WEST VIRGINIA

SECRETARY OF STATE

KEN HECHLER

ADMINISTRATIVE LAW DIVISION

Form #3

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65-11p

NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE
AND
FILING WITH THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

AGENCY: Health Care Cost Review Authority TITLE NUMBER: 16-2D

CITE AUTHORITY W.Va. Code, § 16-2D-4, -8; § 16-29B-11

AMENDMENT TO AN EXISTING RULE: YES___ NO X

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

_____

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: XI

TITLE OF RULE BEING PROPOSED: Exemptions From Certificate of Need Review

THE ABOVE PROPOSED LEGISLATIVE RULE HAVING GONE TO A PUBLIC HEARING OR A PUBLIC COMMENT PERIOD IS HEREBY APPROVED BY THE PROMULGATING AGENCY FOR FILING WITH THE SECRETARY OF STATE AND THE LEGISLATIVE RULE MAKING REVIEW COMMITTEE FOR THEIR REVIEW.

Walter J. Dale

WALTER J. DALE
Chairman

NOTICE

Legislative Rule:"Exemptions From Certificate of Need Review"

Please be advised that at its August 31, 1987, meeting, the board of directors of the West Virginia Health Care Cost Review Authority approved the above designated legislative rule as a proposed rule and directed it to be filed with the Legislative Rule-Making Review Committee and the Office of the Secretary of State.

The above titled legislative rule is hereby submitted to the Legislative Rule-Making Review Committee.

WALTER J. DALE
Chairman

Entered

Arch A. Moore, Jr.
Governor

STATE OF WEST VIRGINIA
HEALTH CARE COST REVIEW AUTHORITY

Walter J. Dale
Chairman

Board Members
Larry C. Fizer
Don M. Keesling

July 7, 1987

CERTIFIED MAIL

Dr. Otis R. Bowen
Secretary
United States Department of
Health and Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20201

Dear Dr. Bowen:

Re: West Virginia Legislative Rule: Exemptions
From Certificate of Need Review

Pursuant to West Virginia Code, § 16-2D-8(b)(3), we are required to send to you any proposed regulations for the West Virginia Certificate of Need Program. Enclosed herewith, please find a copy of the above noted rules which we are distributing for public comment.

We have a public hearing scheduled for August 10, 1987, on these legislative rules and comments may be given to us in either oral form at the public hearing or by mailing copies of written comments to us by the date of the hearing.

We invite you and your agency to make such comments on these rules as you believe appropriate.

Sincerely,

Walter J. Dale

WALTER J. DALE
Chairman

WJD/JHK/jmh

Enclosure

100 Dee Drive Charleston, West Virginia 25311 Telephone: (304) 343-3701

FISCAL NOTE FOR PROPOSED RULES FILED

1987 SEP -3 PM 1:30

SECRETARY OF STATE

Rule Title: Exemptions From Certificate of Need Review

Type of Rule: X Legislative _____ Interpretive _____ Procedural

Agency Health Care Cost Review Authority Address Suite 201, 100 Dee Drive, Charleston, WV 25311

1. Effect of Proposed Rule	ANNUAL Increase	ANNUAL Decrease	FISCAL YEAR Current	FISCAL YEAR Next	FISCAL YEAR Thereafter
Estimated Total Cost	$ -0-	$	$ -0-	$	$
Personal Services					
Current Expense					
Repairs and Alterations					
Equipment					
Other					

2. Explanation of above estimates:

In the absence of this rule, the agency would continue with its former procedures of subjecting projects covered by the rule to certificate of need review. The procedures set forth by the rule may eventually decrease the overall workload of the agency; but, that decrease cannot be projected at this time.

3. Objectives of these rules:

To implement certain amendments to Chapter 16, Article 2D, made by the 1987 Legislature. Specifically, Enrolled Committee Substitute for House Bill 2342 amended section 4 of the Certificate of Need Act by adding to it four (4) new subsections. Those new subsections authorized the agency to establish three (3) new exemptions from certificate of need review for certain types of projects and for the partial or total review of certain other types of projects. The four (4) new subsections are not operative until these rules are promulgated.

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

The rule may eventually decrease the overall workload of the agency by replacing the current full review procedures with a more expedited notice system for certain types of projects. The decrease in workload may lead to a decrease in costs to the agency.

B. Economic Impact on Political Subdivisions; Specific Industries; Specific groups of citizens.

Health care facilities which would be subject to a full certificate of need review for certain projects in the absence of this rule will save funds by not having to go through those reviews. The notice process employed by the rule should be less expensive and more swift than a complete review.

C. Economic Impact on Citizens/Public at Large.

It is hoped that the health care facilities will pass along to their patients the savings projected in 4.B. above.

Date: September 3, 1987

Signature of Agency Head or Authorized Representative

WEST VIRGINIA LEGISLATIVE RULE
HEALTH CARE COST REVIEW AUTHORITY
CHAPTER 16-2D

SERIES XI

Title: EXEMPTIONS FROM CERTIFICATE OF NEED REVIEW

Section 1. General

1.1. Scope - This legislative rule establishes the standards for the exemptions from certificate of need review provided for by the 1987 amendments to the Certificate of Need Act, West Virginia Code, § 16-2D-1 et seq. Pursuant to West Virginia Code, § 16-29B-11, the Health Care Cost Review Authority is designated to be the state agency charged with administering the certificate of need program.

1.2. Authority - West Virginia Code, § 16-2D-8, § 16-2D-4(f)-(i), and § 16-29B-11.

1.3. Filing Date - September _____ , 1987.

1.4. Effective Date - _____ .

Section 2. Introduction

This legislative rule implements certain of the provisions of Enrolled Committee Substitute For House Bill 2342 which was signed by the Governor. That bill amended West Virginia Code, § 16-2D-4, by adding to it four (4) new subsections. Those new subsections authorize the state agency to promulgate rules to exempt from certificate of need review certain activities of health care facilities.

Section 3. Replacement Major Medical Equipment

3.1. Any legal entity which wishes to acquire, either by purchase, lease, or other comparable arrangement, major medical equipment which merely replaces medical equipment already owned by the entity and which has become outdated, worn-out, or obsolete may do so without undergoing certificate of need review but must first notify the state agency of its intention to do so and obtain an exemption from review. This exemption is not available to any entity which previously utilized mobile equipment and who now wishes to replace the mobile equipment with non-mobile equipment. In order to qualify for this exemption, the old equipment must have been defined as major medical equipment when it was initially obtained by the applicant and the applicant must have obtained either certificate of need approval or an exemption for its acquisition. In

addition, in order for the exemption to be obtained, the applicant must divest itself of the old equipment and not utilize it in the future.

3.2. The verified notice shall identify the legal entity involved, the location or locations of the present medical equipment, the location or locations where the new major medical equipment will be placed, the cost including installation of the equipment, the fair market value of the new equipment, the cost of any renovations needed for the installation of the new equipment, a description of the functions and uses of the old and of the new equipment, and utilization rates for the old equipment for the immediate past three (3) calendar years.

3.3. Upon receipt of the notice, the state agency shall within fifteen (15) days determine whether the new equipment acquisition is eligible for the exemption. In the event the state agency needs more information to make its determination, it shall request that information in writing. Such request shall terminate the applicable fifteen (15) day review period and a new fifteen (15) day review period shall begin upon receipt by the state agency of the requested information. Submission of incomplete or inadequate additional information shall not cause the new fifteen (15) day review period to begin.

3.4. Upon determining that the major medical equipment that is proposed to be acquired will merely replace equipment which is already owned by

the entity and which has become outdated, worn-out, or obsolete, the state agency shall grant the entity an exemption from certificate of need review.

3.5. The state agency's ruling upon the applicability of the exemption shall be in writing and shall be a final decision for purposes of West Virginia Code, § 16-2D-7(r) and § 16-2D-10. The legal entity wishing to acquire the new major medical equipment may not do so until the entry of a final decision.

Section 4. Capital Expenditures Not For Health Services.

4.1. Any legal entity otherwise subject to the certificate of need program may obtain an exemption for capital expenditures in excess of the expenditure minimum for the purpose of making emergency repairs to the entity's physical facility or equipment.

4.2. An "emergency repair" refers to a sudden and unforeseen breakdown or failure in the physical plant or equipment of a health care provider. The breakdown or failure must result in an imminent threat to the safety and well-being of the entity's patients or result in the inability of the entity to render health care services to its patients. Examples of such failures or breakdowns include the collapse of a wall of a building or the failure of a facility's boiler if that boiler is the primary source of heat or electricity for the facility.

4.3. The exemption may be obtained by the filing of a verified notice. The verified notice shall identify the legal entity involved, the amount of the capital expenditure involved, a description of the breakdown or failure involved, and a description of why that breakdown or failure constitutes an emergency as required by subsection 4.2.

4.4. Upon receipt of the verified notice, the state agency shall determine whether the proposal is eligible for the exemption. This determination shall be made as soon as possible and is not to exceed three (3) working days. In the event that additional or more complete information is needed, the state agency may first request and receive that information before a decision is made.

4.5. The state agency's ruling upon the applicability of the exemption shall be in writing and shall be a final decision for purposes of West Virginia Code, § 16-2D-7(r) and § 16-2D-10. The legal entity wishing to make the capital expenditure may not do so until after the entry of a final decision.

Section 5. Shared Services.

5.1. Any acute care facility otherwise subject to the certificate of need review program may obtain an exemption from certificate of need review for shared services between two or more acute care facilities. The shared

services must be those provided by major medical equipment and which through new or existing technology can reasonably be made mobile. Examples of such "shared services" are mobile computerized tomography (CT) scanners, magnetic resonance imaging (MRI) devices, and extra-corporeal lithotripters. Other technologies which are similar in mobility may be included in this exemption. In order to qualify as a "shared service," the equipment must be on site at each acute care facility at least four (4) days out of each month unless good cause is established by the acute care facilities for waiving or modifying this requirement.

5.2. In order to obtain the exemption, the acute care facilities must file a verified notice with the state agency. The verified notice shall identify the hospitals and all other entities involved in the proposal, identify the equipment to be acquired and the services to be provided, the fair market value of the equipment to be provided, the capital expenditures to be made by each hospital, each hospital's annual operating expenses for the each of the first three (3) years of operation of the shared services, and the proposed schedule for the equipment's use at each hospital.

5.3. This exemption is not available if any non-acute care facility or entity will utilize the major medical equipment for the provision of health services to that facility's or entity's patients. However, the equipment may be

owned by a non-acute care facility or entity which in turn contracts, leases, or rents it exclusively for use by acute care facilities.

5.4. Upon receipt of the verified notice, the state agency shall within fifteen (15) days determine whether the proposal is eligible for the exemption. In the event the state agency needs more information to make its determination, it shall request that information in writing. Such request shall terminate the applicable fifteen (15) day review period and a new fifteen (15) day review period shall begin upon receipt by the state agency of the requested information. Submission of incomplete or inadequate additional information shall not cause the new fifteen (15) day review period to begin.

5.5. Upon determining that the equipment to be acquired to provide the shared services meets the conditions stated above in subsection 5.1. and in 5.3., the state agency shall grant the entities involved an exemption from certificate of need review.

5.6. The state agency's ruling upon the applicability of the exemption shall be in writing and shall be a final decision for purposes of West Virginia Code, § 16-2D-7(r) and § 16-2D-10. The major medical equipment affected by this exemption shall not be acquired or contracted for until after the entry of a final decision.

Section 6. Other Claims Of Exemption.

6.1. Any health care facility which is otherwise subject to the certificate of need program that intends to enter into a capital expenditure in an amount less than the expenditure minimum but not by more than $100,000.00 shall file a verified notice in the form prescribed by subsection 6.3 of this rule with the state agency. For example, if the expenditure minimum is $1,000,000.00 and the facility intends to make a capital expenditure of $900,000.00, then a notice is required. But, if the intended capital expenditure is $899,999.00, then a notice is not required. Of course, as the expenditure minimum changes, this requirement will change with it.

6.2. If any health care facility proposes to add health services to those offered by the health care facility and if such services were not offered on a regular basis by or on behalf of that facility within the twelve-month period prior to the time such services would now be offered, then that proposal may be exempt from certificate of need review if it meets both of the requirements stated below in this subsection. Otherwise, the proposal is subject to certificate of need review.

6.2.1. If the proposed addition to health services meets the requirements of subsection 4.3. of the Legislative Rule for the Certificate of Need Program, Series 7, Title 65 (1983); and

6.2.2. If a health care facility proposes to develop or to acquire a new physical location separate and apart from its existing physical site upon which the additional health service will be offered or provided, the proposal may be exempt from certificate of need review unless the state agency determines that subsection 6.5. of this legislative rule bars such an exemption. If no new physical site is involved in the proposal, then this subsection 6.2.2. is not applicable to the proposal and only subsection 6.2.1. shall be considered. In the event that it is determined that the proposal actually constitutes the development of an ambulatory health care facility as defined at section 2(b) of the Act, then the proposal shall be subject to certificate of need review under section 3(a) of the Act as being for the construction, development, acquisition, or other establishment of a new health care facility.

6.3. In the case of either subsection 6.1. or 6.2., the verified notice shall identify the health care facility involved, shall describe the proposal, shall state the amount of capital expenditure involved including all acquisition or lease costs, renovation costs, and installation costs, and shall state the annual operating expenses for each of the first three (3) years of operation.

6.4. In those instances where the health care facility wishes to institute a new health service, the verified notice shall also identify all of the existing health care facilities in the geographic area which are similar to the applicant or to the proposed facility and shall explain why those health care

facilities which provide the same or similar services to those proposed by the claimant would not be in competition with those proposed by the claimant. The applicant must also provide the state agency with projections for its first three (3) years of operations of each county in or out of the state from which it expects the proposal to generate at least 10% of its patients or 10% of its gross revenues.

6.5. If the state agency determines based upon economic and geographic factors within the geographic area of the proposed health service that such proposed additional health service will be offered in competition with other health care facilities providing the same or similar services, then the exemption shall be denied and the health care facility shall file the appropriate application for certificate of need approval. This determination shall be made within ten (10) days of the receipt by the state agency of the verified notice. In making this determination, the state agency may obtain additional information from the claimant, other health care facilities, and its own files. The decision on the applicability of the exemption shall identify all of the information obtained by the state agency and the claimant shall be informed of the information obtained and the sources thereof.

6.6. In determining whether or not economic and geographic factors within the geographic area of the proposed health service would result in the proposed health service being offered in competition with other health care

facilities providing the same or similar services, the following criteria shall be used.

6.6.1. In determining what the "geographic area" is of the proposed health service, reference shall first be made to the service area described for that health service by the state health plan. If the state health plan designates a "service area" for that service, then that service area shall form the basis of the geographic area of the proposed health service. To that service area shall be added each county -- in or out of the state -- from which the applicant projects obtaining at least 10% of its clients or 10% of its gross revenue.

6.6.2. Any health care facility that provides the same or similar services to that proposed to be offered by the applicant that is located in the geographic area determined under subsection 6.6.1. shall be determined to be in competition with the proposal. In addition, if a health care facility that is not located in the geographic area determined pursuant to subsection 6.6.1. for the proposal but that does itself derive 10% of its patients or 10% of its gross revenue from within that same geographic area shall be determined to be in competition with the proposal.

6.7. For those instances other than those proposals which are denied pursuant to subsection 6.5., the state agency shall within ten (10) days of its receipt of the verified notice make one of the following responses:

6.7.1. Accept the claim of exemption;

6.7.2. Require the health care facility to furnish the state agency with additional information in which event a new ten (10) day review period shall begin upon receipt of the additional information;

6.7.3. Reject the claim of exemption; or

6.7.4. Determine that a certificate of need application is necessary for the proposal in order to determine if the claim of exemption may be upheld. The application required by this section shall be an expedited application and the review period for it shall be the same as for any other expedited application.

6.8. For an application arising under subsection 6.1., the state agency shall determine the proposed capital expenditure to be exempt from review if the entire expenditure is found to be less than the then applicable expenditure minimum.

6.9. The state agency's ruling upon the applicability of the exemption shall be in writing and shall be a final decision for purposes of West Virginia Code, § 16-2D-7(r) and § 16-2D-10. The health care facility wishing to make the capital expenditure or to add the health service shall not do so until the proposal is determined to be exempt.

Section 7. Requests For Hearings And Reconsideration Hearings.

7.1. In the event that an affected person requests a hearing or a reconsideration hearing on any exemption provided for by this rule, the exemption review period shall be terminated. A hearing shall then be held within thirty (30) days of the request for a hearing unless the state agency sets a later date upon a showing of good cause therefor.

7.2. The state agency may conduct a prehearing conference in accordance with Rule 16 of the West Virginia Rules of Civil Procedure. The parties may engage in discovery as provided by the West Virginia Rules of Civil Procedure if an order is first obtained from the state agency or a hearing examiner appointed by it.

7.3. At the conclusion of the hearing, the parties may submit proposed findings of fact, conclusions of law, and legal briefs. The state agency shall then have twenty (20) days from the receipt of those items or the closure of the record if those items are not tendered to make its determination in writing.

7.4. Upon receipt of any verified claim for an exemption other than one under section 4 of this rule, the state agency shall cause a notice to the public to be issued of that claim. The notice shall identify the applicant and shall describe the proposal. The notice shall be published as part of the state

agency's legal advertisement in the Saturday Charleston newspapers and shall be included in the state agency's weekly newsletter and in the publication in the State Register.

7.5. Notice of a section 4 verified claim shall be in such form and manner as the state agency can reasonably provide and may include a post-decision notice as described in subsection 7.4. of this rule.

Section 8. Definitions

As used in this Legislative Rule, all terms that are defined in the Act at section 2 thereof have those same meanings which are in some cases further clarified herein. All terms not defined in the Act have the following meanings unless the context expressly requires otherwise.

8.1. "Act" means the Certificate of Need Act, West Virginia Code, § 16-2D-1 et seq.

8.2. "Capital expenditure" has the meaning ascribed to it by section 2(f) of the Act. In particular, the state agency calls attention to fact that the term "capital expenditure" includes expenditures for studies, surveys, designs, plans, working drawings, specifications, and other activities, including staff effort and consulting and other services, essential to the proposal. Also, as

section 2(f) of the Act notes, a series of expenditures, each less than the expenditure minimum, may be taken together if the state agency determines the expenditures should be combined as provided for by the Act.

8.3 "Merely replaces" as used in section 3 of this rule means that the new major medical equipment does not differ in essential purpose or function from the equipment that is being replaced. Examples of a "mere replacement" is a second generation CT scanner by a fourth generation CT scanner. However, replacement of a CT scanner with a CT scanner that also provides radiation therapy is not a "mere replacement." Also, replacement of a CT scanner with a magnetic resonance imaging device is not a mere replacement since the essential purpose and function of the two types of imaging devices are dissimilar.

8.4. The term "not offered on a regular basis" means that the applicant has not held itself out to the public as offering the health service in issue or has not actually provided the service to any patient during the requisite twelve (12) months. It does not mean merely maintaining the capability of providing the health service.

8.5. "Obsolete" means no longer used or useful because of outmoded design or construction. This term is subjective and varies from user to user. What is obsolete to one facility may be quite useful to another facility because of varying needs between facilities. Hence, in determining whether or not an

item of major medical equipment is "obsolete," the needs of the possesser of the equipment must be taken into account.

8.6. "Outdated" means that the major medical equipment has become obsolete and has been replaced in common usage by other equipment.

8.7. "State agency" means the West Virginia Health Care Cost Review Authority which is designated to administer the certificate of need program by West Virginia Code, § 16-29B-11.

8.8 "Verified notice" means a notice containing the facts required by the various subsections of these rules and which has attached to it a statement made under oath before a notary public or other official entitled to administer oaths by the chief executive officer of the entity applying for the exemption that the facts and circumstances set forth in the notice are true or are believed to be true by the chief executive officer.

8.9. "Worn-out" means that the maintenance and repair costs together with lost revenue resulting from excessive downtime exceeds the annual depreciation expense of the major medical equipment.

Section 9. Severability

If any provision of these rules or the application thereof to any person 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 involved provisions or application and to this end the provisions of these rules are declared to be severable.

WEST VIRGINIA LEGISLATIVE RULE
HEALTH CARE COST REVIEW AUTHORITY
CHAPTER 16-2D
SERIES XI

Title: EXEMPTIONS FROM CERTIFICATE OF NEED REVIEW

Section 1. General

2. Introduction

3. Replacement Major Medical Equipment

4. Capital Expenditures Not For Health Services

5. Shared Services

6. Other Claims Of Exemption

7. Requests For Hearings And Reconsideration Hearings

8. Definitions

9. Severability

Arch A. Moore, Jr.
Governor

STATE OF WEST VIRGINIA
HEALTH CARE COST REVIEW AUTHORITY

MEMORANDUM

DATE: September 3, 1987

TO: Secretary of State's Office

FROM: Walter J. Dale, Chairman

RE: Responses To Public Comments Regarding Proposed Legislative Rule: "Exemptions From Certificate Of Need Review" and Explanation of Amendments.

At its August 31, 1987, meeting, the board of directors of the West Virginia Health Care Cost Review Authority approved this proposed rule for final adoption. In accordance with the Administrative Procedure Act, West Virginia Code, § 29A-1-1 et seq., the Authority convened a public hearing on this proposed rule on August 10, 1987. A copy of the transcript of that hearing and of the written comments concerning the proposed rule are enclosed herewith. This memorandum sets forth the reasons for the changes that were made to the original draft of the proposed rule and also responds to the comments received on the proposed rule. With the exception of one speaker at the public hearing, the oral comments made were also presented in more detailed written form. Hence, the written comments will be addressed in lieu of addressing the duplicative oral comments as well. Finally, two hospitals submitted written comments by mail which were received on August 11, 1987, after the formal cut-off date of August 10, 1987, for the receipt of written comments. However, the Authority has elected to consider those comments and they are addressed below.

(A) HCA - Raleigh General Hospital -- by Kenneth M. Holt.

(1) Initially Mr. Holt comments that the rules are vague due to the lack of specific criteria for determining when an exemption is applicable. The Authority disagrees that the proposed rule lacked criteria for decision-making. However, in order to make even clearer the basis for allowing an exemption, the Authority has reworded the statements of the conditions for each exemption and in several instances has repeated the criteria later in a given section.

(2) Mr. Holt also comments that the provisions of section 4 as originally written should not arbitrarily limit the exemption to $2,000,000.00 and should not discriminate against hospitals by denying the exemption where the expenses related to the capital expenditure would be included in the hospital's rate base.

100 Dee Drive Charleston, West Virginia 25311 Telephone: (304) 343-3701

The Authority disagrees that the former provision of section 4 was either arbitrary or discriminatory in an unlawful fashion. However, the various comments received on section 4 convinced the board that the section would prove problematic in application especially with regard to accounting difficulties. Hence, the board has elected to narrow the scope of the section 4 exemption to emergency situations requiring a capital expenditure in excess of the expenditure minimum to keep the health care facility operational. This will allow the Authority to respond quickly to emergency situations. However, no other capital expenditures in excess of the expenditure minimum are exempted.

(3) Mr. Holt complains that section 5 would prevent two hospitals from obtaining an exemption for certain shared services if they formed a joint venture or company which would actually own the major medical equipment involved. Because of this complaint and because of the other comments received on this point, the Authority has amended section 5 to eliminate the complained of limitation. Thus, it no longer matters who actually owns the equipment so long as only hospitals utilize the equipment for the provision of services to patients.

(4) Finally, Mr. Holt comments that section 6 would subject any and all capital expenditures by any health care facility to potential review. The Authority acknowledges that the scope of section 6 was that broad. It is the opinion of the Authority that section 4(i) of the Act is written that broadly. However, the Authority has elected to exercise its discretion and to substantially narrow the scope of this requirement. As rewritten, section 6 will serve as a check on those capital expenditures which are close to the expenditure minimum but which the facility contends remain less than that minimum. Thus, the Authority will be able to scrutinize borderline cases and ensure that only those capital expenditures that are truly less than the expenditure minimum are exempt.

(B) West Virginia University Hospitals, Inc. (WVUH)

(1) WVUH initially complains that section 4 is arbitrary and that there is no basis for putting a ceiling on capital expenditures that do not relate to health services. WVUH also complains of the requirement that the expenditure not be reflected in the hospitals rate base. This comment was addressed above.

(2) WVUH requests additional clarification of the criteria for the exemption relating to replacement of certain major medical equipment. Clarification has been supplied by the addition of definitions of certain key terms as well as the addition of specific criteria for the review of this type of exemption request. The addition of requirements relating to the length of prior use of the equipment and requiring that the old equipment have itself been major medical equipment for which either approval or an exemption was obtained will avoid situations where a facility could manipulate the exemption beyond its original purpose.

(3) WVUH also complains of section 5's limitation of the exemption to only hospital participants. This limitation has been removed as explained above.

(C) St. Mary's Hospital -- by James E. Spencer.

(1) Mr. Spencer first complains that the rules lack criteria. This has been addressed above.

(2) Mr. Spencer complains that the rule increases costs to the hospitals in several instances. He cites section 3's provisions for the replacement of major medical equipment, section 4's treatment of capital expenditure's not related to health services, and the prohibition of non-hospitals from being a part of a shared services relationship. The Authority disagrees with Mr. Spencer's conclusions. It should be remembered that in the absence of section 3, all acquisitions of major medical equipment would be subject to a complete certificate of need review. By designating criteria under which certain acquisitions are not reviewable, the costs of a complete review are saved. Section 4 has been rewritten to apply to only emergency situations and thus avoids the criticism made by Mr. Spencer. Of course, the scope of the exemption is considerably narrower than that desired by the commentor. Finally, Mr. Spencer's concern over the participants in a shared services scheme has been addressed above.

(D) Princeton Community Hospital — by Allen Meadows.

(1) Mr. Meadows first criticizes section 4's exclusion of exempted capital expenditures from the rate base of a hospital. As noted above, this section has been rewritten and now is limited to emergency situations.

(2) Mr. Meadows complains of the requirement that all participants in a shared services scheme be hospitals. This concern has been addressed above.

(3) Regarding the provision for a hearing in section 7.1, Mr. Meadows suggests that the hearing be held within a specific time-period and should be not left to be scheduled at the "earliest opportunity" of the parties. Section 7.1 has been rewritten to require a hearing "within thirty (30) days of the request for a hearing unless the state agency sets a later date upon a showing of good cause therefor." Thus, the amended provision sets the requested specific time-period for the hearing yet allows the Authority flexibility in handling unusual situations. Mr. Meadows' suggestion of fourteen (14) days is deemed to be unrealistically short for the majority of cases.

(E) HCA - Putnam General Hospital -- by Dennis P. Bridgeman.

(1) Mr. Bridgeman first addresses section 4's limitation of the capital expenditure exemption. He criticizes both the $2,000,000.00 limit and the exclusion of related expenses from the hospital's rate base. This criticism has been discussed above.

(2) Mr. Bridgeman next complains of section 5's limitation of the shared services exemption to hospitals. As addressed above, this limitation has been removed when the exemption was restructured.

(3) Finally, Mr. Bridgeman requests greater specificity in criteria to be used. The new draft of the rule clarifies the criteria in a number of instances and furnishes definitions of certain key terms.

(F) St. Joseph's Hospital of Parkersburg — by Arthur A. Maher.

(1) Mr. Maher requests that the rule define the terms "merely replaces," "outdated," "worn-out," and "obsolete." Definitions have been provided.

(2) Mr. Maher requests a direct statement in section 3 that the "exemption procedure is not required for equipment purchases under $750,000.00". By its terms, section 3 relates only to major medical equipment. The Act's definition of that term specifies the requisite dollar amount (currently $750,000.00) as part of the definition of that term. Hence, the statement requested by Mr. Maher is not needed.

