

**WEST VIRGINIA
SECRETARY OF STATE
NATALIE E. TENNANT
ADMINISTRATIVE LAW DIVISION**

Form #5

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2009 OCT -8 PM 2: 20

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

**NOTICE OF AGENCY ADOPTION OF A PROCEDURAL OR INTERPRETIVE RULE
OR A LEGISLATIVE RULE EXEMPT FROM LEGISLATIVE REVIEW**

AGENCY: Health Care Authority TITLE NUMBER: 65

CITE AUTHORITY: 16-2D-5(f)

RULE TYPE: PROCEDURAL INTERPRETIVE _____

EXEMPT LEGISLATIVE RULE _____

CITE STATUTE(S) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW

AMENDMENT TO AN EXISTING RULE: YES NO _____

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 10

TITLE OF RULE BEING AMENDED: Fee Schedule for Certificate of Need Matters

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: _____

TITLE OF RULE BEING PROPOSED: _____

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE

EFFECTIVE DATE OF THIS RULE IS November 9, 2009


Authorized Signature

**TITLE 65
PROCEDURAL RULE
HEALTH CARE AUTHORITY**

**SERIES 10
FEE SCHEDULE FOR CERTIFICATE
OF NEED MATTERS**

FILED
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OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

§65-10-1. General.

1.1. Scope. -- This rule establishes the schedule of fees for the filing of applications and exemption requests under the West Virginia Certificate of Need Program. Pursuant to W.Va. Code §16-29B-11, the Health Care Authority is authorized to administer the provisions of the Certificate of Need Program. W.Va. Code §§16-2D-1 et seq.

1.2. Authority. -- W.Va. Code §16-2D-5(f).

1.3. Filing Date. -- October 8, 2009.

1.4. Effective Date. -- November 9, 2009.

§65-10-2. Introduction.

2.1. W.Va. Code §16-2D-5(f) authorizes the charging of fees "for the filing of any application, the filing of any notice in lieu of an application, the filing of any exemption determination request, or the filing of any request for a declaratory ruling." The statute further provides that the "fees charged may vary according to the type of matter involved, the type of health service or facility involved, or the amount of capital expenditure involved." Finally, the statute directs that the fees received shall be deposited into a special fund known as the "Certificate of Need Program Fund" and are to be expended for the purposes of the program.

2.2. In setting a fee schedule, the Health Care Authority acknowledges the Certificate of Need program must be economically self sustaining. Fees are the primary revenue source to the program. The fees must support administrative, publication, review and other costs related to the statutory requirements of the program.

2.3. The Health Care Authority acknowledges that the State's acute care hospitals fund the general operations of the agency through the assessments provided for by W.Va. Code §16-29B-8(c), thus supporting the legal counsel services provided for the Certificate of Need program. Hence, the agency is of the opinion that accommodation of that fact should also be made in setting a fee schedule.

§65-10-3. Fee Schedule.

3.1. The fee to be paid by a health care facility or other entity upon filing an application or a request for an exemption shall be based upon a combination of the type of matter and the amount of the capital expenditure proposed. In addition, the Health Care Authority has taken into account the amount of staff time and resources that can be expected to be expended during the review of the various types of Certificate of Need applications and requests for exemptions.

3.2. There shall not be any fee imposed for a request by any entity for a determination of whether any specific proposal is reviewable by the Certificate of Need program.

3.3. Fees for applications. The following fees shall be paid concurrently with the filing of the application.

3.3.1. A fee of \$350.00 per bed for any application which involves the addition of beds.

3.3.2. A fee of \$1,500 for an application with a capital expenditure less than the expenditure minimum.

3.3.3. A fee of one-tenth of one percent of the total capital expenditure for any application with a capital expenditure in excess of the expenditure minimum, with a maximum fee of \$100,000.

§65-10-4. Fee Schedule for Exemption Requests.

4.1. There shall be a one thousand dollar (\$1,000.00) fee for the filing of any request for an exemption from Certificate of Need review.

§65-10-5. Waiver of Fees.

5.1. Any applicant which has had a loss (excess expenses over revenues) for its most recently completed fiscal year, may request a waiver of Certificate of Need fees.

§65-10-6. Credits and Refunds of Fees.

6.1. The Health Care Authority will issue a refund if the fee was erroneously paid.

6.2. In the event an entity files an exemption request which is denied, that entity will receive a credit applied to the application fee.

§65-10-7. Adjustments to Fees Paid.

