

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

Form #3

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STATE OF WEST VIRGINIA  
DEPARTMENT OF STATE

**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: 65

CITE AUTHORITY W.Va. Code § 16-2D-4(h); 16-2D-8

AMENDMENT TO AN EXISTING RULE: YES  NO

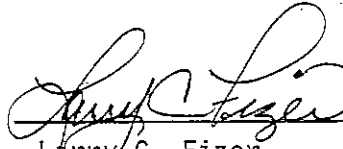
IF YES, SERIES NUMBER OF RULE BEING AMENDED: \_\_\_\_\_

TITLE OF RULE BEING AMENDED: \_\_\_\_\_

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: 16

TITLE OF RULE BEING PROPOSED: Exemption For Shared Services

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.

  
\_\_\_\_\_  
Larry C. Fizer  
Chairman



STATE OF WEST VIRGINIA  
DEPARTMENT OF HEALTH AND HUMAN RESOURCES

Building 3, Capitol Complex  
Charleston, WV 25305

Gaston Caperton  
Governor

July 23, 1990

The Honorable Ken Hechler  
Secretary of State  
State Capitol Complex  
Building 1, Room 157-K  
Charleston, West Virginia 25305

Re: HCCRA Legislative Rule: Exemption for Shared Services

Dear Secretary Hechler:

Enclosed please find a proposed legislative rule of the Health Care Cost Review Authority regarding exemption for shared services. I hereby approve this rule for filing.

Very truly yours,

A handwritten signature in cursive script, reading "Taunja Willis Miller".

Taunja Willis Miller, Secretary  
Department of Health and Human Resources

TWM/jah

Enclosure

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Exemption For Shared Services

Type of Rule: X Legislative        Interpretive        Procedural

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

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

2. Explanation of above estimates.

The agency estimates no cost associated with the implementation of this rule.

3. Objectives of these rules:

To implement an exemption from certificates of need review for shared services between two or more acute care facilities when said services are available through existing technology and can reasonably be made mobile as required by W. Va. Code, § 16-2D-4(h).

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

None.

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

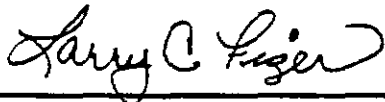
Acute Care Facilities affected by this rule should realize a savings by sharing the costs of major medical equipment.

C. Economic Impact on Citizens/Public at Large.

Citizens and the public should benefit from the cost savings to the acute care facilities if the cost savings are reflected in a reduction in hospital rates and charges.

Date June 11, 1990

Signature of Agency Head or Authorized Representative



LARRY C. FIZER, Chairman

TITLE 65  
WEST VIRGINIA LEGISLATIVE RULE  
HEALTH CARE COST REVIEW AUTHORITY

SERIES 16

Title: EXEMPTION FOR SHARED SERVICES

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§ 65-16-1      General

1.1.      Scope - This legislative rule establishes an exemption from certificate of need review for certain shared services between two or more acute care facilities when the shared services can reasonably be mobile as provided by W. Va. Code, § 16-2D-4(h). This rule further repeals section 5 of "Exemptions From Certificate of Need Review," § 65 C.S.R. 11 (1988).

1.2.      Authority - W. Va. Code § 16-2D-4(h) and § 16-2D-8.

1.3.      Filing Date - \_\_\_\_\_.

1.4.      Effective Date - \_\_\_\_\_.

1.5.      This legislative rule repeals and replaces section 5 of the "Exemptions From Certificate of Need Review," § 65 C.S.R. 11 (1988).

HCCRA  
Leg. Rule, 16-5F  
Series 16, Sec. 2

§ 65-16-2     Introduction

This legislative rule implements Enrolled House Bill 4230 which was passed by the Legislature on March 10, 1990 and became effective ninety (90) days from passage. This bill amended W. Va. Code, § 16-2D-4(h) by placing more stringent requirements upon the eligibility for an exemption for shared services and also by limiting the exemption to lithotripsy and magnetic resonance imaging (MRI). This bill authorizes the state agency to promulgate rules to implement the exemption.

§ 65-16-3     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.

3.1.     "Act" means the certificate of need act, West Virginia Code, § 16-2D-1 et seq.

3.2.     "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.

3.3 "Verified notice" means a notice containing the facts required by this rule 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.