(3) Mr. Maher complains of former section 4's limitation of the capital expenditure exemption to $2,000,000.00 and to the exclusion of related expenses from the hospital's rate base. This criticism has been addressed above.

(4) Mr. Maher complains of section 5's limitation of the shared services exemption where the equipment is not owned by a hospital and where other entities will also use the equipment. The ownership limitation, as noted above, has been eliminated. However, it is the Authority's understanding of section 4 of the Act that the shared services exemption was to be available only to hospitals who use the major medical equipment involved and not to other providers.

(5) Mr. Maher suggests a sixty (60) day review period for situations where a hearing has been requested. By setting a thirty (30) day period for the holding of a hearing, the Authority believes it has shortened the hearing process considerably and that it can maintain control over the period of time following a hearing for the issuance of a decision.

(G) United Hospital Center -- by David Bailey

(1) Mr. Bailey first comments that section 3 concerning the replacement of worn-out, out-dated, or obsolete equipment requires too much data to be filed to justify the exemption. He also comments that once a particular item of equipment is determined to be obsolete, it should be automatically deemed obsolete in all future instances. The information requested by the board is deemed to be necessary to determine whether the equipment to be replaced really is out-dated, worn-out, or obsolete. The Authority has a mandatory duty to explore the factual basis for a claim of exemption and cannot rely blindly upon a facility's assertion of that fact. In addition, prior determinations that a

specific model or type of equipment is obsolete may vary from user to user depending upon the facility's needs. Such prior decisions can be relied upon as precedent by any other facility. However, such findings are not binding on other parties or in other factual circumstances.

(2) Mr. Bailey also comments that section 4 prevents hospitals from having access to the exemption by the imposition of the requirement that expenses related to the exempt capital expenditure not be included in the hospital's rate base. Mr. Bailey also believes that the $2,000,000.00 limit is arbitrary. As discussed above, both of these elements that Mr. Bailey complains of have been eliminated when this exception was rewritten to apply solely to emergency situations.

(3) Mr. Bailey complains of section 5's requirement that the shared equipment be owned by the hospitals involved. As discussed above, this requirement has been eliminated.

(4) Mr. Bailey also contends that in section 6 of the rule the requirement for a verified notice to obtain the exemptions discussed there actually defeats the availability of an exemption. He argues that section 6 is much too broad in scope and that an exemption request ought not be denied merely because a hearing has been requested by an affected party. The Authority has substantially limited the scope of the matters which must be submitted for a determination of non-reviewability. Only two limited areas are now subject to the determination. Also, the commentor misunderstands the intent behind the statement in former subsection 6.5.4. concerning the effect of a request for a hearing. Such a request was not intended to automatically indicate that an application would have to be submitted. Rather, it was one circumstance that appeared to be likely to sometimes result in the necessity for a full application to be filed. To eliminate this confusion, however, the Authority has eliminated the statement and will decide whether an application must be filed on the facts as they exist as a given time. Finally, the commentor fails to understand that all of the exemptions must be obtained by the applicant; that is, the burden of proof that an exemption is applicable always remains with the facility involved. The verified notices are intended to inform applicants of what information they must provide in order to carry their burden of proof. As such, the Authority believes the verified notices are necessary and essential.

(H) Charleston Area Medical Center, St. Francis Hospital, and Thomas Memorial Hospital -- by Jack Canfield.

(1) Mr. Canfield first notes that under section 3 the obsolescence of equipment is a subjective term which varies from provider to provider depending upon the uses and needs of that provider. The Authority agrees with this concept. Accordingly, the definition of "obsolete" reflects this subjective feature.

(2) Mr. Canfield also believes that the thirty (30) day review period provided by section 3 is too long. He suggests a ten (10) day period. The Authority has shortened the review period to fifteen (15) days which is the same length of time as for a determination of completeness. Since the verified notice will not only have to be reviewed for completeness but will also require that a determination on the merits be made and a written decision issued, the Authority believes ten (10) days would be too short.

(3) Mr. Canfield also suggests that the rule should provide for a hospital to request a hearing. The rule states that any affected party can request a hearing. Under section 2 of the Act, the term "affected party" is defined to include the applicant.

(4) Mr. Canfield also suggests that after a decision is made that the applicant be afforded an opportunity to present additional information through the hearing process. The Authority does not agree. As an example, subsection 3.5. of the amended rule provides that a decision on an exemption request is a final decision for purposes of sections 7(r) and 10 of the Act. Section 7(r) concerns requests for reconsideration. In the Act, criteria are provided for when a reconsideration can be had and also provision is made for a hearing. Section 10 concerns appeals.

(5) Mr. Canfield comments that section 4 of the original draft should not be limited to a $2,000,000.00 ceiling and that expenses related to the exempt expenditure should not be excluded from a hospital's rate base. This objection has been addressed above.

(6) Mr. Canfield again suggests a ten (10) day review period for section 4. The Authority, for the reasons given above, believes a fifteen (15) day period is more appropriate.

(7) As to section 5, Mr. Canfield first objects to the limitation of the exemption if the shared equipment is not owned by the hospitals. This concern has been eliminated as noted above.

(8) Mr. Canfield repeats his concern for a ten (10) day review period and for a reconsideration process. These points have been addressed above.

(9) As to section 6, Mr. Canfield disputes the requirement that proof of competition with another provider should not bar a proposal from the exemption. He also states that the burden of proof regarding competition should be on the other, non-applicant facility. The Authority's reading of section 4(i) of the Act leaves no doubt that the Legislature intended for competition between facilities to be a basis for denying a requested exemption and for requiring the filing of an application. The Authority cannot change that requirement. Also, under certificate of need the burden of proof is always on the applicant for obtaining approval or for obtaining an exemption. The burden of coming forth with

evidence does shift from side to side during a case. This will be true as claims of competition arise.

(10) Mr. Canfield also suggests that a mechanism for avoiding frivolous challenges be developed. The statute gives any affected party an absolute right to a hearing if one is requested. No method of sorting meritorious from frivolous challenges is provided. The Authority questions its jurisdiction and power to create such a mechanism and also questions whether any such mechanism will actually result in a saving of resources. Rather, it appears to the Authority that such a mechanism will merely lead to contested situations over whether or not a challenge is frivolous.

(11) Mr. Canfield suggests that subsection 7.1. be amended to include a specific time for the holding of a requested hearing. This point has been addressed above.

(12) Finally, Mr. Canfield suggests that this rule be amended to allow for modifications to the expenditure minimum thresholds for both capital expenditures and for annual operating costs. The Authority declines this suggestion. We do not believe that this rule is an appropriate vehicle for that task. Also, we believe that those thresholds can be amended when the Authority elects to do so by the use of the rule-making process at that time.

(I) Wheeling Hospital -- by Gary Gould.

(1) Mr. Gould's oral comments at the public hearing began with his criticism of former section 4's treatment of capital expenditures. He objected to eliminating the expenses associated with those expenditures from the hospital's rate base. This point has been addressed above.

(2) Mr. Gould also suggested that the review periods for the exemption determinations be shortened including using a tight framework for requests for additional information. As noted above, the review periods, save when a hearing is requested, have been reduced to fifteen (15) days.

(J) West Virginia Hospital Association -- by Ken Rutledge.

(1) WVHA begins its critique of the proposed rule by stating four "areas of concern." First, is a complaint that the "rules as written require HCCRA to make a determination of the eligibility of exemption of a project." This criticism displays a fundamental misunderstanding of the workings of an administrative system and of fundamental statutory construction. In addition, this criticism, as do many of those that follow, are indicative of WVHA's attempt to use the rule-making process to gain territory it lost during the 1987 legislative session. It is axiomatic that if an exemption from review does not exist, then review is required for a proposal covered by the program. The exemptions permitted by the statute and committed to the discretion of the Authority do not establish an entitlement to health care facilities unless and until the exemption

is deemed applicable. WVHA would usurp that function and give it to the individual facilities. In the words of the cliche, the fox would be guarding the hen-house. Secondly, statutory construction requires one to take notice of subsections 4(d) and 4(e) of the Act. Those subsections create two exemptions -- one mandatory and one discretionary. Both subsections were implemented by rule. See section 4, Legislative Rules, Certificate of Need, 65-7 (1983). Both of those exemptions require agency approval of the claims for the exemptions. The new subsections of section 4 of the Act are modeled in their purpose, function, language, and intent after the two older exemptions. It is a fundamental principle of statutory construction that where an agency adopts a practice which is left standing by the Legislature and when the Legislature subsequently acts in a way consistent with the agency's prior practice, then it is concluded that the Legislature not only endorsed the agency's actions but also intended the same result. If not, the Legislature would have changed the prior formula. Thus, it can be seen that this criticism is wrong as a matter of law and of practical administration of the program.

(2) WVHA's second "area of concern" involves the criteria by which decisions will be made. As noted above, the Authority is of the opinion that the initial version of this rule did set forth adequate criteria. However, the rule was amended to make the criteria even clearer.

(3) WVHA next states that the "rules require information via inappropriate formal agency notification which could be used and misconstrued to require review under other sections of the statute." WVHA fails to recognize that in many places the Act overlaps itself in its requirement of review. Thus, it is often the case that two or more requirements for review under section 3 of the Act apply to a given proposal. Politically, WVHA desires to eliminate the certificate of need program or to at least restrict review to as narrow a scope as is possible. This latter view fails to comport with the breadth of the review requirements. It is a usual rule of law that exemptions from any general regulatory requirement are to be treated narrowly unless the Legislature expressly indicates otherwise. Here, there is no such express statement of intent. It is quite consistent with the Legislative purpose of these exemptions to find that while a given proposal is exempt from one review requirement, that a second review requirement applies. The Authority is mandated to carry-out the purposes of the Act. It is not mandated to ignore provisions of the law that apply to a given proposal. Merely because an opponent of the program believes that the other requirements of the Act should not be applied to a proposal that qualifies for an exemption from a different requirement does not justify such a dereliction of duty by the Authority. The rule requires information from an applicant that the Authority believes to be needed to both determine whether an exemption does apply and to fully understand what is proposed. We do not agree that the rule requires excessive or inappropriate information. Also, as described above, a formal exemption process is contemplated by the Act and not a situation where the industry polices itself.

(4) The last general area of concern by WVHA is that the rules "as written misconstrue the statute." No explanation is given. The Authority concludes that this non-specific allegation merely reflects WVHA's opposition to the Authority and the Certificate of Need program rather than any reasoned critique.

(5) WVHA criticizes the introduction to the rules because it does not comport with their notion that the exemptions create a self-policing mechanism to avoid the program. As explained above, the exemptions require an administrative decision that they are applicable. Hence, the criticism that the rule expands the program is inapposite because in those situations where full review is found to be not necessary, then the burden of full review would be avoided.

(6) WVHA's next critique is of section 3 of the rule. Initially, WVHA continues its objection to the requirement for filing a formal notice and obtaining approval. These points have been responded to above. Also, as has been noted above, the review period for these exemptions has been shortened to fifteen (15) days. The burden is properly placed upon an applicant to prove its qualification for an exemption. Hence, it is up to the applicant to make sure it provides the necessary information for that review. To the extent it fails to perform that task, then it follows that the exemption review will be prolonged. WVHA also mistakenly attempts to apply section 4(i) of the Act to the section 3 exemption. Subsection 4(i) of the Act creates an altogether separate process for the possible review of proposals which would otherwise not be reviewable under the Act. Hence, comparison of subsection 4(i) to the three exemptions is not only inappropriate, it is illogical. The suggested version of the exemption that is offered by WVHA is flawed because it illegally substitutes the term "mainly replaces" for the term used by the Legislature -- "merely replaces."

(7) WVHA next critiques section 4 of the rule. WVHA first argues that a formal exemption process is not contemplated by subsection 4(g). WVHA characteristically ignores the full language of the subsection and only quotes that portion it wishes to emphasize and then does so out of context. The subsection states: "The state agency may adopt regulations pursuant to section eight of this article to specify the circumstances under which and the procedures by which a certificate of need may not be required for the obligation of a capital expenditure in excess of the expenditure minimum for certain items not directly related to the provision of health services." To be noted is that the state agency is to define not only the criteria of the exemption -- that is, when it even exists -- but also, the procedures for obtaining the exemption. Of particular importance is the subsection's explicit recognition that full certificate of need review is what is being avoided and replaced by the exemption process. Comparison of this language should be made with subsection 4(e) of the Act which states: "The state agency shall adopt regulations, pursuant to section eight of this article, wherein criteria are established to exempt from review the addition of certain health services, not associated with a capital expenditure, that are projected to entail annual operating costs of less than the expenditure

minimum for annual operating costs." First to be noted is that subsection 4(e) is mandatory while subsection 4(g) is discretionary. Secondly, subsection 4.3. of the Legislative Rule, Certificate of Need, 65-7 (1983), relies upon the subsection 4(e) language to require an expedited application from the applicant. This is an even heavier burden on the applicant than section 4 of this proposed rule requires. It should be noted that the 1983 rule is a legislative rule which has been approved by the Legislature. Next WVHA criticizes former section 4 of the proposed rule for the criteria it stated. Those criteria -- a $2,000,000.00 limit and an exclusion of expenses from a hospital's rate base -- have been eliminated. The Authority has elected to reduce this exemption to emergency situations because of the impact of capital expenditures on the rates to be charged a facility's patients and because of the accounting problems that would be caused by the original version. Thus, WVHA's criticism of former section 4 is abrogated.

(8) Initially, WVHA repeats its philosophical concern over the wording of section 5 of the proposed rule. Those concerns have been dealt with above. WVHA also objects to restricting the ownership of the proposed shared major medical equipment to hospitals. That requirement has been dropped as noted above.

(9) WVHA claims that as originally proposed, section 6 of the rule exceeds the Authority's statutory power and jurisdiction. The Authority has rewritten section 6 as explained above. The discretion vested in the Authority under subsection 4(i) of the Act appears to allow for a very wide scope of inquiry inorder to determine if a proposal is not covered (i.e., not reviewable) under the Act. The original section 6 was written with that wide scope in mind. In revising the rule, however, the Authority is of the opinion that a narrower scope will more adequately carry-out the purpose of subsection 4(i). Those purposes appear to be twofold. First, to scrutinize capital expenditures by health care facilities; and, second, to force certificate of need review where a proposed new health service or a change in a health service by an existing facility is proposed for a new location that will also be in competition with existing facilities. This latter purpose largely duplicates existing provisions under section 3 of the Act; however, there may be areas that previously escaped certificate of need review under subsections 3 and 4(e) that will now be subject to review if competition is present.

WVHA presents a tortured construction of subsection 4(i). An examination of the language of subsection 4(i) reveals the following:

(a) There is a general statement of non-reviewability and, therefore, no requirement for an application for proposals not covered by the Act. This requires that the contents of subsection 4(i) be construed narrowly in favor of the applicant.

(b) The agency is then given the discretionary power to adopt rules to require the filing of a notice when a health care facility proposes to make a capital expenditure, to initiate a new health service, or to change a health

service -- even though the facility claims that the proposal is not required by the Act to be reviewed.

(c) The agency is then given four (4) optional responses: acceptance of the exemption; requiring more information; rejection of the exemption; or requiring an "application" in order "to determine if the claim of exemption may be upheld...."

(d) In addition, the subsection amplifies the fourth option noted above by stating that in some cases of a proposal for a new health service that are found to be in competition with another facility, then applications are required. This latter point is mandatory.

The Authority initially notes that employment of the subsection 4(i) process is totally discretionary with the agency. In reviewing the requirements of the subsection, the Authority believes the Legislature intended to subject capital expenditures, even if below the capital expenditure minimum, to some review. The Authority has elected to utilize this provision to examine proposed expenditures that approach the minimum level in order to assure itself that the proposal really is below the minimum. In addition, the latter part of the subsection focuses upon competition. It is the Authority's understanding that the Legislature's intent in this subsection was to provide for proposals where a new location is involved for the offering of a new health care service. Thus, in the rule the aspect of competition is highlighted as required while leaving facilities free, within normal certificate of need requirements, to continue using their existing facilities without regard to subsection 4(i). Thus, subsection 4.3. of the 1983 certificate of need rules remains in effect to cover most proposals for new services without a capital expenditure. Additionally, section 3 of the Act will still require full review for new services involving a capital expenditure or for new sites that constitute a new ambulatory health care facility. Only where none of these alternatives exist will subsection 4(i) of the Act and section 6 of the proposed rule be applicable to proposed new health services at new sites. WVHA's final point for section 6 that a definition is needed for "geographic area" has been dealt with by providing such a definition.

(10) WVHA claims that section 7 is redundant of section 10 of the Act and of Chapter 29A of the Code. The Authority does not agree that pointing out the rights of other parties than hospitals and other facilities is "unnecessary and redundant." The public, which is often less educated in the certificate of need program than the facilities, is highly deserving of knowing what its appeals and reconsideration rights are in a given case. In addition, section seven provides for prehearing conferences and arranges a schedule for the conclusion of a case following a hearing. Both of these matters are not fully set forth in the sources described by WVHA.

(11) WVHA concludes with a summary which reiterates its earlier points which will not be responded to again here. The Authority remains convinced that properly interpreted and administered, the exemption rules will provide a cost

savings to the public while not at the same time permitting the program to be ripped to shreds as is the apparent purpose of WVHA. WVHA's proposed rule which it includes with its comments is rejected for the reasons given throughout this memorandum.

(K) Other Amendments.

The rule has also been amended at the recommendation of the Authority's staff. Subsection 7.2. has been added to allow for limited discovery during preparation for a hearing. This question arises repeatedly during regular reviews and we thought it advisable to deal with it here. Subsection 7.4. was also added to expressly deal with the question of notice to the public of exemption requests and rulings thereon. This will allow the public to better assert its position on various matters.

Finally, despite all of the changes made to this proposed rule, it is the opinion of the Authority that the main purpose of the rule has not been changed and that no further public hearing is necessary or needed.

WJD/JHK/jmh

Arch A. Moore, Jr.
Governor

STATE OF WEST VIRGINIA
HEALTH CARE COST REVIEW AUTHORITY

Walter J. Dale
Chairman

Board Members
Larry C. Fizer
Don M. Keesling

September 3, 1987

Honorable Larry A. Tucker
Honorable Thomas A. Knight
Co-Chairmen, Legislative
Rule-Making Review Committee
Room M-438, State Capitol Building
Charleston, West Virginia 25305

Gentlemen:

Re: Proposed Legislative Rule:
Exemptions From Certificate of Need Review

Enclosed herewith please find fifteen (15) copies of the above noted rule and supporting documentation.

We request that the Committee waive the August 17, 1987, filing deadline for legislative rules in this instance. In support of this request, please note that Chapter 16, Article 2D of the Code, the Certificate of Need Program, was amended by the Legislature during the 1987 session. See Enrolled Committee Substitute for House Bill 2342. That bill was passed on March 14, 1987, and was made effective ninety days from passage; that is, June 14, 1987. This proposed rule was developed by the Authority during that time-period and was formally proposed by the Authority at its July 7, 1987, public meeting. A public hearing was scheduled for August 10, 1987, comments were received, modifications made to the rule, and it was finally formally approved on August 31, 1987.

We believe that we have moved with all deliberate speed in developing this rule in the time available to us while still complying with all of the time requirements of the rule-making process. Also, if the Legislature does not consider this proposed rule during its 1988 session, then the new exemptions permitted by section 4 of the Act will not be available to the health care industry until after the 1989 session. For these reasons, we believe the Committee should permit the late filing of this rule.

100 Dee Drive Charleston, West Virginia 25311 Telephone: (304) 343-3701

You will also note that in addition to the usual required documents to support a proposed rule, we have also enclosed the additional documentation required by section 8 of the certificate of need law. Thus, you will find a copy of our letter of July 7, 1987, to Dr. Otis R. Bowen, Secretary, United States Department of Health and Human Services, and a response letter dated August 17, 1987, from Robert E. Windom, M.D., Assistant Secretary of Health. You will also note that we caused publication of a legal notice of this proposed rule in at least one newspaper in every health planning and development region of the state and that we issued public notice of this proposed rule through the news media, the State Register, and through our newsletter which is sent to our interested persons list.

Sincerely,

WALTER J. DALE
Chairman

LARRY C. FIZER
Board Member

DON M. KEESING
Board Member

DFK/JHK/jmh

cc: Secretary of State

Fed I D 55 0464593

State of West Virginia, Mingo County, to-wit:

I, Louis P. Harvath III, Publisher of the WILLIAMSON DAILY NEWS, Inc., a paper published in the County aforesaid, do swear that the legal notice for the public meeting

_____

_____ hereto attached was published in said paper for one time successive weeks, the first publication thereof being on the 13th day of July 19 87, and subsequent publication on the _____ day of _____ 19_____, the _____ day of _____ 19_____, the _____ day of _____ 19_____, the _____ day of _____ 19_____, and the _____ day of _____ 19_____.

Louis P. Harvath III
Publisher

State of West Virginia, Mingo County, to-wit:

_____ being duly swon, says that he posted a copy of the annexed _____ at the front door of the Court House of said County, on the _____ day of _____ 19_____.

_____

Taken, subscribed and sworn to before me, this 13th day of July 19 87 Printer's FeeS 15.93

Sandra L. Gibbs
Notary Public for Mingo County

My Commission expires My Commission Expires August 20, 1992.

CLASS I
LEGAL NOTICE

TO WHOM IT MAY CONCERN:

Walter J. Dale, Chairman, West Virginia Health Care Cost Review Authority, hereby gives notice pursuant to West Virginia Code § 16-29D-6(b), § 16-29B-4, and § 29A-3-5, that the Health Care Cost Review Authority at its July 7, 1987, meeting promulgated a proposed legislative rule for the Certificate of Need Program titles "Exemption From Certificate of Need Review."

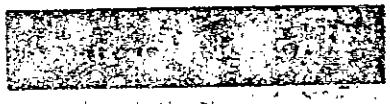
A public hearing for the receipt of oral and written comments on these rules will be held at 2:00 p.m., Monday, August 10, 1987, at the Authority's offices located at Suite 201, Dee Drive, Charleston, West Virginia 25311. Comments may be mailed to the Authority in lieu of attending the public hearing. The comments must be received at the Authority's offices by August 10, 1987, to be included in the record.

For a copy of the rule, please contact the Secretary of State's Office.

For additional information, contact Samuel B. Felio, Executive Director, at the Authority's address or by telephoning (304) 343-3701.

WALTER J. DALE
Chairman
7:13

State of West Virginia, County of Randolph, ss.



TO WHOM IT MAY CONCERN:

Walter J. Dale, Chairman, West Virginia Health Care Cost Review Authority, hereby gives notice pursuant to West Virginia Code, 16-2D-8(b), 16-29B-6, and 29A-3-5, that the Health Care cost Review Authority at its July 7, 1987 meeting promulgated a proposed legislative rule for the Certificate of Need Program—titled "Exemption From Certificate of Need Review."

A public hearing for the receipt of oral and written comments on these rules will be held at 2:00 p.m., Monday, August 10, 1987, at the Authority's offices located at Suite 201, 100 Dee Drive, Charleston, West Virginia 25311. Comments may be mailed to the Authority in lieu of attending the public hearing. The comments must be received at the Authority's offices by August 10, 1987, to be included in the record.

For a copy of the rule, please contact the Secretary of State's Office.

For additional information, contact Samuel B. Fallo, Executive Director, at the Authority's address or by telephone (304)345-3701.

WALTER J. DALE
Chairman

7—13

I, Charles R. Olson, Publisher of THE INTER-MOUNTAIN, a newspaper published at Elkins, in said county, do hereby certify that the annexed advertisement was published on the following dates:

July 13

19 87 as required by law.

Given under my hand this 13 day of July 19 87

Charles R. Olson
Publisher

Printer's Fee: $ 13.13

Subscribed and sworn to before me this 13 day of July 19 87

Notary Public

My Commission Expires the 24 day of [illegible] 19 94.

THE West Virginia Daily News

P.O. Box 471
Lewisburg, WV 24901
Phone 645-1206

Certificate Of Publication

TO WHOM IT MAY CONCERN:
Walter J. Dale, Chairman, West Virginia Health Care Cost Review Authority, hereby gives notice pursuant to West Virginia Code, Section 16-29D-6(b), Section 16-29B-8, and Section 29A-2-6, that the Health Care Cost Review Authority at its July 7, 1987, meeting promulgated a proposed legislative rule for the Certificate of Need Program – titled "Exemption From Certificate of Need Review".

A public hearing for the receipt of oral and written comments on these rules will be held at 2:00 p.m., Monday, August 10, 1987, at the Authority's offices located at Suite 201, 100 Dee Drive, Charleston, West Virginia, 25311. Comments may be mailed to the Authority in lieu of attending the public hearing. The comments must be received at the Authority's offices by August 10, 1987, to be included in the record.

For a copy of the rule, please contact the Secretary of State's Office.

For additional information, contact Samuel B. Foster, Executive Director, at the Authority's address or by telephoning (304) 342-5701.

WALTER J. DALE
Chairman
(July 13c)

STATE OF WEST VIRGINIA,

COUNTY OF GREENBRIER, ss:

I, Mary Bassett, one of the Editors of THE WEST VIRGINIA DAILY NEWS, a daily newspaper of general circulation published at Lewisburg, in the County of Greenbrier, State of West Virginia, do certify that publication of the advertisement or advertisements attached hereto was made in One (1) issues of said newspaper, dated July 13, 1987

Given under my hand this 20 day of July, 1987.

Mary Bassett
Editor or Publisher

16.50
Publication Fee

Subscribed and Sworn to before me this 21st day of July, 1987.

My commission expires April 11, 1990

Notary Public

Certificate of Publication

Welch, W. Va. .....JULY 16,....., 19 .87....

Ordered by...STATE OF WV.....
HEALTH CARE COST REVIEW
...CHARLESTON, WV...25311.....

To publishing annexed....NOTICE.....

.....ONE.....Times $ 16.25.

I, D. H. Corcoran, Editor and Publisher of the Welch Daily News, a newspaper published at Welch, McDowell County, W. Va., do certify that the annexed notice was published in said

paper for.....ONE TIME.....

~~xxxxxxxxxxxx~~ beginning on the.....13TH..... day of

.....JULY..... 19 . 87 . . and ending on the .13TH day of

of .....JULY..... 19 . . 87

...David H. Corcoran.....

Superior Welch XD759 6 Editor and Publisher

LEGAL NOTICE

TO WHOM IT MAY CONCERN:

Walter J. Dale, Chairman, West Virginia Health Care Cost Review Authority, hereby gives notice pursuant to West Virginia Code, — 16-29B-6, — 33A-3-6, — 33A-3-8, that the Health Care Cost Review Authority at its July 7, 1987, meeting promulgated a final and legislative rule for the Certificate of Need Program — titled "Exemption from Certificate of Need Review."

A public hearing for the receipt of oral and written comments on these rules will be held at 10:00 a.m., Monday, August 10, 1987, at the Authority's offices located at Suite 701, 100 Dee Drive, Charleston, West Virginia 25311. Comments which are mailed to the Authority in lieu of presenting the public hearing. The comments must be received at the Authority's offices by August 14, 1987, to be included in the record.

Copies of the rules may be obtained from the Secretary of State's Office.

For additional information, contact Samuel B. Reilly, Executive Director, at the Authority's address or by telephone at (304) 348-2931.

WALTER J. DALE
Chairman

7-13-1tc

CERTIFICATE OF PUBLICATION

THE WEIRTON DAILY TIMES

PUBLISHED BY

THOMSON NEWSPAPER, INC.

STATE OF WEST VIRGINIA
COUNTY OF HANCOCK

I....., for the publisher of the WEIRTON DAILY TIMES, a newspaper in the CITY of Weirton, State of West Virginia, hereby certify that the annexed publication was inserted in said newspaper on the following dates:

.... July 13, 1987 .....

