Asst. Atty. Gen., State of Connecticut, Hartford, Conn., was on brief, for intervenor, State of Connecticut Department of Environmental Protection.

Gregory W. Sample, Asst. Atty. Gen., State of Maine, Augusta, Me., was on brief, for intervenor, State of Maine. Donald G. Alexander, Augusta, Me., also entered an appearance for intervenor, State of Maine.

R. Daniel Prentiss, Providence, R. I., was on brief, for intervenor, State of Rhode Island Department of Environmental Management.

Benson D. Scotch, Asst. Atty. Gen., State of Vermont, Montpelier, Vt., was on brief, for intervenor, Agency of Environmental Conservation of the State of Vermont.

James G. Greilsheimer, First Asst. Corp. Counsel, City of New York, New York City, was on brief, for intervenor, City of New York.

Judith W. Rogers, Corp. Counsel, John C. Salyer and Richard G. Wise, Asst. Corp. Counsel, Washington, D. C., entered appearances for intervenor, District of Columbia.

Leonard J. Theberge, Washington, D. C., entered an appearance, for intervenor, Mid Atlantic Legal Foundation.

Before McGOWAN and WILKEY, Circuit Judges, and DAVIES,* United States District Judge for the District of North Dakota.

Opinion for the court filed by Circuit Judge McGOWAN.

McGOWAN, Circuit Judge:

We review here a rule promulgated by the Administrator of the Environmental Protection Agency under section 7407(d) of the Clean Air Act. Because the Administrator felt that a tight statutory schedule gave him "good cause" to do so, he promulgated that rule without the prior notice and

* Sitting by designation pursuant to 28 U.S.C. § 294(d).

without the prior solicitation of public comments which section 553 of the Administrative Procedure Act ordinarily requires. Because we find that the Clean Air Act's schedule for promulgation of the rule did not place such time constraints on the Administrator that notice and comment rulemaking would have been impracticable, we hold he erred in invoking the good cause exception. We therefore reverse the Administrator and remand the record for further proceedings.

I

In 1955, Congress passed the original Clean Air Act; in 1970 and 1977 Congress passed major amendments to that Act.[1] The Clean Air Act, 42 U.S.C. 7401 *et seq.*, (Supp. I 1977), now stands as an emphatic expression of Congress's intent that the air Americans breathe be clean.

On November 25, 1971, the Administrator of the Environmental Protection Agency (EPA), in obedience to the command of the Clean Air Act, promulgated "National Ambient Air Quality Standards" for several pollutants, including a pollutant variously referred to as photochemical oxidants or ozone. 36 Fed.Reg. 22384 (Nov. 25, 1971), 40 C.F.R. Part 50. In 1970, Congress had expected that these standards would be met by the middle of the decade. However, by 1975 Congress apprehended that that expectation would go unrealized in many areas. Congress viewed this failure with the utmost seriousness, for it understood that the "non-attainment of air quality standards in a wide and densely populated region could result in a phenomenal health impact, measured in terms of millions of days of aggravated disease, asthma attacks and lower respiratory disease episodes." H.Rep. No. 95–294, 95th Cong., 1st Sess. 209 (1977), U.S.Code Cong. & Admin.News 1977, pp. 1077, 1288.

Fearing for the health of "tens of millions," *id.*, Congress imposed a new, and tight, schedule for achieving the air quality standards the Administrator had set in 1971. The part of the new schedule relevant to our task was 42 U.S.C. § 7407(d), which required states to submit to the Administrator a list of (1) those air-quality-control regions (to be designated "attainment") which, on August 7, 1977, met the national air quality standards, (2) those regions (to be designated "nonattainment") which did not meet the standards, and (3) those regions (to be designated "unclassifiable") for which there were insufficient data to permit classification. This list was to be submitted "within one hundred and twenty days after August 7, 1977," that is, on December 5, 1977. Within sixty days thereafter—by February 3, 1978—the Administrator was directed to "promulgate each such list with such modifications as he deems necessary."

Using the Administrator's modified list, each state was to formulate by January 1, 1979, plans for the "implementation, maintenance, and enforcement" of air quality standards. A "state implementation plan" for oxidants was to be written which would assure that air quality standards would be reached by December 31, 1982. 42 U.S.C. § 7502(a)(1) (Supp. I 1977). Of necessity, therefore, plans would impose much more stringent measures for areas designated "nonattainment" than for areas not so designated. By July 1, 1979, the Administrator was to have approved or disapproved state plans. If a state failed to secure approval for a plan for dealing with regions designated "nonattainment," the statute forbad the construction or modification of any major stationary source of pollution in those regions when "the emissions from such facility will cause or contribute to concentrations of any pollutant for which [an air quality standard] is exceeded in such area . . . ." 42 U.S.C. § 7410(a)(2)(I) (Supp. I 1977).

1. Clean Air Act of 1955, Pub.L. 84–159, ch. 360, 69 Stat. 322, July 14, 1955 (originally codified at 42 U.S.C. §§ 1857–1858); Clean Air Act Amendments of 1970, Pub.L. 91–604, 84 Stat. 1676, Dec. 31, 1970 (formerly codified at 42 U.S.C. §§ 1857–1858); Clean Air Act Amendments of 1977, Pub.L. 95–95, 91 Stat. 685, Aug. 7, 1977 (recodified at 42 U.S.C. §§ 7401–7642 (Supp. I 1977)).

Although the statute required the Administrator to promulgate a list of nonattainment areas on February 3, 1978, he in fact promulgated it on March 3, 1978. 43 Fed.Reg. 8962. And although section 553 of the Administrative Procedure Act (APA) requires that, when an agency proposes to issue a rule, it must first publish a general notice in the Federal Register, 5 U.S.C. § 553(b), and "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments," 5 U.S.C. § 553(c), the Administrator provided neither notice nor opportunity for comment. Instead, his "final rule" was effective "immediately." 43 Fed.Reg. 8962 (March 3, 1978). In justification, he invoked the exception to the usual requirement of notice and comment rulemaking which section 553(b)(B) creates for those occasions "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(B). The Administrator explained that the tight schedule Congress had set prevented notice and comment rulemaking:

> The States are now preparing revisions to their State implementation plans (SIPs) as required by sections 110(a)(2)(I) and 172 of the Act. This enterprise, which must be completed by January 1, 1979, requires that the States have immediate guidance as to the attainment status of the areas designated under section 107(d). Congress has acknowledged this by imposing a tight schedule on the designation process and requiring EPA to promulgate the list within 180 days of the enactment of the amendments. Under these circumstances it would be impracticable and contrary to the public interest to ignore the statutory schedule and postpone publishing these regulations until notice and comment can be effectuated. For this good cause, the Administrator has made these designations immediately effective.

43 Fed.Reg. 8962 (March 3, 1978). However, the Administrator did offer to receive *post hoc* public comment:

> The Agency recognizes . . . the importance of public involvement in the designation process. It is[,] therefore, soliciting public comment on this rule by May 2, 1978.

Id.

In his list (*i. e.*, in the rule we now review), the Administrator designated "over 600" of the 3,044 counties in the country as "nonattainment" for photochemical oxidant pollution. (The EPA represents that this figure was later decreased when, on January 29, 1979, the Administrator adjusted the national standard for oxidant pollution by increasing the permissible proportion of it from .08 parts per million to .12 parts per million.) Most counties in the industrial Northeast and in western California were designated nonattainment for oxidant pollution; little of the rest of the country was. J.A. at 132a. In its brief, though, the EPA argues that "[a]pproximately 71% of all precursor sources and 79% of the stationary sources [of oxidant pollution] are situated in counties designated nonattainment." Respondents' Brief at 9.

On April 28, 1978—and thus within the 60 days allotted by the Administrator for comments—the State of New Jersey wrote the Administrator to protest his analysis of the way oxidants are formed, the time they persist in the atmosphere, the distances they travel, the ways they should be measured, and the degree of their ubiquity:

> Ozone air pollution is widespread; certain meteorological conditions carry it over wide areas of the country at levels above the Federal health standard. As these ozone-laden air masses move across the United States, every area, rural or urban, is likely to violate the ozone standard. Moreover, sources everywhere contribute ozone generating ingredients to the air mass exacerbating the problem.

J.A. at 246a. New Jersey thus asked the Administrator to "change your designations and policies in such a way as to require all states to establish control regulations for the ingredients to ozone formulation." *Id.* at 247a.

On May 2, 1978, New Jersey petitioned this court for review of the Administrator's rule. Since that time, the States of Maine, Connecticut, Massachusetts, New York, Rhode Island, and Vermont, the District of Columbia, and the City of New York have intervened in favor of petitioner New Jersey, and the States of Georgia, Arkansas, Missouri, and New Mexico have intervened in favor of the respondents (the EPA and its Administrator).[2]

On July 7, 1978, New Jersey supplemented its submission to the EPA. On January 26, 1979, however, the Administrator affirmed the controverted designations and briefly responded to New Jersey's comments. 44 Fed.Reg. 6395 (Feb. 1, 1979). (It will be recalled that, three days later, the Administrator increased the permissible level of oxidant pollution. *See* text at 1041 *supra*.) Finally, in "January 1979" the EPA published a "Technical Support Document for Agency Policy Concerning Designation of Attainment, Unclassifiable, and Nonattainment Areas for Ozone." J.A. at 358a–399a.

II

In its brief, New Jersey argues that the Administrator's oxidant designations of "nonattainment" and "unclassifiable" are invalid because (1) they were issued without notice-and-comment rule-making and (2) they are arbitrary, capricious, and without adequate basis in the record. At oral argument, however, counsel for New Jersey bowed to the deference which, as a legal and practical matter, this court must pay the EPA's technical expertise and conceded that, in the present circumstances of this case, we could not properly invalidate the rule on the state's second ground. In any event, we find New Jersey's first argument persuasive and consequently need not reach the second.

We begin our discussion of the propriety of the Administrator's invocation of the good-cause exception embodied in section 553(b)(B) by outlining the reasoning of the four Circuits which recently reviewed other aspects of the same rule, two of which reversed the EPA, and two of which upheld it. In the first of these cases—*United States Steel Corp. v. EPA*, 595 F.2d 207 (1979), the Fifth Circuit held that the Administrator erred in dispensing with section 553's notice and comment. To the agency's avowal that that omission was justified by the schedule under which it labored, the court, citing *American Iron & Steel Institute v. EPA*, 568 F.2d 284, 292 (3d Cir. 1977), and *Shell Oil Co. v. FEA*, 527 F.2d 1243, 1248 (Em.App.1975), responded, "[T]he mere existence of deadlines for agency action, whether set by statute or court order, does not in itself constitute good cause for a § 553(b)(B) exception." 595 F.2d at 213. Nor was the court convinced by the Administrator's claim that the requisite "good cause" lay in his need to furnish the states guidance in formulating their implementation plans, since, the court pointed out, the Administrator could "at least have published a state's list as a proposed rule and then have accepted comments on it." 595 F.2d at 213. Because we find persuasive and adopt the Fifth Circuit's reasoning in this respect, we quote it at length:

> First, the respective states already had most of the information contained in the EPA's designations, since those designations were based on submissions by the states. The statute indicates that the EPA's role is limited to reviewing the state designations and modifying them where necessary. 42 U.S.C. § 7407(d)(2). The states could have begun the revisions with the information on hand, changing them later as required by EPA alterations of the § 7407(d) list.
>
> Furthermore, the EPA undercuts its own argument on this point by repeatedly emphasizing elsewhere the preliminary nature of the § 7407(d) designations in the entire process. The designations had little legal effect on the states; rather they were important in guiding the S[tate] I[mplementation] P[lan] revisions. The same guidance that was accomplished by the EPA's procedures could

2. For convenience' sake we refer to the respondents interchangeably.

> have been accomplished by issuing a proposed list in March, followed by final promulgation after notice and comment.

595 F.2d at 214.

In *Sharon Steel Corp. v. EPA*, 597 F.2d 377 (3d Cir. 1979), the Third Circuit opened its discussion of the "good cause" exception by commenting that, when Congress passed the Clean Air Act Amendments of 1977,

> the circumstances that the Administrator advances as good cause should have been apparent. Nonetheless, Congress nowhere recorded any express indication that the 1977 amendments should relieve the Administrator from the ordinary procedures set forth in the APA for rulemaking.

597 F.2d at 380. In any event, the court continued, since the Administrator modified the designations submitted by the states only when they were clearly incorrect, the Administrator could simply have published as proposed rules the state designations shortly after he received them. Under the circumstances of *Sharon Steel*, the notice and comment period would have ended by January 15, 1978. Had the Administrator then taken ninety days to review those comments, a final rule could have issued April 15, 1978, giving the states time to draft their plans before the January 1, 1979, deadline.[3] Although this would have given the states about a month less time than they were actually given, the time would have sufficed because of two improvements of the court's procedure over the one the Administrator used:

> First, the states would then have known with certainty the content of the final rule, but under the procedure used by the Administrator the final rule issued March 3 was subject to change after a sixty-day period for comments following promulgation. Second, because the Administrator was largely fashioning his own designations according to the designations submitted by the states, the states (on the assumption they knew of this fact) could have begun as early as December 5 to draft their plans for attaining the national standards.

597 F.2d at 380.

In *United States Steel Corp. v. EPA*, 605 F.2d 283 (7th Cir. 1979), the Seventh Circuit rejected the reasoning and result of the Third and Fifth Circuits. (Since there are among our four precedents two cases denominated *U. S. Steel v. EPA*, we shall call these cases by the names of the courts which decided them.) The Seventh Circuit's starting point was a portion of the language which we quote *in extenso* below from the Senate and House Reports on the APA. *See* text at 1046 *infra*. That language interpreted the word "impracticable" as applying to situations "in which the due and required execution of the agency functions would be [unavoidably] prevented by its undertaking public rule-making proceedings."[4] S.Doc. No. 248, 79th Cong., 2d Sess. 200, 258 (1946), *quoted in* 605 F.2d at 287. The court then cited two cases for the proposition that "the 'good cause' exception may be utilized to comply with the rigors of a tight statutory schedule."[5] 605 F.2d at 287. The court next set about to show that the EPA's was such a schedule: The EPA had been given sixty days after the deadline for state lists to promulgate its rule, the states had been given eleven months for the "time-consuming process" of producing implementation plans, and the failure of some states to submit their lists on time further constricted the schedule. The court

3. The court acknowledged that, on this schedule, the Administrator would have missed the statutory deadline of February 3. But like the court in *U. S. Steel*, 595 F.2d at 213, the court in *Sharon Steel* pointed out that he missed it anyway. 597 F.2d at 380 & 380 n.7.

4. The word "unavoidably" appears at t pages cited from the Senate and House ports, though it does not appear in the Seve Circuit's quotation from those pages.

5. The cases were *Clay Broadcasting Corp. v. United States*, 464 F.2d 1313 (5th Cir. 1972), *rev'd on other grounds sub nom. National Cable Television Ass'n, Inc. v. United States*, 415 U.S. 336, 94 S.Ct. 1146, 39 L.Ed.2d 370 (1974), and *Energy Reserves Group v. FEA*, 477 F.Supp. 1135 (D.Kan.1978). *See* text at 1047 *infra* for the reasons we reject the Seventh Circuit's reading of these cases.

calculated that, "[a]dding one month for comment and four months to review and respond to these comments, compliance with notice and comment procedures would have delayed promulgation by five months or more, leaving the states with less than 6 months to formulate implementation plans." 605 F.2d at 288 (footnote omitted).

The final element in the Seventh Circuit's approval of the EPA's reliance on the good-cause exception was the Circuit's caustic reminder that the recalcitrance of the steel industry in general and of United States Steel in particular had been conspicuous among the reasons Congress imposed a tight schedule in the Clean Air Act Amendments of 1977. In a lengthy footnote, the court quoted "[t]he only specific example of nonattainment given by the House Report":

> The committee is also mindful of the fact that several categories of major polluters have not complied with emissions limits in nonattainment areas. The 1975 subcommittee hearings reflect this disturbingly high incidence of noncompliance. In particular, the following testimony is of great concern:
>
> Mr. ROGERS. Let's see, we have had the law 5 years now. Could you tell me company by company, how many of your plants are in compliance presently and how many are not?
>
> Mr. ARMOUR [Interlake, Inc.]. I think we have to define in compliance with what.
>
> Mr. ROGERS. The Clean Air Act?
>
> Mr. ARMOUR. We do not have any in compliance.
>
> Mr. ANDERSON [Bethlehem Steel Corp.]. None.
>
> Mr. JAICKS [Inland Steel Co.]. None.
>
> Mr. MALLICK [U.S. Steel Co.]. None.
>
> Mr. TUCKER [National Steel Corp.]. We have no plants in compliance.
>
> Mr. JAICKS. It sounds terrible. But these are hard value money expenditures.