§ 65-16-4 Exemption Criteria

4.1 Any acute care facility otherwise subject to the certificate of need program may obtain an exemption from certificate of need review for shared services between two (2) or more acute care facilities. The shared services must be those provided by major medical equipment and through existing technology can reasonably be made mobile. The major medical equipment which is eligible for this exemption is magnetic resonance imaging (MRI) devices and lithotripters. On an annual basis the state agency shall review existing technologies to determine if other major medical equipment should be included in this exemption. Qualification for an exemption under this rule shall not constitute a waiver or exemption from certificate of need review for the offering of magnetic resonance imaging or lithotripsy services by the acute care facility if these services are provided by major medical equipment which is not mobile and is not shared with another acute care facility.

HCCRA  
Leg. Rule  
Series 16, Sec. 4

4.2. To qualify as a "shared service," the equipment must be on site at each acute care facility at least four (4) days per month. This requirement may be waived by the state agency if three (3) or more acute care facilities share the equipment.

4.3. This exemption is limited to one piece of major medical equipment per shared service. An acute care facility may obtain only one exemption for each shared service permitted under this rule.

4.4. This exemption is not available if the shared services mobile unit is less cost effective than a fixed unit. The state agency shall determine cost effectiveness based upon patient charges.

4.5. 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. The equipment may be owned by a non-acute care facility or entity, which in term contracts, leases, or rents it exclusively for use by acute care facilities. ~~Provided, that a physician shall not own in whole or in part any major medical equipment subject to this rule which provides services to any acute care facility at which he or she has admitting privileges.~~

4.6. In order to obtain the exemption, each acute care facility 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 each of the first three (3) years of operation of the shared services, the proposed schedule for the equipment's use at each hospital, a complete list of all persons and/or entities with an ownership interest in the equipment and a complete list of all persons with an ownership interest in the entity which owns the equipment, a complete list of all physicians with admitting privileges at the facility, and the proposed charges to the patient for the service.

4.7. Following receipt of the verified notice, the state agency shall publish a notice of the filing in the Saturday Charleston newspapers, the State Register, and in the state agency's newsletter. The notice shall identify the applicants and describe the proposal. It shall also describe the review period including the rights of affected parties to a hearing.

4.8. Following receipt of the verified notice, the state agency shall determine within fifteen (15) days whether or not the verified notice is complete. If the verified notice is not complete, the state agency shall request additional information. Upon receipt of that additional information, the state

HCCRA  
Leg. Rule  
Series 16, Sec. 4

agency shall have fifteen (15) days within which to determine if the verified notice is complete. Upon determining that the verified notice is complete, the state agency shall publish a notice of that fact in the Saturday Charleston newspapers, the State Register, and in the state agency's newsletter. The notice shall identify the applicants, shall describe the proposal, and shall, if a hearing on the exemption has been requested, state the time, place, and date of the hearing.

4.9. If a hearing has not been requested, then following the determination of completeness the state agency shall within ten (10) days issue a written decision on the verified notice which decision shall be a final decision for purposes of West Virginia Code, § 16-2D-7(r) and § 16-2D-10. The state agency shall publish notice of the decision in the Saturday Charleston newspapers, the State Register, and the state agency's newsletter. The major medical equipment affected by this rule shall not be acquired or contracted for until after entry of a final decision.

4.10. If a hearing has been requested by an affected party, the state agency shall follow the provisions of subsections 5.1, 5.2 and 5.3 of this legislative rule.

4.11. In order to be effective, the request for a hearing must be from an affected party and must be filed in writing with the state agency within

fifteen (15) days of the publication of the notice in the Saturday Charleston newspapers as required by subsection 4.7.

§ 65-16-5      Requests For Hearings

5.1.      In the event that an affected person requests a hearing, 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.

5.2.      The state agency may conduct a prehearing conference in accordance with Rule 16 of the West Virginia Rules of Civil Procedure. If an order is first obtained from the state agency or a hearing examiner appointed by it, the parties may engage in discovery as provided by the West Virginia Rules of Civil Procedure; except that the scope of discovery shall be limited to relevant and admissible evidence.

5.3.      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.