.....

commencing on the 13th day of July, 19 87

Given under my hand this 15th day of July, 19 87

Sworn to and subscribed before me this 15th day of July, 19 87.

NOTARY PUBLIC

of, in and for HANCOCK COUNTY, WEST VIRGINIA
My Commission expires February 5, 1996

OFFICIAL SEAL
NOTARY PUBLIC
STATE OF WEST VIRGINIA
LINDA J. PRATT
R.D. #1, Box 340
Weirton, West Virginia 26062
My Commission Expires Feb. 5, 1996

LEGAL NOTICES

TO WHOM IT MAY CONCERN:

Walter J. Dale, Chairman, West Virginia Health Care Cost Review Authority, hereby gives notice pursuant to West Virginia Code, 16-2D-8(a), 16-29B-6, and 29A-3-5, that the Health Care Cost Review Authority at its July 7, 1987, meeting promulgated a proposed legislative rule for the Certificate of Need Program titled "Exemption From Certificate of Need Review."

A public hearing for the receipt of oral and written comments on these rules will be held at 2:00 p.m., Monday, August 10, 1987, at the Authority's offices located at Suite 201, 100 Dea Drive, Charleston, West Virginia 25311. Comments may be mailed to the Authority in lieu of attending the public hearing. The comments must be received at the Authority's offices by August 10, 1987, to be included in the record.

For a copy of the rule, please contact the Secretary of State's Office.

For additional information, contact Samuel B. Folio, Executive Director, at the Authority's address or by telephoning (304) 343-2701.

WALTER J. DALE
Chairman
7-13-87

AFFIDAVIT OF PUBLICATION

No 1696

State of West Virginia
County of Marion, to-wit:

I, Carolyn S. Hatting, being first duly sworn upon my oath,

do depose and say that I am Advertising Manager of THE TIMES-WEST VIRGINIAN a corporation, publisher of the newspaper entitled THE TIMES-WEST VIRGINIAN an Independent newspaper;

that I have been duly authorized by the board of directors of such corporation to execute this affidavit of publication; that such newspaper has been published for more than one year prior to publication of the annexed notice described below; that such newspaper is regularly published daily except Saturday and Sunday, for at least fifty weeks during the calendar year, in the Municipality of Fairmont, Marion County, West Virginia; that such newspaper is a newspaper of "general circulation," as that term is defined in article three, chapter fifty-nine of the Code of West Virginia, 1931, as amended, within the publication area or areas of the aforementioned municipality and Marion County; that such newspaper averages in length four or more pages, exclusive of any cover, per issue; that such newspaper is circulated to the general public at a definite price or consideration; that such newspaper is a newspaper to which the general public resorts for passing events of a political, religious, commercial and social nature, and for current happenings, announcements, miscellaneous reading matter, advertisements and other notices;

that the annexed notice of Notice was duly published in said newspaper once a day for 1 successive day (Class I), commencing with the issue of the 13 day of July 19 87, and ending with the issue of the 13 day of July 19 87 and was posted at the front door of the Marion County Court House on the 13 day of July 19 87; that said annexed notice was published on the following dates: July 13, 1987

and the cost of publishing said annexed notice as aforesaid was $ 15.25;

Carolyn S. Hatting

Taken, subscribed and sworn to before me in said county this 13 day of July 19 87.

My commission expires Jan. 24, 1990.

Notary Public of Marion County, West Virginia

CLASS I
LEGAL NOTICE
TO WHOM IT MAY CONCERN:
Walter J. Dale, Chairman, West Virginia Health Care Cost Review Authority, hereby gives notice pursuant to West Virginia Code, 16-29B-6, 16-29B-8(b), and 29A-3-5, that the Health Care Cost Review Authority at its July 7, 1987, meeting promulgated a proposed legislative rule for the Certificate of Need Program titled "Exemption From Certificate of Need Review."
A public hearing for the receipt of oral and written comments on these rules will be held at 2:00 p.m., Monday, August 10, 1987, at the Authority's office located at Suite 201, 100 Dee Drive, Charleston, West Virginia 25311. Comments may be mailed to the Authority in lieu of attending the public hearing. These comments must be received at the Authority's offices by August 10, 1987, to be included in the record.
For a copy of the rule, please contact the Secretary of State's Office. For additional information, contact Samuel B. Foltz, Executive Director, at the Authority's address or by telephoning (304) 343-3701.
WALTER J. DALE
Chairman
Times: July 13, 1987.

State of West Virginia, County of Upshur, ss:

.....Hunter.Long.....Advertising Manager
Record Delta, a newspaper published at Buckhannon in the said county, do hereby certify that the annexed .....
.....Class.I..Legal.Notice.for.West.Virginia.....
.....Health.Care.Cost.Review.Authority.....
was published once a week for .....one.(1)..... successive weeks in said Record Delta newspaper published as aforesaid, commencing on the .....
.....13th.of.July..... days of 19...87.....

Given under my hand this ....22nd.of.July..... day of 19...87.....
.... Hunter Long .....Advertising Manager

Printers fee $. 8.65 .....

WEST VIRGINIA, UPSHUR COUNTY, TO-WIT:

Subscribed and sworn to before me this 22nd day of July day of 19 87.....
Linda Snyder Notary Public.

My Commission expires .....February.21.1989.....

1987 LEGAL NOTICE

CLASS I

LEGAL NOTICE

TO WHOM IT MAY CONCERN:

Walter J. Dale, Chairman, West Virginia Health Care Cost Review Authority, hereby gives notice pursuant to West Virginia Code, 16-2D-5(b), 16-29B-6 and 29A-3-5, that the Health Care Cost Review Authority at its July 7, 1987, meeting promulgated a proposed legislative rule for the Certificate of Need Program, titled "Exemption From Certificate of Need Review."

A public hearing for the receipt of oral and written comments on these rules will be held at 2:00 p.m., Monday, August 10, 1987, at the Authority's offices located at Suite 201, 100 Dee Drive, Charleston, West Virginia 25311. Comments may be mailed to the Authority in lieu of attending the public hearing. The comments must be received at the Authority's offices by August 10, 1987, to be included in the record.

For a copy of the rule, please contact the Secretary of State's Office.

For additional information, contact Samuel B. Pallo, Executive Director, at the Authority's address or by telephoning (304) 343-2701.

WALTER J. DALE
Chairman
7-13-87

Affidavit of Publication

STATE OF WEST VIRGINIA,

MASON COUNTY, To-wit:

Personally appeared before the undersigned authority in and for the said County of Mason, this 13 day July of 1987, Ola Ewing, who being be me first duly sworn, did depose and say that he is employed of The Register, a daily newspaper of general circulation, printed, published and circulated in said County; that the Class 1 cost review

hereto annexed, was published in said newspaper for one day the first publication thereof having been made as aforesaid in the issue of 13 day of July, 1987 and the last issue of the _____ day of _____, 19_____

Ola Ewing

Taken, subscribed and sworn to before me in my said County, this 13 day of July 1987.

Notary Public.

My commission expires Jan 25 1993

Publication fee, $ 17.55

CLASS I LEGAL NOTICE

TO WHOM IT MAY CONCERN:

Walter J. Dale, Chairman, West Virginia Health Care Cost Review Authority, hereby gives notice pursuant to West Virginia Code, § 16-2D-8(b), § 16-29B-8, and § 29A-3-5, that the Health Care Cost Review Authority at its July 7 1987, meeting promulgated a proposed legislative rule for the Certificate of Need Program -- titled "Exemption From Certificate of Need Review."

A public hearing for the receipt of oral and written comments on these rules will be held at 2:00 p.m., Monday, August 10, 1987, at the Authority's offices located at Suite 201, 100 Dee Drive, Charleston, West Virginia 25311. Comments may be mailed to the Authority in lieu of attending the public hearing. The comments must be received at the Authority's offices by August 10, 1987, to be included in the record.

For a copy of the rule, please contact the Secretary of State's Office.

For additional information, contact Samuel B. Folio, Executive Director, at the Authority's address or by telephoning (304) 343-3701.

Walter J. Dale
Chairman

7-13-1t

STATE OF WEST VIRGINIA,
COUNTY OF OHIO.

I, Marjorie A. Strauss for the publisher of the

~~WHEELING INTELLIGENCER~~
WHEELING INTELLIGENCER newspapers published in the CITY OF WHEELING, STATE OF WEST VIRGINIA, hereby certify that the annexed publication was inserted in said newspaper on the following dates:

July 13, 1987

commencing on the 13th day of July, 1987

Given under my hand this 17th day of July, 1987

Marjorie A. Strauss

Sworn to and subscribed before me this 17th day of July 1987 at WHEELING, OHIO COUNTY, WEST VIRGINIA

Sandra M. Fydrick Notary Public

of, in and for OHIO COUNTY, WEST VIRGINIA

My Commission expires

OFFICIAL SEAL
NOTARY PUBLIC
STATE OF WEST VIRGINIA

[illegible] hereby gives notice pursuant to [illegible] Code, Section 16-[illegible], Section [illegible] and Section 29A-3-5, that the Health Care Cost Authority at its July 7, 1987, meeting proposed legislative rule for the Certificate [illegible] Exemption From Certificate of [illegible]

[illegible] for the receipt of oral and written [illegible] on the [illegible] will be held at 2:00 p.m., Monday, August 10, 1987, at the Authority's offices located [illegible] 207, 100 Dee Drive, Charleston, West Virginia 11. Comments may be mailed to the Authority in time preceding the public hearing. The comments must be received at the Authority's offices by August 10, 1987, to be included in the record.

[illegible] a copy of the rule, please contact the Secretary of [illegible]'s Office.

[illegible] additional information, contact Earnest B. Fella, Executive Director, at the Authority's address or by [illegible] (304) 343-2701.

WALTER J. DALE
Chairman

[illegible]: July 13

The MOUNDSVILLE DAILY ECHO

(304) 845-2660
POBOX369
MOUNDSVILLE
WV 26041

FED. ID NO. 55-0385-0173

—Attach clipping of ad here, permanently—

AFFIDAVIT OF PUBLICATION

STATE OF WEST VIRGINIA,
COUNTY OF MARSHALL, to wit:

I, Alleah Fahey, being first duly sworn upon my oath, do depose and say:

— that I am Legal Advertising Manager of the MOUNDSVILLE DAILY ECHO, an independent Democratic newspaper;

— that I have been duly authorized by the publisher, Samuel Shaw, to execute this affidavit;

— that such newspaper has been published for over 93 years, is regularly published afternoons daily except Sundays, for at least fifty weeks during the calendar year, in the municipality of Moundsville, Marshall county, West Virginia;

— that such newspaper is a newspaper of "general circulation" as defined in Art. 3, Chap. 50 of the Code of West Virginia 1931 as amended, within Moundsville and Marshall county;

— that such newspaper averages in length four or more pages, exclusive of any cover, per issue;

— that such newspaper is circulated to the general public at a definite price or consideration;

— that such newspaper is a newspaper to which the general public resorts for passing events of a political, religious, commercial and social nature and for current happenings, announcements, miscellaneous reading matters, advertisements and other notices;

—and that the annexed notice described as follows:

PARTY(ies) WV Health Care Cost Review Authority

NATURE (and agency if heard before one)

Public Hearing

CERTIF-BILL TO

Attn: Ms. Terah Jacobs
100 Dee Drive
Charleston, WV 25311

CLASS I

LEGAL NOTICE

TO WHOM IT MAY CONCERN:

Walter J. Dale, Chairman, West Virginia Health Care Cost Review Authority, hereby gives notice pursuant to West Virginia Code, +16-2D-8(b), +16-29B-8, and +29A-3-5, that the Health Care Cost Review Authority at its July 7, 1987, meeting promulgated a proposed legislative rule for the Certificate of Need Program -- titled "Exemption From Certificate of Need Review."

A public hearing for the receipt of oral and written comments on these rules will be held at 2:00 p.m., Monday, August 10, 1987, at the Authority's offices located at Suite 201, 100 Dee Drive, Charleston, West Virginia 25311. Comments may be mailed to the Authority in lieu of attending the public hearing. THe comments must be received at the Authority's offices by August 10, 1987, to be included in the record.

For a copy of the rule, please contact the Secretary of State's Office.

For additional information, contact Samuel B. Follo, Executive Director, at the Authority's address or by telephoning (304) 343-3701.

WALTER J. DALE
Chairman

PUBLISH: July 13, 1987.

WAS PUBLISHED IN SAID NEWSPAPER AS FOLLOWS:

TIMES	DATES
1	July 13, 1987

By WORDS OR	By INCHES	PUBLICATION CHARGES
	9	$10.80

(signed) Alleah Fahey

NOTARIZATION

Taken, sworn to and subscribed before me this 23 day of July, 1987

OFFICIAL SEAL
NOTARY PUBLIC
STATE OF WEST VIRGINIA
EILEEN CLARK
515 Tenth Street
Moundsville, West Virginia 26041
My Commission Expires Dec. 15, 1991

Eileen Clark
Notary public

Marshall Co.

LEGAL ADVERTISING RATES
(W.Va. official rate)

ONE TIME, per word 5c
TWO TIMES, per word 8.75cc
THREE TIMES, per word 12.5c

(Or, figured by space, according to official conversion table for regular Echo text type sizes):
ONE TIME, per inch, $2.12
TWO TIMES, per inch, $3.72
THREE TIMES, per inch $4.68
FOUR TIMES, per inch $5.95

If an ad is printed photographically in a size different from regular Echo text type, we will calculate inch measurement to equal the size ad would have taken if we had set it in our regular type.

When remitting payment, please either:
1—Enclose a duplicate of this certificate; OR
2—Note on your check WHAT ad is being paid for, to be sure you get proper credit.

I, CELIA BAILEY Classified Manager of THE LOGAN BANNER, a newspaper in Logan County, West Virginia, do hereby certify that the annexed Notice was published in said newspaper for 1 successive times on the following dates July 13, 1987

Given under my hand this 13th day of July, 19 87

Celia Bailey Classified Manager

State of West Virginia)

County of Logan) to wit:

Subscribed and sworn to before me this 13th day of July, 1987

My Commission expires

OFFICIAL SEAL
NOTARY PUBLIC
STATE OF WEST VIRGINIA
BARBARA J. SMITH
P.O. Box 149
Man, WV 25635
My Comm. Exp. Jan. 7, 1997

Barbara J. Smith
Notary Public

COPY OF PUBLICATIO
From The Logan Banne

TO WHOM IT MAY CONCERN: Walter J. Dale, Chairman, West Virginia Health Care Cost Review Authority, hereby gives notice pursuant to West Virginia Code 16-2D-8(b), 16-29B-8 and 29A-3-5, that the Health Care Cost Review Authority at its July 7, 1987, meeting promulgated a proposed legislative rule for the Certificate of Need Program - titled "Exemption From Certificate of Need Review."

A public hearing for the receipt of oral and written comments on these rules will be held at 2:00 p.m., Monday, August 10, 1987, at the Authority's offices located at Suite 201, 100 Dee Drive, Charleston, West Virginia 25311. Comments may be mailed to the Authority in lieu of attending the public hearing. The comments must be received at the Authority's offices by August 10, 1987, to be included in the record.

For a copy of the rule, please contact the Secretary of State's Office.

For additional information, contact Samuel B. Follo, Executive Director, at the Authority's address or by telephoning (304) 343-3701.

Walter J. Dale, Chairman

COPY

NOTICE

CLASS I
LEGAL NOTICE

TO WHOM IT MAY CONCERN:

Walter J. Dale, Chairman, West Virginia Health Care Cost Review Authority, hereby gives notice pursuant to West Virginia Code, §16-2D-8(b), §16-29B-8, and §29A-3-5, that the Health Care Cost Review Authority at its July 7, 1987, meeting promulgated a proposed legislative rule for the Certificate of Need Program – titled "Exemption From Certificate of Need Review."

A public hearing for the receipt of oral and written comments on these rules will be held at 2:00 p.m., Monday, August 10, 1987, at the Authority's offices located at Suite 201, 100 Dee Drive, Charleston, West Virginia 25311. Comments may be mailed to the Authority in lieu of attending the public hearing. The comments must be received at the Authority's offices by August 10, 1987, to be included in the record.

For a copy of the rule, please contact the Secretary of State's Office.

For additional information, contact Samuel B. Folio, Executive Director, at the Authority's address or by telephoning (304) 345-2701.

WALTER J. DALE
Chairman

LH-991 7-13-87

AFFIDAVIT OF PUBLICATION

STATE OF WEST VIRGINIA, COUNTY OF CABELL, TO-WIT:

I, Fay Lovejoy being first duly sworn, depose and say that I am Legal Clerk for Huntington Publishing Company, a corporation, who publishes at Huntington, Cabell County, West Virginia, the newspaper: The Herald-Dispatch, a independent newspaper, in the morning seven days each week, Monday through Sunday including New Year's Day, Memorial Day, the Fourth of July, Labor Day, Thanksgiving and Christmas; that I have been duly authorized by the Board of Directors of such corporation to execute this affidavit of publication for and on behalf of such corporation and the newspaper mentioned herein; that the legal advertisement attached in the left margin of this affidavit and made a part hereof and bearing number LH-991 was duly published in

The Herald-Dispatch

one time, ~~once a week for ... successive weeks~~, commencing with its issue of the 13th day of July, 19 87, and ending with the issue of the 13th day of July, 19 87, and was posted at the East door of Cabell County Courthouse

on the 13th day of July, 19 87; that said legal advertisement was published on the following dates: July 13, 1987

; that the cost of publishing said annexed advertisement as aforesaid was $11.75; that such newspaper in which such legal advertisement was published has been and is now published regularly, at least as frequently as once a week for at least fifty weeks during the calendar year as prescribed by its mailing permit, and has been so published in the municipality of Huntington, Cabell County, West Virginia, for at least one year immediately preceding the date on which the legal advertisement set forth herein was delivered to such newspaper for publication; that such newspaper is a newspaper of "general circulation" as defined in Article 3, Chapter 59, of the West Virginia Code, within the publication area or areas of the municipality of Huntington, Cabell and Wayne Counties, West Virginia, and

; that such newspaper is circulated to the general public at a definite price or consideration; that such newspaper on each date published consists of not less than four pages without a cover; and that it is a newspaper to which the general public resorts for passing events of a political, religious, commercial and social nature, and for current happenings, announcements, miscellaneous reading matters, advertisements and other notices.

Fay Lovejoy

Taken, subscribed and sworn to before me in my said county this 13th day of July, 19 87

My commission expires 12-26-93

Notary Public
Cabell County,
West Virginia

10M Form A - 135 (3784)

Certificate of Publication

This is to certify the annexed advertisement

WV HEALTH CARE COST REVIEW AUTHORITY

LEGAL NOTICE - CERTIFICATE OF NEED PROGRAM, LEGISLATIVE RULE.

appeared for ..1... consecutive days/weeks in EVENING JOURNAL PUBLISHING CO. a newspaper published in the City of Martinsburg, W. Va., in it's issue beginning

JULY 13, 1987

and ending

JULY 13, 1987

THE EVENING JOURNAL

S. Page Burdette

Fee $ 21.50

TO WHOM IT MAY CONCERN:

Walter J. Dale, Chairman, West Virginia Health Care Cost Review Authority, hereby gives notice pursuant to West Virginia Code, §16-29D-3(b), §16-29B-3, and §29A-3-5, that the Health Care Cost Review Authority at its July 7, 1987, meeting promulgated a proposed legislative rule for the Certificate of Need Program titles "Exemption From Certificate of Need Review."

A public hearing for the receipt of oral and written comments on these rules will be held at 2:00 p.m., Monday, August 10, 1987, at the Authority's offices located at Suite 201, 100 Dee Drive, Charleston, West Virginia 25311. Comments may be mailed to the Authority in lieu of attending the public hearing. The comments must be received at the Authority's offices by August 10, 1987, to be included in the record.

For a copy of the rule, please contact the Secretary of State's Office.

For additional information, contact Samuel B. Polio, Executive Director, at the Authority's address or by telephoning (304) 343-3701.

WALTER J. DALE
Chairman

7-13(3t)

PUBLISHER'S CERTIFICATE

.....

vs.

.....

STATE OF WEST VIRGINIA,
COUNTY OF MONONGALIA

I, Mickey Carlock (Classified) Advertising Manager of THE DOMINION-POST, a newspaper of general circulation published in the City of Morgantown, County and State aforesaid, do hereby certify that the annexed

Public Hearing

.....

.....

was published in the said DOMINION-POST once a week for 1 successive weeks, commencing on the 13 day of July, 19 87 and ending on the 13 day of July, 19 87

I also certify that the same was duly posted on the 13 day of July, 19 87, at the front door of the Court House of said county, as provided by law.

The publisher's fee for said publication is $ 23.50

Given under my hand this 15 day of July, 19 87

(SEAL)
Advertising Manager of THE DOMINION-POST

Subscribed and sworn to before me this 15 day of July, 19 87

Notary Public of Monongalia County, W.Va.

My commission expires on the 12 day of March, 19 96

OFFICIAL SEAL
NOTARY PUBLIC
STATE OF WEST VIRGINIA
... 1996

0021974 July 13

LEGAL NOTICE

TO WHOM IT MAY CONCERN:

Walter J. Dale, Chairman, West Virginia Health Care Cost Review Authority, hereby gives notice pursuant to West Virginia Code, SS16-2D-8(b), S16-29B-8, and SS29A-3-5, that the Health Care Cost Review Authority at its July 7, 1987, meeting promulgated a proposed legislative rule for the Certificate of Need Program - titled "Exemption From Certificate of Need Review."

A public hearing for the receipt of oral and written comments on these rules will be held at 2:00 p.m., Monday, August 10, 1987, at the Authority's offices located at Suite 201, 100 Dee Drive, Charleston, West Virginia, 25311. Comments may be mailed to the Authority in lieu of attending the public hearing. The comments must be received at the Authority's offices by August 10, 1987, to be included in the record.

For a copy of the rule, please contact the Secretary of State's Office.

For additional information, contact Samuel B. Follo, Executive Director, at the Authority address or by telephoning (304) 343-3701.

WALTER J. DALE
CHAIRMAN

LEGAL NOTICE

TO WHOM IT MAY CONCERN.

Walter J. Dale, Chairman, West Virginia Health Care Cost Review Authority, hereby gives notice pursuant to West Virginia Code 16 20-8(o), 16 29B-6, and 29A 3 5, that the Health Care Cost Review Authority at its July 7, 1987, meeting promulgated a proposed legislative rule for the Certificate of Need Program - titled "Exemption From Certificate of Need Review."

A public hearing for the receipt of oral and written comments on these rules will be held at 2 00 p.m., Monday, August 10, 1987, at the Authority's offices located at Suite 201, 100 Dee Drive, Charleston, West Virginia 25311. Comments may be mailed to the Authority in lieu of attending the public hearing. The comments must be received at the Authority's offices by August 10, 1987, to be included in the record.

For a copy of the rule, please contact the Secretary of State's Office.

For additional information, contact Samuel B. Fotio, Executive Director, at the Authority's address or by telephoning (304) 343-3701.

WALTER J. DALE
Chairman

July 11 N,S

MARCI A MOORE

being first duly sworn, says that the

legislative rule for the Certificate of Need Program -- titled "Exemption From Certificate of Need Review

heroto attached was printed in the **Parkersburg Sentinel**

a daily newspaper published in the City of Parkersburg, Wood County, West Virginia, and posted at the front door of the Court House for one successive weeks, the first publication ~~appearing~~ thereon being on the 11th day of JULY 19 87, and subsequent publication on the ..... day of ..... 19 ....., the ..... day of ..... 19 ....., the ..... day of ..... 19 ....., the ..... day of ..... 19 ....., and the ..... day of ..... 19 ..... .

Printer's Fee $ 13.25

212 words @ .0625 Marci Moore

Subscribed and sworn to before me this 11th day of JULY 19 87

Notary Public for Wood County, West Virginia

My commission expires 7-21-92

Parkersburg Printing Co.

I, W. D. Tetrick, publisher of the NEWS-TRIBUNE, a daily newspaper published at Keyser, Mineral County, West Virginia, hereby certify that the Public Hearing in the case of Health Cost Review

vs. _____

a copy wereof is hereto annexed has been published for 2 consecutive times in said NEWS-TRIBUNE, the first publication being on the 11th day of July, 19 87.

Given under my hand at Keyser this 13th day of July, 1987.

Walter D Tetrick

Publisher

Publisher's Fee $ 23.22

LEGAL NOTICE

TO WHOM IT MAY CONCERN:

Walter J. Dale, Chairman, West Virginia Health Care Cost Review Authority, hereby gives notice pursuant to West Virginia Code, S 16-2D-8(b), S 16-29B-8, and S 29A-3-6, that the Health Care Cost Review Authority at its July 7, 1987, meeting promulgated a proposed legislative rule for the Certificate of Need Program — titled: "Exemption From Certificate of Need Review."

A public hearing for the receipt of oral and written comments on these rules will be held at 2:00 p.m., Monday, August 10, 1987, at the Authority's offices located at Suite 201, 100 Dee Drive, Charleston, West Virginia 25311. Comments may be mailed to the Authority in lieu of attending the public hearing. The comments must be received at the Authority's offices by August 10, 1987, to be included in the record.

For a copy of the rule, please contact the Secretary of State's Office.

For additional information, contact Samuel B. Folio, Executive Director, at the Authority's address or by telephoning (304) 343-3701.

Walter J. Dale
Chairman

7:11
7:13

PUBLISHER'S CERTIFICATE

STATE OF WEST VIRGINIA,
COUNTY OF HARRISON

I, Deborah S. Veltri

Classified Office Manager of CLARKSBURG TELEGRAM, a newspaper of general circulation published in the City of Clarksburg, County and State aforesaid, do hereby certify that the annexed

CLASS I

LEGAL NOTICE

was published in said CLARKSBURG TELEGRAM one time, on the 13th day of July 19 87

The publisher's fee for said publication is $ 11.00

Deborah S Veltri
Classified Office Mgr. of Clarksburg Telegram.

SEAL

Subscribed and sworn to before me this 13th day of July 19 87

Notary Public in and for Harrison County, W. Va.

My commission expires on the 24th day of October 19 93

Form CA-14 T

LEGAL NOTICE

TO WHOM IT MAY CONCERN:

Walter J. Dale, Chairman, West Virginia Health Care Cost Review Authority, hereby gives notice pursuant to West Virginia Code 16-2D-6(b), 16-29B-8, and 29A 3-5, that the Health Care Cost Review Authority at its July 7, 1987, meeting promulgated a proposed legislative rule for the Certificate of Need Program titled "Exemption From Certificate of Need Review."

A public hearing for the receipt of oral and written comments on these rules will be held at 2:00 p.m., Monday, August 10, 1987 at the Authority's offices located at Suite 201, 100 Dee Drive, Charleston, West Virginia 25311. Comments may be mailed to the Authority in lieu of attending the public hearing. The comments must be received at the Authority's offices by August 10, 1987, to be included in the record.

For a copy of the rule, please contact the Secretary of State's Office.

For additional information, contact Samuel B. Ford, Executive Director, at the Authority's address or by telephoning (304) 348-3701.

WALTER J. DALE
Chairman

Affidavit of Publication

No. 7-11

RECEIVED
1987 JUL 27 PM 12: 24
HEALTH CARE COST REVIEW AUTHORITY

STATE OF WEST VIRGINIA,

Kanawha County, to-wit:

I, Kim Tyler of the

☐ Sunday Gazette-Mail ☒ Charleston Gazette, a daily Democratic newspaper ☒ Daily Mail, a daily Republican newspaper, published in the City of Charleston, Kanawha County, West Virginia, do solemnly swear that the annexed notice of Legislative Rule

was duly published in said paper once a day for one successive day commencing with the issue of the 13th day of July, 19 87, and ending with the issue of the 13th day of July, 1987, and was posted at the front door of the Court House of said Kanawha County, West Virginia, on the 14th day of July, 19 87

Dates Published: 7-13-87

Subscribed and sworn to before me this 13 day of July 19 87

Notary Public of Kanawha County, West Virginia

My Commission expires October 28, 1991

Printer's Fee $ 32.04

ACCT-7

TO WHOM IT MAY CONCERN:

Walter J. Dale, Chairman, West Virginia Health Care Cost Review Authority, hereby gives notice pursuant to West Virginia Code, §16-2D-5(b), §16-29B-6, and §29A-3-5, that the Health Care Cost Review Authority at its July 7, 1987, meeting promulgated a proposed legislative rule for the Certificate of Need Program—titled "Exemption From Certificate of Need Review."