7.1. Should an application be changed or should the proposed or actual capital expenditure of any application be increased at any point during the review of the application or following approval and up to the substantial compliance determination, then the applicant's fee will be recalculated and if an additional fee is determined to be required, then all review or post-review activities shall be placed on hold until such additional fee is paid by the applicant.

7.2. Should an application be changed or should the proposed capital expenditures be decreased at any point after the filing of the application, there shall not be any refund of the fee paid by the applicant.

§65-10-8. Conflicts in the Applicable Fee.

8.1. In the event that a proposal either fits into more than one category for the determination of the applicable fee or if more than one fee category is applicable to any given proposal, only one fee shall be imposed and that fee shall be the greater of the various applicable fees.

§65-10-9. Failure to Comply with Rule.

9.1. Any filing that is subject to the charging of a fee but which is not accompanied by the required fee shall not be processed by the agency and shall not be legally effective until the required fee is received.

9.2. In those instances subject to Section 7.1 of this rule where an additional fee is required because of a change in a proposal or of an increase in the proposed or actual capital expenditure, the state agency shall discontinue review or withhold substantial compliance determination until the required fee is paid.

9.3. Should any entity develop a new health service, a new institutional health service, or any other project that requires the filing of a request for exemption determination or an application without paying the required fee, the entity is hereby placed on notice that it may be subject to all of the penalty provisions of the certificate of need program including injunctive relief and imposition of a civil penalty pursuant to W.Va. Code §16-2D-13 and denial or revocation of license for operating pursuant to W. Va. Code §16-2D-12.

§65-10-10. Severability.

If any provisions of this rule or the application thereof to any entity or circumstance shall be held invalid, such invalidity shall not affect the provisions or the applications of these rules which can be given effect without the invalid provisions or application and to this end the provisions of these rules are declared to be severable.



WEST VIRGINIA
HOSPITAL ASSOCIATION

RECEIVED

2009 AUG 13 AM 11:11

Joseph M. Letnaunchyn
President and CEO

100 Association Drive
Charleston, WV 25311-1571
(304) 344-9744

August 13, 2009

WV HEALTH CARE
AUTHORITY

Sonia Chambers, Chair
West Virginia Health Care Authority
100 Dee Drive, Suite 200
Charleston, WV 25311

Dear Ms. Chambers:

On behalf of the West Virginia Hospital Association and its 73 hospitals and health systems, I submit this comment letter on the proposed Certificate of Need Procedural Rule "Fee Schedule of Certificate of Need Matters," Title 65 Series 10. We agree that SB 321 requires the agency to amend the current procedural rule to contain a maximum amount or cap for Certificate of Need (CON) fees. However, we do not understand the general principles articulated in the proposed rule for creating an economically self-sustaining CON program; the justification for the proposed \$100,000 fee cap (versus a lower cap); and the budgetary necessity for the overall increases contained in the fee schedule.

Issue 1: WVHA has not been provided evidence that a CON fee increase is necessary to support the operation of the CON program. Hospitals already more than adequately fund the agency through the annual assessment and will bear the financial burden of the proposed fee increases, as discussed below:

As you are aware, the West Virginia Hospital Association has been working with its membership for several years to formulate recommendations for improving the CON program in West Virginia. The WVHA and the Authority have worked collaboratively with the Legislature to address some very difficult issues while promoting and supporting the overall goals of the Certificate of Need program. However, we have also shared with you many of our concerns and issues regarding the Authority's operation of the CON program and the need for greater efficiency and fairness. Among the recommendations that we have shared with you are goals for streamlining the CON review process and imposing upper limits on CON fees to achieve fair treatment for all stakeholders.

We have also discussed with you the issues of equity and fairness relative to the overall assessment paid by hospitals to the Authority to fund the agency as authorized under WV Code 16-29B. In this ongoing discussion, we have expressed our concerns that only hospitals pay the general assessment and hospitals are also the predominant revenue source under the CON program with respect to application fees. Yet, increasingly, the Authority's operations have expanded beyond those core programs originally created by WV Code 16-29B and the revenues collected from hospitals are being used to fund programs that benefit stakeholders who do not share the burden of funding the agency. The West Virginia Health Information Network (WVHIN) is but one example of this inequity in the shared funding burden. This year's assessment on hospitals totaled over \$8 million.

And so, we are now puzzled by the position articulated and direction taken by the agency in the proposed "Fee Schedule" rules at § 65-10-2.2 and 2.3:

2.2. In setting a fee schedule, the Health Care Authority acknowledges the Certificate of Need program must be economically self sustaining. Fees are the primary revenue source to the program. The fees must support administrative, publication, review and other costs related to the statutory requirements of the program.