H.Rep. No. 294, 95th Cong., 1st Sess. 210–11 (1977), *quoted in* 605 F.2d at 287–88 n.5. Thus the court said, "Given that the strict deadlines were intended to force compliance by U.S. Steel and others, we are hesitant to allow U.S. Steel to again delay compliance through its procedural challenges." 605 F.2d at 288 n.5.

The Seventh Circuit's panel did not depend solely on its holding that the Administrator had properly invoked the good-cause exception of subsection 553(b)(B).[6] The first of its two other holdings rested on the "good cause" exception embodied in subsection 553(d)(3). Saying that "there is sound reason to believe that 'good cause' should encompass more situations in (d)(3) than in (b)(B)," 605 F.2d at 290, the court readily concluded that, *a fortiori*, (d)(3) permitted the Administrator to dispense with notice-and-comment rule-making. The court's second alternative holding was that, under its reading of subsection 7607(d)(9) of the Clean Air Act, it could reverse the Administrator on procedural grounds only where the procedural error (1) was arbitrary or capricious, (2) had been protested during the period for public comment, and (3) was so serious and was related to matters so central to the rule that, but for the error, there would be a substantial likelihood that the rule would have been significantly changed. The court decided that this rule did not fall within these criteria, and that it was therefore valid.[7]

6. The court appended a footnote to its discussion of the good-cause exception which read, in part, "This opinion has been circulated among all judges of this Court in regular service. A majority did not favor a rehearing in [*sic*] banc on the question of this difference among circuits." 605 F.2d at 289 n.11.

7. On January 15, 1980, the Supreme Court denied a petition for a writ of certiorari in the Seventh Circuit's *U. S. Steel* case. 444 U.S. 1035, 100 S.Ct. 710, 62 L.Ed.2d 672. Justice Rehnquist, with whom Justice White and Justice Powell joined, dissented, saying that the Seventh Circuit's decision was "in square conflict with the decisions of two other courts of appeals." *Id.* Justice Rehnquist wrote that this fact, in tandem with the Seventh Circuit's expansive interpretation of section 7607(d)(9), made the case "a formidable candidate for review." 100 S.Ct. at 712. (He added, "The fact that the requirements of the Clear [*sic*] Air Act Amendments virtually swim before one's eyes is not a rational basis, under these circumstances[,] for refusing to exercise our discretionary jurisdiction." *Id.*)

In *Republic Steel Corp. v. Costle*, 621 F.2d 797 (1980), the Sixth Circuit expressly agreed with the Seventh Circuit that, in the situation this group of cases presents, the Administrator was justified in invoking section 553(b)(3). 621 F.2d at 804. We quote in full the Sixth Circuit's discussion of the statutory schedule:

> . . . Congress had confronted [the Administrator] with the second of two mandatory attainment dates for national air quality standards for sulfur dioxide and it was obvious that the January 1, 1979, date could not be achieved if notice and comment procedures were allowed in advance. It would, indeed, have been "impracticable" to ignore the January 1, 1979, date.

621 F.2d at 803. Like the Seventh Circuit, the Sixth was patently impatient with "the long delays in implementation" of the Clean Air Act. 621 F.2d at 804. The court thus found part of its justification for the Administrator's action in the fact that he had "every reason to contemplate a continuation" of the "immediate and repetitive protest and litigation" which had followed EPA's earlier attempts to reduce sulfur-dioxide pollution in Ohio. 621 F.2d at 803. Furthermore, the court believed that "the Administrator could not comfortably rely upon the Ohio EPA's designation of attainment and nonattainment areas since experience had taught that the Ohio EPA was much more concerned with industry interests than those of the general public." 621 F.2d at 803.

III

[1] As we said above, we accept the reasoning followed and the result reached by the Third and Fifth Circuits, and we hold that the Administrator erred in declining to adhere to the notice-and-comment requirements of section 553 of the APA. Since we have recounted that reasoning in some detail, we need not retrace it here; but we do wish to identify some of the considerations which persuade us that that reasoning is correct as well as some of those which compel us to reject the holdings of the Sixth and Seventh Circuits.

[2] First, we emphasize that judicial review of a rule promulgated under an exception to the APA's notice-and-comment requirement must be guided by Congress's expectation that such exceptions will be narrowly construed. In *American Bus Association v. U. S.*, 627 F.2d 525 (D.C.Cir. 1980), where we investigated at length another exception to the notice-and-comment requirement of section 553, we said that that section "was one of Congress's most effective and enduring solutions to the central dilemma it encountered in writing the APA—reconciling the agencies' need to perform effectively with the necessity that 'the law must provide that the governors shall be governed and the regulators shall be regulated, if our present form of government is to endure.'" 627 F.2d at 528 *quoting* S.Doc. No. 248, 79th Cong., 2d Sess. 244 (1946). It is now a commonplace that notice-and-comment rule-making is a primary method of assuring that an agency's decisions will be informed and responsive. And we have previously explained that, "if the Agency, in carrying out its 'essentially legislative task,' has infused the administrative process with the degree of openness, explanation, and participatory democracy required by the APA, it will thereby have 'negate[d] the dangers of arbitrariness and irrationality in the formulation of rules . . . .'" *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1027–28 (D.C.Cir. 1978).

From this, it should be clear beyond contradiction or cavil that Congress expected, and the courts have held, that the various exceptions to the notice-and-comment provisions of section 553 will be narrowly construed and only reluctantly countenanced. S.Doc. No. 248, 79th Cong., 2d Sess. 19, 199, 258 (1946); *American Bus*, 627 F.2d at 529; *Humana of South Carolina v. Califano*, 590 F.2d 1070, 1082 (D.C.Cir.1978); *National Nutritional Foods Association v. Kennedy*, 572 F.2d 377, 384 (2nd Cir. 1978); *National Wildlife Federation v. Snow*, 561

F.2d 227, 232 (D.C.Cir.1976). Nowhere did Congress make its intention in this respect plainer than in its deliberations over the very exception respondent cites. The Senate Committee responsible for the APA warned:

> The exemption of situations of *emergency* or *necessity* is not an "escape clause" in the sense that any agency has discretion to disregard its terms or the facts. A true and supported or supportable finding of necessity or emergency must be made and published. "Impracticable" means a situation in which the due and required execution of the agency functions would be *unavoidably prevented* by its undertaking public rule-making proceedings.

S.Doc. No. 248, 79th Cong., 2d Sess. 200 (1946) (emphases added). The Committee concluded its report by reminding courts of their particular obligation to enforce the APA through a meticulous and demanding interpretation of its terms:

> It will thus be the duty of reviewing courts to prevent avoidance of the requirements of the bill by any manner or form of indirection, and to determine the meaning of the words and phrases used. For example, in several provisions the expression "good cause" is used. The cause so specified must be interpreted by the context of the provision in which it is found and the purpose of the entire section and bill. Cause found must be real and demonstrable.

Id. at 217. As the Fifth Circuit commented in *U. S. Steel*,

> This exception should be read narrowly. It is an important safety valve to be used where delay would do real harm. It should not be used, however, to circumvent the notice and comment requirements whenever an agency finds it inconvenient to follow them.

595 F.2d 207, 214 (5th Cir. 1979) (citation and footnote omitted). *Accord, Sharon Steel*, 597 F.2d at 379; *American Iron & Steel Institute v. EPA*, 568 F.2d 284, 292 (3d Cir. 1977).

Our understanding of the purposes of notice-and-comment rule-making leads us to the second consideration which inclines us to accept the reasoning of the Third and Fifth Circuits. The Sixth and Seventh Circuits assume that the goals of the Clean Air Act and the Administrative Procedure Act irreconcilably conflict, and no doubt the facts and background of *U. S. Steel* and *Sharon Steel* suggest that the rules of the latter Act may be employed to thwart the goals of the former. But this assumption fundamentally misconceives the purpose and shrugs off the wisdom of the APA. Both the case at bar and our explication of the APA show that the APA may be deployed to insure that the Administrator fulfills his obligations under the Clean Air Act: Here petitioner is challenging the Administrator's decision that a large expanse of the country need not be designated "nonattainment" and hence need not be required to establish special programs to reduce pollution.[8] The agency itself seems originally to have contemplated that, "in the absence of data showing attainment, all areas east of the Mississippi River should be presumed nonattainment."[9] If the agency scanted its duty under the Clean Air Act when it subsequently cut back the regions to be designated nonattainment, the pro-

8. Congress's concern that the Administrator's performance of his duties under the Clean Air Act be checked by public scrutiny and participation is especially conspicuous in 42 U.S.C. § 7604(a), which gives "any person" authority to bring a civil action in federal court "against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator," and against any person who is in violation of certain provisions of the Act. This authority to bring an action is without regard to the amount in controversy, and under subsection 7604(d) reasonable attorney and expert-witness fees may be awarded.

9. We quote here from a "Model Letter From Regional Administrators to State Agencies," which accompanied a Memorandum from David G. Hawkins, Assistant Administrator for Air and Waste Management, to EPA Regional Administrators.

We of course intimate no view as to the correctness of the Administrator's designations.

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tests of affected parties such as New Jersey are the congressionally mandated and perhaps the only systematic means of identifying the error and urging its reformation. Furthermore, the case at bar points up the lesson that, in the implementation of the Clean Air Act, where the heaviest responsibilities rest upon state governments and where federalism concerns are implicated,[10] the usefulness and desirability of the APA's notice-and-comment provision may be magnified.

Our third, and basic, consideration is that, whatever one's conclusions about the general compatibility of the APA and the Clean Air Act, the Third and Fifth Circuits have demonstrated that, under the facts of this case, the Administrator could have reconciled the commands of the two acts by publishing the designations submitted to him by the states as proposed rules. *See Sharon Steel*, 597 F.2d at 380; *U. S. Steel* (Fifth Circuit), 595 F.2d at 213–14; text at 1042–1043 *supra*. Neither the Seventh and Sixth Circuits nor respondents have shown us how that reconciliation might be unsatisfactory. If the admonition to construe the good-cause exception of section 553(b)(B) narrowly means anything, it means that we cannot condone its invocation where, as here, such a reconciliation is possible.

The Seventh Circuit builds its analysis of the Administrator's choices on two cases which, it says, applied the good-cause exception to accommodate a "tight statutory schedule." While we do not contend that a statutory schedule can never preclude notice-and-comment rule-making, we doubt these two cases will bear the precedential weight placed on them. Specifically, the Seventh Circuit describes *Clay Broadcasting Corp. v. United States*, 464 F.2d 1313 (5th Cir. 1972), *rev'd on other grounds sub nom. National Cable Television Ass'n, Inc. v. United States*, 415 U.S. 336, 94 S.Ct. 1146, 39 L.Ed.2d 370 (1974), as holding that "the FCC had good cause to dispense with rule-making before altering a license fee schedule . . . ." 605 F.2d at 287. In fact, the FCC had entirely complied with the requirements of notice-and-comment rule-making. 464 F.2d at 1316–17. The only "good cause" issue in the case arose in respect to whether the FCC had erred in excepting the rule from APA section 553(*d*)'s requirement that rules be published at least thirty days before they become effective. 464 F.2d at 1320. In *Energy Reserves Group v. FEA*, 447 F.Supp. 1135 (D.Kan.1978), the time statutorily allotted for the promulgation of regulations was so extraordinarily short—fifteen days—that notice and comment were "unavoidably prevented," S.Doc. No. 248, 79th Cong., 2d Sess. 200 (1946), in an almost physical sense. In addition, the holding in *Energy Reserves Group* equally relied on "the necessity to quickly decontrol stripper lease prices once Congress' intent to do so was statutorily mandated in order that oil not be held off the market in anticipation of such price increase . . . ." 447 F.Supp. at 1150.

Both the Sixth and Seventh Circuits' analyses of the Administrator's choices hinged in part on their perception that the Administrator had had to take into account the past recalcitrance of certain states and corporations. We need not decide what weight should be given to evidence of this kind of behavior, since no such evidence has been presented to us in this case.[11]

10. *See generally* Stewart, *Pyramids of Sacrifice?—Federalism Problems in Mandating State Implementation of National Environmental Policy*, 86 Yale L.J. 1196 (1977); Stewart, *The Development of Administrative and Quasi-Constitutional Law in Judicial Review of Environmental Decisionmaking: Lessons from the Clean Air Act*, 62 Iowa L.Rev. 713, 741–62 (1977).

11. It might be objected that our decision requires of the Administrator foresight equal to our hindsight. However, we believe that some imaginative accommodation of possibly conflicting statutory commands may legitimately be expected of the Administrator, and we note that the Third Circuit reports that "counsel for the Administrator conceded at oral argument that the Administrator had forewarning of these possible [legal] problems . . . ." *Sharon Steel Corp. v. EPA*, 597 F.2d 377, 382 (1979).

Our fourth consideration is that we cannot accept in any absolute form the Sixth and Seventh Circuits' argument that the Administrator cannot be reversed here because to do so would delay implementation of the Clean Air Act. An agency's functions will be impaired any time it is reversed on procedural grounds, and such occasional impairments are the price we pay to preserve the integrity of the APA. Of course, cases under the "tight schedule" version of good cause are sure to be particularly troublesome in this respect, since if an agency's allegations as to the need for expedition are remotely true, the elapse of time necessary to secure judicial review will assure that a court cannot easily reverse the agency. But a court serves neither the law nor, ultimately, the parties before it by succumbing, without a cautious examination of a case's facts, to whatever *fait accompli* an agency may choose to present. Fortunately, such an examination of this case indicates that, for reasons which were discussed above and will appear again below, *see* text at 1050 *infra*, our reversal of the Administrator should not noticeably interfere with, and may actually promote, the ends of the Clean Air Act.

[3] The fifth and final consideration which compels us to accept the conclusions of the Third and Fifth Circuits and to reject those of the Sixth and Seventh is our conviction that the Seventh Circuit's two alternative rationales for its holding are meritless. The first of these alternatives is predicated upon the "good cause" exception of subsection 553(d). The court takes pains to show that that exception is broader than the "good cause" exception of subsection 553(b)(B). This may well be true, but it is wholly irrelevant here, since subsection 553(d) says nothing about whether notice-and-comment rule-making is required. Rather, that subsection simply states:

> The required publication or service of a substantive rule shall be made not less than 30 days before its effective date
>
> . . . .

The plain language of the subsection: the statute's structural separation of its requirements that a rule be preceded by notice and comment (subsection 553(b)–(c)) and that, once written, a rule be published before it becomes effective (subsection 553(d)); and the statute's legislative history make it thoroughly plain that subsection 553(d) "does not provide procedures alternative to notice and other public proceedings required by the prior subsections of this section." S.Doc. No. 248, 79th Cong., 2d Sess. 201 (1946). *See id.* at 258–59.

The Seventh Circuit's second alternative holding was derived from subsection 7607(d)(9) of the Clean Air Act. That subsection allows courts to reverse the Administrator only under circumstances which arguably are not present here.[12] *See* text at 1044 *supra*. However, subsection 7607(d) is expressly confined to actions taken under a list of specified provisions of the Act.[13] Subsection 7407(d), under which the Administrator acted in this case, is not among the provisions listed. *See U.S. Steel* (5th Cir.), 595 F.2d at 215 n.18.

In his brief, the Administrator adverts to the Seventh Circuit's interpretation of subsection 7607(d), and, though he treats that interpretation somewhat obliquely, he seems to ask us to adopt it.[14] The Administrator does not point out, however, that

12. We emphasize that we need not, and therefore do not, decide whether the circumstances enumerated in subsection 7607(d)(9) exist here.

13. The subsection also applies to "such other actions as the Administrator may determine." The Agency does not allege that the Administrator has made any such determination in respect to the rule before us.

14. Respondents' Brief at 38–41. It is not certain from the material before us whether the EPA has ever unequivocally espoused the Seventh Circuit's view of subsection 7607(d)(9). In his dissent from the Supreme Court's denial of certiorari in the Seventh Circuit's *U.S. Steel*, Justice Rehnquist, referring to that circuit's holding under subsection 7607(d), said,

> Apparently uncomfortable with this holding, EPA [in its response to the petition for certiorari] attempts to dismiss it as dicta. It clearly is not.