A public hearing for the receipt of oral and written comments on these rules will be held at 2:00 p.m., Monday, August 10, 1987, at the Authority's offices located at Suite 201, 100 Dee Drive, Charleston, West Virginia 25311. Comments may be mailed to the Authority in lieu of attending the public hearing. The comments must be received at the Authority's offices by August 10, 1987, to be included in the record.

For a copy of the rule, please contact the Secretary of State's Office.

For additional information, contact Samuel B. Polio, Executive Director, at the Authority's address or by telephoning (304) 343-2701.

WALTER J. DALE
Chairman

(1563)

CERTIFICATE OF PUBLICATION

State of West Virginia, }
County of Mercer, } To-wit:--

I, Charlotte Beckner of the Bluefield Daily Telegraph, a daily morning newspaper published in the City of Bluefield, Mercer County, West Virginia, do certify that the notice attached hereto under the caption;

LEGAL NOTICE
TO WHOM IT MAY CONCERN:

Walter J. Dale, Chairman, West Virginia Health Care Cost Review Authority, hereby gives notice pursuant to West Virginia Code, §16-2D-8(b), §16-29B-8, and §29A-3-5, that the Health Care Cost Review Authority at its July 7, 1987, meeting promulgated a proposed legislative rule for the Certificate of Need Program--titled "Exemption From Certificate of Need Review."

A public hearing for the receipt of oral and written comments on these rules will be held at 2:00 p.m., Monday, August 10, 1987, at the Authority's offices located at Suite 201, 100 Dee Drive, Charleston, West Virginia 25311. Comments may be mailed to the Authority in lieu of attending the public hearing. The comments must be received at the Authority's offices by August 10, 1987, to be included in the record.

For a copy of the rule, please contact the Secretary of State's Office.

For additional information, contact Samuel B. Folio, Executive Director, at the Authority's address or by telephoning (304) 343-3701.

WALTER J. DALE
Chairman

was published in the said Bluefield Daily Telegraph 1 Times

on the following days, namely; July 13

in the year 19 87

Publication Fee 18.69

Subscribed and sworn to before me this 13th day of July 19 87

My Commission expires Feb 20 1995

Ruth A. Hopper
Notary Public

AFFIDAVIT OF PUBLICATION

BECKLEY NEWSPAPERS INC.

BECKLEY, WEST VIRGINIA 25301

COPY OF PUBLICATION

July 13, 1987

STATE OF WEST VIRGINIA,
COUNTY OF RALEIGH, to wit:

I, Frank D. Wood being first duly sworn upon my oath, do depose and say that I am Director Of Sales of Beckley Newspapers Inc., a corporation, publisher of the newspaper entitled The Register/Herald, an Independent newspaper; that I have been duly authorized by the board of directors of such corporation to execute this affidavit of publication; that such newspaper has been published for more than one year prior to publication of the annexed notice described below; that such newspaper is regularly published daily, for at least fifty weeks during the calendar year, in the municipality of Beckley, Raleigh County, West Virginia; that such newspaper is a newspaper of "general circulation," as that term is defined in article three, chapter fifty-nine of the Code of West Virginia, 1931, as amended, within the publication area or areas of the aforesaid municipality and county; that such newspaper averages in length four or more pages, exclusive of any cover, per issue; that such newspaper is circulated to the general public at a definite price of consideration; that such newspaper is a newspaper to which the general public resorts for passing events of a political, religious, commercial and social nature, and for current happenings, announcements, miscellaneous reading matters, advertisements and other notices; that the annexed notice

of Legal Notice
(Description of notice)

was duly published in said newspaper once a week for one successive week (Class I), commencing with the issue of the 13th day of July 19 87 and ending with the issue of the 13th day of July, 19 87 (and was posted at the _____ on the _____ day of _____ 19___); that said annexed notice was published on the following dates: July 13th, 1987

and that the cost of publishing said annexed notice as aforesaid was $11.81.

Signed Frank D Ward
Frank D. Wood, Director Of Sales
Beckley Newspapers

Taken, subscribed and sworn to before me in my said county this 13th day of July 19 87

My commission expires August 6, 1996

Notary public of Raleigh County,
West Virginia

R/H

CLASS I

LEGAL NOTICE

TO WHOM IT MAY CONCERN:

Walter J. Dale, Chairman, West Virginia Health Care Cost Review Authority, hereby gives notice pursuant to West Virginia Code, § 16-2D-8(b), § 16-29B-8, and § 29A-3-5, that the Health Care Cost Review Authority at its July 7, 1987, meeting promulgated a proposed legislative rule for the Certificate of Need Program -- titled "Exemption From Certificate of Need Review."

A public hearing for the receipt of oral and written comments on these rules will be held at 2:00 p.m., Monday, August 10, 1987, at the Authority's offices located at Suite 201, 100 Dee Drive, Charleston, West Virginia 25311. Comments may be mailed to the Authority in lieu of attending the public hearing. The comments must be received at the Authority's offices by August 10, 1987, to be included in the record.

For a copy of the rule, please contact the Secretary of State's Office.

For additional information, contact Samuel B. Folio, Executive Director, at the Authority's address or by telephoning (304) 343-3701.

Walter J. Dale

WALTER J. DALE
Chairman

NEWS RELEASE

July 7, 1987

Walter J. Dale, Chairman, West Virginia Health Care Cost Review Authority, announced today that the Authority had begun the process for adopting a new legislative rule for the Certificate of Need Program. The rule is required by the 1987 amendments adopted by the Legislature. The rule for the Certificate of Need Program sets forth the procedures for three (3) new exemptions from complete certificate of need review for projects involving the replacement of major medical equipment, capital expenditures not related to health services, and certain mobile technology that can be shared by hospitals. The rule also provides for the review of certain new services which are already offered in the proposed service area.

A public hearing will be held on the rule at the Authority's offices located at Suite 201, 100 Dee Drive, Charleston, West Virginia 25311, on August 10, 1987. The public is invited to attend and to make oral or written comments on the rules. In lieu of attending, written comments may be mailed to the Authority's offices.

For for further information, contact should be made with Samuel B. Folio, Executive Director, at the Authority's offices or by telephoning (304) 343-3701. For a copy of the rule, please contact the Secretary of State's Office.

WALTER J. DALE
Chairman

DEPARTMENT OF HEALTH & HUMAN SERVICES

Public

AUG 17 1987

Mr. Walter J. Dale
Chairman, West Virginia Health Care
Cost Review Authority
100 Dee Drive
Charleston, West Virginia 25311

Dear Mr. Dale:

This is in response to your letter of July 7 to Secretary Bowen requesting comments on West Virginia Legislative Rule: Exemption from Certificate of Need (CON) Review.

It is no longer necessary for the Department of Health and Human Services to comment on the above proposed regulations for West Virginia's CON program. Title XV of the Public Health Service Act, the health planning legislation that required States to develop their CON programs to meet minimum federal requirements, was repealed January 1, 1987 by P.L. 99-660. Accordingly, regulations governing the Federal health planning program, including CON were rescinded under the final rule published in the March 30, 1987 Federal Register. In the absence of authorization, the Department ceased the operation of its health planning program and CON functions.

Sincerely yours,

Robert E. Windom, M.D.
Assistant Secretary for Health

WV HEALTH CARE COST REVIEW AUTHORITY
MEETING REGISTRATION

Date of Meeting: Monday, August 10, 1987

Nature of Meeting: HCCRA Board Mtg And Public Hearing

	Individual's Name:	Name of Organization:	Do you wish to speak? Y or N
21	Kenneth M. Hall	Raleigh General Hospital	
22	Gary L Thompson	WV HCCRA	
23	KEN SAMPLE	Huntington Hosp	NO
24	Keith Biddle	Cabell [illegible]	NO
25	Gina A. Bell	Cabell Mtgn.	NO
26	Dalton Shaw	So. Charleston Community Hosp	No
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WV HEALTH CARE COST REVIEW AUTHORITY
MEETING REGISTRATION

Date of Meeting: Monday, August 10, 1987

Nature of Meeting: HCCRA Board Mtg And Public Hearing

	Individual's Name:	Name of Organization:	Do you wish to speak? Y or N
1	Cynthia Bumgardner	Wheeling Medical	N
2	Delegate Sam Love	House of Delegates	N
3	Allen Meadows	Princeton Community Hospital	Y
4	Allen Meadows	Princeton Community Hospital	Y
5	Katherine Douglass	WVU Hospitals Inc.	N
6	Robyn C Davis	Goodwin & Goodwin	N
7	John W Warnick	Preston Memorial	N
8	William Prentice	Man General	N
9	Daphne Schreiber	CPTRC	N
10	JACK CANFIELD	CAMC	Y
11	Thomas J Stevens	Stevens Physician Consulting	N
12	David Farley	United Hosp Ctr	Y (2)
13	STEVE J. SOLIS	ST MARY'S HOSPITAL	N
14	JIM SPENCER	ST MARY'S HOSPITAL	N
15	KEN RUTLEDGE	WEST VIRGINIA HOSPITAL ASSC.	Y (1ST)
16	Sally S. Roberts	WVHA	N
17	[illegible]	CAMC/WVNH	"
18	Joe Fiala	Cabell Huntington Hosp.	"
19	[illegible] Fiala	" "	N
20	[illegible]	[illegible]	Y
21	Bob Whitt	WVHA	N
22	STEVE PICKETT	WVUH	N
23	Robert GRAY	THOMAS HOSPITAL	N
24	[illegible]	Camden-Clark	N
25	[illegible]	[illegible]	N
26	Mary [illegible]	Wheeling Hospital	Y
27			
28			
29			
30			

WEST VIRGINIA HEALTH CARE COST REVIEW AUTHORITY

In Re: Health Care Cost Review Authority
Board Meeting

Transcript of proceedings and testimony
adduced at the Health Care Cost Review Authority, Board
Meeting, held in the [illegible] of August, 1997, commencing at
[illegible] at 99 Dee Drive, Charleston, Kanawha County
[illegible]

APPEARANCES: [illegible] Board Chairman
[illegible]

RECEIVED
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HEALTH CARE COST REVIEW
AUTHORITY

PHYLLIS HAYNES EDENS
CERTIFIED COURT REPORTER
2135 KAY NEVA LANE
CHARLESTON, WEST VIRGINIA 25312
(304) 984-3531

I N D E X

CHAIRMAN DALE: It is 2:04 and we will come to order. First, we will have the approval of the minutes of the July 24th meeting.

MR. FIZER: Mr. Chairman, I move the approval of the minutes as they are printed and distributed within our notebooks.

MR. KEESLING: I second that motion.

CHAIRMAN DALE: All in favor.

MR. FIZER: Aye.

MR. KEESLING: Aye.

CHAIRMAN DALE: New business: The approval of the "Fee Schedule for Certificate of Need Matters". At this time, I will turn the meeting over to John Kozak, who will explain the issue before you.

MR. KOZAK: Thank you, Mr. Chairman. You should all have in your notebooks, which are available on the table over there by Margi, copies of the Fee Schedule as they have been amended following the receipt of public comments.

As part of the filing requirements with the Secretary of State's Office, the staff and I will have to respond in writing to all of the comments that have been

made, and that will be done in detail later this week. At the moment, I will just go over the changes that were made in the rules themselves, and deal with the suggested changes that we rejected at a later time.

As you will notice from looking at the rules in Section 3 on Page 2, almost towards the end, they are substantially different in format than the prior rules were. Rather than setting a scheme based upon specifically who the applicant was, we went to a scheme that looked more towards what type of proposal was involved, the estimate of the amount of staff time and resources that would be available and needed to be expended upon that type of proposal, and then secondarily, who will be making the different proposals.

The changes themselves, as far as the amounts that will paid, begin on Page 3. You will note by Section 3.1 that one of the comments that the staff has suggested that the Board accept is that no fee be charged for request for declaratory rulings or for any request on the reviewability of a matter.

We thought the comment that was made that

we should encourage people to ask us questions as to reviewability or non reviewability in other technical matters was correct and should be encouraged. So 3.1 would drop any fee requirement for such inquiries.

Basically, what has been left is a fee for applications and a fee for certain of the exemptions under Section 4 of the Statute itself.

3.2 begins the fees for the applications. As you run down through, you will note that there was set a dollar limit for each of the types of applications. Hospice Proposals, no matter who they are from, to be $25. The Group Home Proposal is an example of a format that we use in a number of places where the fee is geared to the number of beds proposed. So in this situation if a Group Home Proposal came in for 8 beds, then you would have a fee of $400 being proposed. A similar situation is suggested for nursing homes later on.

The different types of ambulatory health centers is set up for a $500 fee. Ambulatory surgical facilities are a bit more complicated. We anticipate that those kind of projects as they are proposed will be

generally somewhat controversial, at least to the hospitals that they are going into the service area of, so we anticipate a bit more of a contested case surrounding those.

So that if anybody does suggest an ambulatory surgical facility, there is a base fee of $1500 for that type of application, assuming that the base type of ambulatory surgical center would have two surgical rooms, and then an additional $500 for each third and above surgery rooms.

As the example shows there, if you come in with a base ambulatory surgical facility that would be $1500, but if your surgical facility wanted three rooms, that would be upped by $500 to $2000. In other words, 4 would be $2500.

At the top of Page 4, acquisitions. As you all know, the acquisition exemption at the moment provides that any health care facility which is to be proposed for $1,000,000 or less is not reviewable and can go through an exempt process under Section 405 of the current regulations.

In Section 3.2.6 we have a $1000 fee for those acquisitions in excess of that $1,000,000, so it is to

cover the higher cost of the acquisitions for the $1000.

3.2.7 is the nursing home situation I mentioned earlier, as well as mental health facilities that would offer alcohol and substance abuse centers. Again, the staff suggests that you concentrate on the number of proposed beds with the fee of $100 per proposed bed. The standard 60 bed nursing home then would be $6000, and if they had the extra two respite care beds, then it would be $6200. The addition of personal care beds by any existing health care facility, which again would primarily be nursing homes, would also be $100 proposed bed level.

All major medical equipment, except for the new Section 4 exemption, would come in at $500. The addition of health services, or a change in health service not covered by an exemption, would be $500. Those will primarily be the ones that involve some sort of a large capital expenditure themselves and would not be covered by the existing 4.03 exemption for new health services.

The development of any new acute care facility will be a fee of $200 per proposed bed. An example of that would be the Greenbrier Psychiatric facility, which

you are all familiar with in Beckley where they are proposing to build a new psychiatric hospital, that being 220-some odd beds at this point. The fee for that would be 220-some times 200.

We next break down into a situation where just a capital expenditure itself is being proposed, rather than any of the specific type of items that we got before. The amount of the fee for those kind of applications varies with the dollar range of the proposal itself. Initially, for the $1,000,000 to $10,000,000 range for an acute care facility, a fee of $500 is being proposed, unless this qualifies for an exemption.

If you recall, under the exemptions regs that we will be discussing later today during the public hearing, there is an exemption for up to $2,000,000 if you are a non acute care hospital, or if you are an acute care hospital, $2,000,000 and no affect on your rates. That kind of a situation would not be covered by this, as is explained later. But a $1,000,000 expenditure by a hospital, say for a health service, modernizing beds, or whatever, then there would be a $500 fee.

The fee schedule then slides up in increments of $10,000,000. As is noted, it tops out at $2000 for anything above $30,000,000. That is to take care of the novelist situations that were discussed before of the new WVU Hospital or the new Greenbrier facility to begin.

You will note that there is a difference there between that fee schedule and the fee schedule for non acute care facilities, which is similar in that it is based on units of $1,000,000 initially, then every $10,000,000 thereafter.

The fees are somewhat higher, depending upon the category, but basically, go up in increments of halves. So that for a non acute facility wanting to make an expenditure of $10,000,000, the fee would be $1000, whereas for a hospital it would be $500.

On exemption requests, an exemption request, specifically under Section 4.1 on Page 5, tied to all of the exemptions given by Section 4 of the Statute, if anybody makes a request for an exemption determination under any of those sub parts, there will be a $100 fee.

4.2 then creates an immediate exception to

that. That is for the 4.I exemption, which is the very lengthy and complicated one that I'm sure we will be hearing about later this afternoon. It tries to make the distinction between just the inquiries, or the reviewability question again, is this capital expenditure reviewable, is this health service reviewable.

If it can remain at that level, there will be no fee for that. If, however, 4(i)(4) is necessary to require an application, then the section goes onto say then, depending upon the type of application involved, the fee would then be ascertained.

There was a lot of discussion during the public hearing concerning the weakened condition financially of a number of hospitals in the state. In addition to this slight difference in the amount of some of the fees to be paid, Section 5 on Page 6 also creates a waiver of any fee for any hospital which has had a three-year average of earning less than $150,000. That is their after everything net income.

We used the language from the Rate Review Statute, which is what we picked up there, it is the net

revenue over expenditures. So if as a very bottom line the hospital has had less than $150,000 on the average for three years, there will be a waiver completely.

Section 6, which is new, specifies that there will be no refunds under any circumstances of any fees that were paid, unless at the very initial moment when they are paid it is determined that the fee shouldn't have been paid in the first place, or if it was too high.

If we determine that as it comes in, then there could be a refund in that situation. But a refund in the situation where, say, initially a 400 bed facility, which is later cut to a 200 bed facility, there would be no refund on that.

The question of a credit arose from a number of comments. Section 6.2 would deal with that by noting that if somebody applies for an exemption, pays the fee for an exemption and the exemption is ruled negatively, they do not get the exemption and they didn't come back and file an application, the fee paid for the exemption would be credited against what is owed for the application.

Section 7, Adjustments to Fees Paid, is

contained in the former rules that has been rearranged to fit better. What this basically does is it prevents situations from somebody coming in initially and either undervaluing an application or proposing a smaller application, paying a fee on it, and then increasing it later. This indicates that any of those kind of increases in midstream would cause the review to stop and the collection of the required fee, based upon what the thing looks like. Conversely, as I mentioned earlier, there would be no refund if the application gets smaller.

Section 8, on Page 7, Conflicts in the Applicable Fee. We recognize that categories, to some extent, may overlap, and that more than one category may apply to a given proposal. What Section 8 indicates is that in those situations only one fee will be charged, even if three or four are applicable, and it will be the highest of the ones that are applicable, but you would not total up the whole group of them.

Section 9 basically remains the same, except that I did try, particularly in 9.3, to clarify the meaning of why 9.3 is there. 9.3 was objected to on the basis that

some folks thought we were trying to impose criminal liability on the basis of procedural rules. That wasn't the intention, and is not the intention of 9.3.

The intention is merely to notify people that those penalty provisions are out there on the substantive basis, and that if you run into any of the problems that might trigger any of those penalties, then you are going to have difficulty dealing with them. But these rules in and of themselves do not impose the liability, it is still the Statute itself. We thought that it would just be useful to have a specific notice provision so that folks would have something to jog their memories to remind themselves they are under some duress to make sure all of this is done accurately.

That highlights the changes, but does not, of course, deal with the comments that were rejected, which will be addressed in writing later on and filed with the Secretary of State's Office. We did consider thoroughly the question of just how much money the staff thought would be raised by these questions and how much money was needed to keep the program going.

In short, according to our calculations, the current budget for HCCRA does not make provision for five people, that there are five people whose positions are expected to be paid for by these rules and from the fees that they generate. That will be detailed in the written response that will come later.

Mr. Chairman, unless there are any questions, that is my synopsis. I would suggest that the Board adopt a motion accepting these changes and directing that they be filed as permanent procedural rules.

CHAIRMAN DALE: Thank you, Mr. Kozak. At this time we have a motion and we will discuss the...

MR. KEESLING: Of course, I as a Board Member make the motion that we approve this new fee schedule that has been set out by Mr. Kozak.

MR. FIZER: I have a question of the counsel. With the substantial change that we made within these regulations, Mr. Kozak, should they not go back out for public hearing?

MR. KOZAK: I think they have been changed, as I said there in my little monologue, substantially in format,

but I don't think that the impact of them has been changed in terms of the overall amount of money that they are intended to generate. It has just been spread around a bit different. So I think as a result of that, that they don't reach the level of the Statute requiring a second public hearing. I think legally we can make a debate on that, but my own opinion, I don't think that it would be necessary to have a second hearing on these.

MR. KEESLING: Mr. Chairman, I feel like this new fee schedule adequately addresses the concerns and the comments of all the people who attended the public hearing originally. I think down the road if there is any further concerns by anyone or comments, and all, I think that we could again address them at that particular time. But I feel like our going over these, the speech given, and everything like that, we have been very careful to try to address ourself to the concerns and the comments that were made. I think in its present form it has done a substantial job of trying to placate everybody's concern.

MR. FIZER: Mr. Chairman, I don't disagree with what Mr. Keesling was saying, that we have addressed those

comments that we received before. But as I sit here and I listen to the review from the counsel, and so forth, and considering the time that these regs have been out, I personally consider them to be substantially changed from where we started from and where we solicited comments.

Therefore, I would suggest that we file them with the appropriate agency, but also set another public hearing date on them.

CHAIRMAN DALE: Well, I agree with both, but I think there has been adequate time for anybody to appear up here or things to be in writing, so I have to go along with Mr. Keesling. Would you care to vote at this time?

MR. KEESLING: Yes, I vote in favor of accepting the fee schedule as it presently stands.

MR. FIZER: I support the filing of them, but maybe in order to clear this up, that it would be more proper to make an amendment to Mr. Keesling's amendment, and then deal with that amendment as to whether we should or should not go for the public hearing, and then vote on the filing of the regs.

With that, I would make the motion that we

file the regs with the appropriate entities, and we also put them back out for public hearing. That would be my amendment to Mr. Keesling's amendment.

MR. FOLIO: Deal with the amendment now.

MR. KEESLING: I vote opposed to the amendment that Mr. Fizer has suggested.

CHAIRMAN DALE: Again, I state that there has been plenty of discussion and everybody has had ample time, in my estimation. If they would want to offer any opposition, they have had every opportunity to be up here and express themselves.

MR. FIZER: I vote for the amendment.

MR. KEESLING: I vote against the amendment.

CHAIRMAN DALE: I vote against the amendment. There is a two to one vote against the amendment.

Now on the main motion.

MR. KEESLING: As I stated, on the main motion I vote to accept the fee schedule as it presently stands.

CHAIRMAN DALE: Mr. Fizer?

MR. FIZER: I approve the main motion.

CHAIRMAN DALE: That is three for the main motion.

At this time we will go on to the Procedural Rule for Requests for Hospital Rate Changes. Mr. Kozak.

MR. KOZAK: Thank you, Mr. Chairman. Again, those are in your books, and there is a pile of them on the table there. We used the same format for these with the strike through and underline that a lot of folks are used to using in the legislature, except, of course, for caption headings.

The first change shows up on Page 4 of the Procedural Rule for Requests for Hospital Rate Changes. It was suggested in one comment that we should make available as to the specific allowance for a pre-application conference between the staff and any hospital that wishes to meet with the staff in putting together a rate application. That is similar to what is already done with the Certificate of Need.

We have held that out on an informal basis as a possibility to anybody that wanted to request it in the past. The staff believes that putting it in writing as a formal offer is probably a good idea. So at the bottom of Page 4 and onto Page 5, there is an allowance now for a pre-application conference specifically.

The next change shows on Page 7, relating to Section 4.4. There was a comment that the hospital be notified in advance of the news media and community of what a decision is on a particular application. Historically, we have attempted to do that by mailing the decision to the hospital first, a day in advance, and then followed by news releases later. Again, as the underlining shows, the staff is suggesting that we formalize that process and put that in as a requirement. At the time that a decision is written, as well, the staff could call the hospital. If it were a hospital, say in the eastern panhandle, or elsewhere, that may not get mail delivery within 24 hours, they could arrange that with the individual hospital during the course of the review to let them know what the decision is going to be after the decision is ready.

Page 8, in Section 4.7. There was some criticism of where the application paper should be for the public to review them. The section before only mentioned that they would be available at the hospital if anybody wanted to wander into the hospital from the community to look at that. We had assumed that everybody would

understand that under the State Freedom Information Act, that those papers will also be available here at the Agency.

We suggested an amendment to 4.7 that would include the offices of the Board as a place they could come to look at it. We rejected the notion that the hospital should not have those available as well, basically in the interest of those communities that are a far distance from Charleston and would have to travel four or six hours to come here to look at the papers, rather than being able to go to the hospital during regular business hours. So we left that requirement as it is, and we suggest that the Board merely change that by adding the language indicated there in the middle of the page.

A number of criticisms, or a criticism that appears a number of times, relates to some confusion between the use in some places of interested person and other places of interested party. For the sake of clarity, we have switched to just using interested party at all times.

Inserted into Section 4.7 also the phrase "or entity", indicating that somebody other than a natural person can be an interested person in a proceeding, that

being, say another hospital, perhaps, or some local union, some local citizen's group, just some non natural person also has a right to be an interested party. So that is, again, by way of clarification, and that continues onto Page 9.

Also, on Page 9 in Section 4.8, we accepted the criticism of the rules that the 20-day reconsideration process should begin upon receipt by the hospital of the order, rather than the date of its entry. As you will recall, we sent out the orders to the hospital by certified mail, so we do have a date certain by which to judge when the 20 days would begin, as shown by the certified mail receipt. The staff suggested that we acquiescent that.

There was a criticism made that in the case of a request for reconsideration that was denied, that the reasons be stated. Again, under the Administrative Procedures Act any decision by the Board is supposed to be in writing, with reasons given for their decision.

The staff is suggesting that we put that in as clarification of what existing policy is just so it will be formally noted, so that whether granting or denying the

reconsideration, the decision has to be in writing and has to state the reasons for it.

On Section 5 we clarified the title a little bit by inserting the word "automatic" in front of rate to show that there is a difference there between the rate application requests that come through in the usual course of matters and those that are available as a result of any change to the section this past term.

Section 5.1, there was some criticism as to whether or not this automatic rate increase should apply only to the average rates per discharge for inpatients, or whether or not the legislature was intending for the automatic rate of increase at the inflation level would also apply to such things as outpatients, and presumably, non operating and other operating revenue.

Mainly because of a decision that I will discuss later, the staff would suggest that we acquiescent that criticism. As a result, I struck out the word "only" there in the first line of 5.1, so that that change with a change that appears later would indicate that besides discharge averages, also outpatient charges and other

incoming can also raise with the rate of inflation.

5.5, at the bottom of Page 10, is probably the most controversial item. As you will recall, the structure language uses the Data Resources index. The staff has suggested that the regulation be amended to use the "hospital and related services" item off of the Consumer Price Index for all urban consumers as reported by the United States Bureau of Labor Statistics.

That component, in looking at it, we noted that it is made up of a number of items, such as room rates, other hospital services, as well as outpatient services. Since the outpatient services is a specific component of that number, that is what led us to make the change that I mentioned earlier in 5.1.

At the end of 5.5, on Page 11, the Board has suggested to point out specifically to the hospitals something that the staff believes is implicit within the automatic rate increase as it is provided. That is, that within the automatic rate increase of inflation it is expected to be all increases for new technology, for non supervisory wages, malpractice premiums, new services, or

the other individual adjustments that the Board in the past has made to the DRI factor.