HCCRA  
Leg. Rule  
Series 16, Sec. 5

5.4. A written decision made pursuant to subsection 5.3 shall be a final decision for purposes of West Virginia Code, § 16-2D-7(r) and § 16-2D-10. The state agency shall publish notice of the decision in the Saturday Charleston newspapers, the State Register, and the state agency's newsletter. The major medical equipment affected by this rule shall not be acquired or contracted for until after entry of a final decision.

DATE: July 30, 1990

TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE

FROM: Health Care Cost Review Authority

LEGISLATIVE RULE TITLE: Exemption For Shared Services

1. Authorizing statute(s) citation W.Va. Code § 16-2D-4(h);

§16-2D-8

2. a. Date filed in State Register with Notice of Hearing:

June 11, 1990

b. What other notice, including advertising, did you give of the hearing?

publication in HCCRA newsletter (circulation: approx. 1000,  
health care providers, payors and interested persons).

c. Date of hearing (s): July 13, 1990

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

Attached X No comments received \_\_\_\_\_

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

July 30, 1990

f. Name and phone number of agency person to contact for additional information:

Marianne K. Stonestreet, General Counsel

343-3701

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

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

N/A

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b. Date of hearing: \_\_\_\_\_

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

d. Attach findings and determinations and reasons:

Attached \_\_\_\_\_



Gaston Caperton  
Governor

Tanja Willis Miller  
Secretary

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES  
**HEALTH CARE COST REVIEW AUTHORITY**

Larry C. Fizer  
Chairman

Board Members  
Walter J. Dale  
Don M. Keesling

M E M O R A N D U M

TO: Legislative Rule-Making Review Committee

FROM: Health Care Cost Review Authority

RE: Brief Summary of Proposed Legislative Rule:  
Exemption For Shared Services; and  
Statement of Circumstances Requiring The Rule

DATE: July 30, 1990

The proposed legislative rule implements Enrolled H. B. 4230 which was passed by the Legislature on March 10, 1990, and became effective ninety (90) days from passage. This bill amended W. Va. Code, § 16-2D-4(h) by placing more stringent requirements upon the eligibility for an exemption from certificate of need review for shared services between two or more acute care facilities which can reasonably be mobile. The proposed rule limits the exemption to lithotripsy and magnetic resonance imaging (MRI) and also tightens the eligibility requirements for an exemption for shared services. This rule repeals and replaces section 5 of the "Exemptions From Certificate Of Need Review," § 65 C.S.R. 11 (1988).

Enrolled H. B. 4230 changed the language in Code § 16-2D-4(h). Accordingly, a new rule is needed to implement the changes in said Code section. This Code section as amended further requires that new rules be implemented by the HCCRA within ninety (90) days.

MKS/jmh



Gaston Caperton  
Governor

Taunja Willis Miller  
Secretary

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES  
**HEALTH CARE COST REVIEW AUTHORITY**

Larry C. Fizer  
Chairman

Board Members  
Walter J. Dale  
Don M. Keesling

MEMORANDUM

TO: Legislative Rule-Making Review Committee

FROM: Health Care Cost Review Authority

RE: Amendments and Reasons for Amendments to  
Proposed Legislative Rule: Exemption  
For Shared Services

DATE: July 30, 1990

The proposed legislative rule establishes an exemption from certificate of need review for shared services between two or more acute care facilities which can reasonably be made mobile as provided by the 1990 amendments to W. Va. Code, § 16-2D-4(h). This memorandum will address the written and oral comments made regarding the proposed rule and will explain the reasons for accepting some of the suggestions and for rejecting others. Consequent changes in the language of the proposed rule will also be addressed.

(1) The majority of comments, both written and oral, received by the HCCRA concerned section 4.5 of the proposed rule. Specifically, the majority objected to the language in this section which prohibits physician ownership of major medical equipment subject to this rule which provides services to any acute care facility at which he or she has admitting privileges. The West Virginia Hospital Association, the West Virginia State Medical Association, Cabell Huntington Hospital, and Paul Nusbaum (health care consultant) objected to the physician ownership language contained in the proposed rule. All felt that this language was unduly restrictive.

The Public Employees Insurance Agency (PEIA) supported the language in the proposed rule.

The HCCRA originally included this language due to a growing concern in the health care field about physicians who over-utilize diagnostic equipment in which they have an ownership interest. This is an issue which Congress is currently in the process of addressing.