444 U.S. 1035, 1037, 100 S.Ct. 710, 711, 62 L.Ed.2d 672 (1980) (citation omitted).

subsection 7607(d) establishes, for those actions taken under one of the subsection's list of specified provisions, procedures (particularly notice and comment procedures) *more* elaborate than those required by the APA. For instance, the subsection requires the Administrator to establish a rule-making docket for such action; to provide, with the notice of a proposed rule-making, a full-dress statement of its basis and purpose; to maintain the docket for public inspection and copying; to allow any person to submit written comments; to permit interested persons to address the agency orally as well as in writing; to keep the record open for thirty days after the proceedings' end for rebuttal and supplementary comments; and, when actually promulgating the rule, to publish another full-dress statement of basis and purpose along with a response to each significant comment received. Subsection 7607(d)(10), to which respondents' brief does not refer, specifically provides for the possibility that these procedures will bring about a conflict with a statutory schedule:

> Each statutory deadline for promulgation of rules to which this subsection applies which requires promulgation less than six months after date of proposal may be extended to not more than six months after date of proposal by the Administrator upon a determination that such extension is necessary to afford the public, and the agency, adequate opportunity to carry out the purposes of this subsection.

The subsection does not provide for a "good cause" exception to its procedural requirements. Respondents, of course, made no effort to follow many of the procedures prescribed in subsection 7607(d), presumably because actions taken under subsection 7407(d) are not among the actions to which, by its terms, subsection 7607(d) applies. Thus it would ill behoove the Administrator to invoke on review the features of that subsection which might seem to bolster his argument. We assume that the Administrator's statement that our jurisdiction arises from subsection 7607(b) is an acknowledgement of this fact. Respondents' Brief at 1.

IV

[4] It will be recalled that, after promulgating a "final rule" which was to be effective "immediately," the Administrator stated the Agency would accept public comments received within sixty days of the promulgation of the rule. 43 Fed.Reg. 8962 (March 3, 1978). The Administrator now argues that his provision for *post hoc* comment "cures" his failure to follow section 553's procedures. We cannot agree.

Once again, we accept the reasoning of the Fifth Circuit in its *U.S. Steel*:

> Section 553 is designed to ensure that affected parties have an opportunity to participate in and influence agency decision making at an early stage, when the agency is more likely to give real consideration to alternative ideas. Other courts have recognized this difference and rejected arguments similar to that asserted here:
>
> > Permitting the submission of views after the effective date is no substitute for the right of interested persons to make their views known to the agency in time to influence the rule making process in a meaningful way. . . . "We doubt that persons would bother to submit their views or that the Secretary would seriously consider their suggestions after the regulations are a *fait accompli*."
>
> . . . Were we to allow the EPA to prevail on this point we would make the provisions of § 553 virtually unenforceable. An agency that wished to dispense with pre-promulgation notice and comment could simply do so, invite post-promulgation comment, and republish the regulation before a reviewing court could act.

595 F.2d at 214–15.[15] *Accord, Sharon Steel,*

15. The Fifth Circuit was quoting *City of New York v. Diamond*, 379 F.Supp. 503, 517 (S.D.N.Y.1974), *quoting Kelly v. Department of Labor*, 339 F.Supp. 1095, 1101 (E.D.Cal.1972). The Fifth Circuit noted that "[s]imilar conclusions were reached in *Maryland v. EPA*, 530 F.2d

597 F.2d at 381.[16] We are convinced that the Fifth Circuit accurately assessed the psychological and bureaucratic realities of *post hoc* comments in rule-making. It was in recognition of those realities that Congress specified that notice and an opportunity for comment are to *precede* rule-making. Further, we note that, while both the Sixth and Seventh Circuits accepted the Administrator's argument in this respect, those circuits had evidence that the Agency had been sufficiently open-minded that it had actually made changes in its rules in response to comments received. *U.S. Steel*, 605 F.2d at 291; *Republic Steel*, 621 F.2d at 803. Although the agency responded to New Jersey's comments—after litigation had been instituted[17]—we are not aware that the Agency made any significant changes in its oxidant-pollution designations in response to New Jersey's comments. Perhaps the Administrator's designations ought not be changed, but the fact remains that we have no evidence to rebut the presumption that *post hoc* comment was not contemplated by the APA and is generally not consonant with it.

V

Both the Third and Fifth Circuits diligently sought to ensure that, on remand, the Agency will be able to follow those procedures most in accord with the goals of the Clean Air Act. *U.S. Steel*, 595 F.2d at 215–18; *Sharon Steel*, 597 F.2d at 381–82. We are greatly assisted in following their example by the fact that petitioner challenges only designations of "attainment" or "unclassifiable" as to oxidant pollution. We therefore set aside only those challenged designations and remand the record for reconsideration of them.

That reconsideration must, certainly, be preceded by notice of the designations proposed and by opportunity for public comment, as section 553 prescribes. Reconsideration, and any consequent alterations of state implementation plans, shall proceed as expeditiously as possible. In no case shall a stage of the reconsideration process extend beyond the time allotted for such stage by 42 U.S.C. § 7407. In view of the need for expedition, we retain jurisdiction over the case so that parties will be able to submit motions to us where necessary to secure the prompt and proper accomplishment of the mandate of the Clean Air Act.

It is so ordered.

215, 222 (CA4, 1975), *vacated on other grounds sub nom. EPA v. Brown*, 431 U.S. 99, 97 S.Ct. 1635, 52 L.Ed.2d 166 (1977), and *Wagner Electric Corp. v. Volpe*, 466 F.2d 1013, 1020 (CA3, 1972)." 595 F.2d at 215.

16. "After the final rule is issued, the petitioner must come hat-in-hand and run the risk that the decisionmaker is likely to resist change."

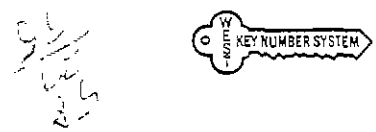
17. The Agency might answer that its responses came after litigation had begun only because New Jersey brought suit on the last day assigned for public comment. This answer would only reinforce our point—*post hoc* notice and comment comes so late in rule-making that there is no longer time or inclination for disinterested consideration of new views.

In sum, a review of recent Congressional activity concerning synfuels supports our conclusion that the Commission acted without proper authority in ordering Opinion No. 69. Congress has repeatedly declined to permit any extension of FERC authority into the synthetic gas area; on the other hand, it has specifically authorized a different governmental unit to undertake the tasks which FERC sought to perform through questionable use of its regulatory tools. In addition, FERC improperly ignored contemporaneous Congressional activity in its attempt to "fill in" where it believed some federal financial help was needed.

V. CONCLUSION

This court fully understands the urgency which underlies our country's strivings to achieve energy self-sufficiency, and we recognize also that promotion of coal gasification may serve that goal. But despite the stress of the energy crisis, federal involvement in synfuel promotion can only proceed pursuant to legal authority conferred by statute. Because FERC in this case acted without statutory authority, its order is set aside and the case remanded to the Commission for further proceedings—if any are necessary—consistent with this opinion.[39]

So ordered.



39. This court was informed by intervenor Great Plains Gasification Associates in a motion filed November 20, 1980, that the Department of Energy issued a conditional loan guarantee commitment of up to $1.5 billion for the Great Plains project on November 19, 1980. Intervenor asserts in that motion that because of this new loan guarantee commitment it will be able to finance the project without any requirement for consumer repayment of debt in the event of the project's abandonment.

We recognize, however, that the terms of this new DOE commitment assumed that the financing scheme approved by FERC in Opinion No. 69 would form the basis of the project's financing. Our holding today invalidates that assumption, and further proceedings by FERC to revise its tariff orders may therefore be needed to take account of both the new loan commitment and this court's decision.

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL–CIO, et al., Appellants,

v.

John R. BLOCK, Secretary of Agriculture, et al.

No. 79–2128.

United States Court of Appeals, District of Columbia Circuit.

Argued Oct. 9, 1980.

Decided March 18, 1981.

Appeal was taken from order of the United States District Court for the District of Columbia, George L. Hart, Jr., J., which upheld USDA regulations establishing uniform poultry inspection rates. The Court of Appeals, Tamm, Circuit Judge, held that in view of federal court order holding the old rates to be null and void provided good cause for issuing the new rates without notice of proposed rule making and for making the new rates effective immediately; but there was not good cause for making the new rates permanent.

Affirmed as modified.

1. **Administrative Law and Procedure** ⇐394

Exception to notice provisions of the Administrative Procedure Act will be narrowly construed and only reluctantly countenanced. 5 U.S.C.A. § 553(b, d).

2. **Administrative Law and Procedure** ⇐394, 408

That which may constitute good cause to forego notice of proposed rule making

may not be good cause for foregoing publication of the rule 30 days before its effective date; that which may constitute good cause for foregoing the latter may not constitute good cause for foregoing the former. 5 U.S.C.A. § 553(b, d).

3. Food ⇐3

In view of federal court order declaring uniform poultry inspection rates null and void, good cause existed for the Department of Agriculture to forego notice of proposed rule making and for making the new rates effective immediately. 5 U.S.C.A. § 553(b).

4. Food ⇐3

Fact that district court had held poultry inspection rates of the Department of Agriculture null and void, thus justifying the Department's failure to give notice of proposed rule making when issuing new orders did not provide good cause for making the new rules permanent. 5 U.S.C.A. § 553.

Appeal from the United States District Court for the District of Columbia (D.C. Civil Action No. 79–1724).

Mitchell Jay Notis, Washington, D. C., with whom James R. Rosa, Washington, D. C., was on the brief, for appellants.

Anne M. Gulyassy, Washington, D. C., of the bar of the Supreme Court of Michigan, pro hac vice, by special leave of court, with whom Alice Daniel, Asst. Atty. Gen., Charles F. C. Ruff, U. S. Atty., and William G. Kanter, Atty., Dept. of Justice, Washington, D. C., were on the brief, for appellee Secretary of Agriculture.

James F. Rill and David W. Burling, Washington, D. C., were on the brief for appellee National Broiler Council.

Before TAMM and ROBINSON, Circuit Judges, and HARLINGTON WOOD, Jr., Circuit Judge, United States Court of Appeals for the Seventh Circuit.*

Opinion for the court filed by Circuit Judge TAMM.

TAMM, Circuit Judge:

At issue in this case is the response by the Department of Agriculture to a judicial directive to employ uniform standards in the enforcement of inspection rates in poultry processing plants. Because we find that an unusual emergency situation arose as a result of this directive, we hold that the Department possessed good cause to publish regulations that were immediately effective. Given the breadth of these regulations, however, justification did not exist for their promulgation as final and permanent regulations without the public procedures required by the Administrative Procedure Act. We therefore affirm the judgment of the district court as modified and direct the Department to institute rulemaking proceedings forthwith.

I. BACKGROUND

In November of 1978 certain Arkansas poultry processors and the Attorney General of the State of Arkansas brought suit against the Department of Agriculture (USDA or Department) in the District Court for the Eastern District of Arkansas alleging discrimination in the enforcement of inspection rates in processing plants. No formal regulations existed governing these rates; instead, USDA had made available informal guidelines that by virtue of varying interpretations had resulted in the enforcement of different maximum allowable inspection rates.[1] This variation in rates had then been frozen by a "status-quo order" issued by the Department in late 1976 or early 1977. Finding no justification for this disparity, the District Court for the Eastern District of Arkansas ordered then Secretary Bergland and the Department "to

* *Circuit Judge* Wood did not participate in the disposition of this case.

1. The Department's authority to issue these guidelines and related regulations stems from the Poultry Products Inspection Act as amended by the Wholesome Poultry Products Act, codified at 21 U.S.C. § 451 *et seq.* (1976).

use uniform inspection rate standards and to apply and enforce same uniformly" and not to permit "to exist any practice which results in disparate inspection rate standards for same or similar situations." *Arkansas Poultry Federation v. Bergland*, No. LR–C–78–395 (E.D. Ark. Apr. 3, 1979), *reprinted in* Joint Appendix (J.A.) at 17. The court further ordered the defendants to file a report on April 16, 1979 "setting forth in detail the manner and form in which defendants have complied with the injunctive provisions of this order." *Id.*, J.A. at 17–18.

On April 13, 1979, the Department complied with this order by publishing two final and immediately effective regulations based upon recommendations made by a study group of inspection officials in a November 1978 report. The first rule, entitled "Young Chicken Slaughter Inspection Rate Maximums," established as uniform maximum inspection rates those currently in effect in the Southwest region, increased by five percent.[2] 44 Fed.Reg. 22,047 (1979) (codified in 9 C.F.R. § 381.67), J.A. at 19–21. The second rule, "Modified Traditional Poultry Inspection," established an alternate method of poultry inspection to be used whenever inspection efficiency would increase as a result. 44 Fed.Reg. 22,049 (1979) (codified in 9 C.F.R. § 381.76), J.A. at 21–23. In this rule, the Department proposed that "considerable time savings" would result from a procedure that reduces the number of motions required of an inspector and splits the inspection task so that each young chicken is examined by two inspectors. J.A. at 21.

USDA noted that the regulation establishing uniform inspection rates had already been prepared as a proposed rule. In order to comply with the court order noted above, however, "and to assure that the consumer is adequately protected," the Department asserted that "this regulation providing for national uniform maximum inspection rates must be issued immediately." J.A. at 20. The Department further claimed for both regulations that their emergency nature constituted good cause to forego "notice and other public procedure" and to make them immediately effective. USDA did solicit, however, written or oral comments upon these regulations for a period of ninety days after their promulgation.

On July 3, 1979, appellants filed a complaint in the United States District Court for the District of Columbia against Robert Bergland, Secretary of the Department of Agriculture, alleging the invalidity of these regulations on both procedural and substantive grounds. On July 27, 1979, the district court granted summary judgment for the defendants. The plaintiffs then filed this appeal.

II. DISCUSSION

The procedural[3] question in this case is simply stated: whether the Department possessed good cause to forego the rulemaking requirements of section 553 of the Administrative Procedure Act (APA). 5 U.S.C. § 553 (1976). Two specific requirements are pertinent here, the notice requirement of section 553(b) and that of 553(d). Section 553(b) requires that general notice of proposed rulemaking be published in the Federal Register; section 553(d) requires that a rule be published not less than thirty days before its effective date. To each of these requirements, however, the APA provides a good cause exception. An agency may avoid the 553(b) requirement if it "for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(B) (1976). An agency may also avoid its 553(d) notice obliga-

2. The increase was obtained through the elimination of the inspection procedure known as tibia palpation, a procedure designed to detect osteopetrosis or "marble bone." Elimination of this procedure was thought acceptable because the disease does not occur in young chickens. Affidavit of Merlin A. Nelson, ¶ 5, J.A. at 136.

3. Because of our disposition of this case on procedural grounds, we do not address plaintiffs' substantive attacks upon the regulations.

tion "for good cause found and published with the rule." 5 U.S.C. § 553(d)(3) (1976).

[1] We begin our examination of the Department's assertion of these exceptions with the firm understanding that the exceptions to the provisions of section 553 "will be narrowly construed and only reluctantly countenanced." *State of New Jersey, Department of Environmental Protection v. EPA*, 626 F.2d 1038, 1045 (D.C.Cir. 1980). *See generally* Note, *The "Good Cause" Exceptions: Danger to Notice and Comment Requirements Under the Administrative Procedure Act*, 68 Geo.L.J. 765 (1980). As the legislative history of the APA makes clear, moreover, the exceptions at issue here are *not* "escape clauses" that may be arbitrarily utilized at the agency's whim. S.Rep.No. 752, 79th Cong., 1st Sess. (1945), *reprinted in* Administrative Procedure Act, Legislative History, 79th Cong. 1944–46 at 200, 201. Rather, use of these exceptions by administrative agencies should be limited to emergency situations, *id.* at 200; furthermore, the grounds justifying the agency's use of the exception should be incorporated within the published rule.

As we stated above, two specific requirements of section 553 are at issue here. Both the requirement of 553(b) that notice of proposed rulemaking be published in the Federal Register and the requirement of 553(d) that publication of a rule be made at least thirty days prior to its effective date serve the laudable purpose of informing affected parties and affording them a reasonable time to adjust to the new regulation. Section 553(b) serves, however, the even more significant purpose of allowing interested parties the opportunity of responding to proposed rules and thus allowing them to participate in the formulation of the rules by which they are to be regulated. The more expansive the regulatory reach of these rules, of course, the greater the necessity for public comment. *See National Nutritional Foods Association v. Kennedy*, 572 F.2d 377, 385–86 (2d Cir. 1978).