2.3. The Health Care Authority acknowledges that the State's acute care hospitals fund the general operations of the agency through the assessments provided for by W.Va. Code §16-29B-8(c). (Thus, supporting the legal counsel services provided for the Certificate of Need program.) Hence, the agency is of the opinion that accommodation of that fact should also be made in setting a fee schedule.

On one hand, the Authority is suggesting that the CON program should be economically self-sustaining. As such, revenues must be adequate to support the operation of the program. The Authority has not responded to WVHA's request for information concerning the operating budget of the agency and its programs, and so we have no ability to evaluate the adequacy of revenues generated from CON fees to fund the program.

Conversely, 2.3 suggests that the annual hospital assessment required by §16-29B supports the CON program's legal services. This seems to contradict the "self-sustaining" provision in 2.2 since "legal services" are a very large component of this regulatory program. And again, the WVHA has not been provided evidence to support the need for an increase in revenues funded by hospitals (either through CON fees or the annual hospital assessment) or the Authority's operating expenses and use of funds by the Authority.

One possible justification for raising fees would be to counteract a decline in the number of applications being filed and processed by the Authority in order to maintain budget neutrality. However, an analysis of the data presented by the Authority to the Select Committee D back in December of 2008, as supplemented by information obtained from the Authority's newsletters for the last 3 months of 2008, reveals that the number of applications have actually been increasing over time. Below is a summary of the Authority's own data on applications by year:

YEAR	APPROVED	DENIED	WITHDRAWN	PENDING/OTHER	TOTAL
2004	53	2	2	3	60
2005	52	0	1	0	53
2006	73	1	5	0	79
2007	60	0	5	8	73
2008	72	1	6	16	95

If anything, this would indicate that the Authority's CON fee revenue has been steadily increasing over a period of time in which the internal staff assigned to the program has not significantly changed. It seems incongruous that the Authority would choose now to implement an increase in fees when so many hospitals and other health care providers around the State of West Virginia have been significantly and adversely impacted by the downturn in the economy.

Issues 2 and 3: The WVHA opposes the proposed fee schedule increases and the cap at the level proposed, as explained below:

Reviewability requests: increased from \$0 to \$500 (500% increase)

§65-10-3.2 states that there shall not be a fee for a request for determination of reviewability. However, §65-10-3.1 imposes a new fee of \$500 (an increase from \$0.00) for such a request. The WVHA believes that this new fee for requests for determination of reviewability is unfair and unnecessary. Health care providers should continue to be encouraged to seek such determinations under this complex law and should not be saddled with a \$500 fee for a basic determination from the Authority. In 2008 alone, the Authority processed 122 reviewability requests. This proposed change will raise \$50,000 to \$60,000 in additional fees annually for the Authority on top of its other fee increases. No justification has been provided for this additional fee. Furthermore, there should be a provision (if such a fee is imposed) that the \$500 shall be credited toward the filing fee if a Certificate of Need application is to be required for the proposed activity.

Addition of beds: increased from \$200 to \$500 (150% increase)

§65-10-3.2 increases the fees by \$300 for each additional bed with no evidence of the need for such an increase in fees. It is very uncommon for a hospital, nursing homes, or residential facility to "add beds," and the necessity for an increase in this fee is unjustifiable.

Exemption applications: increased from \$500 to \$1,500 (200% increase)

§65-10-3.3 increases the fee for an exemption application by \$1,000. The purpose of the exemption application is to streamline the review process for specific projects having a minimal impact under specified statutory provisions, such as shared mobile technologies. Therefore it is an unnecessary burden for an applicant to be subject to this fee increase when the goal is to have a simple, expedited review process.

Capital expenditures under the expenditure minimum: increased from \$0 (or as specified) to \$1,500

§65-10-3.4 increases the fees for all reviewable projects that are under the capital expenditure minimum, involving the addition of a health service, establishment of an ambulatory health care facility, the acquisition of major medical equipment, hospices, group homes, home health agencies, and other reviewable capital expenditures. We believe there is no justification for such a high increase.