The HCCRA has amended the proposed rule by deleting the language containing the prohibition on physician ownership. Although the over-utilization of diagnostic equipment issue remains of great concern to the HCCRA, the agency believes a total ban on physician ownership is premature at this time.

(2) The second amendment made by the HCCRA to the proposed rule is contained in section 4.6. The language was added for clarification purposes and was suggested in the comments made by PEIA.

(3) PEIA submitted comments regarding section 4.1. The HCCRA notes that any changes made to a legislative rule must be done pursuant to the APA. Accordingly, the language suggested by PEIA is not necessary.

(4) PEIA suggested changes in section 4.2. Issues addressed are the subject of past decisions of the HCCRA and therefore can be dealt with administratively. Accordingly, the language suggested by PEIA is not necessary.

(5) PEIA also suggested changes in section 4.4. Changes suggested by PEIA concern an entirely different Code section, § 16-2D-4(i). It is the opinion of the HCCRA that the suggestions made by PEIA would be best included in a rule promulgated pursuant to subsection (i) and not subsection (h).

Legislative Rule-Making Review Committee  
July 30, 1990  
Page 3

(6) PEIA also suggested changes in sections 4.7 and 4.11 regarding clarification of the time-periods in which to request a hearing. It is the opinion of the HCCRA that the procedures and the time-periods for public hearings are well established and understood by the entities interested in certificate of need matters. Any changes made to this procedure or time-period would serve to confuse and not clarify.

MKS/jmh

WV HEALTH CARE COST REVIEW AUTHORITY  
MEETING REGISTRATION

Date of Meeting: July 13, 1990

Nature of Meeting: Proposed Legislative Rule for Exemption for Shared Services

	Individual's Name:	Name of Organization:	Do you wish to speak? Y or N
1	Bob Whittier	WVHA	Y
2	George Rider	WV S MA	Y
3	Dan Chrity	BPH, Office of Planning	N
4	Paul Nusbaum	Health Care Consultant	Y
5	Don Sensabaugh	WV S MA	Y
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**RECEIVED**

EMERGENCY WEST VIRGINIA LEGISLATIVE RULE  
HEALTH CARE COST REVIEW AUTHORITY  
Series 16  
EXEMPTION FOR SHARED SERVICES

JUL 13 1990

HEALTH CARE COST REVIEW AUTHORITY

Good morning, my name is Bob Whitler, Vice President/Public Policy Development, West Virginia Hospital Association. On behalf of the West Virginia Hospital Association and its 63 member hospitals, I appreciate the opportunity to speak this morning on the Health Care Cost Review Authority's emergency legislative rule implementing the first part of H.B. 4230 which deals with the Certificate of Need exemption for mobile shared services.

The West Virginia Legislative Interim Committee on Health Care Services and Payments studied the exemption for mobile shared services and recommended to the full legislative body that the exemption criteria be tightened up somewhat to make it clear that mobile cardiac catheterization not be eligible for the exemption; if mobile services are less cost effective than a fixed unit, the acute care facility not be eligible for the exemption; and the exemption be for existing technology only and not for future technology, such as PET.

The emergency rule which we are commenting on this morning, generally, is a fair interpretation of the law and implements legislative intent. However, the West Virginia Hospital Association does have concerns with Paragraph 4.5 under exemption criteria. The last sentence of that paragraph reads, "Provided that a physician shall not own in whole or in part any major medical equipment subject to this rule which provides services to any acute care facility at which he or she has admitting privileges." This appears to discriminate against in-state physicians. For example, a hospital in West Virginia could contract with a group of physician investors from Columbus,

Ohio, but not with physicians from their own community.

I believe the intent behind this proviso is to prevent physicians from over utilizing diagnostic equipment in which they have ownership. This is a legitimate concern. However, it is a concern that can be best addressed through existing and future utilization review programs such as concurrent review and precertification for expensive outpatient procedures. HCCRA might want to consider adding a special requirement to this exemption such as requiring submission of utilization review plans.

The WVHA very much appreciates the cooperative spirit that HCCRA showed during the negotiations on H.B. 4230 and also appreciates the opportunity to testify this morning.