[2] In light of the different purposes served by these two requirements, we believe that different standards govern the applicability of the good cause exceptions to these requirements. Further support for this view is found in the more detailed language of section 553(b)(B) which provides that an agency may forego notice-and-comment procedures in this context only upon a finding that such procedures are "impracticable, unnecessary, or contrary to the public interest." We do not break new ground when we hold, based upon the language of the APA and the underlying purposes of the subsections at issue, that what may constitute good cause to forego one notice requirement may not satisfy the other. *See Rowell v. Andrus*, 631 F.2d 699, 703 (10th Cir. 1980); *Kollett v. Harris*, 619 F.2d 134, 145 & n.15 (1st Cir. 1980); *State of New Jersey, Department of Environmental Protection v. EPA*, 626 F.2d at 1047; *United States Steel Corp. v. EPA*, 605 F.2d 283, 289–90 (7th Cir. 1979), *cert. denied*, 444 U.S. 1035, 100 S.Ct. 710, 62 L.Ed.2d 672 (1980);[4] *United States v. Gavrilovic*, 551 F.2d 1099, 1104 & n.9 (8th Cir. 1977).

In this case the Department found itself subject to court order to institute uniform inspection rate standards. The Department had argued before the District Court for the Eastern District of Arkansas that the suit brought by the poultry processors should be dismissed or, alternatively, that proceedings should be stayed based in part upon the impending rulemaking proceedings. The Department informed the court

4. We do not agree, however, with the analysis of these two exceptions found in *United States Steel Corp. v. EPA*, 605 F.2d 283, 289–90 (7th Cir. 1979), *cert. denied*, 444 U.S. 1035, 100 S.Ct. 710, 62 L.Ed.2d 672 (1980). The court there apparently found the good cause exception of section 553(d)(3) to act as an alternative justification for the lack of the notice-and-comment procedures mandated by section 553(*b*). Such an analysis misreads the statute and ignores the legislative history. The only exceptions for the absence of public procedures are found within section 553(b) itself. *Western Oil and Gas Association v. EPA*, 633 F.2d 803 (9th Cir. 1980); *State of New Jersey, Department of Environmental Protection v. EPA*, 626 F.2d at 1048.

by its memorandum filed March 27, 1979, that it expected proposed rules to receive final departmental approval and to be published for notice-and-comment by the end of April. Memorandum In Support Of Defendants' Motions To Dismiss Or, In The Alternative, To Stay Proceedings at 18, *Arkansas Poultry Federation v. Bergland*, No. LR–C–78–395 (E.D. Ark. Apr. 3, 1979). On April 3, however, the court granted the plaintiffs' motion for preliminary injunction, declaring the informal guidelines under which the regional inspectors had been operating null and void. The Department was ordered "*forthwith* to use uniform inspection rate standards . . . ." *Id.* at 2 (Order), J.A. at 17 (emphasis added). The Department then published the two regulations at issue here in the Federal Register on April 13, 1979, promulgating them as final and immediately effective.

[3] We believe that the promulgation of emergency regulations by the Department was a reasonable and perhaps inevitable response to the injunctive court order issued on April 3. Although the trial judge indicated that he was only voiding the status quo order and was not mandating the action to be taken by the Department to comply with his injunction,[5] the absence of specific and immediate guidance from the Department in the form of new standards would have forced reliance by the Department upon antiquated guidelines, thereby creating confusion among field administrators, and caused economic harm and disruption to those northeastern processors whose inspection lines ran at varying speeds. This harm would not have been limited to those within the broiler industry but would have extended in all likelihood to the consumer in the form of poultry shortages or increases in consumer prices. J.A. at 23. We believe that the issuance of emergency regulations to ameliorate this expected harm and, at the same time, to comply with the court order did not violate section 553 of the Administrative Procedure Act. *See Valiant Steel and Equipment, Inc. v. Goldschmidt*, 499 F.Supp. 410 (D.D.C.1980) (implementing congressional mandate); *Friendship Dairies, Inc. v. Butz*, 432 F.Supp. 508 (E.D.N.Y.) (economic problems in dairy industry), *aff'd*, 573 F.2d 1290 (2d Cir. 1977). *Cf. Hercules, Inc. v. EPA*, 598 F.2d 91, 129 (D.C.Cir.1978) (omission of tentative decision justified by deadlines).

[4] The Department has failed to offer, however, and we have been unable to discover, any justification for the issuance of *permanent* regulations of this breadth in response to this situation. Common sense suggests that any administrative action taken in a rare "emergency" situation such as the one at hand,[6] while perhaps necessarily "immediately effective," need only be temporary, pending public notice-and-comment procedures. *Valiant Steel and Equipment, Inc. v. Goldschmidt*, 499 F.Supp. 410, at 412–413 (D.D.C.1980). Here, however, we hold only that detailed regulations which respond—as these do—to much more than the exigencies of the moment must be promulgated through public procedures before they are chiseled into bureaucratic stone.[7] Although in this case much study had apparently been done prior to the publication of the regulations, such preparedness may not characterize future situations.

5. "Now nothing herein shall be deemed to interfere with defendant's further pursuit of some new uniform standards through rulemaking procedures or otherwise, if the defendants deem such course appropriate in the discharge of their legitimate legislative mandates." Transcript of Hearing on Temporary Restraining Order at 7, *Arkansas Poultry Federation v. Bergland*, No. LR–C–78–395 (E.D.Ark. Apr. 3, 1979).

6. We believe that administrative agencies should remain conscious that such emergency situations are indeed rare and that courts will examine closely proffered rationales justifying the elimination of public procedures. *See, e. g., Mobil Oil Co. v. Dep't of Energy*, 610 F.2d 796, 803 (Temp. Emer. Ct. App. 1979) (no emergency situation existed), *cert. denied*, 446 U.S. 937, 100 S.Ct. 2156, 64 L.Ed.2d 790 (1980).

7. We are especially concerned in this case with the Department's promulgation of the regulation concerning modified inspection procedures. Although clearly rationally related to inspection rates, this rule is less easily viewed as a necessary response to the court's directive.

Therefore, once an emergency situation has been eased by the promulgation of interim rules, it is crucial that the comprehensive permanent regulations which follow emerge as a result of the congressionally-mandated policy of affording public participation that is embodied in section 553. We do not find in the case at hand any reason to believe that, once the interim rules were published, notice and public procedure would have been "impracticable, unnecessary, or contrary to the public interest" in the formulation of the final regulations governing inspection standards, speeds, and techniques in poultry processing plants.

Our decision today to uphold the regulations as interim ones is not in conflict with prior case law invalidating even temporary regulations as violative of section 553(b). In *American Iron and Steel Institute v. EPA*, 568 F.2d 284 (3d Cir. 1977), the court addressed the procedural validity of regulations governing steelmaking processes within the specialty steel industry. The Environmental Protection Agency published the regulations in "interim final" form because of an expressed need to expedite implementation of the Federal Water Pollution Control Act and because the agency was acting under a court order requiring the promulgation of regulations for this industry category. The court order required the promulgation of regulations no later than March 15, 1976; the EPA published the rules in the Federal Register on March 19, 1976. As the court pointed out, however, the agency had been under court order since November of 1973. Furthermore, the EPA had published in August of 1975 a notice of proposed rulemaking listing the subcategories of the steel industry for which tentative regulations were being prepared; this list did not include specialty steel. The court thus held invalid the applicability of the regulations to the specialty steel industry. *Id.* at 292.

In *Kollett v. Harris*, 619 F.2d 134 (1st Cir. 1980), the court struck down interim regulations implementing amendments to the Social Security Act. The amendments had gone into effect on January 1, 1974; the agency claimed, therefore, that "abundant and obvious" good cause existed for the promulgation of the regulations published on January 22 of that year without notice and public procedures. *Id.* at 145. The court pointed out, however, that *fourteen months* had intervened between the passage of the amendments and their effective date. No justification could be advanced for the agency's failure to conduct public notice-and-comment procedures within the time available.

In each of these cases, therefore, the court held promulgation of even interim regulations invalid without public procedures. In each case, however, the respective agency had a substantial period of time within which to prepare regulations, the promulgation of which it knew was both necessary and forthcoming in the near future. In such a case we can agree that "the mere existence of deadlines for agency action, whether set by statute or court order, does not in itself constitute good cause for a § 553(b)(B) exception." *United States Steel Corp. v. EPA*, 595 F.2d 207, 213 (5th Cir. 1979). In the case at hand, however, the Department operated not under a deadline which gave it substantial time within which to take action but rather under a judicial directive to take immediate action. The promulgation of interim and immediately effective regulations without public procedures was thereby made necessary.

In modifying the judgment of the district court and affirming these regulations as interim ones, we are not unmindful of the possibility of heightened agency resistance to suggested changes to final rules, albeit temporary ones, in contrast to the reception accorded responses to proposed rules. We agree that "[p]ermitting the submission of views after the effective date [of a regulation] is no substitute for the right of interested persons to make their views known to the agency in time to influence the rule making process in a meaningful way." *City of New York v. Diamond*, 379 F.Supp. 503, 517 (S.D.N.Y.1974). For this reason the Department's solicitation of comments on its regulations for a period of ninety days, while laudable, does not satisfy the statutory criteria at issue here. We have no reason to believe, however, that the Department will fail to respond in a knowledgeable and even-handed manner to criticisms

of its temporary regulations. Of course, should plaintiffs not be satisfied with the permanent regulations that emerge from notice-and-comment rulemaking, judicial review of the final regulations will be available to them; furthermore, the administrative response to public criticism will be of substantial aid in this review.

III. CONCLUSION

Although it might be thought that our decision today requires of the Department foresight equal to our hindsight, *State of New Jersey, Department of Environmental Protection v. EPA*, 626 F.2d at 1047 n.11, we believe that the Department could have reconciled the statutory commands of the Administrative Procedure Act with the judicial command embodied in the injunctive order by promulgating these regulations as interim regulations and instituting notice-and-comment procedures for the promulgation of permanent rules. As Chief Judge McGowan has stated, "[i]f the admonition to construe the good-cause exception of section 553(b)(B) narrowly means anything, it means that we cannot condone its invocation where, as here, such a reconciliation is possible." *Id.* at 1047. We affirm the judgment of the district court as modified and direct the Secretary to institute rulemaking proceedings forthwith.

It is so ordered.

KEY NUMBER SYSTEM

UNITED STATES of America,

v.

Albert ROSS, Jr., Appellant.

No. 79-1624.

United States Court of Appeals, District of Columbia Circuit.

Argued en banc Oct. 23, 1980.

Decided March 31, 1981.

Certiorari Granted Oct. 13, 1981. See 102 S.Ct. 386.

Defendant was convicted in the United States District Court for the District of Columbia, William B. Bryant, Chief Judge, of possession of narcotics with intent to distribute, and defendant appealed. The Court of Appeals, Ginsburg, Circuit Judge, held that: (1) the Supreme Court decision holding that warrantless searches, made in absence of exigent circumstances, of luggage taken from automobile properly stopped and searched for contraband violate Fourth Amendment applied retroactively; (2) defendant had standing to challenge search; and (3) neither informant's telling police that defendant had narcotics in trunk of his car, nor "unworthiness" of container found in trunk, rendered lawful officers' warrantless opening of closed but untaped brown paper bag after properly stopping defendant's vehicle and after properly seizing the bag where the bag was not within defendant's immediate control at any time after car was stopped, there was not slightest danger that defendant or anyone other than police would remove contents of the paper bag before warrant could be obtained, and delay in opening the bag pending appearance before magistrate would not have jeopardized safety of police or public.

Reversed and remanded.

Tamm, Circuit Judge, dissented in part and filed opinion in which Robb, Circuit Judge, concurred.

MacKinnon, Robb, and Wilkey, Circuit Judges, dissented and filed opinions.

1. Courts ⇐100(1)

The Supreme Court decision holding that warrantless searches, made in absence of exigent circumstances, of luggage taken from automobile properly stopped and searched for contraband violate Fourth Amendment applied retroactively. U.S.C.A.Const. Amend. 4.

2. Courts ⇐100(1)

The Supreme Court decision holding that defendants charged with crimes of possession may claim benefits of exclusionary

AMERICAN HOSPITAL ASSOCIATION, a private, non-profit corporation, West Virginia Hospital Association, a private, non-profit corporation, Stonewall Jackson Memorial Hospital Company, a private, non-profit, charitable corporation, Charles Town General Hospital, a private, non-profit, charitable corporation, Sistersville General Hospital, a city hospital, Wheeling Hospital, Inc., a private, non-profit, charitable corporation, and The Catholic Health Association of the United States, a private, non-profit corporation, Plaintiffs,

v.

L. Clark HANSBARGER, Director of the West Virginia Department of Health, Defendant.

Civ. A. No. 84-0144-C(K).

United States District Court, N.D. West Virginia, Clarksburg Division.

Sept. 20, 1984.

A group of nonprofit or local governmental hospitals located in West Virginia sought a preliminary injunction against the enforcement of a West Virginia statute which required that on or before July 1, 1984, at least 40% of board of directors of such hospitals located in West Virginia be composed of an equal proportion of consumer representatives from small businesses, organized labor, elderly persons and persons whose income was less than national median income. The District Court, Kidd, J., held that non-profit and local governmental hospitals were not entitled to preliminary injunction.

Motion denied.

1. Injunction ⇐136(3), 137(2)

The district court, in determining whether to issue a preliminary injunction, must balance likelihood of irreparable harm to plaintiffs against likelihood of harm to defendants.

2. Injunction ⇐136(3)

Group of nonprofit or local governmental hospitals located in West Virginia were not entitled to preliminary injunction against enforcement of West Virginia statute which required that on or before July 1, 1984, at least 40% of board of directors of all nonprofit and local governmental hospitals located in West Virginia be composed of an equal proportion of consumer representatives from small businesses, organized labor, elderly persons and persons whose income is less than national median income since hospital failed to show that any harm would result from representatives of community serving on hospital boards or that community individuals were less capable of managing affairs of hospitals. W.Va.Code 16-5B-6a.

George G. Guthrie, Charles L. Woody, Robert J. O'Neil, Spilman, Thomas, Battle & Klostermeyer, Charleston, W.Va., Seymour J. Schafer, Markel, Schafer & Means, P.A., Pittsburgh, Pa., William J. Yaeger, Herndon, Morton, Herndon & Yaeger, Wheeling, W.Va., Donna D. Fraiche, Wyllie, Fraiche & Sullivan, A Professional Corp., New Orleans, La., Richard L. Epstein, Robert W. McCann, Linda A. Tomaselli, Chicago, Ill., for plaintiffs.

Chauncey H. Browning, Jr., Atty. Gen., Charleston, W.Va., for defendant.

MEMORANDUM OPINION

KIDD, District Judge.

Findings of Fact

1. Jurisdiction of this Court is predicated upon 28 U.S.C. § 1331 and 28 U.S.C. § 1343. The plaintiffs seek a declaratory judgment pursuant to 28 U.S.C. § 2201 that W.Va.Code § 16-5B-6a is unconstitutional and is an interference with collective bargaining rights between plaintiffs and their employees, which is an area pre-empted by federal labor law.

2. Plaintiff American Hospital Association is a private, non-profit corporation organized and existing under the laws of the State of Illinois, having and maintaining its principal office and place of business in Chicago, Illinois, and having as members thereof individual non-profit and local governmental hospitals located throughout West Virginia including plaintiffs Stonewall Jackson Memorial Hospital Company, Charles Town General Hospital, Weirton Medical Center, Inc., Sistersville General Hospital, and Wheeling Hospital, Inc.

3. Plaintiff West Virginia Hospital Association is a private, non-profit corporation organized and existing under the laws of the State of West Virginia, having and maintaining its principal office and place of business in Charleston, West Virginia, and having as members thereof individual non-profit and local governmental hospitals located throughout West Virginia including plaintiffs Stonewall Jackson Memorial Hospital Company, Charles Town General Hospital, Weirton Medical Center, Inc., Sistersville General Hospital and Wheeling Hospital, Inc.

4. Plaintiff Stonewall Jackson Memorial Hospital Company is a private, non-profit, charitable corporation organized and existing under the laws of the State of West Virginia, having and maintaining its principal office and place of business at Weston, West Virginia, and owns and operates a seventy (70) bed hospital located in Weston, West Virginia.

5. Plaintiff Charles Town General Hospital is a private, non-profit, charitable corporation organized and existing under the laws of the State of West Virginia, having and maintaining its principal office and place of business at Ranson, West Virginia, and owns and operates a one hundred fourteen (114) bed hospital, known as Jefferson Memorial Hospital, located in Ranson, West Virginia.