So that as a result of that, as it would work as an example, if the inflation rate is running at 7.1 percent, the hospital would be expected to take a 7.1 percent increase and not have any additional adjustments for any of these other items. If what they want is a 7.1 percent, then they have got to live within that for all these other increases. If they need additional funds for these other increases, then they have got to come back through a regular rate application. Regular rate applications, of course, will continue using the DRI, as opposed to the CPI Index.

5.8, on Page 12, again no specific -- the section is available to outpatient revenues and other non patient sources of revenues. There was considerable confusion over what the second sentence in 5.8 meant. Hopefully, the language there clarifies it and doesn't make it worse.

What it was intended to do was that since this whole thing is based upon an average charge per

discharge, the staff is concerned about situations where the utilization is less than what the hospital is expecting to make, so that the hospital's gross patient revenue would be lower.

All this sentence is attempting to say is that the hospital cannot expect to increase its average charge per discharge on the lesser number of patients to get to the same level of gross patient revenue. Hopefully, it is understood that that is what that is trying to say.

Again, in 5.9, on Page 12 and carrying on over to 13, is another notice provision which indicates that the hospitals which apply for the automatic rate of inflation increase are expected to live within that increase and not to exceed it, and that if they do exceed it, they are notified that they are subject to the various penalty provisions of the Act. As the last sentence that has been added indicates, such liability will be determined by reference to those sections and not by these rules.

Again, procedural rules cannot impose substantive requirements insofar as penalties go, but we thought that a specific statement, placing everybody on

notice that those penalty type provisions did exist in the Statute, was in order so that everybody is aware of what they are doing.

5.10: There was a question concerning the hearings as to whether or not somebody besides the Authority or an interested party could request the hearing. Some folks thought that the hospital should specifically be mentioned. We, agreeing that they should be specifically mentioned, have done so in 5.10.

5.11: There was some criticism as to when monitoring would take place, which it appears again later in the Regulation back on Page 18 on what is now Section 12, the Compliance Reports. In 5.11, in particular, there was concern raised by the staff with the way the automatic rate increases would apply, that if what is being allowed is an automatic increase on top of what is actually being earned, then what we are running into with the number of hospitals in this current rate cycle, a number of the hospitals are coming in with actual earning rates higher than their immediate succeeding order would allow them, and in fact, were over the revenue limits. The staff was concerned that

the automatic rate of inflation increase not be allowed to legitimatize what may be a past violation by granting an increase on what is, in effect, an overage.

Rather than trying to sort out all of those issues during the course of what the legislature seemed to intend a fairly rapid process, the rate of inflation increase will still remain upon what the hospital actually earned.

However, 5.11 indicates that the Board still has the authority under the Statute itself to note prior excesses in the revenue limits, make adjustments for those in terms of reducing the amount that was actually earned, and then applying that relief prospectively.

So, in effect, there may be a situation where a hospital would exceed its past revenue limit, come in and put their automatic rate of inflation increase into effect and go up to that level, be then followed by a determination by the Board that the excess did occur and was not justified, that there should be some penalty in that year, and then a rolling forward of that effect into the following year, which would then have the effect of lowering

the automatic rate of inflation increase.

That whole scenario involves pulling together a number of different sections of the Statute, and not merely the automatic rate of inflation increase. But we thought, as concisely as we could, that we should have something in the rules pointing out that that was a possibility.

Section 6.1, on Page 14, the non lawyers in the crowd, hopefully alone, didn't understand the buzz words that I was using where I stated that the application must state the fact with specificity and not in a conclusory fashion. All that that meant was that they have to describe them in detail, they just can't say "We are having financial hardship, give us an increase."

They have got to give us the reasons why they are having difficulty, the boilers blew up, we lost half of a wing, three-fourths of our nurses quit, or whatever, details of what is needed there for the temporary rate changes, not just something in a conclusory fashion.

Section 6.6 again includes that a hospital specifically can request a hearing on the temporary rate

increase, if it wants to, or in effect call a hearing on its own.

Page 17, Section 8. This puts into formal effect something that folks who watch us have probably noticed that we have been doing for the last six months, which is tying the rate review process down with the old Health Care Facility Financial Disclosure Act, Article 5F-16. If you have been following our recent orders, we have been rejecting a number of applications in part, at least, because they are out of compliance with the Financial Disclosure Act, which we use a lot of the information in it to evaluate the application.

Section 8 formally states that is something that we are going to be doing, and indicates that an application will not be accepted unless the facility is in compliance with the Financial Disclosure Act. That is similar to what the regulations for CON presently state, and will tie both of the regular arms of HCCRA to our third responsibility of implementing the Financial Disclosure Act.

Other than that, the changes are mainly renumbering. At the very end of the change of regulations,

there is a form that was devised for how the automatic rate of inflation could be affected. It didn't seem to us that any changes were needed in that form, other than in Line 4 there at the bottom where instead of saying DRI, the most recent hospital related services component is CPI, which we abbreviated at CPI, should be used. The hospital could either have that by referring themselves to the most recent publication, or by calling us and we would be happy to tell them what that is.

It is still referred to as Hospital Market Basket Component, since that is what the Statute itself uses. If you recall the list of Statutes, which is the problem we've had in understanding this section in the past, we refer to the Hospital Market Basket Component or the Consumer Price Index. What we are using is something called the Hospital and Related Services component or line item, actually.

It was thought that Hospital Market Basket Component was the more readily understandable to the public term of trying to get across what was being intended here. Rather than use the technical term in the title, we thought

that using the commonly understood term would probably be best for communication purposes.

If there are no further questions, I would suggest that the Board entertain a motion adopting the changes in the procedural rules and permitting me to file them as permanent procedural rules for the rate review program.

CHAIRMAN DALE: Could I have a motion on this?

MR. KEESLING: I make a motion that we adopt the Procedural Rules for Requests for Hospital Rate Changes as presented by Mr. Kozak.

MR. FIZER: Mr. Chairman, I would move to offer an amendment to those regulations prior to the adoption of the main motion. That amendment would be to strike Section 5 within those proposed rules, and I would like to speak to my motion, sir.

MR. KEESLING: Section 5 as it refers to the Automatic Rate of Inflation?

MR. FIZER: Yes, sir.

CHAIRMAN DALE: The whole section or just one?

MR. FIZER: I think the whole section is relevant

to it.

MR. KEESLING: What sort of reasons do you have, Larry?

MR. FIZER: Primarily, the reasons being that we have discussed those, as the comments alluded to, awhile back. We had initially inserted the index of the DRI. I would be one of the first to readily admit that that was not the intent of the legislature.

However, one of the things that is clear within this, while the legislature intended something beyond the DRI, it is not clear that it meant the Hospital Related Component of the Consumer Price Index. The figures that were present and were used within the legislature, as they pertain to the word Market Basket Component of the CPI, was somewhat less than the 7.7 that was produced last year as that measure.

I am suggesting to you today, even as we sit here, and by the industry themselves, as I look at Mr. Rutledge's comments from the last public hearing before this body, the word Market Basket, or the words Market Basket, were inserted between hospital and component of the CPI,

thus creating some confusion, and in fact, defining an index which does not exist.

I am of the opinion that since we do not know, and the legislature failed to make clearly what their intent was, I don't think that I want to second guess them. I would prefer seeing it go back to them to define since there is no such index.

MR. KEESLING: We have various alternatives that we have discussed regarding this matter. I feel that the alternative that we have chosen here more closely follows the intent of the legislature than any of the other alternatives. It was pretty obvious that the legislature did intend to use the Consumer Price Index because they spell that out in here.

I think what the legislature did was maybe a poor choice of words. They inserted Hospital Market Basket as a subtitle to Consumer Price Index, rather than the Hospital and Related Services. But I feel very clearly that they intended to use a hospital component or the Consumer Price Index. So for that reason, I think that these new rules and regulations do follow the intent of the

legislature.

MR. FIZER: In closing, Mr. Chairman, before the motion is put to a vote, I would only point out to you today that I don't disagree with what Mr. Keesling was saying, that it was the intent to allow an increase at some rate of inflation.

The Statute does not clearly define that. As a matter of fact, it defines an index that is not in existence, one at the present that is 7.1 and is projected to cause something like an 11 percent increase for this year, which means that within the State of West Virginia our hospitals can increase their charges to the consumers of this state up to 11 percent without any review. I don't think that was the intent of the legislature to give such an enormous rate of increase without any type of review. Therefore, I would urge the adoption of the amendment.

CHAIRMAN DALE: As far as I'm concerned, in part and essence I agree with both members, but I strongly agree with Mr. Keesling. Number one, because I think the only fair barometer in there is the DRG, which gives the hospital component the complete CPI. So I think that is the only

fair way, and that's the way I would have it go at this time.

MR. KEESLING: Do you want to call for a vote on Mr. Fizer's amendment?

CHAIRMAN DALE: Yes.

MR. KEESLING: I oppose Mr. Fizer's amendment.

CHAIRMAN DALE: I oppose it.

MR. FIZER: I vote for it. Mr. Chairman, I would offer one more amendment. That amendment would be that since there has been such a substantial change from the original regulations that called for the DRI, which was around 4 percent as proposed in those regs., to be exempt from review we now have an automatic increase of up to 7 percent. I would suggest to you that that is definitely a substantial change within the proposed regs and request that we file those for a public hearing.

MR. KEESLING: I oppose Mr. Fizer's amendment.

CHAIRMAN DALE: I oppose the amendment. At this time we will go onto to vote on the approval of these rules and regulations.

MR. KEESLING: I think I have already proposed to

adopt the Procedural Rule for Requests for Hospital Rate Changes as they have been presented by Mr. Kozak.

CHAIRMAN DALE: I vote for them.

MR. FIZER: I vote nay.

CHAIRMAN DALE: Two for and one against. Now we will go to conducting the public hearing on the legislative matters concerning the Certificate of Need Review.

MR. KOZAK: Thank you, Mr. Chairman. Ladies and gentlemen, we will follow basically the same format that I believe most of you are familiar with from the public hearing that we conducted a couple of days ago. Briefly, under the Administrative Procedures Act we are required to hold a public hearing for the receipt of comments from anybody who wishes to comment on proposed regulations.

The set that we have before us is a bit unusual in that they are legislative rules, which means that they ultimately have to be approved by the legislature, but they are also presently in effect as Emergency Legislative Rules, so that they are, in effect, the laws that exist as we meet here today.

As a result of the comments that we hear

today, the Board will hold a meeting, that at this point is scheduled for August 31, at two o'clock in this room, for going through a similar process that we just did with two procedural steps for making changes. Such changes as are adopted at that time, if any, would have the effect of changing both the emergency set, as well as ultimately the permanent proposed legislative rules.

From here, the legislative rules would have to be filed with the legislature's Rule Making Committee, and I would suspect that they will be taking comments at that time, as well as possibly conducting their own public hearing, so you all can be assured that you will get another shot at whatever happens as a result of what the Board does.

As I mentioned at the beginning of the meeting, actually before we got started, we are required under the APA to file with the rules and with the legislature a copy of a list showing everybody who was in attendance and their organization that they are representing. There is a sheet remaining outside at the door there. If you have not signed it, I will again ask that you do so, please. I have one sheet in front of me

which indicates some names that wish to speak, and I will call for other persons after I have exhausted this list.

Before I go on to do that I would just like the record to note that I have received written comments today. Prior to today I had not received any written comments. Initially, we received comments from the West Virginia Hospital Association, from United Hospital Center, from West Virginia University Hospitals, Inc., from HCA Raleigh General Hospital, and also from St. Mary's Hospital.

In addition to those written findings we can take verbal or oral comments at this time. As you will again note, there is a Court Reporter present to make a transcript of what is said today so that we and others can make reference to the comments that are made. To begin with, I would like to recognize Mr. Rutledge of the West Virginia Hospital Association.

MR. RUTLEDGE: This may take a little bit of time. I think we have an 11 page legislative rule. I noted just before I came up here that we prepared 26 pages of comments on that rule. I will let you know right now that I don't plan on going through all 26 pages of comments, but rather

try and hit the major points.

First of all, we are pleased to have an opportunity to submit written comments relating to the Emergency Legislative Rules filed by HCCRA on July 7, 1987.

Primary concerns is the first category we address. A review of the Emergency Legislative Rules have resulted in the identification of several broad and significant areas of concern.

Number 1. The rules as written require HCCRA to make a determination of the eligibility of exemption of a project. As we will discuss later in these comments, it is only under certain well defined circumstances, as articulated by the legislature, that such Agency determination should be made.

Number 2. The rules as written do not provide the criteria by which the Agency will be making determination on the exemption of any given project. In this respect, the Emergency Legislative Rules are seriously deficient. One function of the administrative rule making process centers upon conduct of the State Agency.

The regulatory authority has an obligation

to clearly outline the criteria by which decisions will be made. This identification of standards to be utilized in the Agency decision making is important for two reasons. First, it allows the entities regulated to have some reasonable predictability of results. The Health Care providers affected by these regulations should know in advance what substantive factors will influence and guide Agency decision making.

Secondly, clearly articulated standards announced by the Agency insure that Health Care providers who are similarly situated are treated in a similar manner. The objective is to ensure a fair decision making process, not an arbitrary one.

Number 3. The rules require information via inappropriate formal Agency notification which could be used and misconstrued to require review under other sections of the Statute.

Number 4. The rules as written misconstrue the Statute. We feel this is particularly obvious when we compare Section 16-2D-4(i)(4) of the West Virginia Code to Section 6 of the Agency Rule, which is explained in some

detail later on.

Moving on to the introduction. In this section of the Emergency Legislative Rule HCCRA renders its perception of legislative intent in enacting the enrolled committee substitute for House Bill 2342 by stating, number one, that it is to alleviate the financial burden on Health Care facilities, and thereby prevent passage of such burden onto Health Care consumers; number two, to accelerate the Certificate of Need process for certain activities.

We maintain that there is a third and more pervasive intent of the legislature which can be seen through the 1987 statutory modification. That legislative intent is to grant health care providers in West Virginia relief from the regulatory process of the Certificate of Need Program, provided that certain criteria or threshold circumstances are met.

It is precisely when the basic criteria exists that the legislature has decreed that health care providers shall be exempt from the regulatory process. The intent of the Statute is not to increase the decision making authority of the Agency.

Upon study of the 1987 Statutory modifications, which are contained in House Bill 2342, it is respectfully suggested that the title of these Emergency Legislative Rules be changed from "Exemptions from Certificate of Need Review" to "Activities which are not subject to the Certificate of Need Review Program."

Accordingly, the language contained in the fifth line of the introduction, which states in part, "Promulgate rules to exempt from Certificate of Need Review certain activities of health care facilities" should be changed to read, "Promulgate rules which indicate when hospital, health care providers, and legal entities are not subject to the Certificate of Need Program." Similar changes in language should also be made where appropriate in other sections to the Rules.

Section 3, dealing with replacement of major medical equipment. Section 3 and related subsections as written contain provisions for the filing of notice and subsequent Agency action. These provisions will be discussed later in this comment, they won't be discussed in detail as written in the comment.

However, the same provision as they relate to Section 3 will cause an unnecessary delay in the delivery of appropriate patient care. This delay, especially as relating to the replacement of worn out equipment which may not be functioning properly, experiencing excessive down time, or not functioning at all, has the potential of causing substantial harm to the public interest by impeding the accessibility of needed services and adequate patient care.

It is therefore suggested that Subsection 3.1 be rewritten in its entirety. We have provided you, both in the text of our comments, and in a revision of your rule, suggested language for that rewriting. These suggested changes are made because certain portions of the State Health Plan which identify specialized acute care services, if utilized, would make Section 3 of the rules meaningless relating to replacement of obsolete equipment which has been and will be substituted by equipment in that shelter.

It is also respectfully suggested that Subsection 3.2 of the existing Rule be rewritten. This

section deals primarily with the information required in the requirement of notice. Subsection 3.2 as originally written by the Agency contains a requirement of notice to the State Agency. This requirement has no statutory basis and should not be included as part of the Emergency Rules.

Subsection 3.4 as written by the Agency should be eliminated because there is nothing for the Health Care Cost Review Authority to rule upon. There is no requirement for the Agency to make any determination, either in the Statute, or the rule as rewritten.

Section 4 dealing with capital expenditures not for health services. It is suggested that Subsection 4.1 and 4.2 be written. Statutory authority for this section, as contained in the West Virginia Code, "Significantly, the legislature deliberately does not require Health Care facilities or legal entities to apply for an exemption from obtaining a Certificate of Need."

The language of the Statute is deliberate in nature, particularly when compared with other language contained in the Statute. If the legislature had intended that the State Agency issue exemptions for capital

expenditures and not for health services, it would have clearly so stated.

To provide an example, in the Statute it states that a health maintenance organization is not exempt from obtaining a Certificate of Need unless it has submitted an application for such exemption to the State Agency, and the State Agency approves such application. In the subsection that is under present consideration the legislature omitted that type of an exemption language, thus the legislature again indicated that hospitals should not have to apply for an exemption. Rather, the deliberate language of the Statute says, "The State Agency may adopt regulations by which a Certificate of Need may not be required."

We argue that a determination by the State Agency of exemption should not be required, except as clearly defined by the Statute. Indeed, Section 16-2D-4 is the very section of the article which instructs the State Agency to refrain from including certain activities in the Certificate of Need Program. Therefore, we believe that Section 4 of the rule should be rewritten as we have

outlined in our testimony.

In addition, the provisions of Subsection 4.3, as written, indicate that only those capital expenditures equal to or less than $2,000,000 shall be exempt from CON activity. No Statutory authority, whatsoever, exists for this arbitrary limitation. By declining to determine a maximum dollar amount the legislature has indicated that there should be no maximum amount. If the lawmakers determine otherwise, they would have included a monetary standard as it did in other sections of the 1987 Statutory modification.

We also note that acute care health care facilities are singled out for discriminatory treatment in that no capital expenditure which will result in an increase in rates charged to the entity's patients will be eligible for this exemption.

Legislatively created dispensation is effectively obliterated by disallowing the cost for any expenditure to be considered as part of an acute care facilities expense base. Taking this subsection in its totality it is obvious that the effect is to completely

negate that portion of the 1987 legislative modification.

Further, taking subsection 4.3 as it is written from a practical viewpoint it is unworkable. Capital cost to include depreciation has long been recognized as a legitimate expense incident to all industries and businesses. The Federal Medicare and the State Medicaid Programs, as well as third-party payors, have been advocates, and in the instance of Medicare proponents are in concept with funded depreciation.

To deny capital cost as a part of a facilities expense base, irrespective of the level of capital expenditure, will prevent a hospital from recovering necessary funds for replacement, renovation, and initial investment.

Medicare and Medicaid Program reimburse providers for their share of capital costs only. The non Medicare and non Medicaid payors to evade paying their share could prevent providers, especially our smaller and more rural providers, from acquiring needed new capital and/or replacement items. No prudent business would attempt to market his product below cost, and this section arbitrarily

sets a level of capital expenditure for which the full cost would not be recoverable.

To state that such expenditures should not be included in the hospital's expense base denies the legitimacy of the expenditure itself. The Agency therefore takes the position that such items as telephones, computer hardware and software, and other items listed, are really not essential for hospitals.

For all of the above reasons, it is respectfully suggested that Subsection 4.3 be deleted in its entirety. Accordingly, also Subsections 4.4 and 4.5 become unnecessary and should be eliminated in their entirety for the reasons that I have listed above.

Section 5, dealing with shared services. Subsection 5.1 and related Subsections should be rewritten to reflect the understanding that no exemption is needed from the Agency for the reasons that were indicated earlier in our testimony and our comments.

Subsection 5.3, as written by the Agency, should be deleted in its entirety. Nothing in the Statute restricts ownership of equipment. In reality, any third

party may acquire or own the equipment. The legislature did not restrict such ownership to an acute health facility. Inclusion of this provision arbitrarily restricts hospitals from obtaining a legislatively created benefit of the Statute.

Further, it prevents two or more hospitals that wish to joint venture from forming a third entity in order to acquire the equipment. The formation of a third entity can eliminate conflicts with regard to scheduling and provides joint accountability. It also obviates problems that could arise if the hospitals involved have different organizational structures. Single providers change, religious orders, profit makers versus non profit makers.

Subsection 5.4 should be deleted in its entirety. The legislature clearly intended hospitals, and therefore, the patient community served, relief from the regulatory process in the provision of shared services between two or more acute care facilities.

Additionally, this Subsection, as well as Subsection 5.5, as written, serve only to delay the effectuation of new provisions, in effect, would defeat the

legislative intent of moderation through a regulatory process.

Section 6, dealing with other claims of exemption. This section is premised upon a notice to the State Agency, as contained in West Virginia Code 16-2D-4, for those situations and circumstances in which notice is required by the Statute. As such, in Section 6 other claims of exemption was a misnomer. The Section, as written, clearly exceeds the Statutory authority and jurisdiction of the State Agency.

16-2D-4 is concerned with relief from both the CON process, as well as from obtaining a formal exemption determination from CON by the Agency, except in those instances such as health maintenance organizations, projects undertaken for research, and acquisition of health care facilities. These activities are the exclusive and only circumstances under which notice to the Agency and an Agency determination must be reached. Therefore, the notice requirements only pertain to the above narrow but important situations.

To read the Statute as the Agency does in

requiring notice where no notice requirement statutorily exists is exemplified by Subsection 6.1. Adhering to the requirement of this Subsection as written will render two results. First, it will require a health care facility that wishes to make any capital expenditure, institute a new health service, or to effect any change in an existing health service for reasons other than replacement of major and medical equipment, share services or obligations of a capital expenditure for services not directly related to clinical health services that require them to be reviewed. In these situations the health care facility will have to file a verified notice with the Agency.

Secondly, once HCCRA receives any verified notice the provisions of 16-2D-4(i) will be activated. This means that irrespective of any clear intention on the part of the legislature to declare those activities which are not subject to CON Program, such legislative intent is again ignored by the Agency in these Rules.

This disregard for legislative intent results in precisely the opposite effect of what the legislature has decreed. That is, under this Section

virtually any activity undertaken by a health care facility is now made subject to the CON Program.

Additionally significant, the Agency has included Subsection 6.4 and 6.54, as these sections clearly demonstrate, in our opinion, an inadvertent misinterpretation of the Statute which cannot be justified. We go into some detail, by the way, in clarifying exactly what we mean there.

We would also voice our concern regarding the Agency's failure to define by Rule the term "geographic area" as used in Subsection 6.3 and 6.4. Nothing in the Statute provides a definition of this term. In the absence of a definition the term itself is open to extremely broad interpretation.

Failure to provide some direction or limitation to this term will unacceptably result in placing tertiary facilities in competition with virtually everyone in the State, and also could impede the development of new services in West Virginia if they are found to be in competition with health care facilities in the bordering states of Kentucky, Maryland, Ohio, Pennsylvania and

Virginia.

Having completed a review of the 6 sections, we also have a comment on the 7th section in our written comments that I would like to summarize. The intent of the legislature in enacting House Bill 2342 was to grant relief to health care providers from the regulatory process through the addition of Statutory provisions which moderate that process.

The Health Care Cost Review Authority has construed the language of the Statute in such a way that, Number 1, health care facilities and hospitals, in particular, are denied the benefit of that relief. Number 2, the Agency regulatory process will dramatically increase resulting in, A) Increased cost to health care facilities; B) Unnecessary and untimely delays in the provision of needed services to patients; C) Increased opportunities for litigation and associated costs; and 4) Increased cost to consumers. The Rules as written will therefore cause substantial harm in the public interest.

In several instances the Agency has, albeit unintentionally, abused its discretionary authority to

promulgate rules by, 1) Misconstruing the language of the Statute. Neither the regulatory authority nor the entities regulated are free to disregard, ignore, or obliterate the intent of the legislature. Number 2) Failing to provide criteria by which exemption will be judged, thereby awarding to themselves extraordinary discretions in making such determination. Number 3) By promulgating rules clearly in excess of Statutory authority.

For all of the above reasons the Agency is respectfully requested to rescind by modification the present Emergency Legislative Rules and to issue revised rules which we have attached to these comments and identified as Attachment Number 1.

Health care providers are willing to inform the Agency of their activities, which is evidenced by the rules as rewritten. The suggested rules achieve the Statutorily permitted balance incurred by the 1987 modifications between Agency regulation and the ability of health care providers to expeditiously provide appropriate services to the citizens of West Virginia.

The revised criteria also provide a clear

direction to both the regulator and the regulated for activities which are not subject to the Certificate of Need Program and make the 1987 modifications consistent and coherent.

I appreciate your indulgence.

MR. KOZAK: Thank you, Mr. Rutledge. Next would be David Bailey from the United Hospital Center.

MR. GOULD: Mr. Kozak, I have an appointment conflict. My remarks are brief and I was wondering if I might be permitted to --

MR. KOZAK: There being no objection, Mr. Gould.

MR. GOULD: My name is Gary Gould. I am the Assistant Administrator of Wheeling Hospital, and I appreciate the opportunity to speak before you. I will be very concise. Specifically, there is really only one area in particular that I would like to address to you and it has already been mentioned, as have several others.

I share some of the concerns that Mr. Rutledge has outlined. One in particular deals with Section 4.3, and that is the one on the exempt projects for non health care related services and their impact upon rate

setting. The proposed rules indicate that the provider may obtain an exemption for a capital expenditure which is not directly related to the provision of health services, and which is less than $2,000,000.

However, Section 4.3 further states that capital expenditures and operating expenses related to such an exempt project would not be included in an acute care facility's expense base, and that further, the exempt expenditure cannot result in an increase in the rates charged by the facility.

As a result of those two restrictions, in essence, all acute care facilities will be required to file Certificate of Need applications for otherwise exempt projects in order to assure that there will be no negative impact on that facility's rate review process in the future.

Since the reasonableness of expenses and rates of acute care facilities is subject to rate review, Section 4.3 of the proposed rules should provide that capital and operating expenses shall be included as part of the acute care facility's expense base and may serve as a legitimate reason for increases in rates.

I sit back and I kind of think of a few projects that we have had back over the years. As I understand the way the rules are written at this time, a piece of digital angiography equipment, which is extremely sophisticated and expensive, if it was indeed a replacement, would be exempt from this process. Presumably, although it is not written in here specifically, the expenses associated with that piece of replacement medical equipment would be included in my expense basis and could, in fact, be a justifiable reason for a rate increase.

But on the other hand, if I implement a new telephone system or repair existing heating systems, that, in turn, as I read this, unless I misconstrue it, would not be acceptable as part of my expense base unless I went for a CON. That does not seem to me to make a lot of sense, and doesn't seem to be particularly consistent.

I would urge that you adopt that if it is truly going to be an exemption for those services, that, in essence, those expenses and rates should be in there and their reasonableness reviewed as part of the rate review process, the overall rate review process.

The only other item that I would comment upon would be that in the proposed rules there are several places when it talks about the determination of the exemption. I believe it indicates that there is 30 days that there would be a determination of exemption. That determination would be delayed if there was a request for additional information.

I think that it would be very, very -- at least from our perspective, I guess, it would be very helpful if that time period for determining those exemptions, if the remaining portion of the rules were nailed down a little tighter. It would be preferable that we either get a response on the exemption being there within 10 working days, or that we get a very timely notice for additional information, shorten up the time period. Those are the only two comments that I would like to address specifically. Thank you.

MR. KOZAK: Thank you, Mr. Gould. David Bailey, United Hospital Center.

MR. BAILEY: Mr. Chairman, Members of the Board, others of The Authority, United Hospital Center appreciates

the opportunity to respond to your proposed Emergency Rules on Exemptions from the CON review process as filed with the Secretary of State on July the 7th of this year.