Sonia Chambers, Chair
August 13, 2009
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Capital expenditures over the expenditure minimum: same at \$0.1%

§65-10-3.5 continues the current rate, with a cap of \$100,000 that would not be reached until a capital expenditure of \$100,000,000. Projects of this magnitude are extremely rare, so the benefit of such a high cap benefits few if any future projects. In fact, based upon the data presented by the Authority to Select Committee D, only two projects in the last eleven years would have benefited from this enormous cap. Because of the excess revenues already collected by the Authority from hospitals, WVHA requests consideration of a \$25,000 cap, so that the capital expenditures made by a hospital are dedicated to the project rather than paid as a "tax" to "overfund" a governmental agency. Even at the proposed cap level of \$25,000, only one project filed in 2008 with the Authority would have benefited. A more reasonable and realistic cap must be identified going forward.

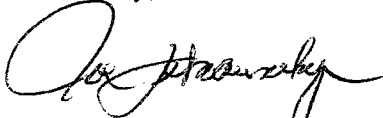
Waiver of fees

§65-10-5.1 provides a waiver of fees for a hospital with a negative cash flow for the prior five fiscal years and with less than 30 days cash on hand. This waiver provision has little if any benefit except for the smallest and most financially vulnerable hospitals that are already subject to fee waivers under the CON law. The waiver provision has been rendered meaningless by these drastic changes.

We stand ready to work with you to develop a fair and defensible fee schedule based upon an examination of reasonable revenue requirements to fund the Authority's statutory responsibilities. Our goal is to promote an efficient and effective CON program while promoting equity among stakeholders, and financial and regulatory relief for West Virginia hospitals.

As you know, WVHA and the members of the Health Care Authority Board have a meeting scheduled for September 23 to discuss a variety of issues, including CON fees. Therefore, we respectfully request that the fee schedule implementation be delayed until we can have that exchange. I look forward to meeting with you.

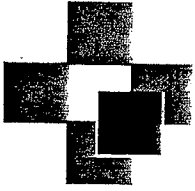
Sincerely,



Joseph M. Letnaunchyn
President & CEO

JML/jm

c: Joe Manchin, III, Governor, State of West Virginia
Larry Puccio, Chief of Staff



West Virginia
Behavioral
Healthcare
Providers
Association

RECEIVED

2009 AUG 14 AM 11:38

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WV HEALTH CARE
AUTHORITY

August 12, 2009

Ms. Marianne Kapinos, General Counsel
West Virginia Health Care Authority
100 Dee Drive
Charleston, WV 25311

Dear Ms. Kapinos:

On behalf of the West Virginia Behavioral Healthcare Providers Association (the "Association"), please accept these comments on the Health Care Authority's ("Authority") proposed procedural rule, Fee Schedule for Certificate of Need Matters. The Association has serious concerns about the proposal to charge \$500 for the filing of a request for a ruling on reviewability and recommends that the Authority delete this fee from the procedural rule.

If the Authority imposes this fee, it may inadvertently eliminate a source of information about health care providers. Providers frequently request a determination of reviewability as a way to keep the Authority informed, even when the provider is fairly certain the proposed action is not subject to certificate of need review based on numerous previous decisions. With a \$500 fee for a reviewability review, providers will be reluctant to file a request unless there is a reasonable doubt about the answer.

In addition, this fee will pose a burden on comprehensive behavioral health providers/Hartley Core Providers. In a decision issued January 31, 1997 (**IN RE: All Behavioral Health Providers; CON File #97-WV-5953-X/HC**), the Authority determined that behavioral health services offered by the "Hartley Core Providers and core service agencies, recognized under Chapter 9 of the Community Behavioral Health Services Plan ('Hartley Plan')" were not subject to certificate of need review. In that decision, the Health Care Authority also directed that Hartley Core Providers request a determination of reviewability prior to any change in service and/or site.

Marianne Kapinos
August 12, 2009
Page 2

Hartley Core Providers are, with limited exceptions, not-for profit agencies charged with providing services to persons in need of behavioral health services based on ability to pay. Under this order and proposed fee schedule, Hartley Core Providers would be required to pay \$500 to request a ruling on reviewability even for a complete relocation of a site within a service area, something the Authority has determined numerous times is not subject to certificate of need review for any health care provider.

In like manner, and for the same reasons already mentioned, the proposed fee of \$1500 to file an application for exemption seems excessive in light of the fact that the vast majority of services proposed by our Members over the past few years resulted in a determination that the service was not reviewable.

Thank you very much for your consideration of this request to eliminate the proposed fee for requests for rulings on reviewability. If you have any questions or need additional information, please do not hesitate to let me know.

Sincerely,

A handwritten signature in cursive script that reads "John Russell".

John Russell
Executive Director

Cc: Association Members