6. Plaintiff Weirton Medical Center, Inc. is a private, non-profit, charitable corporation organized and existing under the laws of the State of West Virginia, having and maintaining its principal office and place of business at Weirton, West Virginia, and owns and operates a two hundred sixty-five (265) bed hospital located in Weirton, West Virginia.

7. Plaintiff Sistersville General Hospital is a local governmental hospital organized and existing under the laws of the State of West Virginia and the ordinances of the City of Sistersville, having and maintaining its principal office and place of business at Sistersville, West Virginia, and owns and operates a thirty-two (32) bed hospital located in Sistersville, West Virginia.

8. Plaintiff Wheeling Hospital, Inc. is a private, non-profit, charitable corporation organized and existing under the laws of the State of West Virginia, having and maintaining its principal office and place of business at Wheeling, West Virginia, and owns and operates a two hundred seventy-six (276) bed hospital located in Wheeling, West Virginia.

9. Plaintiff The Catholic Health Association of the United States is a private, non-profit corporation organized and existing under the laws of the State of Missouri, having and maintaining its principal office and place of business in St. Louis, Missouri, and having as members thereof religious institutes, more commonly referred to as religious orders of nuns, which own, operate and sponsor certain non-profit hospitals located throughout West Virginia and which appoint the respective directors of said hospitals.

10. Defendant L. Clark Hansbarger is the Director of the West Virginia Department of Health and in such capacity is one of the individuals who may enforce the provisions of W.Va.Code § 16-5B-6a.

11. Code 16-5B-6a is enforceable by injunction obtained in an action at law authorized by Code 16-5B-6a(d).

12. During its 1983 regular session the West Virginia Legislature enacted Section 6a of Article 5B of Chapter 16 of the Code of West Virginia of 1931, as amended, and provided it was to be effective as of July 1, 1984.

13. During the 1984 regular session of the West Virginia Legislature, separate bills were introduced in the House of Delegates (H.B. 1805) and the Senate (Senate Bill No. 556) to repeal Section 6a of Article 5B in its entirety, which bills were unsuccessful, thereby leaving intact its effective date of July 1, 1984.

14. W.Va.Code § 16–5B–6a requires that on or before July 1, 1984, at least forty percent (40%) of the board of directors of all non-profit and local governmental hospitals located in West Virginia must be composed of an equal proportion of "consumer representatives" from "[s]mall businesses, organized labor, elderly persons, and persons whose income is less than the national median income" and that "[s]pecial consideration shall be made to select women, racial minorities and handicapped persons" for such positions and authorizes defendant Hansbarger and private citizens to enforce its provisions. The entire text of W.Va.Code § 16–5B–6a is as follows:

(a) The legislature declares that a crisis in health care costs exists, and that one important approach to deal with this crisis is to have widespread citizen participation in hospital decision-making, and that many hospitals in West Virginia exclude from their boards important categories of consumers, including small businesses, organized labor, elderly persons and lower-income consumers. The legislature further declares that non-profit hospitals receive such major revenue from public sources and are so crucial in health planning and development that it is necessary to require consumer representatives on their boards of directors. Therefore, the legislature determines that non-profit hospitals and hospitals owned by local governments should have boards of directors representative of the communities they serve.

(b) As used in this section, "applicable hospitals" means all non-profit hospitals and all hospitals owned by a county, city or other political subdivision of the State of West Virginia.

(c) At least 40 percent of the boards of directors of applicable hospitals shall, on or before the first day of July, 1984, be composed of an equal proportion of consumer representatives from each of the following four categories: Small businesses, organized labor, elderly persons and persons whose income is less than the national median income. Special consideration shall be made to select women, racial minorities and handicapped persons.

(d) The provisions of this section may be enforced by the director of health, or by any citizen of the county wherein any offending hospital is located, by the filing of an action at law in the circuit court of such county.

15. W.Va.Code 16–5B–6a(d) provides:

> The provisions of this section may be enforced by the director of health, or by any citizen of the county wherein any offending hospital is located, by the filing of an action at law in the circuit court of such county.

The Court finds that the Legislature's intent was to give the Director of Health or any citizen of such county the authority to seek injunctive relief against any offending hospital for violation of this section.

16. The Court finds that there is no conflict between W.Va.Code § 16–5B–6a(d), and W.Va.Code § 16–5B–11, and W.Va. Code § 16–5B–6(1). W.Va.Code § 16–5B–11 provides that any person, association, corporation or local governmental agency violating W.Va.Code § 16–5B–6a shall be fined up to five hundred dollars ($500) or imprisoned for up to ninety (90) days or both. W.Va.Code § 16–5B–6(1) authorizes defendant Hansbarger in his capacity as Director of the West Virginia Department of Health to suspend or revoke the license of a non-profit or local governmental hospital for violation of W.Va.Code § 16–5B–6a.

17. No administrative rules and regulations have been promulgated to implement, administer, or interpret W.Va.Code § 16–5B–6a.

18. Plaintiffs Stonewall Jackson Memorial Hospital Company, Charles Town Gen-

eral Hospital, Weirton Medical Center, Inc., Sistersville General Hospital, and Wheeling Hospital, Inc., are subject to the provisions of W.Va.Code §§ 16–5B–6a, 16–5B–11, and 16–5B–6(1) by virtue of being non-profit hospitals located in West Virginia.

19. Certain members of plaintiffs American Hospital Association and West Virginia Hospital Association are subject to the provisions of W.Va.Code §§ 16–5B–6a, 16–5B–11, and 16–5B–6(1) by virtue of being non-profit or local governmental hospitals located in West Virginia.

20. Certain members of plaintiff The Catholic Health Association of the United States are subject to the provisions of W.Va.Code §§ 16–5B–6a, 16–5B–11, and 16–5B–6(1) by virtue of being religious orders which own, operate, and sponsor non-profit hospitals located in West Virginia.

21. Certain members of plaintiff West Virginia Hospital association are subject to the provisions of W.Va.Code §§ 16–5B–6a, 16–5B–11, and 16–5B–6(1) by virtue of being non-profit and local governmental hospitals located in West Virginia.

22. The Court finds the following witnesses qualified as experts: Richard P. Moses (an expert on the roles and qualifications for directors on a board of directors); University of Virginia Professor Stanley D. Henderson (expert on federal labor law); G. Roger King (expert on labor relations in the health care field); Sister Mary Roch Rocklage (expert on the religious mission of a Roman Catholic religious order which owns and sponsors a hospital); Sister Margaret Mary Modde (expert on the Code of Canon Law of Roman Catholic Church); Paul E. Mullen (expert on hospital accreditation and federal Medicare programs); and Deborah S. Kolb (expert on health care planning and finance).

23. The Court finds from the testimony of Sister Diane Bushee, Major Superior of North America and Provincial Superior for the Sisters of the Pallottine Missionary Society, that the religious order owns St. Joseph's Hospital of Buckhannon; that the present bylaws of the Sisters of the Pallottine Missionary Society, a West Virginia non-profit corporation, require that 70% of the board of directors, called the Provincial Council, be composed of members of the religious society; that the religious mission of St. Joseph's Hospital of Buckhannon, like the Sisters of the Pallottine Missionary Society, is to render care to the sick and poor in accordance with the examples set by Jesus Christ and St. Vincent Pallotti and the tenets of the Roman Catholic Church. St. Joseph's Hospital of Buckhannon is not a corporation separate from the Sisters of the Pallottine Missionary Society, but rather is the property of the Sisters of the Pallottine Missionary Society. St. Joseph's Hospital of Buckhannon nonetheless has its own "board of directors." The Provincial Council of the Sisters of the Pallottine Missionary Society appoints all of the members of such board of directors, and has the power to approve or disapprove the major actions of such board of directors. In order to ensure that St. Joseph's Hospital of Buckhannon remains devoted to its religious mission, the Provincial Council appoints to the board of directors of St. Joseph's Hospital of Buckhannon only persons who are devoted to such mission. The current bylaws of such board of directors specifically require that at least seventy percent (70%) of such board of directors must be members of the Sisters of the Pallottine Missionary Society.

The Court finds the Sisters of the Pallottine Missionary Society have a contingency plan to place representatives of special interest groups—"consumer representatives from ... small businesses, organized labor, elderly persons, and persons whose income is less than the national median income"—on the board of directors of St. Joseph's Hospital of Buckhannon; that presently all members of the board of directors of the Sisters of the Pallottine Missionary are members of the religious order; that St. Joseph's Hospital of Buckhannon is a division of the religious order; that seven members of the religious community, which serve on the board of directors for St. Joseph's Hospital of Buckhannon and the Sisters of the Pallottine Missionary Society,

have income below any definition of national median income; that the purpose of the Sisters of the Pallottine Missionary Society is to render care to the sick and poor in accordance with the example set by Jesus Christ and the tenets of the Roman Catholic Church.

24. Each of the witnesses presented by the plaintiffs, with the single exception of Professor Stanley Henderson, was directly interested in the outcome of this litigation, as they were either officials or members of plaintiff organizations (Tr. 35–36, Moses) (Tr. 202, Rocklage) (Tr. 231, Bushee) (Tr. 258–259, Mode) (Tr. 264, Carter) (Tr. 285, Mullen) or had strong pecuniary ties to the plaintiffs. (Tr. 135–136, King; Tr. 308, Kolb.)

25. The testimony of Professor Stanley D. Henderson and Roger King, Esquire, was essentially legal argument and was entitled to little, if any, probative weight on the ultimate issue of the legality of W.Va. Code 16–5B–6a under federal labor laws.

26. Code 16–5B–6a had been enacted for one year and one-half before plaintiffs attempted to challenge the law. At no time had any of the plaintiffs sought clarifications from the Department of Health regarding the meaning or effect of this legislation. (*See, e.g.*, Tr. 275–276.) "If the plaintiffs were indeed as concerned with the effects arising from the implementation as they allege, they certainly would have come before this Court at an earlier period." Memorandum Opinion and Order, p. 5. Plaintiffs have failed to show irreparable injury from the operation of Code 16–5B–6a.

Conclusions of Law

This is a case of first impression since no other state has passed a statute similar to West Virginia Code 16–5B–6a. There is no case law to guide the Court with respect to the identical issues raised by the plaintiffs.

The settled principles which govern consideration on whether a preliminary injunction should issue, pursuant to Rule 65(a) in this circuit have been enumerated in *Blackwelder Furniture Company of Statesville, Inc. v. Seilig Manufacturing Company, Inc.*, 550 F.2d 189 (4th Cir.1977). In *Blackwelder* the court held that the court must "balance the likelihood of irreparable harm to the plaintiff against the likelihood of harm to the defendant."

> The two more important factors are those of probable irreparable injury to plaintiff without a decree and of likely harm to the defendant with a decree. If that balance is struck in favor of plaintiff, it is enough that grave or serious questions are presented; and plaintiff need not show a likelihood of success. Always, of course, the public interest should be considered.

Blackwelder v. Seilig, supra.

[1, 2] The Court in determining whether to issue a preliminary injunction must balance the likelihood of irreparable harm to the plaintiff against the likelihood of harm to the defendant. *Blackwelder v. Seilig, supra.* In this instance plaintiffs allege that they will be irreparably injured unless the Director of Health is restrained from enforcing this statute. Plaintiffs argue that criminal charges could be brought against them pursuant to W.Va.Code § 16–5B–11, and that they could also have their license to operate a hospital suspended pursuant to W.Va.Code § 16–5B–11. However, testimony by plaintiffs' witnesses contradicts this assertion. *See e.g.*, Tr. 251–252. Indeed, testimony revealed that certain of the plaintiffs have a contingency plan to implement the requirements of this statute. Evidence reveals that the Department of Health has not disapproved any proposed board nor taken any administrative, civil, or criminal action against anyone. W.Va.Code § 16–5B–6a was passed during the 1983 regular session of the West Virginia Legislature and became effective as of July 1, 1984. During the one year period between passage of this legislation and its effective date the plaintiffs did not attempt to challenge its constitutionality. The State of West Virginia has an interest in seeing that its laws are implemented without interruption. If this Court were to grant the requested relief, the

State would be harmed in that it would prevent the orderly implementation of this statute. Further, there has been no showing by the plaintiffs that harm would result from representatives of the community serving on hospital boards. Indeed, no showing has been made that such individuals are less capable of managing the affairs of hospitals.

The Court is of the opinion that the plaintiffs have failed to show that any irreparable harm would result from implementation of W.Va.Code § 16–5B–6a.

The plaintiffs argue that the statute as presently written is vague and they are not certain how to comply with the law. In fact, Mr. Bruce Carter did not seem to have a problem defining small business (Tr. 278) nor did Sister Mary Diane Bushee have difficulty defining those individuals below the median income, organized labor, and elderly (Tr. 243). Sister Mary Diane testified that the Sisters of Pallottine had developed a contingency plan to comply with the law and that she believed that the plan would meet the requirements of the statute (Tr. 254). The Court is of the opinion that the plaintiffs have failed to raise serious questions of law regarding the Constitutionality of W.Va.Code § 16–5B–6a.

For reasons stated herein the Court hereby DENIES plaintiffs' motion for a preliminary injunction. It is so ORDERED.

Judgment shall be rendered accordingly.

The Clerk is directed to transmit certified copies of this Memorandum Opinion to counsel of record herein.

James V. LOPEZ, et al., Plaintiffs,

v.

Charles D. RICHARDS, et al., Defendants.

James A. PEARMAN and Fred H.T. Wong, Cross-Claimants and Third Party Plaintiffs,

v.

George MITCHELL, Cross-Defendant,

and

Oscar B. Labarre, Third Party Defendant.

Civ. A. No. W81–0101(B).

United States District Court, S.D. Mississippi, W.D.

Sept. 21, 1984.

Action was brought alleging violations of Racketeer Influenced and Corrupt Organizations Act and securities laws in connection with land purchase option. On defendants' motion to dismiss, or for summary judgment, the District Court, Barbour, J., held that: (1) complaint alleged widespread activities on part of defendants in furtherance of their scheme to defraud plaintiff and sufficiently stated claim for relief under the Racketeer Influenced and Corrupt Organizations Act, and (2) land purchase option, without any development or management of property by defendants anticipated, did not constitute an investment contract, and thus was not a security under the federal securities laws.

Order accordingly.

1. Commerce ⇐82.72

Complaint alleging that defendants engaged in fraud in their dealings with plaintiff in soliciting his investment in option contract for purchase of 529,000 acres of land, that defendants engaged in active misrepresentation and withheld material information from plaintiff in sale of interest to him, and that, in furthering of fraudu-

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

AT WHEELING

AMERICAN HOSPITAL ASSOCIATION, a private, non-profit corporation; WEST VIRGINIA HOSPITAL ASSOCIATION, a private, non-profit corporation; STONEWALL JACKSON MEMORIAL HOSPITAL COMPANY, a private, non-profit, charitable corporation; CHARLES TOWN GENERAL HOSPITAL, a private, non-profit, charitable corporation; WEIRTON MEDICAL CENTER, INC., a private, non-profit, charitable corporation; SISTERSVILLE GENERAL HOSPITAL, a city hospital; WHEELING HOSPITAL, INC., a private, non-profit, charitable corporation; and THE CATHOLIC HEALTH ASSOCIATION OF THE UNITED STATES, a private, non-profit corporation,

Plaintiffs,

v. CIVIL ACTION NO. 84-144-C(K)

L. CLARK HANSBARGER, Director of the West Virginia Department of Health,

Defendant.

MEMORANDUM OF LAW IN OPPOSITION TO MOTION FOR PERMANENT INJUNCTION

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INDEX

TABLE OF CITATIONS

TABLE OF CITATIONS (Cont'd)

TABLE OF CITATIONS (Cont'd)

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MEMORANDUM OF LAW IN OPPOSITION
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I.

INTRODUCTION

The case sub judice is brought to prevent the implementation of a statute enacted by the 1983 Regular Session of the West Virginia Legislature. The statute, West Virginia Code § 16-5B-6a, requires that on or before July 1, 1984, the boards of directors of nonprofit and local government hospitals must include a specified proportion of consumer

representatives from certain enumerated categories. The plaintiffs in the action are three (3) special interest associations for hospitals and five (5) non-profit or local government hospitals within the State of West Virginia. The defendant is L. Clark Hansbarger, Director of the West Virginia Department of Health. Dr. Hansbarger is the State official alleged by the plaintiffs to be charged by State law with the enforcement of Code 16-5B-6a.