United Hospital Center concurs with the analysis of the West Virginia Hospital Association, which has identified and discussed in detail several significant areas of concern related to the proposed Emergency Rules. Because of the in-depth critique already provided by Mr. Rutledge, my comments will emphasize those areas of the rules which impact United Hospital Center.

First, Section 3. This provision effecting a replacement of major medical equipment is of particular interest at United Hospital Center, which not too many years ago went through a drawn out and expensive Certificate of Need process, which included a reconsideration hearing to replace an outdated and obsolete Cobalt 60 Unit Linear Accelerator.

In its decision on that replacement HCCRA specifically found that the Linear Accelerator would be providing a more effective and safer method of radiation therapy for cancer patients. Despite this, as we interpret

these Legislative Rules, other hospitals seeking to replace Cobalt units would still be required to undergo a full blown Certificate of Need review. We think this defies legislative intent to impose CON review in these circumstances.

We are also concerned that the notice requirement contained in Subsection 3.2, which can trigger a full blown Certificate of Need review, directly contradicts the intent of 16-2D-4 to make replacement of major medical equipment non reviewable. We believe that the filing of information about the equipment should be sufficient.

Second, capital expenditures not for health services. The West Virginia Legislature, in drafting 16-2D-4, deliberately did not require health care facilities or legal entities to obtain an exemption for capital expenditures not related to health services. In other words, the legislature intended that hospitals and other entities could acquire items such as telephone systems, computer software and hardware, and medical office buildings without being subject to the Certificate of Need Program.

Section 4 of the rules, as presently

drafted, attempts to circumvent this dispensation and to single out hospitals by forbidding hospitals which make such purchases from including them in their expense base for purposes of rate review.

As the Authority surely realizes, from a practical point of view such a requirement precludes hospitals from taking advantage of the exemption since it prevents them from recovering necessary funds for replacement, renovation, and initial investment, thus, despite legislative intent otherwise, this regulation will force hospitals to undergo a CON review if they want to recover their cost.

We also question the arbitrary limitation of those exempt capital expenditures at $2,000,000. How was that number selected? What criteria were relied upon? Did the Authority review the average cost of telephone or computer systems to determine whether $2,000,000 is a reasonable cap?

Third, shared services. Section 5 of the rules pertaining to shared services imposes an unwarranted ownership restriction which effectively eliminates the

benefit of the exemption. As this Authority is well aware, many hospitals who are presently participating in a shared mobile service, such as MRI or Lithotripsy, do not own the equipment. The usual reasons for this relates to the financing of the service or the utilization of the facility's parent organization venture.

Nevertheless, the acute facility is the entity which utilizes the equipment and provides the service to the community. Why has HCCRA chosen to focus on ownership, an aspect on which the Statute is silent, unless to trigger a review which the legislature did not intend.

The situation involving United Hospital Center's mobile CT Scanner illustrates this point. As the Authority will recall, during the late 1970's and early 1980's, United Hospital Center shared mobile CT services with Fairmont General, Davis Memorial, and Memorial General Hospital. During this time, for reasons related primarily to the financing, the Union National Bank of Clarksburg actually owned the CT. Services, however, were provided by the acute care facilities.

From our own experience, we frankly fail to

see the relevance of ownership in this scheme of review where, in fact, acute care facilities are sharing the services and thereby meeting the federal requirements of the Statute.

Finally, other claims of exemptions. By requiring verified notices which may result in CON review, Section 6 of the regulations clearly exceeds the statutory intent of limiting the applicability of the Certificate of Need Program.

To us, this section particularly conflicts with HCCRA's statement in the preamble of the rules, that their purpose is to alleviate the financial burden on health care facilities and to accelerate the Certificate of Need process for certain activities.

The many concerns we have with the provisions of Section 6 are illustrated by the provision granting the Authority unbridled discretion to order a CON application merely because an affected party requested a hearing on a claim of exemption. Under this provision request for exemption, which the legislature explicitly removed from the Certificate of Need application process,

now by regulation becomes subject to a full application.

In summary, Section 6 ignores legislative intent to limit the impact of the Certificate of Need process by attempting to subject every activity undertaken by a health care facility to review.

In conclusion, our review of these Emergency Legislative Rules demonstrates that rather than reducing the scope of Certificate of Need coverage as the legislature intended, the rules actually impermissibly expand HCCRA's control over the activities of hospitals and other health care facilities. We respectfully submit that such expansion violates legislative intent.

If West Virginia hospitals are subjected to the broader review contemplated by these regulations, the consumers of West Virginia will pay in terms of increased health care cost and government expense. In our view, the West Virginia Legislature exercised good judgment when it trimmed back the scope of the CON review.

United Hospital Center respectfully urges HCCRA to abide by that legislative intent and reduce the break of these legislative rules. Thank you, very much.

MR. KOZAK: Thank you, Mr. Bailey. Jack Canfield, Charleston Area Medical Center.

MR. CANFIELD: Thank you, very much, Mr. Chairman, and members off the Authority. I am Jack Canfield, Senior Vice President for Corporate Development at CAMC. I testify today on behalf of Charleston Area medical Center, St. Francis Hospital and Thomas Memorial Hospital. All three concur in the comments which I shall be making.

Mr. Chairman, we again appreciate the opportunity to appear before the Authority and to comment on regulations relating to exemptions from Certificate of Need review. We feel that the general thrust of the recently enacted law is beneficial, both for the hospitals, and also for the Health Care Cost Review Authority. I wish to comment on just a few of the provisions in the Emergency Rules.

Our first observation relates to the provision in Section 3.1 concerning the replacement of major medical equipment. We fully understand that the Code provides a definition of major medical equipment and establishes a cap of $750,000 before formal approval by

HCCRA is required.

Further, Section 3.1 specifies that a Certificate of Need may not be required in those instances in which an applicant proposes to acquire major medical equipment which merely replaces medical equipment which is already owned by the facility and which has become outdated, worn out or obsolete.

One issue we would raise here relates to what HCCRA would consider to be outdated, worn out or obsolete. As an example, Hospital A might be interested in purchasing a piece of replacement equipment in order to take advantage of the new generation of technology. But the used piece of equipment might not be technically obsolete by a dictionary definition, that is to say, no longer in use. Hospital B might be perfectly willing to purchase that used piece of equipment. So what is obsolete for one hospital is not necessarily obsolete for another.

A second example would involve equipment which may not technically be considered worn out or outdated, but which might have a great deal of down town. So with technology in medical equipment as dynamic as it is,

tremendous changes are occurring practically overnight. While we do not at this time have specific language to offer, we do recommend that this regulation be liberally construed in such a way that the hospitals would not be precluded from acquiring new generation equipment.

We do have a specific suggestion in regard to the timetable in the 3.3. A 30-day review of notices filed by health care facilities to purchase routine medical equipment seems excessive. For such purchases, Section 3.2 specifically defines the information which is required. HCCRA, in fact, requires extensive supporting justification, as drafted. With all of that information on hand, it does not seem unreasonable that such reviews be completed within 10 days after receipt of the notice.

Our specific recommendation would be that you consider operating this section in 10-day increments, rather than in 30-day increments, because, as currently written, not a great deal of time is saved.

For example, and this has been touched upon by some of the previous speakers, but HCCRA has a 30-day review period. If more information is desired at the end of

the 30-day period, then another 30-day review period begins upon receipt of the requested information. That amounts to at least a 60-day review for replacement equipment.

We suggest that you consider 10-day review periods instead. That would not be unprecedented in that, under existing law, HCCRA is required to act in some cases within 10 days. This would provide you with the information you need. It retains the opportunity for you to request more information, but it meets the intent of the law, which is to speed up the process.

Also, in Section 3.4, we would urge you, as we have in previous testimony, to specifically allow hospitals to request a hearing on matters which have been decided upon by HCCRA. In this section it is indicated that the decision by HCCRA will be final. We suggest the opportunity to present additional information should be made available through the hearing process.

We, too, would like to comment on procedures for exemptions from capital expenditures as outlined or referenced in Section 4. These are for expenditures not directly related to health services.

The Code in 16-2D-2(g) defines expenditure minimum as $1,000,000, defines major medical equipment as $750,000 or higher, and defines expenditure minimum for annual operating costs as $500,000.

However, we find no statutory provision which establishes a $2,000,000 threshold for non health care related services. We understand the thinking of the Authority behind a dollar cap. I think this was touched upon at the seminar that was held here in Charleston a few weeks ago. That was to put such a cap in place of having to spell out every conceivable exemption that might come up.

However, we feel the language presently drafted in the regulations, minus a cap, is sufficient, in that you list some expenditures as examples, and then add the words "among others." That would appear to me to provide HCCRA with both the guidance and the flexibility it needs to make its decisions. So we respectfully suggest that, with the retention of such language, a dollar cap is unnecessary and certainly it was not intended in the legislation.

We do note that the cost of providing non

health care services, whether more than $2,000,000 or less than $2,000,000, constitutes overhead. One cannot efficiently operate a hospital without such fundamental services as computer systems, parking areas, or telephones, for example. As such, there should not be a prohibition against the patient rate structure reflecting such overhead costs as capital and depreciation.

Without reiterating our earlier comments, we would recommend again that the 30-day review procedure in Section 4 be replaced with a procedure in 10-day increments, and a hearing process to be included for hospitals.

Turning to Section 5, we again call attention to the West Virginia Code. In the Code HCCRA is given the option to promulgate regulations for shared services between acute care facilities. The Code provides that the equipment must reasonably be mobile, and that HCCRA shall specify the items exempt from review.

We note again, as some earlier have, that the law does not require that acute care facilities own that equipment. Yet the proposed rule requires ownership. As we mentioned earlier, rapidly changing technology in medical

equipment is a fact of life. Indeed, in some instances, it may be more cost efficient for a hospital to rent equipment or to lease it, rather than to purchase it.

In other cases, equipment might even be acquired under a lease/purchase arrangement. It does not seem in the best interest of our hospitals, particularly our teaching and referral hospitals, to require ownership of mobile equipment in order to qualify for this exemption provision.

The proposal in Section 6 provides the process by which health care facilities are to request a determination of exemption from review. The basic problem here is that almost any new service can be considered competitive with services provided by other facilities, depending on the definition of competition, geographic area or economic factors, which is referred to in the rules. Furthermore, even if one facility does not provide a given service, the initiation of that service by another facility could very easily be viewed as competition.

Should you, however, choose to leave in language about competition, it would appear that the burden

of proof is on the wrong party, that is to say, the applicant. If there is a claim that a service is unreasonably competitive, it should be the burden of the challenger to provide that documentation.

Again, to repeat myself, we would request that hearing procedures be specifically provided for hospitals as they have been for any affected person. This was addressed in the regulations we went over earlier. As we requested in earlier testimony, we urge that the term "affected person" be clearly defined, and that procedural requirements for such intervention be established in order that the application process not be tied up by frivolous challenges.

In Section 7.1, the language states, "A hearing shall then be held at the earliest opportunity of the parties and the state agency." We suggest a specific time period be established for the hearing to be scheduled. This is not inconsistent with your earlier proposals for hearing procedures. For example, in the proposed rules for Requests for Hospital Rate Changes, hearings are required to be scheduled within 45 days. A requirement such as this

would prevent unnecessary delays in the review process.

Our final point, Mr. Chairman, we would note that the regulations are absent any procedure or timetable with respect to increasing the expenditure minimums established by the Legislature. As you know, the statutory thresholds on capital expenditures and major medical equipment are effective October 1st of this year, and they remain in effect until September 30, 1988.

HCCRA has the authority to establish regulations to adjust the expenditure minimum to reflect the impact of inflation. The manner in which such a review would be carried out logically fits in these regulations and would enable hospitals and the Authority to better plan for future activities. So we would like to suggest including the procedure for that inflation adjustment as well in these regulations.

Mr. Chairman, that concludes my comments, and let me again thank the Authority.

MR. KOZAK: Thank you, Mr. Canfield. Allen Meadows from Princeton Community Hospital.

MR. MEADOWS: Thank you, Mr. Kozak. Mr. Chairman,

Board Members, ladies and gentlemen. My name is Allen Meadows. I am the Director of Marketing at the Princeton Community Hospital.

With regard to your new proposed regulations regarding exemptions from Certificate of Need, let me first say that Princeton Community Hospital is pleased with the various threshold increases for capital expenditures, major medical equipment purchases, and annual operating expenses.

We are also pleased to see the change in the definition of substantial change to health services to exclude hospices, wellness centers, adult day care, and ambulance services from review. Dropping the review requirement for changes in the use of beds is also a welcome change.

Princeton Community Hospital thinks all of these changes will allow us to more quickly react to changing health care consumer demands in Mercer County and the surrounding region. However, we do have three suggestions regarding your proposed regulations.

Our first suggestion concerns Section 4.3, "Capital Expenditures Not For Health Services." We feel the

last sentence, "Any item obtained by an acute care facility pursuant to this exemption and the expenditure and expenses related thereto shall not be considered a part of the acute care facility's expense base," does not reflect generally accepted accounting principles or standard accounting methods approved by Medicare.

For example, if we decide to build a $2,000,000 medical office building, what do we do with our depreciation expense in the years to come. Let's say we depreciate the $2,000,000 over the next 30 years. Using straight line depreciation we would have to include approximately $67,000 depreciation expense in our expense base each year, according to generally accepted accounting principals.

What if we had borrowed the $2,000,000? Why wouldn't the interest expense be included in the expense base? We respectfully suggest that you simply delete the last sentence in Section 4.3.

Our second suggestion is with regards to Section 5.3 where you have, we believe, inadvertently excluded from the exemption acute care facilities who

participate in a shared service but who do not technically own the service.

Our hospital is a member of Voluntary Hospitals of America, VHA. The primary reason that we joined VHA was to be able to develop shared services with other member hospitals in order to maintain our lower costs to patients. But VHA is not an acute care facility, therefore, it is our understanding of Section 5.3 of your new proposed regulations that, if VHA owned a mobile lithotripter and VHA member hospitals wanted to share that service, your shared services exemption would not apply.

We respectfully suggest that you amend Section 5.3 by simply taking out the phrase, "or if the ownership," so that the section reads, "This exemption is not available if any participant in the shared services is not an acute care facility."

Our third suggestion deals with Section 7.1, "Requests for Hearing and Reconsideration Hearings." The last sentence reads, "A hearing shall then be held at the earliest opportunity of the parties and the state agency." We feel the phrase "earliest opportunity" is too vague a

time frame. This may lead to individuals unnecessarily delaying the CON process to the detriment of patients needing a new service.

Therefore, we respectfully suggest that a definite but short time period be set, for example, "within 14 days."

Thank you, gentlemen, for this opportunity to express Princeton Community Hospital's suggested changes to what we otherwise feel are some very positive steps towards helping hospitals more easily meet health care consumer demands.

MR. KOZAK: Thank you, Mr. Meadows. That completes the names on my list. Is there anybody else present who would wish to address these regulations?

(No response.)

MR. KOZAK: Seeing and hearing none, Mr. Chairman, I would return the course of the meeting to you and declare the public comment period ended.

CHAIRMAN DALE: Any other business that needs to come before the Board?

(No response.)

CHAIRMAN DALE: If not, on behalf of the Board, I certainly appreciate the participation and attendance of everybody today and appreciate your patience and input. As in the past, we will be striving in the future to see what we can possibly be doing to help all of the consumers and everybody concerned in the State of West Virginia.

(WHEREUPON, the Board Meeting was adjourned at 3:41 p.m.)

REPORTER'S CERTIFICATE

STATE OF WEST VIRGINIA,

HEALTH CARE COST REVIEW AUTHORITY, to-wit:

I, the undersigned, Daniel W. Skidmore, a Court Reporter and Notary Public in and for the State of West Virginia, do hereby certify that the foregoing is, to the best of my skill and ability, a true and accurate transcript of all the proceedings as set forth in the Board Meeting held on August 10, 1987.

Given under my hand this 20th day of August, 1987.

My Commission expires August 10, 1992.

Daniel W. Skidmore

Daniel W. Skidmore
Court Reporter

HCA Raleigh General Hospital

August 10, 1987

Mr. Walter Dale, Chairman
WV Health Care Cost Review Authority
100 Dee Drive
Charleston, West Virginia 25311

RE: HCCRA Emergency Rules on Exemptions
From CON Review

Dear Mr. Dale:

A review of emergency legislative rule filed by the Health Care Cost Review Authority has resulted in the following concerns by Raleigh General Hospital.

The written rules do not provide specific criteria by which the Health Care Cost Review Authority will be making its determination on the exemption of any given project. By not listing such criteria or factors which the Authority will take into account in its decision making capacity, hospitals and other health care providers are not aware of the decision making factors considered by the Authority and therefore may consider some of the determinations by the Authority to be arbitrary. Due to the vagueness of these rules as to the criteria to be used, this could increase the number of public hearings and appeals of the Authority's decisions.

The rule as written in Section 4 Capital Expenditures Not For Health Services contains significant problems for health care providers. The exemption allowed under Section 4 is limited in Section 4.3 to expenditures equal to or less than $2,000,000. The legislation does not include any reference to this type of limit and therefore this appears to be an arbitrary amount with no basis set by the Authority. Also acute health care facilities are discriminated against in that no capital expenditure which will result in an increase in rates either directly or indirectly (i.e. depreciation) will be eligible for the exemption. The legislative intent was to create relief for health care providers on these types of expenditures and not to place additional burdens on them. Any acute health care facility would be remiss in its duties to its Borad or shareholders if it elected to go for an exemption in this manner and therefore not have its expense base considered for

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rate review purposes. This will mean that the acute health care facility would be paying for the CON fee of .18% of the total expenditure for this type of project just to have the associated expenses included in its base for rate review purposes. The obvious effect that the authority wants by the inclusion of this subsection in the rules is to eliminate the availability of this exemption to hospitals.

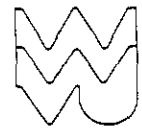
The rule as written in Section 5 Shared Services also contains a significant problem for hospitals. Subsection 5.3 states that "This exemption is not available if any participant in the shared services or if the ownership of the equipment to be obtained is not by an acute care facility." This statement prevents two hospitals form forming a separate entity to own and operate any type of shared service. This is a typical type of an arrangement for these shared services and would infringe upon the entrepreneurship of the State's hospitals. Again, by not having this exemption available to hospitals with this type of an arrangement for ownership it will necessitate the hospitals going through the full review process and also for paying for the .18% Certificate of Need application fee.

Subsection 6.1 as written would require a hospital or <u>any</u> other health care facility that wishes to make any capital expenditure, regardless of the amount of that expenditure to file a verified notice of such action with the Authority. This means that if Raleigh General Hospital needed to make an expenditure for a file cabinet that meets the internal criteria for a capital expenditure then we would have to file a verified notice of this action with the Authority and submit along with that the appropriate fees related to this expenditure. As you can see as this section is taken literally, virtually any activity undertaken by a hospital is now made subject to the CON program.

Respectfully Submitted,

Kenneth M. Holt

Kenneth M. Holt
Administrator



West Virginia University Hospitals, Inc.

Office of the President

West Virginia University Hospitals, Inc.
Statement
HCCRA CON Exemption

August 10, 1987

West Virginia University Hospitals, Inc., wishes to express its concern over the proposed emergency legislative rules for the Health Care Cost Review Authority. It is our view that the legislature, in authorizing expanded exemptions from CON, intended to provide some relief to hospitals from the burdensome and costly CON process. However, we believe that the proposed rules do not offer that intended relief.

In particular, the proposed exemption rules for capital expenditures will have a major negative impact on hospitals, particularly upon hospitals like WVUH, that are in the midst of major replacement activities. The two million dollar limit on exemptions is arbitrary, and there is no basis in the legislation for placing a dollar ceiling on exemptions. Particularly detrimental is the requirement for expenditures under two million dollars be excluded from the hospital's expense base. Given these rules, there is in effect no exemption available to hospitals that need to replace or build computer systems, telecommunications systems, parking areas, or other needed facilities.

The proposed rules for the replacement of equipment are unclear, although the rules apparently do not apply to equipment upgrades. With health care technology constantly changing, and many pieces of equipment not replaceable without an upgrade, the rules are indefinite enough to make a determination of exemption entirely at HCCRA's discretion. We strongly suggest additional clarification in these rules to make clear what constitutes replacement and what constitutes upgrading.

The proposed rules on exemptions for shared services appear to directly contradict HCCRA's mission of cost containment. By only allowing shared-service exemptions when all parties are acute-care hospitals, the rules eliminate the incentive to work with other institutions (e.g. hospital alliances, physician groups, equipment companies) to share or reduce the capital cost of the service. We believe that the parties to shared-service agreements should not be limited for purposes of CON exemption.

We appreciate the opportunity to comment on the proposed rules. We hope that our views will be used to make positive changes in those rules.

Medical Center Box 6401•Morgantown, WV 26506-6401•304-293-7075

St. Mary's Hospital
2900 First Avenue / Huntington, West Virginia 25701 / (304) 526-1234

August 10, 1987

Mr. Walter J. Dale, Chairman
Mr. Larry C. Fizer, Board Member
Mr. Don M. Keesling, Board Member
West Virginia Health Care Cost Review Authority
100 Dee Drive
Charleston, West Virginia 25311

RE: HCCRA EMERGENCY RULES ON EXEMPTIONS FROM CON REVIEW

Dear Gentlemen:

It appears to us, following our detailed review of the HCCRA emergency rules, that HCCRA has expanded their control over the CON process rather than reducing the scope of CON coverage as we thought the Legislature intended. Our concerns include:

(1) the fact that the rules do not contain the criteria that HCCRA will use in making CON determinations on the exemption of a project. Since the rules do not list the criteria which will be used by HCCRA in making the determination, it places the hospital at a disadvantage in attempting to comply with the rules.

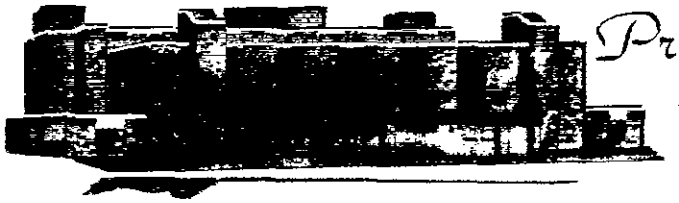
(2) the rules increase the cost to the hospital in complying with the CON process and could cause untimely delays to us in providing the services. Examples include the "replacement major movable equipment" which most likely will have to be reviewed if the hospital intends to increase their charges to compensate for the increased cost of the replacement unit (Section 3); the rule at Section 4.3 which exempts capital expenditures costing two million dollars or less from CON activity, without any statutory authority for that rule; IT APPEARS THAT HCCRA IS ATTEMPTING TO ELIMINATE THE AVAILABILITY OF THIS EXEMPTION TO HOSPITALS; in the subsection 4.3, HCCRA excludes capital costs, including annual depreciation from being a part of a facility's expense base and thereby prohibits recovering the necessary funds for replacement, renovation and initial investment of capital assets. It is very interesting to note that HCCRA is the only governmental agency that has taken this backwards approach in denying the hospital the possibility of recovering their full cost; and prohibition of two hospitals forming a joint venture through a third company, prevents hospitals from exercising good financial judgement and will prevent competition by increasing the cost (Section 5.3).

On behalf of St. Mary's Hospital, I am respectively requesting your consideration of our opinions and encourage you to modify your emergency rules for the CON process.

Sincerely,

James E. Spencer
Director of Financial Affairs

cc: Steve J. Soltis, Executive Director



Princeton Community Hospital
TWELFTH STREET — P. O. BOX 1369
PRINCETON, WEST VIRGINIA 24740
TELEPHONE (304) 487-1515

HCCRA Public Heating

Monday, August 10, 1987

Allen Meadows, Director of Marketing

PRINCETON COMMUNITY HOSPITAL

"Exemptions from Certificate of Need Review"

Thank you Mr. Kozak. Mr. Chairman, board members, my name is Allen Meadows, Director of Marketing at Princeton Community Hospital.

With regard to your new proposed regulations regarding exemptions from certificate of need, let me first say that Princeton Community Hospital is pleased with the various threshhold increases for capital expenditures, major medical equipment purchases and annual operating expenses. We are also pleased to see the change in the definition of substantial change to health services to exclude hospices, wellness centers, adult day care, and ambulance services from review. Dropping the review requirement for changes in the use of beds is also a welcome change.

Princeton Community Hospital thinks all of these changes will allow it to more quickly react to changing health care consumer demands in Mercer County and the surrounding region.

However, we have three suggestions regarding your proposed regulations.

Our first suggestion concerns section 4.3 "Capital Expenditures Not For Health Services." We feel the last sentence "Any item obtained by an acute care facility pursuant to this exemption and the expenditure and expenses related thereto shall not be considered a part of the acute care facility's expense base," does not reflect generally accepted accounting principles or standard accounting methods approved by Medicare.

For example, if we decide to build a $2 million medical office building, what do we do with our depreciation expense in the years to come. Let's say we depreciate the $2 million over the next 30 years. Using straight line depreciation we would have to include approximately $67,000 depreciation expense in our expense base each year, according to generally accepted accounting principals.

And what if we had borrowed the $2 million? Why wouldn't the interest expense be included in the expense base?

We respectfully suggest that you simply delete the last sentence in section 4.3.

Our second suggestion is with regards to section 5.3 where you have, we believe, inadvertently excluded from the exemption acute care facilities who participate in a shared service but who do not technically own the service.

Our hospital is a member of Voluntary Hospitals of America, Inc. (VHA). The primary reason that we joined VHA was to be able to develop shared services with other member hospitals in order to maintain our lower costs to patients. But VHA is not an acute care facility, therefore it is our undersrtanding of section 5.3 of your new proposed regulations that, if VHA owned a mobile lithotripter and VHA member hospitals wanted to share that service, your shared services exemption would not apply.

We respectfully suggest that you amend section 5.3 by simply taking out the phrase "or if the ownership," so that section reads "This exemption is not available if any participant in the shared services is not an acute care facility."

Our third suggestion deals with section 7.1 "Requests for Hearings and Reconsideration Hearings." The last sentence reads "A hearing shall then be held at the earliest opportunity of the parties and the state agency." We feel the phrase "earliest opportunity" is too vague a time frame. This may lead to individuals unnecessarily delaying the CON process to the detriment of patients needing a new service.

Therefore, we respectfully suggest that a definite but short time period be set, for example, "within 14 days."

Thank you gentleman for this opportunity to express Princeton Community Hospital's suggested changes to what we otherwise feel are some very positive steps towards helping hospitals more easily meet health care consumer demands.

HCA Putnam General Hospital

August 7, 1987

RECEIVED
1987 AUG 11 AM 11:46
HEALTH CARE COST REVIEW AUTHORITY

Walter J. Dale, Chairman
West Virginia Health Care
Cost Review Authority
100 Dee Drive, Suite 201
Charleston, WV 25311

Dear Mr. Dale:

Subject: Emergency Rules, 16-2D, Series XI
Exemptions From Certificate Of Need Review

I am writing to offer my comments on the above referenced emergency rules and would like them to be made part of the record for the public hearing scheduled for Monday, August 10.

Section 3. Capital Expenditures Not For Health Services

In Subsection 4.3, the proposed legislative rules would cap the exception generally at $2 million and, in the case of acute care facilities, allow it only if the hospital were willing not to include it as part of its expense base for the purposes of establishing rates. Neither one of these limitations are mandated or even suggested by the language in the revised certificate of need law authorizing this exemption (S. 16-2D-4(g)). That Section states only, "The State Agency shall specify the types of items in the regulations which may be so exempted from review." As a hospital administrator I take particular exception to the specific limitation imposed upon acute care facilities. Clearly, if a hospital was planning to spend between $1-$2 million on any capital expenditure, it would reasonably expect to be able to include the associated costs of capital in its expense base. In fact, it would be irresponsible for any health care administrator to do otherwise. In effect, this provision makes this exemption unavailable to hospitals. Clearly this was not the intent of the Legislature, and this discriminatory provision should be deleted from the rules before their promulgation.