In a laborious complaint, containing fifteen (15) separate counts, the plaintiffs attack Code 16-5B-6a as being constitutionally infirm and in conflict with various federal statutes. The relief sought is a declaration of the unconstitutionality of the statute and temporary and permanent injunctive relief preventing the implementation. Although the plaintiffs had over a year's notice of the implementation of the statute, this litigation commenced with the eleventh-hour drama of plaintiffs' motion, pursuant to Rule 65(b) of the Federal Rules of Civil Procedure, for the extraordinary relief of a temporary restraining order.

On June 24, 1984, a hearing was held on plaintiffs' motion for a temporary restraining order. The hearing consisted of the argument of counsel for the parties. The plaintiffs paid only lip service to the fundamental question of whether irreparable injury would result if the temporary restraining order were not granted. Blackwelder Furniture Co. v. Seilig Manufacturing Co., 550 F.2d 189 (4th Cir. 1977); Westinghouse Broadcasting Co. v. Dukakis, 409 F. Supp. 895 (D.C. Mass. 1976). Plaintiffs posited that draconian

penalties would be levied against them if they could not comply with the statute. (Emphasis supplied.) This is an important point. Plaintiffs only allegation of irreparable harm depends entirely on their charge that the statute is so vague that it is impossible for them to know how to make compliance with its provisions. Conversely, plaintiffs, while having the leisure of over a year to discuss their alleged problems with the defendant to insure their compliance, made no effort to contact or question Dr. Hansbarger or his staff concerning the statute. This nonchalant attitude speaks volumes to the fact that plaintiffs have no real fear of harm or questions on how to comply. Otherwise, plaintiffs could point to no harm that would accrue from compliance with the statute. This, indeed, is important. Compliance with the statute presents no harm to the plaintiffs.

Perhaps in realization of the extreme vulnerability of their allegation of irreparable harm, the plaintiffs fell back to a secondary position. Plaintiffs argued that, rather than there being the existence of a clear and present danger of irreparable harm, the implementation of Code 16-5B-6a would result in the balance of hardships being in their favor. Thus, the plaintiffs argued, they need show only that grave or serious questions are presented by their complaint to be entitled to injunctive relief. North Carolina State Ports Authority v. Dart Containerline Company, 592 F.2d 749 (4th Cir. 1979). This reliance on the "grave or serious questions" issue quickly transformed the temporary restraining order hearing into a symposium for the

explanation of plaintiffs' legal theory for each of the fifteen (15) counts of the complaint.

The Court denied the plaintiffs' motion for a temporary restraining order by its Memorandum Opinion and Order of June 26, 1984.

The plaintiffs entered the fray once again. Their motion for preliminary injunction was heard on July 16, 1984. The testimony in support of the request for the injunction stretched over two (2) days. The defendant presented no witnesses. At the close of the evidence, the Court directed the parties to file memoranda of law in accordance with a schedule arranged at that time.

This document will detail, infra, the arguments of the defendant on the issues presented in this case. In so doing, the defendant will forego a separate, detailed discussion of the testimony of the witnesses. This decision is not an act of caprice. The testimony of each witness tended to relate to one or two specific counts of the fifteen-count (15) complaint. With so many individual issues, the discussion of testimony relating to a specific count being coupled with the discussion of the count serves both clarity and brevity.

The plaintiffs have raised many issues respecting Code 16-5B-6a. This fact is evidenced by the number of counts in the complaint. But the large number of counts cannot obscure the fact that this case turns on only two or three basic issues. The position of the parties is reversed from

the norm. It is common for a plaintiff to continually point out the central issue in an action and cut through the defense's efforts to obfuscate and cloud that issue. But in the case sub judice it is the plaintiffs that seek advantage by obsfuscation. The avalanche of counts and claims pussyfoots around the real question of the case. Pettifogging is the time-honored tactic of the defense. But here the plaintiffs have taken it to heart.

Simply put, the issue of this case is whether Code 16-5B-6a is a valid exercise of State government's authority to regulate corporations? Corporations are creations of the state. These artificial entities have no existence except as allowed and tolerated by the sovereign. Thus, it has been ever so.

Corporations first appeared in Anglo-American jurisprudence as a grant direct from the crown during the reign of Elizabeth I. No corporation could exist except by decree of the sovereign prince. Corporations came early to America in the form of the ill-fated Roanoke Island colony. It was followed by the colonies at Jamestown and Plymouth. All were the manifestations of crown-chartered joint stock companies. These early corporations started the English colonization of America as commercial enterprises.

Since the sixteenth century much about corporations has changed. But one basic fact has remained constant: Corporations are created and regulated by state law. The United States Supreme Court has stated:

> "Corporations are creatures of state law, and investors commit their funds to corporate directors on the understanding that, except where federal law expressly requires certain responsibilities of directors with respect to stockholders, state law will govern the internal affairs of the corporation. * * *" Cort v. Ash, 422 U.S. 66, 45 L. Ed. 2d 26, 95 S. Ct. 2080 (1975), at 95 S. Ct. 2091.

Let there be no mistake, the statute in question is a regulation of the internal affairs of corporations which exist only at the sufferance of the State of West Virginia. What the State of West Virginia creates, it may also regulate. The degree of regulation is primarily a matter of legislative prerogative. If this were not so, the corporation laws of all fifty states would be uniform. It cannot be gainsaid by the plaintiffs that the corporation laws of all fifty states are not uniform.

The underlying inquiry is whether the State of West Virginia's regulation of the internal affairs of these corporations intrudes upon an area protected by the Constitution or controlled by federal law? Being corporations, the plaintiffs do not enjoy the same panoply of rights reserved to individuals. Corporations have no right against self-incrimination. Neither do corporations have the protection of the privileges and immunity provisions of the United States Constitution, Article IV, Section 2, and the Fourteenth Amendment. Corporations have no privileges and immunities which are recognized or protected by the Constitution. Asbury Hospital v. Cass County N.D., 326 U.S. 207, 90 L. Ed. 6, 66 S. Ct. 61 (1945); Hague v. CIO; Greater Hartford Free Bridge

Ass'n v. Greater Hartford Bridge Authority, 172 F. Supp. 244 (D.C. Conn. 1958); Gewery v. Howard, 365 F. Supp. 567 (W.D. La. 1973). Because of the limited bundle of rights with which corporations are vested and their historical status as creatures of statute, state government has much greater authority to control corporations than is apparent with the individual citizen. Plaintiffs have a heavy burden to displace the State of West Virginia as the regulator of the corporations it allows to be created.

Having now set the stage, it is appropriate to make some general comments about the instant case before undertaking to deal, in depth, with the various issues. One topic which demands comment is the relationship between the plaintiffs and the legion of expert witnesses that testified on plaintiffs' behalf. To be blunt those relationships are incestuous in nature. Almost to a man these expert witnesses revealed that they had an ongoing relationship with one or more of the plaintiffs. Any opinion they gave was suspect because of the ongoing relationship of the witness with the plaintiffs. The witness Richard P. Moses is a member the board of directors of the plaintiff American Hospital Association. The witness G. Roger King is a lawyer for hospitals that hold membership in the plaintiff American Hospital Association. The three (3) Catholic Sisters are members of religious orders supporting the plaintiff Catholic Health Association. Paul Edward Mullen formerly was employed by the American Hospital Association (AHA) and now is employed by the Joint Commission on the Accreditation of Hospitals,

an organization of which the AHA is a member. Deborah Kolb is employed by a consulting firm that regularly does work for some of the plaintiffs. The degree of partiality of these witnesses, testifying as experts, may fairly be inferred from their relationships with the plaintiffs. Their testimony must be weighed for what it is: The opinion, belief and prejudice of men and women who have a direct interest in the outcome of this litigation.

Plaintiffs also have attempted, through the testimony of witnesses Henderson and King, to substitute paid opinion for legal precedent. These two, testifying on the labor law counts, presented legal opinions. As such, these men, both lawyers, became advocates for the plaintiffs. Their testimony was tantamount to the argument of counsel. Their testimony went to a determination of a question of law thereby invading the province of the Court. Their testimony was either irrelevant or inadmissible.

The plaintiffs are inconsistent in their characterization of the statute. On the one hand, it is too vague for compliance to be possible. On the other hand, plaintiffs find within the statute a preciseness of direction not fairly inferable from its general language. In particular, the plaintiffs, by a phantasmagoric leap of illogic, have divined that the board members to come from the four (4) designated segments of the community are directed by statute to be advocates for special interest groups first and serve the needs of the hospital second. Nowhere in Code 16-5B-6a is any such direction to be found.

Further, plaintiffs go beyond the above to find in the statute that the board member from the labor segment of the community must be from an organized bargaining unit within the hospital. Such as this is stuff and nonsense.

The statute is directed to insure broad-based community involvement on the affected hospital boards of directors. The statute does not necessitate a restructuring of each and every subject board. It is quite possible many boards are in compliance as now constituted. There is no proscription which prevents now-serving board members to qualify as the designate for each of the four (4) specified segments of the community. Only a hospital which does not now have broad community involvement will be required to alter the composition of its board of directors. Indeed, Exhibit No. 3 to the complaint (Application For License To Conduct A Hospital) requires only a designation of which members of the governing body of the hospital are from the four (4) segments of the community. Wide latitude is allowed in compliance with the statute. Exhibit No. 3 to the complaint is an innocuous method of monitoring compliance. It is not, as the plaintiffs suggest, a tool for unleashing on the unwary hospital all the draconian forces surmised to be standing ready to pounce at a moment's notice.

To move their case forward, the plaintiffs found it necessary to raise the specter of a vicious bogeyman. But in truth no bogeyman is to be found in the statute or in the West Virginia Department of Health. The most rhadamanthine application does not require what plaintiffs posit: loss of

licensure. All the ends of the statute can be accomplished by resort to the legal action authorized by Code 16-5B-6a(d). A simple order of the appropriate State court will direct those responsible to open the hospital board to community involvement. If these responsible individuals refuse to comply, it is they and not the hospital that face the prospect of feeling the power of the court to compel compliance with its orders. Further, the prospect of punishment arises only on refusal to comply, not upon the making of a good faith effort to comply.

The contradictions set out above show that the plaintiffs, in reading and interpreting this statute, are straining at gnats while easily swallowing camels. They find this statute to be both fatally vague and capable of being interpreted in minute detail. While couching this statute as being "void for vagueness," the plaintiffs are actually arguing the corollary to that doctrine: "vague for voidness." While "void for vagueness" is a doctrine of constitutional law, "vague for voidness" is a manufacture of argument. Plaintiffs are so repulsed by the thought of having wide community involvement on their boards of directors that they must find a way to void the statute. In pursuit of this goal, the plaintiffs have cast about frantically for some claims of vagueness. As will be shown, infra, Code 16-5B-6a is not constitutionally infirm for vagueness.

The filing of the complaint in this action is a cavil by the plaintiffs. The objections to the statute are frivolous and without substance. The discussion of the issues individually will demonstrate this fact in detail.

II.

ISSUES

1. DOES THE ELEVENTH AMENDMENT OF THE UNITED STATES CONSTITUTION BAR THE COURT FROM ENJOINING A STATE OFFICIAL, SUCH AS THE DEFENDANT, TO COMPLY WITH STATE LAW?

2. IS THERE A PRIVATE RIGHT OF ENFORCEMENT UNDER 29 U.S.C. § 158(a) OF THE LABOR MANAGEMENT RELATIONS ACT OF WHICH THIS COURT HAS JURISDICTION?

3. IS WEST VIRGINIA CODE § 16-5B-6a PREEMPTED BY THE NATIONAL LABOR MANAGEMENT RELATIONS ACT?

4. DO PLAINTIFFS HAVE STANDING TO ENFORCE THE LABOR MANAGEMENT REPORTING DISCLOSURE ACT?

5. SHOULD THE COURT ABSTAIN FROM ENJOINING THE OPERATION OF WEST VIRGINIA CODE § 16-5B-6a?

6. DOES WEST VIRGINIA CODE § 16-5B-6a VIOLATE ANY FIRST AMENDMENT RIGHT TO FREEDOM OF ASSOCIATION?

7. DOES WEST VIRGINIA CODE § 16-5B-6a TAKE ANY PROPERTY OF PLAINTIFFS WITHOUT COMPENSATION AND IN VIOLATION OF DUE PROCESS OF LAW OR VIOLATE THE CONTRACTS CLAUSE?

8. IS WEST VIRGINIA CODE § 16-5B-6a VOID FOR VAGUENESS UNDER THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION?

9. DOES WEST VIRGINIA CODE § 16-5B-6a VIOLATE THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION?

III.

ARGUMENT

1. DOES THE ELEVENTH AMENDMENT OF THE UNITED STATES CONSTITUTION BAR THIS COURT FROM ENJOINING A STATE OFFICIAL, SUCH AS THE DEFENDANT, TO COMPLY WITH STATE LAW?

Pennhurst State School & Hospital v. Halderman, ___ U.S. ___, 79 L. Ed. 2d 67, 104 S. Ct. 900 (1984) (hereinafter Pennhurst II) stands for the proposition that the Eleventh Amendment of the United States Constitution is a limitation on the Article III powers of federal courts and bars them from enjoining state officials to comply with state law.

Counts I and V of the complaint allege that the operation of W. Va. Code § 16-5B-6a would negatively affect rights stemming from the West Virginia Constitution, Article XI, Section 1. Federal courts may not require state officials to recognize or abide by rights which are created solely by state law. Neither may claims of this type be heard by federal courts under the doctrine of pendent jurisdiction. Pennhurst II, at 79 L. Ed. 2d at 92, 104 S. Ct. at 919..

To the extent that Counts I and V seek to require the defendant to obey State law, this Court is without power to hear these claims. The Eleventh Amendment bars them from the jurisdiction of federal courts and they should be dismissed for lack of subject matter jurisdiction.

Additionally, The Catholic Health Association of the United States (CHA) would be without standing to assert the claim raised in Count V of the complaint even were the Eleventh Amendment not a bar to the claim. A close reading of Count V reveals that CHA is bringing the claim on its own behalf and not on behalf of its member hospitals. The CHA's claim is that its member hospitals are somehow analogous to stockholders in CHA and that Code 16-5B-6a would affect the hospitals' rights as regards membership on the CHA board of directors. Count V, Paragraph 36. This is poppycock. Code 16-5B-6a applies to nonprofit and local governmental hospital boards which operate hospitals within the State of West Virginia. It plainly has no application to the board of directors of a national private association, such as CHA, based in another state. Because CHA is unaffected by the challenged statute, Count V should be dismissed for lack of standing.

2. IS THERE A PRIVATE RIGHT OF ACTION TO ENFORCE RIGHTS CREATED BY 29 U.S.C. § 158(a) OF THE LABOR MANAGEMENT RELATIONS ACT OF WHICH THIS COURT HAS JURISDICTION?

Title 29 U.S.C. § 158(a) of the Labor Management Relations Act sets forth a list of practices which are "unfair labor practices." Title 29 U.S.C. § 160 grants to the National Labor Relations Board (hereinafter the Board) the exclusive jurisdiction to determine, in the first instance, that which constitutes an unfair labor practice and that which does not.

The statutory structure for the enforcement of the Labor Management Relations Act set forth in 29 U.S.C. § 160 is comprehensive and exclusive. The "Board, or any agent or agency designated by the board" may issue a complaint when charges of an unfair labor practice are brought to it. (Emphasis supplied.)

The complaint issued by the Board or its agent provides for notice of a hearing before an agency of the Board. Subsequent to such hearing, the Board makes its determination as to whether an unfair labor practice has been committed. Either the Board or the party aggrieved by an order of the Board may seek review, or, in the Board's case, enforcement in the proper United States Circuit Court of Appeals.

The right to seek injunctions in federal district court for certain enumerated violations of federal labor law is given to "the officer or regional attorney" of the Board. Title 29 U.S.C. 160(1). The provision of a specific statutory scheme of enforcement necessarily implies that the statutory scheme provided is exclusive, and that no private right of enforcement flows to the plaintiffs under 42 U.S.C. § 1983. As the United States Supreme Court noted in Middlesex Cty. Sewerage Auth. v. Sea Clammers, 453 U.S. 1, 69 L. Ed. 2d 435, 450, 101 S. Ct. 2615 (1981), quoting with approval Chapman v. Houston Welfare Rights Organization, 441 U.S. 600, 673 n.2, 60 L. Ed. 2d 508, 99 S. Ct. 1905 (1979) (dissenting opinion), "when 'a state official is alleged to have violated a federal statute which has its own comprehensive enforcement scheme, the requirements of that enforcement

procedure may not be bypassed by bringing suit directly under § 1983.'" (footnote omitted). The statutory procedure for enforcing all relevant provisions of the Labor Management Relations Act requires that the National Labor Relations Board and its agents, officers, and regional attorneys shall have exclusive jurisdiction. Conduct which is even arguably an unfair labor practice is within the exclusive jurisdiction of the Board under the Labor Management Relations Act. See, e.g., Huge v. Long's Hauling Co., Inc., 442 F. Supp. 1041 (W.D. Pa. 1977), aff'd, 590 F.2d 457 (3rd Cir. 1978), cert. denied, 442 U.S. 918, 61 L. Ed. 2d 285, 99 S. Ct. 2840. Neither state nor federal courts may entertain suits to redress alleged unfair labor practices. Associated General Contractors of North Dakota v. Otter Tail Power Co., 457 F. Supp. 1207 (D.C. N.D. 1978), aff'd, 611 F.2d 684 (8th Cir. 1974). As regards questions of the application of federal labor laws to nonprofit hospitals, no exception to the rule of Board exclusivity exists. Memorial Hospital of Roxborough v. N.L.R.B., 545 F.2d 351, 354 (3rd Cir. 1976).

It is axiomatic that the declaratory judgment form of action, permitted by 28 U.S.C. § 2201, confers no additional jurisdiction upon federal district courts. See, e.g., Utah v. Wycoff, 344 U.S. 237, 9 L. Ed. 2d 291, 73 S. Ct. 236 (1952); Lake Carriers' Asso. v. MacMullan, 406 U.S. 498, 32 L. Ed. 2d 257, 92 S. Ct. 1749 (1972). Certainly, if any of the individual plaintiff hospitals sought to challenge, by an action in district court, an individual Board member's membership on the Board as a violation of 29 U.S.C. § 158(a), the action would be given appropriately short shrift. This

is the Board's province, and to it must charges of this ilk be addressed. No different result should obtain when, as in the case sub judice, relief is sought collectively under the declaratory judgment act.

In an attempt to substitute paid opinion for legal precedent, plaintiffs offered Professor Stanley Henderson and Attorney Roger King as expert witnesses in the field of labor law. Professor Henderson admitted that the Board possessed the exclusive jurisdiction to determine that which is and that which is not an unfair labor practice. He sought, however, upon cross-examination, to separate plaintiffs from their claim that W. Va. Code § 16-5B-6a causes an unfair labor practice or practices by focusing on the doctrine of preemption. Count XI of plaintiffs' complaint will not admit of Professor Henderson's circumlocution for it rests plaintiffs' claim that Code 16-5B-6a is preempted squarely upon the preceding contention that it causes a violation of 29 U.S.C. § 158(a). Failing the 29 U.S.C. § 158(a) violation, the Count XI claim of preemption is without basis.

Attorney King's opinion should be accorded the same weight as argument of counsel for the plaintiffs, for his identification with the American Hospital Association is complete; he is counsel for the Ohio Hospital Association, a member of the American Hospital Association. This witness appeared as an advocate for his client's interest. He has followed the challenged legislation since its inception in his capacity as advocate. Attorney King represents hospitals exclusively in labor disputes. While this may be an

honorable calling above ethical reproach, it may reasonably be inferred that he has, of necessity, acquired an outlook upon the labor laws of this country inimical to the public interest of the State of West Virginia as expressed in Code 16-5B-6a. Dismissal for lack of subject matter jurisdiction is appropriate as to Count XI.

3. IS WEST VIRGINIA CODE § 16-5B-6a PREEMPTED BY THE LABOR MANAGEMENT RELATIONS ACT?

The United States Supreme Court has described the doctrine of preemption as it applies to the Labor Management Relations Act as follows:

> "Our cases have announced two doctrines for determining whether state regulations or causes of action are preempted by the NLRA. Under the first, set out in San Diego Building Trades Council v Garman, 359 US 236, 3 L Ed 2d 775, 79 S Ct 773 (1959), state regulations and causes of action are presumptively preempted if they concern conduct that is actually or arguably either prohibited or protected by the Act. Id., at 245, 3 L Ed 2d 775, 79 S Ct 773. The state regulation or cause of action may, however, be sustained if the behavior to be regulated is behavior that is of only peripheral concern to the federal law or touches interests deeply rooted in local feeling and responsibility. In such cases, the state's interest in controlling or remedying the effects of the conduct is balanced against both the interference with the Board's ability to adjudicate the controversies committed to it by the Act * * * and the risk that the state will sanction conduct that the Act protects. The second preemption doctrine, set out in Machinists v Wisconsin Employment Relations Commission, 427 US 132, 49 L Ed 2d 396, 96 S Ct 2548 (1976), proscribes state regulation and state-law causes

> of actions concerning conduct that Congress intended to be left unregulated * * *." Belknap, Inc. v. Hale, ___ U.S. ___, 77 L. Ed. 2d 798, 806-807, 103 S. Ct. ___ (1983). (Citations omitted in part.) (Punctuation as in original.)

Plaintiffs argue only that the Garmon-type preemption is applicable to W. Va. Code § 16-5B-6a.

Garmon preemption is inapplicable to Code 16-5B-6a for two primary reasons. First, according to its plain meaning, Code 16-5B-6a does not interfere with the establishment or maintenance of any relationship between or among employers and employees protected by the NLRA and plaintiffs' contorted attempts to manufacture such a conflict collapse under their own ponderous weight. Second, the regulation of corporations is a matter deeply rooted in local law and is, for this reason, an area of state law not subject to preemption under the NLRA.

The supposed conflict between Code 16-5B-6a and the NLRA is premised upon a very specific interpretation of the meaning of the term "consumer representatives from * * * the * * * category * * * of organized labor." To create the illusion of conflict, plaintiffs, sub silentio, attribute the following meaning to the above-quoted language: hospital boards must select an official representative from their employees' bargaining unit for membership on the board. First, it should be noted that the plaintiffs' ability to discern very specific meaning from the language of Code 16-5B-6a, in this context, is at odds with their claim that

they are unable to discern any clear meaning from its language in Count III of their complaint. Plaintiffs find clear meaning when and where it is convenient to do so to bolster a legal argument.

Even if Code 16-5B-6a were interpreted to require membership on the board of directors of hospitals of a representative from the bargaining unit for the employees, no conflict with 29 U.S.C. § 158(a) is apparent and no case for preemption is made out under the previously cited Belknap standards, supra. Certainly, it is true that situations might arise where participation of a representative of the bargaining unit or units in board decision-making might place that board member in a position of choosing between competing duties of fidelity to the bargaining unit and fidelity to the constitution. This situation of competing loyalties and duties is not unique to board members that would represent employees, however, and, indeed is not inherently more likely to occur with a board member from labor than with a board member from a community business that vends to the hospital. For instance, a vendor whose dairy reaps huge profits from dairy sales to a hospital would be expected, under fiduciary principles, to stand aside when contracts for dairy products are decided by the hospital board. Obviously, such a board member would be placed in a position of possible conflict of interest and breach of fiduciary responsibility which could be avoided only by withdrawing from decision-making on this issue. Plaintiffs assume, again sub silentio, that consumer representatives with a labor background would be uniquely incapable of

conforming their conduct to the dictates of state and federal law. No such assumption is justified.

Of course, interpreting Code 16-5B-6a according to its plain meaning makes it clear that this Court is not required to decide whether membership on the board of directors by a representative of the hospital's bargaining unit would violate any duty under the NLRA. Nothing in Code 16-5B-6a requires that the board of the hospital select a representative of the bargaining unit of the employees of the hospital to sit as the consumer representative with an organized labor background. The choice of a board member with an organized labor background is left solely to the board of directors. No attempted obfuscation may divert attention from the fact that Code 16-5B-6a leaves the choice of all consumer representatives for the board, including the consumer representative from organized labor, precisely where it was prior to the passage of the statute--in the able hands of the board members themselves.

As plaintiffs point out in their memorandum of law, p. 31, the NLRB has held that voluntary membership of a representative of the hospital's bargaining unit on the board of directors is not a violation of the NLRA's proscription against conflicts of interest. Anchorage Community Hospital, Inc., 225 NLRB 575 (1976). This is, at most, the situation which would be obtained under Code 16-5B-6a. It poses no threat to the conflict proscription of 29 U.S.C. § 158(a) of the NLRA.

4. DO PLAINTIFFS HAVE STANDING TO ENFORCE THE LABOR MANAGEMENT REPORTING AND DISCLOSURE ACT?

The Labor Management Reporting and Disclosure Act (hereinafter referred to as LMRDA), 29 U.S.C. § 501(b) provides:

> "When any officer, agent, shop steward, or representative of any labor organization is alleged to have violated the duties declared in subsection (a) of this section and the labor organization or its governing board or officers refuse or fail to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization, such member may sue * * * for the benefit of such labor organization. * * *" (Emphasis supplied.)

The rights and obligations created by the LMRDA are not enforceable by the plaintiffs, for the plaintiffs do not fall within the class of persons protected by the Act; nor may they meet the procedural requirements of 29 U.S.C. § 501(b) for enforcing the protections of the Act. None of the plaintiffs could be members of labor organizations in this context, or any other. They are employers. It is the membership on their board of directors of a representative from labor which they seek to prevent by this action. Parenthetically, it should be noted that Professor Henderson's insistence that the American Hospital Association, or other of the plaintiffs, might be a member of a labor organization representing the employees of one of its member hospitals is indicative of the chimerical character of his testimony.

Count XII of plaintiffs' complaint depends wholly upon their right to enforce provisions of the LMRDA. They have

no such right and Count XII should be dismissed for lack of standing.

5. SHOULD THE COURT ABSTAIN FROM ENJOINING THE OPERATION OF WEST VIRGINIA CODE § 16-5B-6a?

The standards by which abstention should be judged are set forth in numerous federal cases. In evaluating a request for abstention, the Court should consider the effect abstention will have on the rights to be protected; whether there are available State remedies; whether the challenged State law is unclear; whether the challenged State law is fairly susceptible of an interpretation that would avoid any federal question; and whether abstention would avoid unnecessary federal interference in state operations. See, e.g., George v. Parratt, 602 F.2d 818 (8th Cir. 1979); McRedmond v. Wilson, 533 F.2d 757 (2d Cir. 1976).

Comparing the situation presented in the case sub judice to the factors for abstention, it appears that this case is one in which abstention would be appropriate. Plaintiffs, in their presentation of evidence at the hearings held in this matter, essentially abandoned any contention that they will suffer irreparable harm from the operation of Code 16-5B-6a, choosing to rely instead on their allegation that they have raised serious questions about the statute's constitutionality. Plaintiffs' approach to the case has made it clear that plaintiffs' rights will not be seriously affected by abstention.

Certainly State remedies are available to plaintiffs in abundance. Plaintiffs have ignored the Department of Health's capacity to advise them with respect to compliance with Code 16-5B-6a. They have similarly ignored the State courts of West Virginia. Should the defendant make a decision not to renew a license for noncompliance with Code 16-5B-6a, plaintiffs have an automatic appeal to the circuit court of the county in which the applicant is located for review of that decision, and from there, an appeal to the West Virginia Supreme Court of Appeals. W. Va. Code 16-5B-7 (1947). State remedies are numerous and all have been forsaken by plaintiffs.

Defendant Hansbarger maintains that Code 16-5B-6a is not unconstitutionally vague. To the extent that it is unclear, as plaintiffs allege, abstention becomes more appropriate. No State court has passed judgment upon this statute or interpreted it in any manner. Certainly as to the labor law and vagueness counts, State interpretation may obviate the basis for plaintiffs' objections.

The regulation of corporations is an area of traditional state control, and their regulation should be left to state law. Cort v. Ash, 422 U.S. 66, 45 L. Ed. 2d 26, 95 S. Ct. 2080 (1975). Avoidance of unnecessary federal interference in state operations in this area should lead the Court to abstain from enjoining the operation of Code 16-5B-6a.

6. DOES WEST VIRGINIA CODE § 16-5B-6a VIOLATE ANY FIRST AMENDMENT RIGHT TO FREEDOM OF ASSOCIATION?

Individuals possess the freedom to associate and to express their views through speech and worship, "in pursuit of a wide variety of political, social, economic, educational, religious and cultural ends." Kathryn R. Roberts, Acting Commissioner, Minnesota Department of Human Rights v. United States Jaycees, 52 U.S.L.W. 5076, 5080 (Decided July 3, 1984) (hereinafter Jaycees). They do not possess any First Amendment right to associate to operate a hospital. Neither do they possess any First Amendment right to be free to associate as a corporation in contravention of state law requirements regarding their boards of directors. The right to express religious views must be distinguished from the privilege of operating a hospital. Plaintiffs' attempt to blur this distinction and request the Court to cover the business of hospital administration with the mantle of First Amendment protection due only to the expression of religious beliefs.

Certainly, it could not be maintained that plaintiff Catholic Health Association of the United States or its members have any First Amendment rights to operate hospitals at all. Assuming the State of West Virginia made the policy decision that private operation of hospitals was contrary to the public interest of the State, and that that decision was reasonable, no First Amendment problems would be raised by the total exclusion of private enterprises from the hospital industry in this State. This is so because the operation of a hospital is no more a constitutionally protected form of

expression, than is the operation of a steel mill or chemical plant.

The Supreme Court implicitly recognized that the right of freedom of association is not applicable in settings similar to that presented in this case in Jaycees, supra. The Court noted that, where there is no general plan or purpose of exclusion, it will be unlikely to uphold particular exclusions. 52 U.S.L.W. at 5079. Herein, plaintiffs' witnesses all contended that they did not exclude members of any of the categories set out in Code 16-5B-6a from their boards of directors. They may not be heard to say that any associational rights protected by the First Amendment are implicated where they have consented to the association in principle but have merely failed to accomplish it in practice.

Neither may plaintiff hospitals be heard to argue that the goal of their association is other than the delivery of health care in the hospital setting. They achieved their status as nonprofit corporations under the laws of the State of West Virginia by affirming that their purposes for existence was the operation of hospitals. They are bound by law to the purpose set forth in their charters of incorporation.

Assuming, arguendo, that Code 16-5B-6a might impinge an expressive association, there would still be no case for the abrogation of the statute. As the Supreme Court noted in Jaycees, the group alleging the inhibition of expression must show that admission of the disputed members "will impede the organization's ability to engage in protected

activities or to disseminate its preferred views." Code 16-5B-6a, similar in this respect to the state regulation imposed on membership in Jaycees, requires no change in the "creed" of Catholic hospitals nor does it impose "restrictions on the organization's ability to exclude individuals with ideologies or philosophies different from those of its existing members." 52 U.S.L.W. at 5081. This is evident from the testimony of all Catholic Health Association witnesses that nothing in their religious creed prevented them from accepting as hospital board members persons from any of the four groups delineated in Code 16-5B-6a, and that, indeed, many board members of Catholic hospitals presently qualify in one or more categories contemplated by the statute. As the United States Supreme Court said of the Jaycees' attempt to attribute great significance to the distinction between voting and nonvoting membership in their organization:

> "[T]he Jaycees already invite women to share the group's views and philosophy and to participate in much of its training and community activities. Accordingly, any claim that admission of women as full voting members will impair a symbolic message conveyed by the very fact that women are not permitted to vote is attenuated at best." 52 U.S.L.W. at 5081.

Similarly, any claim that the expansion of participation by groups recognized in Code 16-5B-6a on hospital boards violates or impairs a symbolic message must be "attenuated at best" where there is admittedly no per se religious proscription against such participation.

7. DOES WEST VIRGINIA CODE § 16-5B-6a TAKE ANY PROPERTY OF PLAINTIFFS WITHOUT COMPENSATION AND IN VIOLATION OF DUE PROCESS OF LAW OR VIOLATE THE CONTRACTS CLAUSE?