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Section 5. Shared Services

Subsection 5.3 states, "This exemption is not available if any participant in the shared services or if the ownership of the equipment to be obtained is not by an acute care facility." This limitation appears to be based on the phrase "shared services between two or more acute care facilities providing services" found in S. 16-2D-4(h). This extremely strict application or interpretation of this phrase would preclude two hospitals from developing a separate legal entity to provide the shared services in question or from contracting with an unrelated third party. More flexibility is needed on the part of hospitals seeking to share services; Subsection 5.3 should be dropped from these emergency rules.

Criteria

The regulations generally suffer from delineation of the criteria which will be used to consider the merits of a request for exemption. A provider seeking an exemption will have no idea of what issues need to be addressed.

I wish to close my comments by urging the Health Care Cost Review Authority to approach the emergency rules to implement the newly allowed exemptions with more flexibility and in a spirit of cooperation with hospitals. Thank you for your consideration.

Sincerely,

Dennis P. Bridgeman

Dennis P. Bridgeman
Administrator

DPB:glt

ST.
JOSEPH'S
HOSPITAL

July 31, 1987

Honorable Walter J. Dale
Chairman
Health Care Cost Review Authority
100 Dee Drive
Charleston, WV 25311

Dear Mr. Dale:

The following comments on the proposed Emergency West Virginia Legislative Rule titled "Exemptions From Certificate of Need" are hereby submitted by St. Joseph's Hospital of Parkersburg for inclusion in the record of the Authority.

1) Section 3.1 does not provide any assistance in defining the key terms of the exemption for replacement of major medical equipment. Those terms are "merely replaces" and "outdated", "worn out" and "obsolete".

It is difficult to understand, as those terms are commonly used, why a Hospital would want to replace "outdated" or "obsolete" equipment whether or not a certificate of need exemption was available. Perhaps the Legislature intended something more. In addition, it is unclear as to what type of equipment "merely replaces" equipment already owned by the Hospital. It would be very helpful to have some understanding of the Authority's interpretation of the meaning of those terms.

2) It is recommended that it be reiterated somewhere in Section 3 that "The exemption procedure is not required for equipment purchases under $750,000."

3) Subsection 4.3 states that "Only those capital expenditures equal to or less than Two Million Dollars ($2,000,000) and, if the entity is an acute care facility which will not result in an increase in rates charged to the entity's patients shall be eligible for this exemption" (Capital Expenditures Not For Health Services). It is our contention that $2,000,000 is an inadequate ceiling and that many building projects, even those not directly related to the provision of health services, cost more than $2,000,000, such as physicians' office buildings, parking garages, etc.. In addition, the

19th Street and Murdoch Ave. Parkersburg, WV 26101 1-304-424-4111

Statute does not provide for discriminating between acute care facilities and other facilities. Although the Statute gives HCCRA wide authority to promulgate regulations, it seems that if the Legislature intended to exempt such capital expenditures from a Certificate of Need, they must have also envisioned that the Hospital would have to recoup the cost of such expenditures through its rate structure to the extent that they were not self supporting.

4) Although the Statute states that the state agency "may adopt regulations to specify the circumstances under which and the procedures by which a Certificate of Need may not be required for shared services between two or more acute care facilities...", it does not prohibit shared services between acute care facilities and other entities. Furthermore, the Statute does not require that the equipment be owned by a participating acute care facility. Subsection 5.1 effectively eliminates the Shared Services Exemption for those acute care facilities wishing to share services with other entities.

It is our contention that the sharing of services between acute care facilities and other entities is consistent with the Legislature's intent to encourage the development of cost-effective health care services. Therefore, it is our recommendation that acute care facilities sharing services with other entities be eligible for the Shared Services Exemption.

5) While we recognize the importance of Subsection 7.1 in providing a mechanism whereby an affected person may request a hearing on any exemption provided for by the rule in question, it is our opinion that the affected person requesting the hearing should not be given an opportunity to delay, any more than necessary, the decision regarding the exemption process. Therefore, we would suggest a sixty day time period which could be extended for reasonable cause.

Thank you for your consideration of these comments.

Sincerely,

Arthur A. Maher

Arthur A. Maher
President & Chief Executive Officer

COMMENTS WITH RESPECT TO PROPOSED HCCRA EMERGENCY RULES ON EXEMPTIONS FROM C.O.N. REVIEW

United Hospital Center concurs with the analysis of the West Virginia Hospital Association which has identified and discussed in detail several significant areas of concern related to the emergency rules. Because of the indepth critique already provided by _____, my comments will emphasize those areas of the rules which impact our hospital.

First, Section 3.

This provision affecting the replacement of major medical equipment is of particular interest at United Hospital Center, which, not too many years ago, went through a drawn out and expensive Certificate of Need process, including a reconsideration hearing, to replace an outdated, worn out, and obsolete Cobalt 60 Unit with a Linear Accelerator. In its decision on that replacement, HCCRA specifically found that the Linear Accelerator would be providing a more effective and safer method of radiation therapy for cancer patients. Despite this, as we interpret these legislative rules, other hospitals seeking to replace cobalt units would still be required to undergo a full blown Certificate of Need review. We think this defies legislative intent to impose CON review in these circumstances.

We are also concerned that the notice requirement contained in Subsection 3.2, which can trigger full blown Certificate of Need review, directly contradicts the intent of 16-2D-4 to make replacement of major medical equipment non-reviewable. We

believe that the filing of information about the equipment should be sufficient.

Second, capital expenditures not for health services.

The West Virginia Legislature, in drafting 16-2D-4 (g), deliberately did not require health care facilities or legal entities to obtain an exemption for capital expenditures not related to health services. In other words, the legislature intended that hospitals and other entities could acquire items such as telephone systems, computer software and hardware and medical office buildings without being subject to the Certificate of Need program. Section 4 of the rules, as presently drafted, attempts to circumvent this dispensation, and to single out hospitals, by forbidding hospitals which make such purchases from including them in their expense base for purposes of rate review. As the Authority surely realizes, from a practical point of view such a requirement precludes hospitals from taking advantage of the exemption since it prevents them from recovering necessary funds for replacement, renovation and initial investment. Thus, despite legislative intent otherwise, this regulation will force hospitals to undergo Certificate of Need review if they want to recover their costs.

We also question the arbitrary limitation of those exempt capital expenditures at $2,000,000.00 (Two Million Dollars). How was that number selected? What criteria were relied upon? Did the Authority review the average cost of telephone or computer systems to determine whether two million dollars is a reasonable cap?

Third - Shared Services.

Section 5 of the rules pertaining to shared services imposes an unwarranted ownership restriction which effectively eliminates the benefit of the exemption. As this Authority is well aware, many hospitals who are presently participating in a shared mobile service, such as MRI or lithotripsy, do not own the equipment. The usual reasons for this relates to financing the service or the utilization of the facility's parent organization as the venturer. Nevertheless, the acute facility is the entity which utilizes the equipment and provides the service to the community. Why has HCCRA chosen to focus on ownership, an aspect on which the statute is silent, unless to trigger a review which the Legislature did not intend?

The situation involving United Hospital Center's mobile CT scanner illustrates the point. As the authority will recall, during the late 1970's and early 1980's, United Hospital Center shared mobile CT services with Fairmont General Hospital, Davis Memorial Hospital and Memorial General Hospital. During this time, for reasons related to financing and generally accepted accounting practice, the Union National Bank of Clarksburg actually owned the CT; services, however, were provided by the acute care facilities. From our own experience, we frankly fail to see the relevance of ownership in the scheme of review where, in fact, acute care facilities are sharing the service and thereby meeting the literal requirements of the statute.

Finally - Other claims of exemptions.

By requiring verified notices which may result in CON review, Section 6 of the regulations clearly exceeds the statutory intent of limiting the applicability of the Certificate of Need program. To us, this section particularly conflicts with HCCRA's statement in the preamble of the rules that their purpose is to alleviate the financial burden on health care facilities and to accelerate the Certificate of Need process for certain activities.

The many concerns we have with the breadth of the provisions of Section 6 are illustrated by the provision granting the Authority unbridled discretion to order a Certificate of Need application merely because an affected party requests a hearing on a claim of exemption. Under this provision, requests for exemption, which the Legislature explicitly removed from the Certificate of Need application process, now by regulation become subject to a full application.

In summary, Section 6 ignores legislative intent to limit the impact of the Certificate of Need process by attempting to subject every activity undertaken by a health care facility to review.

In conclusion, our review of these emergency legislative rules demonstrates that, rather than reducing the scope of Certificate of Need coverage, as the Legislature intended, the rules actually impermissibly expand HCCRA's control over the activities of hospitals and other health care facilities. We respectfully submit that such expansion violates legislative intent. We also don't think it will save the consumers of health care services in

West Virginia any money, and we concur with the conclusion of the Federal Trade Commission, the watchdog of consumer interests for the federal government, that the Certificate of Need process historically has not prevented unnecessary duplication of services or saved American consumers any money. If West Virginia hospitals are subjected to the broader review contemplated by these regulations, the consumers of West Virginia will pay in terms of increased health care costs and government expense. In our view, the West Virginia Legislature exercised good judgment when it trimmed back the scope of CON review. UHC respectfully urges HCCRA to abide by that legislative intent and reduce the breadth of these legislative rules.

HEALTH CARE COST REVIEW AUTHORITY

EMERGENCY RULES RELATING TO
EXEMPTIONS FROM CERTIFICATE OF NEED REVIEW

PUBLIC HEARING
MONDAY, AUGUST 10, 1987

Testimony by

JACK CANFIELD
Senior Vice President for Corporate Development
Charleston Area Medical Center

on behalf of

Charleston Area Medical Center
St. Francis Hospital
Thomas Memorial Hospital

Mr. Chairman, members of the Authority, ladies and gentlemen:

I am Jack Canfield, Senior Vice President for Corporate Development at Charleston Area Medical Center.

I testify today on behalf of Charleston Area Medical Center, St. Francis Hospital and Thomas Memorial Hospital. All three hospitals join in the observations I am about to make.

Mr. Chairman, we appreciate this opportunity to appear before the Authority and to comment on regulations relating to exemptions from certificate of need review. We feel this change in the recently-enacted law is beneficial, for both hospitals of our state and for the Health Care Cost Review Authority.

In response to your invitation, we wish to comment on just a few of the provisions in the Emergency Rules.

Our first observation relates to the provision in Section 3.1 concerning the replacement of "major medical equipment."

We fully understand that the Code provides a definition of major medical equipment (16-2D-2(q)) and establishes a cap of $750,000 before formal approval by HCCRA is required.

Further, Section 3.1, as provided by the Code (16-2D-4(f)), specifies that a certificate of need may not be required in those instances in which an applicant proposes to acquire major medical equipment which "merely replaces medical equipment which is already owned by the health care facility and which has become outdated, worn-out or obsolete."

One issue we would raise here relates to what HCCRA would consider "outdated, worn-out or obsolete."

As an example, Hospital A might be interested in purchasing a piece of replacement equipment in order to take advantage of a new generation of technology. The used piece of equipment might not be technically "obsolete" by definition --that is to say, "no longer in use." Hospital B might be perfectly willing to purchase that used piece of equipment. What is obsolete for one hospital is not necessarily obsolete for another. A second example would involve equipment which may not technically be considered as "worn out" or "outdated," but which might have a great deal of down time.

With technology in medical equipment as dynamic as it is, tremendous changes occur practically overnight. While we do not have specific language to offer, we do recommend that this regulation be liberally construed so hospitals will not be precluded from acquiring new generation equipment.

We do have a specific suggestion in regard to the timetable in Section 3.3. A 30-day review of notices filed by health care

facilities to purchase routine medical equipment seems excessive. For such purchases, Section 3.2 specifically defines the information required. HCCRA requires extensive supporting justification. With all of that information on hand, it does not appear unreasonable that such reviews be completed within ten days after receipt of the notice.

Our specific recommendation is that you consider operating this section of the regulations in ten day increments, rather than in 30- day increments. Because, as currently written, not a great deal of time is saved.

For example: HCCRA has a 30-day review period. If more information is desired at the end of that 30-day period, another 30-day review period begins upon receipt of the requested information. That amounts to at least a 60-day review for replacement equipment. We suggest that you consider ten day review periods instead. This would not be unprecedented in that, under existing law (16-2D-4(i)) HCCRA is required to act within 10 days in some cases. This would provide you the information you need. It retains the opportunity to request more information. And, it meets the intent of the law, which is to speed up the process.

Also, in Section 3.4, we would urge you, as we have in previous testimony, to specifically allow hospitals to request a hearing on matters which have been decided upon by HCCRA. In this section, it is indicated that the decision by HCCRA will be final. We suggest the opportunity to present additional information should be made available through the hearing process.

We would also like to comment on procedures for exemptions for capital expenditures as outlined in Section 4. These are for expenditures not directly related to health services.

The Code in 16-2D-2(g) defines "expenditure minimum" as one million dollars, defines "major medical equipment" as $750,000 or higher and defines "expenditure minimum for annual operating costs" as $500,000.

However, we find no statutory provision which establishes a two million dollar threshold for non-health care related services. We understand the thinking of the Authority behind a dollar cap. That was put forth in place of having to spell out every conceivable exemption that might come up. However, we feel the language presently drafted in the regulations, minus a cap, is sufficient, in that you list some expenditures as examples, and then add the words "among others." That would appear to provide HCCRA with both the guidance and the flexibility it needs to make its decisions. So we respectfully suggest that, with the retention of such language, a dollar cap is unnecessary and was not intended in the regulations.

We do, however, note that the cost of providing non-healthcare services -- whether more than $2 million or less than $2 million -- constitutes overhead. One cannot efficiently operate a hospital without such fundamental services as computer systems, parking areas and telephones, for example. As such, there should not be a prohibition against the patient rate structure reflecting such overhead costs as capital and depreciation.

And without reiterating our earlier comments, we would recommend again that the 30-day review procedure in Section 4 be replaced with a review procedure in ten-day increments, and a hearing process for hospitals be included.

Turning to Section 5, we again call attention to the West Virginia Code. In 16-2D-4(h), HCCRA is given the option to promulgate regulations for shared services between acute care facilities. The Code provides that the equipment must reasonably be mobile and that HCCRA shall specify the items exempt from review.

We note that the law does not require that acute care facilities own the equipment. Yet the proposed rule, in Section 5.3, requires ownership. As we mentioned earlier, rapidly-changing technology in medical equipment is a fact of life for hospitals. Indeed, in some instances, it may be more cost efficient for hospitals to rent equipment, or lease it, rather than to purchase it. In other cases, equipment might even be acquired under a lease/purchase arrangement. It does not seem in the best interests of our hospitals, particularly our teaching and referral hospitals, to require ownership of mobile equipment in order to qualify for this exemption provision.

And again, we would request changes in Section 5 in the time periods for review, and the addition of a hearing procedure.

The proposal in Section 6 provides the process by which healthcare facilities are to request a determination of exemption from review. The basic problem here is that almost any new service can be considered competitive with services provided by other facilities, depending on the definition of "competition, geographic area or economic factors." Furthermore, even if one facility does not provide a given service, the initiation of that service by another facility might be viewed as competition.

Should you, however, choose to leave in the language about competition, it would appear that the burden of proof is on the wrong party, that is to say, the applicant. If there is a claim that a service is unreasonably competitive, it should be the burden of the challenger to provide such documentation.

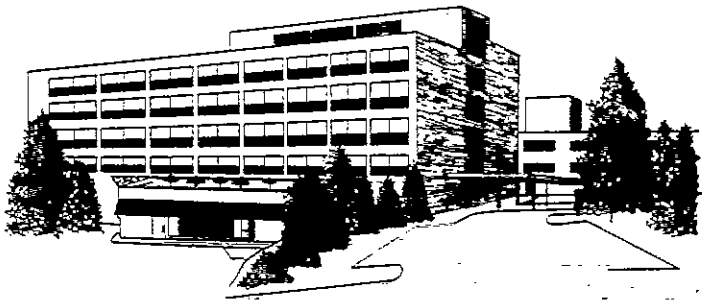
And again, to repeat myself, we would request that hearing procedures be specifically provided for hospitals as they have been for any "affected person." And, as we requested in earlier testimony, we urge that the term "affected person" be clearly defined, and that procedural requirements for such intervention be established in order that the application process not be tied up by frivolous challenges.

In Section 7.1, the language states, "A hearing shall then be held at the earliest opportunity of the parties and the state agency." We suggest a specific time period be established for the hearing to be scheduled. This is not inconsistent with your earlier proposals for hearing procedures. For example, in your proposed rules for Requests for Hospital Rate Changes, hearings

are required to be scheduled within 45 days. A requirement such as this would prevent unnecessary delays in the review process.

And finally, we would note that the regulations are absent any procedure or timetable with respect to increasing the expenditure minimums established by the Legislature. As you know, the statutory thresholds on capital expenditures and major medical equipment are effective October 1, 1987 and remain in effect until September 30, 1988. HCCRA has authority to establish regulations to adjust the expenditure minimum to reflect the impact of inflation. The manner in which such a review would be carried out logically fits in these regulations and would enable hospitals and the Authority to better plan for future activities. We recommend including the procedure for that inflation adjustment process in these regulations.

Mr. Chairman, we appreciate the opportunity afforded us by the Authority and pledge our assistance in any way we can to a successful conclusion to this process.



CAMDEN-CLARK MEMORIAL HOSPITAL

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Parkersburg, West Virginia 26102
(304) 424-2111

LEO D. CARSNER, ADMINISTRATOR

July 15, 1987

Mr. Walter J. Dale, Chairman
Health Care Cost Review Authority
100 Dee Drive, Suite 201
Charleston, WV 25311

Dear Mr. Dale:

May I express my appreciation for your willingness to listen to me concerning the provisions in the emergency West Virginia Legislative Rule for Exemptions from Certificate of Need Review. As I explained to you, 5.3 which delineates the fact that an exemption is not available for shared services if the ownership of the equipment to be obtained is not by an acute care facility is, in my opinion, detrimental to the concept of shared services and should be very carefully considered.

In general, there are definite advantages to having a third party which is not an acute care facility involved in shared services.

FIRST: To provide the capital for the equipment. Thus, the hospitals are not under the necessity to borrow money. This not only lowers the cost to the hospital, but avoids the detriment to the balance sheet which might, in some cases, prevent expenditure or borrowing for other needed projects.

SECOND: When a third party is involved as the owner of the equipment, the risk of the volume and return on investment is on that third party, not the hospitals involved.

THIRD: St. Joseph Hospital, Camden Clark Hospital and Princeton Community Hospital are involved in a Certificate of Need Review to secure MRI Services. This never would have come about had the third party, the VHA Mid-Atlantic Mobile Services, not been able to put together this project by surveying the needs of the three hospitals and conceiving the plan to bring this needed service to the communities.

FOURTH: There is a great deal of hesitancy in sharing services and the initial resistence as well as working problems can be mediated by a third non-hospital party to the benefit of all.

These are, of course, general advantages which can be applied to all hospitals. We come now to the penalties suffered by hospitals, such as Camden Clark Memorial Hospital who are governmental entities and prevented by West Virginia law from entering into joint ventures. By the very nature of VHA Mid-Atlantic Mobile Services, owning the equipment, we are able to contract with them and thus secure MRI Services which otherwise would be unavailable to our patients.

An implementation of this provision, would prove a serious setback in this and other instances where shared services could enable governmental hospitals to upgrade services at a greatly reduced cost.

Many thanks to you and your committee for being willing to explore the ramifications inherent in this rule.

Sincerely,

Frances K. Gracey

Frances K. Gracey
Vice-President Clinical Services
Camden Clark Memorial Hospital

FKG/cm
cc: Larry C. Fizer
Don M. Keesling
Samuel B. Folio
John H. Kozak

WEST VIRGINIA HOSPITAL ASSOCIATION

SUBMISSION OF COMMENTS

EMERGENCY LEGISLATIVE RULES

HEALTH CARE COST REVIEW AUTHORITY:

EXEMPTIONS FROM CERTIFICATE OF NEED REVIEW

AUGUST 10, 1987

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

The West Virginia Hospital Association is pleased to have this opportunity to submit written comments relating to Emergency Legislative Rules filed by the Health Care Cost Review Authority with the office of the Secretary of State on July 7, 1987.

PRIMARY CONCERNS

A plenary review of the Emergency Legislative Rules has resulted in the identification of several broad and significant areas of concern:

I: The rules as written require HCCRA to make a determination of the eligibility of exemption of a project. As discussed later in these comments, it is only under certain well defined circumstances as articulated by the legislature that such Agency determination should be made.

II: The rules as written do not provide the criteria by which the Agency will be making determination on the exemption of any given project. In this respect, the Emergency Legislative Rules are seriously deficient. One function of the administrative rule making process centers upon conduct of the State Agency. The regulatory authority has an obligation to clearly outline the criteria by which decisions will be made. This identification of standards to be utilized in Agency decision making is important for two reasons. First, it allows the entities regulated to have some reasonable predictability of results. The health care providers affected by these regulations should know in advance

what substantive factors will influence and guide Agency decision making. Secondly, clearly articulated standards announced by the Agency insure that health care providers who are similarly situated are treated in a similar manner. The objective is to ensure a fair decision making process, not an arbitrary one.

III. The rules require information via inappropriate formal Agency notification which could be used and misconstrued to require review under other sections of the statute.

IV. The rules as written misconstrue the statute. As an example, compare §16-2D-4(i-4) of the West Virginia Code and section 6 of the Agency rules.

SECTION 2 - INTRODUCTION:

In this section of the Emergency Legislative Rule, the Health Care Cost Review Authority renders its perception of legislative intent in enacting the Enrolled Committee Substitute for House Bill 2342:

1. To alleviate the financial burden on health care facilities and thereby prevent passage of such burden onto health care consumers and

2. To accelerate the certificate of need process for certain activities.

There is a third and more pervasive intent of the legislature which can be seen throughout the 1987 statutory modification. That legislative intent is to grant health care providers in West Virginia relief from the regulatory process of the certificate of need program provided that certain criteria or threshold circumstances are met. It is precisely when these basic criteria exist that the legislature has decreed that health care providers shall be exempt from the regulatory process. The intent of the statute is not to increase the decision making authority of the Agency.

Upon study of the 1987 statutory modifications as contained in the Committee Substitute for House Bill 2342, it is respectfully suggested that the title of these Emergency Legislative Rules be changed from "Exemptions From Certificate of Need Review" to "Activities Which Are Not Subject to the Certificate of Need Program."

Accordingly, the language contained in the fifth line of the introduction which states in part "to promulgate rules to exempt from certificate of need review certain activities of health care facilities" should be changed to read "to promulgate rules which indicate when hospitals, health care providers, and legal entities are not subject to the certificate of need program." Similar changes in language should be made where appropriate in other sections of these rules.

SECTION 3 - REPLACEMENT OF MAJOR MEDICAL EQUIPMENT:

Section 3 and related subsections as written contain provisions for the

filing of notice and subsequent Agency action. These provisions will be discussed in detail later in this comment. However, these same provisions as they relate to Section 3 will cause an unnecessary delay in the delivery of appropriate patient care. This delay, especially as relating to the replacement of worn-out equipment which may not be functioning properly, experiencing excessive down-time, or not functioning at all, has the potential of causing substantial harm to the public interest by impeding the accessibility of needed services and adequate patient care.

It is suggested that subsection 3.1 be rewritten in its entirety, substantially as follows:

> 3.1. Any legal entity which wishes to acquire, either by purchase, lease, or other comparable arrangement, major medical equipment which mainly replaces medical equipment already owned by the entity and which has become outdated, worn out, or obsolete and which performs the same or substantially the same function and which serves the same or substantially the same purpose as the original equipment shall not require a certificate of need or be subject to the certificate of need program to include the exclusion of any certificate of need determination.

Accordingly, a new subsection 3.2 should be written as follows:

> 3.2. Notwithstanding the provisions contained in those portions of the State Health Plan which identify specialized acute care services, this section "Replacement of Major Medical Equipment"

shall govern such replacement actions for any equipment which has become outdated, worn out or obsolete. The provisions contained in these portions of the State Health Plan pertaining to specialized acute care services and collateral provisions are therefore superseded by this section.

These suggested changes are made because certain portions of the State Health Plan which identify specialized acute care services if utilized would make section 3 of these rules meaningless relating to replacement of obsolete equipment which has been or will be substituted by equipment in that chapter. As an example, an outdated cobalt radiation unit may be replaced with a linear accelerator which would perform substantially the same function and purpose as the cobalt unit. Expeditious replacement would benefit the patient community requiring treatment by such equipment. However, if the replacement action is subject to the State Health Plan provisions, replacement would be indefinitely delayed. Additionally, if obsolete equipment is being upgraded, it must be assumed that the new equipment may have technological capacities which result in different applications.

It is also respectfully suggested that subsection 3.2 of the existing rules be rewritten as follows (which would now become subsection 3.3):

3.3. Any legal entity which replaces major medical equipment in conformity with this section shall furnish to the Health Care Cost Review Authority the following information:

a. The identification of the equipment to be replaced with a brief description of the circumstances leading to such replacement;

b. Identification of the replacement equipment to be purchased including:

1. The capital expenditure associated with the lease or acquisition of such equipment;
2. The fair market value of replacement equipment;
3. The estimated cost of any renovations necessary for the installation of the replacement equipment;
4. A general description of the uses of the old and new equipment.

Subsection 3.2 as originally written by the Agency contains a requirement of notice to the State Agency. This requirement has no statutory basis under § 16-2D-4(f) and should not be included as part of the Emergency Rules.

Additional language should be added to the above subsection 3.3 (as rewritten):

> The State Agency may retain the above information for such period of time as it deems advisable. However, nothing in this section or any subsection related to replacement of major medical equipment shall in any way be construed by the Agency to initiate

a certificate of need review or determination of such review under any other section or rule. Receipt of the information contained in this subsection shall not cause or permit further action by the State Agency, except as provided by West Virginia Code Article 5 of Chapter 29 A, et seq.

It is noted under original subsection 3.3 that the Agency is given 30 days in which to determine whether or not a project is eligible for exemption. Even if this were permissible under the statute, the process is anything but expeditious. The original 30 day time period is terminated upon a request by the Agency for additional information. A new 30 day time period begins upon receipt of the additional information. These time periods result in a process which could take up to 60 days or more.

This would seem excessive when compared with the 65 days allowed the Agency to review an entire certificate of need expedited application. In addition, with all of the information to be reviewed in a CON application, the Agency is allowed only 15 days in which to declare the application complete or request additional information. It seems inconceivable that the more limited information required in order to make a determination of exemption should take twice as long to review. Also, nothing in the rule limits the scope of additional information that the Agency may request. In the absence of having established criteria upon which a determination of exemption will be made this could result in an unnecessary burden to the legal entity.

Even if the Agency moves with the utmost speed, by the time the process

set forth in this subsection as written is completed, anything but an expeditious determination has occurred.

Notwithstanding our position that HCCRA has no such authority to require notice except under limited circumstances, we also submit that the proposed time periods misconstrue the language of the statute in § 16-2D-4(i) wherein the State Agency is allowed 10 days from the receipt of a notice claiming exemption in which to make a response.

Subsection 3.4 as written by the Agency should be eliminated because there is nothing for the Health Care Cost Review Authority to rule upon. There is no requirement for the Agency to make any determination either in the statute § 16-2D-(f) or the rule as rewritten.

SECTION 4 - CAPITAL EXPENDITURES NOT FOR HEALTH SERVICES:

It is suggested that subsections 4.1 and 4.2 be rewritten. The statutory authority for this section is contained in West Virginia Code § 16-2D-4(g), part of the 1987 legislative modifications. Significantly, the legislature deliberately does not require health care facilities or legal entities to apply for an exemption from obtaining a Certificate of Need. The language of § 16-2D-4(g) is deliberate in nature particularly when compared with the language contained in § 16-2D-4(b). If the legislature intended that the State Agency issue exemptions for capital expenditures not for health services, it would have clearly so stated as it did in § 16-2D-4(b)(2)(A) et seq. wherein:

(2)(A) A health maintenance organization, combination of health maintenance organizations, or other health care facility is not exempt under subdivision (1), subsection (b) of this section from obtaining a certificate of need unless:

(i) It has submitted, at such time and in such form and manner as the State Agency shall describe, an application for such exemption to the State Agency;

(ii) The application contains such information respecting the organization, combination or facility and the proposed offering, acquisition or obligation as the State Agency may require to determine if the organization or combination meets the requirements of subdivision (1), subsection (b) of this section or the facility meets or will meet such requirements; and

(iii) The State Agency approves such application. (emphasis supplied).

In the subsection under present consideration, the legislature omitted such exemption language. Thus the legislature again indicated that hospitals should not have to apply for any exemption. Rather, the deliberate language of the statute is instructive:

"The State Agency may adopt regulations...by which a certificate of need may not be required..." (emphasis supplied).

Likewise, health care providers in § 16-2D-4 do not have any requirements to give notice for a CON exemption unless such requirement is

clearly stated within the statute itself. Such language is present as an example, in § 16-2D-4(c)(2) wherein:

> (2) Before a health care facility acquires major medical equipment to be used solely for research, offers a health service solely for research, or obligates a capital expenditure solely for research, such health care facility shall notify in writing the state agency of such facility's intent and the use to be made of such medical equipment, health service or capital expenditure.

For all of the above reasons, neither a determination by the State Agency of exemption nor the filing of a notice should be required, except as clearly defined by statute. Indeed, § 16-2D-4 is the very section of the article which instructs the State Agency to <u>refrain</u> from including certain activities in the CON program.

Therefore, section 4 of the rule should be rewritten as follows:

> 4.1. The obligation of the capital expenditure in excess of an expenditure minimum for certain items not directly related to the provision of health services shall not require an Agency determination, a certificate of need or otherwise be subject to the certificate of need program.
>
> 4.2. The term "Items Not Directly Related to The Provisions of Health Services" refers, among other things, to computer hardware and software, telephone systems, parking lots and buildings,

medical office buildings, laundry and boiler plants.

4.3. The legal entity will advise the State Agency by informing the Agency as follows:

(a) The nature and purpose of the project;

(b) The location of the project;

(c) The capital expenditure or estimated capital expenditure.

4.4. The State Agency may retain the above information for such a period of time as it deems advisable. However, nothing in this section or any subsection relating to Capital Expenditures Not For Health Services shall in any way be construed by the Agency to initiate a certificate of need review or determination of such review under any other section or rule. Receipt of the information contained in this subsection shall not cause or permit further action by the State Agency except as provided in Article 5 of Chapter 29A et seq. of the West Virginia Code.

The provisions in subsection 4.3 as written indicate that only those capital expenditures equal to or less than two million dollars shall be exempt from CON activity. No statutory authority whatsoever exists for this arbitrary limitation. By declining to determine a maximum dollar amount, the legislature has indicated that there should be no maximum amount. Had the law makers determined otherwise, they would have included a monetary standard as they did in other sections of the 1987 statutory modification. Compare: § 16-2D-2(g), (q) and §16-2D-4(e) relating to definition of

expenditure minimum, major medical equipment and the expenditure minimum for annual operating costs.

Of note, acute health care facilities are again singled out for discriminatory treatment in that no capital expenditure which will result in an increase in rates charged to the entity's patients will be eligible for the exemption. This legislatively created dispensation is effectively obliterated by disallowing the costs for any such expenditure to be considered as any part of the acute care facility's expense base for the purposes of 16-29B-1 et seq. Taking this Agency subsection as written in its totality, it is obvious that the effect upon hospitals is to completely negate§16-2D-4(g) of the 1987 modifications.

Further, subsection 4.3 as written is, from a practical viewpoint, unworkable. Capital costs, to include depreciation, have long been recognized as a legitimate expense incident to all industries and businesses. The federal Medicare and state Medicaid program as well as third party payors have been advocates and, in the instance of Medicare, proponents of the concept "funded depreciation". To deny capital costs as "a part of a facility's expense base" irrespective of the level of capital expenditures, would prevent a hospital from recovering necessary funds for replacement, renovation and initial investment. Medicare and Medicaid programs reimburse providers for their "share" of capital costs only. For non-Medicare and non-Medicaid payors to evade paying their "share" could prevent providers, particularly small and/or rural providers, from acquiring needed new capital and/or replacement items. No prudent business would attempt to market its product below cost. This section arbitrarily sets a

level of capital expenditures for which the full cost would not be recoverable.

To state that such expenditures should not be included in the hospital's expense base denies the legitimacy of the expenditure itself. The Agency therefore takes the position that such items as telephones, computer hardware and software and other items listed are really not essential for hospitals. For all of the above reasons, it is respectfully suggested that subsection 4.3 is deleted in its entirety.

Accordingly, subsections 4.4 and 4.5 become unnecessary and should be eliminated in their entirety for the reasons given above.

SECTION 5 - SHARED SERVICES:

Subsection 5.1 and related subsections should be rewritten to reflect the understanding that no exemption is needed from the Agency, for the reasoning indicated earlier in these comments.

Section 5 is changed to read as follows:

> 5.1. The provision of services made available through new or existing technology that can reasonably be mobile and which are shared by two or more acute care facilities whether owned by the hospital or a third party shall not require a State Agency determination, a certificate of need, or otherwise be subject to the certificate of need program. The activity described in this

section shall not be subject to Agency action whether or not the shared services are in excess of the capital expenditure minimum as defined in § 16-2D-2(g) and (q) and 4(e) of the West Virginia Code. Additionally, the shared services as described in this section shall not be subjected to Agency action under § 16-2D-3 of the code as a new institutional health service, nor shall they be determined to be an ambulatory health care facility as defined in §16-2D-2(b), nor an ambulatory surgical facility as defined in §16-2D-2(c).

5.2. Examples of such "shared services" are mobile Computerized Tomography (CT) Scanners, Magnetic Resonance Imaging (MRI) devices and Extra-corporeal Lithotripters. Other technologies which are similar in mobility may be included in this exemption.

5.3. The hospitals involved in such shared services shall furnish the following information to the State Agency:

(a) The hospitals sharing the service;
(b) The equipment to be acquired or leased;
(c) Services to be provided;
(d) The fair market value of equipment to be provided, if known;
(e) The capital expenditures to be made by each hospital;

The State Agency may retain the above information for such a period of time as it deems advisable. However, nothing in this

section or any subsection relating to shared services shall in any way be construed by the Agency to initiate a certificate of need review or determination of such review under any other section or rule. Receipt of the information contained in this subsection shall not cause or permit further action by the State Agency, except as provided in Article 5 in Chapter 29A et seq. of the West Virginia Code.

Notwithstanding the provisions contained in those portions of the State Health Plan specifically identified as specialized acute care services, this section, "shared services," shall govern such activity. The provisions contained in those portions of the State Health Plan pertaining to specialized acute care services and collateral provisions are therefore superseded by this section.

Subsection 5.3 as written by the Agency should be deleted in its entirety. Nothing in the statute restricts ownership of equipment. In reality, any third party may acquire or own the equipment. The legislature did not restrict such ownership to an acute health facility. Inclusion of this provision arbitrarily restricts hospitals from obtaining a legislatively created benefit of the statute. Further it prevents two or more hospitals that wish to joint venture from forming a "third entity" in order to acquire the equipment. This prevents hospitals from realizing good accounting practices, which dictate the necessity for accurate cost and utilization data. The formation of a "third entity" further eliminates conflicts with regard to scheduling and provides joint accountability. It also obviates problems that could arise if the hospitals involved have

different organizational structures (i.e., single providers, or providers that are part of a chain or religious order, proprietary and non profit providers).

Subsection 5.4 should be deleted in its entirety. The legislature clearly intended hospitals and therefore the patient community served to relief from the regulatory process in the provision of shared services between two or more acute care facilities. Additionally, this subsection, as well as subsection 5.5 as written serve only to delay the effectuation of new provisions and in fact would defeat the legislative intent of moderation from the regulatory process.

SECTION 6 - OTHER CLAIMS OF EXEMPTION:

This section is premised upon notice to the State Agency as contained in West Virginia Code § 16-2D-4 for those situations and circumstances in which notice is required by the statute. As such, section 6, "Other Claims of Exemption," is a misnomer. The section as written clearly exceeds the statutory authority and jurisdiction of the State Agency.

§16-2D-4 is concerned with relief from both the CON process as well as from obtaining a formal exemption determination from CON by the Agency except in those instances as described in §16-2D-4(b)-Health Maintenance Organizations, § 16-2D-4(c)-Projects Undertaken Solely for Research, and §16-2D-4(d)-Acquisition of Health Care Facilities. These activities are the exclusive and only circumstances under which notice to the Agency and an Agency determination must be reached. Therefore, the notice requirements

only pertain to the above narrow, but important, situations.

To read the statute as the Agency does in requiring notice where no notice requirements statutorily exist is exemplified by subsection 6.1. Adhering to the requirements of this subsection as written will render two results. First, it will require a health care facility as noted in §16-2D-2(i) that wishes to make any capital expenditure, institute a new health service or to affect any change in an existing health service (for reasons other than replacement of major medical equipment, shared services or obligation of a capital expenditure for services not directly related to the provision of health) to be reviewed. In these situations the health care facility will have to file a verified notice with the Agency. Secondly, once the Health Care Cost Review Authority receives any verified notice, the provisions of § 16-2d-4(i) will be activated. This means that irrespective of any clear intention on the part of the legislature to declare those activities which are not subject to the CON program, such legislative intent is again ignored by the Agency.

This disregard for legislative intent results in precisely the opposite effect of what the legislature has decreed. That is, under this section, virtually any activity undertaken by a health care facility is now made subject to the CON program.

Additionally, it is significant that the Agency has included subsections 6.4 and 6.5.4, as these sections clearly demonstrate, in our opinion, an inadvertent misinterpretation of the statute which cannot be justified. Section 6.4 as written states in relevant part:

"If the State Agency determines based upon economic and geographic factors...that such proposed health service will be offered in competition with other health care facilities...then the exemption shall be denied, and...the facility shall file the appropriate application for certificate of need approval...." (emphasis supplied).

Subsection 6.5 further indicates that if a proposal is not denied under subsection 6.4, the Agency is empowered under subsection 6.5.4 to:

"Determine that a certificate of need application is necessary for a review of...[the activity]...in order to determine if the claim of exemption may be upheld. One instance where this...determination may be necessary is where the...Agency receives a request for a hearing from an affected person. The application...shall be an expedited application and the review period for it shall be the same as for any other expedited application." (emphasis supplied).

It is respectfully submitted that the inclusion of both of the immediately above subsections is a misinterpretation of the statute. If retained, the Agency will operate in excess of rightful authority.

The only provision for requiring a certificate of need application under § 16-2D-4(i) is in subsection 4, which reads as follows:

"Determine that a certificate of need application is necessary for a review of the proposed expenditure, new health service, or change in a

health service in order to determine if the claim of exemption may be upheld: Provided, That when a new health service is proposed to be developed, the State Agency shall, within the ten days of receipt of the required notice, determine whether or not economic and geographic factors within the geographic area of the proposed addition to service are such that the proposed new health service will be offered in competition with other health care facilities providing the same or similar service. In the event that an affirmative determination is made on the issue of competition, then the State Agency shall require a certificate of need application for the proposed new health service."

The above subsection must be read as a whole. It consists of two sentences. The first sentence is composed of two independent clauses separated by a colon. According to rules of acceptable and ordinary interpretation, the colon is used between two independent clauses when the second clause explains or amplifies the first.

The second clause in the sentence therefore spells out the findings which must be made by the Agency in order to determine that a CON application must be filed. These required findings are:

1. A new health service is being proposed, and
2. Circumstances are such that the new service would be offered in competition with other health care facilities providing the same or similar service.

Only when these two findings are made can the State Agency determine

that a certificate of need application is required as stated in the first clause.

Of further importance, the application may only then be required by the Agency to make the finding of whether or not the claim of exemption may be upheld. The second sentence merely serves to simplify and reiterate the context of the first sentence.

The effect of the proposed rule as cited in subsection 6.5.4 and in combination with subsection 6.4 is to create an entirely new finding that may be made by the State Agency. The rule in substance announces that the State Agency may require a certificate of need application to determine when a claim of exemption may be upheld in instances other than those made pursuant to subsection 6.4. (That is, those instances in which a proposed a new health service is found to be in competition.) It is suggested that there clearly is no statutory language which permits the Agency to make what is, in effect, the equivalent of a fifth finding under § 16-2D-4(i).

Additionally, subsection 6.4 as written gives the State Agency the authority to deny an exemption by merely finding that it will be offered in competition. There is nothing in the statutory language which gives the State Agency such authority.

Thus, under both subsections the Agency has arbitrarily given itself the power to require a health care provider to file a CON application. The exemptions mandated by the legislature are being abrogated by rule under both subsections.

By merely being found to be in competition or receiving a request for a hearing, the focus on a claim of exemption shifts from whether or not the claim may be upheld to scrutinizing the merits of the proposed project through unnecessary filing of the CON application (standard or expedited) with collateral review and findings by the State Agency.

As noted, nothing in the statutory language under §16-2D-4(i) permits the State Agency to make a determination other than finding whether or not a claim of exemption may be upheld. The plain and literal interpretation of the statute should be used to ascertain legislative intent, which should be clear:

"Nothing in this article shall be construed to require the filing of a certificate of need application for any expenditure, health service or change in health service which is exempt from review under this article."

For these reasons section 6 as written should abolished in its entirety. It is respectfully suggested that the section is rewritten substantially as follows:

SECTION 6 - REQUIREMENTS FOR FILING OF A NOTICE:

6.1. No legal entity shall be required to file a certificate of need application for any expenditure, health service, or change in health service which is exempt from review under this article, nor shall it be made subject to review periods or required findings

for such application.

6.2. The State Agency shall not require the filing of a notice by any legal entity which is exempt under this article except as provided for by statute under § 16-2D-4(b), §16-2D-4(c), and § 16-2D-4(d).

6.3. In those instances where a legal entity is required to file notice pursuant to § 16-2D-4(b), (c), or (d) the notice shall provide such information as required by the respective subsection of the statute for which a claim is being made. The State Agency shall within ten (10) days of receipt of the notice make one of the following responses:

6.3.1. Accept the claim of exemption;

6.3.2. Require the legal entity to furnish the State Agency with additional information in which event a new ten (10) day review period shall begin upon receipt of the additional information;

6.3.3. Reject the claim of exemption in which event the State Agency shall provide the legal entity with written findings which state the agency's grounds for rejecting the claim of exemption; or

6.3.4. In those instances where a legal entity claiming exemption pursuant to §16-2D-4(b), (c), or (d), wishes to develop a new health service, the notice shall also identify the geographic area proposed to be served and

shall explain whether economic and geographic factors are such that the proposed new health service would be offered in competition with health care facilities in the proposed geographic area which provide the same or similar service to those proposed.

6.3.5. For purposes of this subsection, the term "new health service" shall be defined as the addition of a health service which is offered by or on behalf of a health care facility or health maintenance organization which was not offered on a regular basis by or on behalf of a health care facility or health maintenance organization within the twelve month period prior to the time such service would be offered.

6.3.6. If the State Agency determines based upon the information contained in the notice or any relevant information submitted to the Agency in response to such notice that economic and geographic factors within the proposed geographic area are such that the proposed new health service will be offered in competition with other health care facilities providing the same or similar service, the legal entity shall file an exempt application for purposes of determining if the claim of exemption may be upheld. This determination shall be made by he State Agency within ten (10) days of receipt of the notice.

6.3.7. The State Agency shall make its determination of whether the claim of exemption may be upheld within thirty (30) days of the receipt of an exempt application.

We would also voice our concern regarding the Agency's failure to define by rule the term, "geographic area," as used in subsections 6.3 and 6.4. Nothing in the statute provides a definition of this term. In the absence of a definition, the term itself is open to extremely broad interpretation. Failure to provide some direction or limitation to this term will unacceptably result in placing tertiary facilities in competition with virtually everyone in the state and also could impede the development of new services in West Virginia if they are found to be in competition with health care facilities in the bordering states of Kentucky, Maryland, Ohio, Pennsylvania and Virginia.

SECTION 7 - REQUESTS FOR HEARINGS AND RECONSIDERATION HEARINGS:

It is suggested that this Section 7 in its entirety be deleted because of the continued existence of § 16-2D-10 and Article 5, Chapter 29A et seq. of the West Virginia Code. These statutes as cited provide more than ample opportunity to allow for additional administrative or public action. Thus, the provisions of Section 7 in the rules as written are unnecessary and redundant.

SUMMARY

The intent of the legislature in enacting the Enrolled Committee Substitute for House Bill 2342 was to grant relief to health care providers from the regulatory process through the addition of statutory provisions which moderate that process.

The Health Care Cost Review Authority has construed the language of the statute in such a way that:

1. Health care facilities and hospitals in particular are denied the benefit of this relief;
2. The Agency regulatory process will dramatically increase, resulting in:
   a) increased cost to health care facilities;
   b) unnecessary and untimely delays in the provision of needed services to patients;
   c) increased opportunity for litigation and associated costs; and,
   d) increased costs to consumers.

The rules as written will therefore cause substantial harm to the public interest.

In several instances, the Agency has, albeit unintentionally, abused its discretionary authority to promulgate rules by:

1. Misconstruing the language of the statute. Neither the regulatory authority nor the entities regulated are free to disregard, ignore or obliterate the intent of the legislature.

2. Failing to provide criteria by which exemption will be judged, then by awarding to themselves extraordinary discretion in making such determination.

3. Promulgating rules clearly in excess of statutory authority.

For all the above reasons, the Agency is respectfully requested to rescind by modification the present Emergency Legislative Rules and to issue revised rules attached to these comments and identified as Attachment One.

Health care providers are willing to inform the Agency of their activities which is evidenced by the rules as rewritten. The suggested rules achieve the statutorily permitted balance (encouraged by the 1987 modifications) between Agency regulation and the ability of health care providers to expeditiously provide appropriate services to the citizens of West Virginia. The revised criteria also provide a clearer direction to both the regulator and the regulated for activities which are not subject to the certificate of need program and make the 1987 modifications consistent and coherent, particularly as contained in § 16-2D-4 et seq. of the statute.

EMERGENCY
WEST VIRGINIA LEGISLATIVE RULE
HEALTH CARE COST REVIEW AUTHORITY
CHAPTER 16-2D
SERIES XI

Title: ACTIVITIES WHICH ARE NOT SUBJECT TO THE CERTIFICATE OF NEED PROGRAM

Section

1. General
2. Introduction
3. Replacement Major Medical Equipment
4. Capital Expenditures Not For Health Services
5. Shared Services
6. Requirements For Filing Of A Notice
7. Severability

EMERGENCY
WEST VIRGINIA LEGISLATIVE RULE
HEALTH CARE COST REVIEW AUTHORITY
CHAPTER 16-2D

SERIES XI

Title: ACTIVITIES WHICH ARE NOT SUBJECT TO THE CERTIFICATE OF NEED PROGRAM

Section 1. General

1.1. Scope - This emergency legislative rule establishes standards which indicate when hospitals, health care providers, and legal entities are not subject to the certificate of need program provided by the 1987 amendments to the Certificate of Need Act, West Virginia Code, §16-2D-1 et seq. Pursuant to West Virginia Code, §16-29B-11, the Health Care Cost Review Authority is designated to be the state agency charged with administering the certificate of need program.

1.2. Authority - West Virginia Code, §16-2D-8, §16-2D-4(f)-(i), and §16-29B-11.

1.3. Filing Date - August 10, 1987.

1.4. Effective Date - August 10, 1987.

Emergency
HCCRA
Leg. Rule, 16-2D
Series XI, Sec. 2

Section 2. Introduction

This emergency legislative rule implements certain of the provisions of Enrolled Committee Substitute For House Bill 2342 which was signed by the Governor. That bill amended West Virginia Code, §16-2D-4, by adding to it four (4) new subsections. Those new subsections authorize the state agency to promulgate rules which indicate when hospitals, health care providers, and legal entities are not subject to the certificate of need program. In the state agency's opinion, these new exemptions must be implemented immediately so as to prevent substantial harm to the public interest. The state agency concludes that the Legislature intended to alleviate the financial burden on health care facilities which wish to engage in the specified activities. Delays in implementing this rule would defeat this Legislative purpose by causing the health care facilities to continue to bear this financial burden until the rule receives final legislative approval. This unalleviated financial burden, which has been deemed unnecessary by the Legislature, would be passed along to health care consumers in the form of higher costs. Also, delay in effectuating the new provisions would defeat the Legislature's additional purpose of speeding-up the certificate of need process for certain items. Lastly, a delay in implementing the rule will defeat the more pervasive intent of the legislature to grant health care facilities in West Virginia relief from the regulatory process of the certificate of need program.

Section 3. Replacement Major Medical Equipment

3.1. Any legal entity which wishes to acquire, either by purchase, lease, or other comparable arrangement, major medical equipment which mainly replaces medical equipment already owned by the entity and which has become outdated, worn-out, or obsolete and which performs the same or substantially the same function and which serves the same or substantially the same purpose as the original equipment shall not require a certificate of need or be subject to the certificate of need program to include the exclusion of any certificate of need determination.

3.2. Notwithstanding the provisions contained in those portions of the state health plan which identify specialized acute care services, this section "Replacement of Major Medical Equipment" shall govern such replacement actions for any equipment which has become outdated, worn-out or obsolete. The provisions contained in these portions of the state health plan pertaining to specialized acute care services and collateral provisions are therefore superseded by this section.

3.3. Any legal entity which replaces major medical equipment in conformity with this section shall furnish to the Health Care Cost Review Authority the following information:

a. The identification of the equipment to be replaced with a brief description of the circumstances leading to such replacement;

b. Identification of the replacement equipment to be purchased including:

1. The capital expenditure associated with the lease or acquisition of such equipment;
2. The fair market value of replacement equipment;
3. The estimated cost of any renovations necessary for the installation of the replacement equipment;
4. A general description of the uses of the old and new equipment.

The state Agency may retain the above information for such period of time as it deems advisable. However, nothing in this section or any subsection related to replacement of major medical equipment shall in any way be construed by the Agency to initiate a certificate of need review or determination of such review under any other section or rule. Receipt of the information contained in this subsection shall not cause or permit further action by the State Agency, except as provided by West Virginia Code Article 5 of Chapter 29A, et seq.

Section 4. Capital Expenditures Not For Health Services

4.1. The obligation of a capital expenditure in excess of an expenditure minimum for certain items not directly related to the provision of health services shall not require an Agency determination, a certificate of need or otherwise be subject to the certificate of need program.

4.2. The term "Items Not Directly Related to The Provisions of Health Services" refers, among other things, to computer hardware and software, telephone systems, parking lots and buildings, medical office buildings, laundry and boiler plants.

4.3. The legal entity will advise the State Agency by informing the Agency as follows:

(a) The nature and purpose of the project;

(b) The location of the project; and

(c) The capital expenditure or estimated capital expenditure.

4.4. The State Agency may retain the above information for such a period of time as it deems advisable. However, nothing in this section or any subsection relating to Capital Expenditures Not For Health Services shall in any way be construed by the Agency to

initiate a certificate of need review or determination of such review under any other section or rule. Receipt of the information contained in this subsection shall not cause or permit further action by the State Agency except as provided in Article 5 of Chapter 29A et seq. of the West Virginia Code.

Section 5. Shared Services

5.1. The provision of services made available through new or existing technology that can reasonably be mobile and which are shared by two or more acute care facilities whether owned by the hospital or a third party shall not require a State Agency determination, a certificate of need, or otherwise be subject to the certificate of need program. The activity described in this section shall not be subject to Agency action whether or not the shared services are in excess of the capital expenditure minimum as defined in § 16-2D-2(g) and (q) and 4(e) of the West Virginia Code. Additionally, the shared services as described in this section shall not be subjected to Agency action under § 16-2D-3 of the code as a new institutional health service, nor shall they be determined to be an ambulatory health care facility as defined in § 16-2D-2(b), nor an ambulatory surgical facility as defined in § 16-2D-2(c).

5.2. Examples of such "shared services" are mobile Computerized Tomography (CT) Scanners, Magnetic Resonance Imaging (MRI) devices and Extra-corporeal Lithotripters. Other technologies which are similar in mobility may be included in this exemption.

5.3. The hospitals involved in such shared services shall furnish the following information to the State Agency:

(a) The hospitals sharing the services;

(b) The equipment to be acquired or leased;

(c) Services to be provided;

(d) The fair market value of equipment to be provided, if known;

(e) The capital expenditures to be made by each hospital.

The State Agency may retain the above information for such a period of time as it deems advisable. However, nothing in this section or any subsection relating to shared services shall in any way be construed by the Agency to initiate a certificate of need review or determination of such review under any other section or rule. Receipt of the information contained in this subsection shall not cause or permit further action by the State Agency, except as provided in Article 5 in Chapter 29A et seq. of the West Virginia Code.

Notwithstanding the provisions contained in those portions of the state health plan specifically identified as specialized acute care services, this section, "shared services", shall govern such activity. The provisions contained in those portions of the state health plan pertaining to specialized acute care services and collateral provisions are therefore superseded by this section.

Section 6. Requirements for Filing of a Notice

6.1. No legal entity shall be required to file a certificate of need application for any expenditure, health service, or change in health service which is exempt from review under this article, nor shall it be made subject to review periods or required findings for such application.

6.2. The State Agency shall not require the filing of a notice by any legal entity which is exempt under this article except as provided for by statute under § 16-2D-4(b), §16-2D-4(c), and § 16-2D-4(d).

6.3. In those instances where a legal entity is required to file notice pursuant to § 16-2D-4(b), (c), or (d) the notice shall provide such information as required by the respective subsection of the statute for which a claim is being made. The State Agency shall

within ten (10) days of receipt of the notice make one of the following responses:

6.3.1. Accept the claim of exemption;

6.3.2. Require the legal entity to furnish the State Agency with additional information in which event a new ten (10) day review period shall begin upon receipt of the additional information;

6.3.3. Reject the claim of exemption in which event the State Agency shall provide the legal entity with written findings which state the agency's grounds for rejecting the claim of exemption; or

6.3.4. In those instances where a legal entity claiming exemption pursuant to § 16-2D-4(b), (c), or (d), wishes to develop a new health service, the notice shall also identify the geographic area proposed to be served and shall explain whether economic and geographic factors are such that the proposed new health service would be offered in competition with health care facilities in the proposed geographic area which provide the same or similar service to those proposed.

6.3.5. For purposes of this subsection, the term "new health service" shall be defined as the addition of a health service which is offered by or on behalf of a health care facility or health maintenance organization which was not offered on a regular basis by or on behalf of a health care facility or health maintenance organization within the twelve month period prior to the time such service would be offered.

6.3.6. If the State Agency determines based upon the information contained in the notice or any relevant information submitted to the Agency in response to such notice that economic and geographic factors within the proposed geographic area are such that the proposed new health service will be offered in competition with other health care facilities providing the same or similar service, the legal entity shall file an exempt application for purposes of determining if the claim of exemption may be upheld. This determination shall be made by the State Agency within ten (10) days of receipt of the notice.

6.3.7. The State Agency shall make its determination of whether the claim of exemption may be upheld within thirty (30) days of the receipt of an exempt application.

Section 7. Severability

If any provision of these rules or the application thereof to any person 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 involved provisions or application and to this end the provisions of these rules are declared to be severable.