The United States Supreme Court has defined taking for public use prohibited by the Fourteenth Amendment to the United States Constitution in a series of cases, and has distinguished taking from regulation. The Third Circuit Court of Appeals described the Supreme Court cases as follows:

> "It has long been settled that '"since the adoption of the Fourteenth Amendment compensation for private property taken for public uses constitutes an essential element in 'due process of law,' and that without such compensation the appropriation of private property to public uses, no matter under what form of procedure it is taken, would violate the provisions of the Federal Constitution."' Chicago, B. & Q.R.R. v Chicago, 166 U.S. 226, 239, 17 S.Ct. 581, 585, 41 L.Ed. 979 (1897), quoting Scott v. City of Toledo, 36 F. 385, 396 (C.C.N.D.Ohio 1888). It has also been long settled that not every governmental regulation of the uses to which private property may be put is a taking for public use. See Miller v. Schoene, 276 U.S. 272, 277-80, 48 S.Ct. 246, 72 L.Ed. 568 (1928) (statute authorizing destruction of diseased cedar trees); Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 386-95, 47 S.Ct. 114, 117-21, 71 L.Ed. 803 (1926) (industrial zoning regulation)." Troy Ltd. v. Renna, 727 F.2d 287, 299 (3rd Cir. 1984). (footnote omitted.)

The Third Circuit noted that "regulations of the use of private property frequently involve costs to the owner. They are nevertheless not deemed to be takings." Id. at 302.

As the Supreme Court noted in Sweet v. Rechel, 159 U.S. 380, 43 L. Ed. 188, 16 S. Ct. 43 (1895):

> "[T]he restriction imposed by the constitution [is] to the effect that statutes passed in the exercise of the police power of the Commonwealth must not be repugnant or contrary to the constitution, one of the provisions of which is, that the owner of private property appropriated to public uses, shall receive a reasonable compensation therefor. . . .
>
> "Undoubtedly, the state, without taking the title to itself, may, in some appropriate mode and without compensation to the owner, forbid the use of specified private property, where such use would be injurious to the public health. . . .
>
> "The difference [is] between an act passed with exclusive reference to the police power of the state, without any purpose to take and apply property to public uses, and a statute like the one here involved, which, for the general good, ordains and establishes regulations declaring the existence of a nuisance. . . .
>
> "159 U.S. at 398-99, 16 S.Ct. at 48 (emphasis in original)."

W. Va. Code § 16-5B-6a "for the general good, ordains and establishes regulations" regarding membership in certain hospitals' boards of directors. The statute does not appropriate nonprofit or local governmental hospitals, or the control thereof, to the State. It should be noted that it would be impossible to appropriate the plaintiff hospitals to public use as they are, at least nominally, committed to public use by their very nature as nonprofit or local governmental hospitals.

More recently the Supreme Court has stated "governmental regulation--by definition--involves the adjustment of rights for the public good. Often the adjustment curtails some potential for the use or economic exploitation of private property. To require compensation in all such circumstances would effectively compel the government to regulate by purchase." Andrus v. Allard, 444 U.S. 51, 65, 62 L. Ed. 2d 210, 100 S. Ct. 318, 326 (1979).

There is a close relationship between the taking argument advanced by plaintiffs and their argument that Code 16-5B-6a impairs contractual rights established in their charters of incorporation. To the extent that plaintiffs have a property right to control their hospitals the right must be created by the charters of incorporation of their respective hospitals. Of course, the State of West Virginia retains the power to regulate corporations operating within its borders as discussed in the introduction to this memorandum. As the Alabama Supreme Court has noted, "[t]he charter of a corporation, read in connection with the general laws applicable to it, is the measure of its powers." (Emphasis added.) Cadden v. Ladd, 358 So. 2d 437, 459 (Ala. 1978). See, Cort v. Ash, supra. Thus, Counts V and VIII, the taking counts, and Counts IX and X, the Contracts Clause Counts, should be considered together.

As to plaintiffs' contention that the statute in question violates the Contracts Clause of the United States Constitution, little need be said. The United States Supreme

Court noted, in Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 74 L. Ed. 2d 569, 103 S. Ct. 697, 704 (1983), that "[a]lthough the language of the Contracts Clause is facially absolute, its prohibition must be accommodated to the inherent police power of the State." The Court went on to state that the threshold inquiry in determining whether a given state law is in conflict with the Contracts Clause is whether the law has worked a substantial impairment of the contractual relationship. In the instant case the inquiry need go no further, for plaintiffs' evidence and the statute itself clearly show that no substantial impairment of contract results from the operation of Code 16-5B-6a. The most that can be said to stem from any contractual provisions of the corporate charters is the right of the boards to pick new members. That right is essentially retained by Code 16-5B-6a, although the exercise thereof is regulated for the public good.

Before it may be determined that a serious impairment obtains under a state law, the Energy Reserves Court stated that the nature of the industry which the complaining party entered must be considered. An individual or group will not be heard to complain about changes in the nature or extent of government regulation when they have chosen to enter a field or industry which is inherently highly regulated.

> "In determining the extent of the impairment, we are to consider whether the industry the complaining party has entered has been regulated in the past. Allied Structural Steel Co., 438 U.S., at 242, n. 13, 98 S.Ct., at 2721, n. 13, citing Veix v. Sixth Ward Bldg. & Loan Ass'n, 310 U.S. 32, 38, 60 S.Ct. 792,

> 794-795, 84 L.Ed. 1061 (1940) ('When he purchased into an enterprise already regulated in the particular to which he now objects; he purchased subject to further legislation upon the same topic'). The Court long ago observed: 'One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them.' Hudson Water Co. v. McCarter, 209 U.S. 349, 357, 28 S.Ct. 529, 531, 52 L.Ed. 828 (1908)." Energy Reserves, 459 U.S. at 411, 103 S. Ct. at 705.

In subparagraphs c and d of Count IV of the complaint, in their Memorandum of Law in Support of Plaintiffs' Motions for Temporary and Permanent Injunctions, and in evidence presented in hearings in this matter, plaintiffs have taken the position that Code 16-5B-6a is unnecessary because the entire area of cost control in hospitals is regulated by a quilt of federal and state laws. That position is antithetical to any claim under the Contracts Clause, as Energy Reserves makes abundantly clear.

8. IS WEST VIRGINIA CODE § 16-5B-6a VOID FOR VAGUENESS UNDER THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION?

Essentially the plaintiffs' contention that Code 16-5B-6a is so vague that it violates the Due Process Clause of the United States Constitution is predicated upon the plaintiffs' unsubstantiated and incorrect allegation that the statute restricts the fundamental right of freedom of association. Code 16-5B-6a is an economic regulation restricting no First Amendment rights and it must be accorded the deference that attends economic regulations by the states challenged under the Due Process Clause.

As the Fifth Circuit has noted in a pair of cases, no fundamental rights or suspect classifications are involved in the economic regulations imposed by state governments on the health care industry. The Fifth Circuit stated, in Woods v. Holy Cross Hospital, 591 F.2d 1164, 1173, note 15, (1979), "[r]egulation of the practice of medicine does not involve a fundamental right or a suspect class." Similarly, that court has held that the State of Florida's imposition of special licensing requirements upon the administrators of nursing homes, as opposed to, for instance, hospitals, involved no fundamental rights or suspect classifications. Florida v. Mathews, 526 F.2d 319, 325 (5th Cir. 1976).

In this context it is clear that the rational basis test of constitutionality under the Due Process Clause is applicable to Code 16-5B-6a. In determining whether Code 16-5B-6a meets the rational basis test, it is important to remember that the Due Process Clause imparts no inherent right to plaintiffs to operate their business as they have operated them in the past. When faced with a challenge under the Federal Due Process Clause to a Florida statutory scheme, which effectively eliminated certain existing legitimate fund-raising businesses, the Supreme Court of Florida noted that:

> "'Among [the constitutionally protected rights] are a persons right to contract and the right to pursue a lawful business, both recognized under the fifth and fourteenth amendments to the United States Constitution * * *. These are not, of course absolute rights. They are subject to reasonable restraint in the interest of the public welfare. Legislative limitations

> upon the exercise of these liberties are constitutional if they rationally relate to a valid State objective.'" Fraternal Order of Police v. Dept. of State, 392 So. 2d 1296, 1302, quoting Department of Business Regulation v. National Manufactured Housing Federation, Inc., 370 So. 2d 1132, 1136 (1976) (emphasis in original) (citations omitted).

The rationality of Code 16-5B-6a is beyond doubt. The Legislature has determined that participation on boards of directors of hospitals is limited and that broadened participation will further the admittedly valid goal of cost containment. It is inconsistent for plaintiffs to, on one hand, exalt the duties and responsibilities of members of hospital boards of directors in determining the direction of hospital resources (see, e.g., the testimony of Richard Moses and Paul Edward Mullen) and, on the other hand, denigrate the ability of the members required by Code 16-5B-6a to have any impact on health care costs (see Plaintiffs' Memorandum of Law, p. 24). Either these boards have impacts on costs or they do not. The confusion in plaintiffs' approach indicates that was certainly within the prerogative of the West Virginia Legislature to determine that board decisions do have an impact on health costs and to further determine that broader-based board memberships would assist in holding down those costs.

As to vagueness the central inquiry, succinctly stated by the Supreme Court in Jaycees, 52 U.S.L.W. at 5081, is whether the challenged statute "requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess and differ as to its application." The

doctrine requires only "that government articulate its aims with a reasonable degree of clarity," not absolute clarity.

Judged by this standard, Code 16-5B-6a is not unconstitutionally vague. It is clear from Sister Mary Dianne's testimony that the plaintiff West Virginia Hospital Association's members have undertaken to comply with the Act and have developed a board of directors which they believe to comply with the law. No evidence indicates that they have not complied fully. They have not been threatened with the rhadamanthine sanctions alledgedly applicable to noncomplying hospitals under the law. No loss of licensure has occurred and, indeed, none has been intimated.

The terms of this law are simply not of the quality which have been declared void on due process grounds. Those void statutes have prohibited acts in generalized terms, such as the prohibition on "loitering" declared invalid by the court in State v. Caez, 81 N.J. Super. 315, 195 A.2d 496 (1963). As the Sixth Circuit noted in Anderson v. United States, 215 F.2d 84, 90 (1954), "[t]he test is whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common practice and understanding."

Common practice and understanding permits members of hospital boards to act with confidence in choosing consumer representatives from the categories of persons below the median national income, elderly persons, small business persons, and persons from organized labor. Of course, a froth

of insubstantial consternation can be conjured up over almost any statutory language. The question for the Court is not whether, after one year and a half of brainstorming, plaintiffs can succeed in pointing out some uncertainties in the statute, but, rather, whether, with a similar effort, plaintiffs could produce hospital boards clearly in compliance with the statute. There is, of course, no serious question but that plaintiffs could have produced such boards of directors. That they choose not to do so discloses no constitutional infirmity in the statute.

9. DOES WEST VIRGINIA CODE § 16-5B-6a VIOLATE THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION?

West Virginia Code § 16-5B-6a is an economic regulation imposed on all nonprofit and local government hospitals in the State of West Virginia. It is reasonably related to a valid State purpose and is a perfectly permissible exercise of the State's authority, consistent with the Equal Protection Clause. In Pollard v. Cockrell, 578 F.2d 1002, 1012 (5th Cir. 1978), the Fifth Circuit considered an equal protection challenge to a San Antonio massage parlor ordinance. While assuming that operating a massage parlor was a legitimate business under Texas State law, the court noted that "[t]he theory that classifications affecting the right to pursue a legitimate business demand strict scrutiny flies in the face of the well established rule that state regulations of business or industry are to be reviewed under the less exacting 'rational basis' standard."

The United States Supreme Court applied the rational basis standard for review in Friedman v. Rogers, 440 U.S. 1, 59 L. Ed. 2d 100, 99 S. Ct. 887 (1979). While distinguishable on some grounds, Friedman is also instructive with regard to certain claims raised by plaintiffs in the instant litigation.

In Friedman the State of Texas established the requirement, by statute, that four members of the six-member Texas Optometry Board must be members of the Texas Optometry Association (TOA), a private, professional organization of optometrists with certain group goals and standards of conduct. The Texas Optometry Board grants, reviews, suspends and revokes licenses to practice optometry.

Persons practicing optometry in Texas were not required to be members of TOA, and a substantial percentage were not. A non-TOA optometrist and member of the Texas Board of Optometry, Rogers, filed suit challenging the law, inter alia, on the ground that it violated the equal protection rights of non-TOA member optometrists. Of Roger's equal protection argument, the court made short work.

First, it stated the rule of law in the area of economic regulation:

> "We stated the applicable constitutional rule for reviewing equal protection challenges to local economic regulations such as § 2.02 in New Orleans v. Dukes, 427 U.S. 297, 303 (1976).

> "'When local economic regulation is challenged solely as violating the Equal Protection Clause, this Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations. See, e.g., Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356 (1973). Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest.'" 440 U.S. at 17, 59 L. Ed. 2d at 114-115, 99 S. Ct. at 898.

"Rogers," the court said, "has no constitutional right to be regulated by a Board that is sympathetic to the commercial practice of optometry." 440 U.S. at 18, 99 S. Ct. at 898.

Certainly, the Texas Optometry Board was a state agency, whereas at least some of the plaintiffs are private agencies. The fundamental lesson of Friedman, supra, is applicable to plaintiffs' claim under the Equal Protection Clause, however. Nothing in the Equal Protection Clause prohibits the state from mandating certain conditions for membership on governing boards of those institutions which it creates, or which it permits to exist. As the Supreme Court stated when faced with an equal protection challenge to economic regulation in Almeida-Sanchez v. United States, 413 U.S. 266, 271, 37 L. Ed. 2d 596, 93 S. Ct. 2535, 2538 (1973), "[t]he businessman in a regulated industry in effect consents to the restrictions placed upon him." As plaintiffs exhaustively illustrate by

their Count IV, Paragraph 33, subparagraphs (c) and (d), and in their Memorandum of Law in Support of Plaintiffs' Motions For Temporary and Permanent Injunctions, p. 24, the health care industry is a highly regulated industry.

The West Virginia Legislature made a perfectly reasonable distinction in applying Code 16-5B-6a only to nonprofit and local governmental hospitals. These are the only hospitals in the State which are supported directly by the State, yet over which the State has no direct control. Nonprofit hospitals benefit from favorable tax status which has the effect of a grant of public monies. Local governmental hospitals are funded by political subdivisions of the State. The State has an interest in conforming the behavior of those institutions whose existence it directly supports more nearly to the Legislature's conception of the public weal. It may not have chosen, in Code 16-5B-6a, the most effective or least intrusive means of accomplishing its goal. That, however, is not the test. If the Court can find "'any reasonable ground for believing that there were public considerations justifying the particular classification and distinction made'," Fraternal Order of Police v. Dept. of State, 392 So. 2d 1296, 1303 (Fla. 1981), quoting North Ridge General Hospital v. City of Oakland Park, 374 So. 2d 461, 465 (Fla. 1979), then the enactment must be upheld against an equal protection challenge. W. Va. Code § 16-5B-6a should be upheld on this ground.

CONCLUSION

As the Court is well aware, professional corporations are limited by the laws of the State of West Virginia to stockholders who are licensed practitioners of the subject profession. See, e.g., W. Va. Code § 30-2-5a (1972) (legal corporations); W. Va. Code § 30-13-9 (1975) (engineering corporations). The Legislature may impose such restrictions and conditions on the boards of directors of corporations as it sees fit. See, e.g., W. Va. Code § 33-25-4 (1971) (setting forth specific requirements for members of board of directors for health care corporations). Code 16-5B-6a is but another legitimate regulation in this vein.

No serious harms will flow from a rejection of plaintiffs' request for an injunction. No hospitals will be closed, no jobs lost, no patients turned out into the street. As previously discussed, there is a statutory structure providing for an appeal from any license revocation, during which time the revocation would be stayed. Furthermore, not one single bit of evidence indicates that the Department of Health is going to revoke any hospital's license for noncompliance. Plaintiffs have utterly failed to demonstrate any propensity on defendant's part to take such action. Indeed, there is no reason why such action would be necessary in view of the remedy of injunctive relief available to the defendant under Code 16-5B-6a(d) to compel compliance with the statute.

CERTIFICATE OF SERVICE

I, Walt Auvil, Assistant Attorney General and counsel for L. Clark Hansbarger, Director of the West Virginia Department of Health, hereby certify that a copy of the foregoing Memorandum of Law in Opposition to Motion for Permanent Injunction was served on the counsel of record for plaintiffs herein on this 30th day of July, 1984, by hand delivering the same to:

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All other counsel of record, listed below, were served by depositing a copy of the same, postage prepaid, in the United States mail on this 30th day of July, 1984, at their last known addresses as disclosed by the pleadings:

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For the reasons set forth in this memorandum, the Court should deny plaintiffs' request for permanent injunctive relief and should dismiss Counts I through XV of the complaint with prejudice.

Respectfully submitted,

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