# West Virginia STATE MEDICAL ASSOCIATION

4307 MacCORKLE AVENUE, SE, CHARLESTON, WEST VIRGINIA  
Address Reply To: P. O. Box 4106, Charleston, West Virginia 25364

Phone (304) 925-0342  
Fax (304) 925-0345

DERRICK L. LATOS, M.D.  
President  
Wheeling

MICHAEL M. STUMP, M.D.  
President Elect  
Elkins

CONSTANTINO Y. AMORES, M.D.  
Vice President  
Charleston

WILLIAM C MORGAN, JR., M.D.  
Treasurer  
Charleston

**RECEIVED**

July 13, 1990

JUL 13 1990

Mr. Larry C. Fizer, Chairman  
WV Health Care Cost Review Authority  
100 Dee Drive, Suite 201  
Charleston, WV 25311

**HEALTH CARE COST REVIEW AUTHORITY**

SUBJECT: HCCRA Legislative Rule, Series 16, Section 4  
Exemption for Shared Services

Dear Mr. Fizer:

Thank you for the opportunity to comment on the above referenced rules.

It is difficult to comprehend the rationale for the last sentence in Section 4.5. I have had our attorney review these rules and his analysis is attached. It appears that physicians have been singled out, for whatever reason, as improper participants in a shared service program. I believe that such a discriminatory action is unconstitutional.

Physicians want access to technology for their patients. To deny exemption for a Certificate of Need, under these rules, because a physician who practices at a particular hospital has an economic interest in the equipment, could adversely affect access. I don't think that is what your agency wants.

Sincerely,

  
George Rider  
Executive Director

nd  
Enclosure



1600 CHARLESTON NATIONAL PLAZA  
MAILING ADDRESS: P. O. BOX 2031  
CHARLESTON, WEST VIRGINIA 25327

TELEPHONE (304) 343-8900

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(304) 343-9833

**KAY,  
CASTO,  
CHANEY,  
LOVE & WISE**  
ATTORNEYS AT LAW

3000 HAMPTON CENTER, SUITE C  
MAILING ADDRESS: P. O. BOX 1230  
MORGANTOWN, WEST VIRGINIA 26507

TELEPHONE (304) 599-8900

TELEFAX (304) 599-8901

PLEASE REPLY TO:  
Charleston Office

July 11, 1990

Mr. George Rider  
Executive Director  
West Virginia State Medical Association  
Post Office Box 4106  
Charleston, West Virginia 25364

**Re: HCCRA Legislative Rule, Series 16, Section 4  
Exemption for shared services**

Dear Mr. Rider:

Pursuant to your request, I have reviewed the HCCRA proposed Emergency Legislative Rule, Series 16, Section 4, regarding exemption criteria for magnetic resonance imaging devices and lithotripters providing exemption from certificate of need review for shared services between two or more acute care facilities for magnetic resonance imaging devices and lithotripters. After a review of the rule, it is my opinion that the third sentence in Section 4.5 is unconstitutional. The proposed section states "Provided, that a physician shall not own in whole or in part any major medical equipment subject to this rule which provides services to any acute care facility which he or she has admitting privileges." The provision is unconstitutional on the following grounds:

(1) The rule unconstitutionally discriminates against physicians and is a violation of the Equal Protection Clause of the Fourteenth Amendment. Any other persons regardless of their profession can own either part or all of the equipment involved except physicians. There appears to be no rational basis for singling out physicians as opposed to other owners. Although the West Virginia Code does not prohibit physicians from owning such major medical equipment, it requires them to go through a much more expensive certificate of need process in order to own any of the services. This would, in turn, either eliminate the possibility of physicians becoming a part owner with hospitals or other entities because of the additional cost involved or, at the very least, increase the cost of purchasing and putting into use such equipment owned by physicians, in effect creating an unfair advantage to non-physicians in the ownership of said equipment.

(2) Who owns a shared unit has no reasonable relation to whether or not a health care entity should be entitled to an exemption from certificate of

Mr. George Rider  
July 11, 1990  
Page 2

need procedures. The proposed rules provide that the exemption is limited to one piece of major medical equipment per shared service, and an acute care facility may obtain only one exemption for each shared service permitted under this rule. Therefore, if HCCRA determines that a health care entity does not have this type of medical equipment available to it except on the requested shared basis, what relevance is the owner of the said equipment? Thus, this provision excluding physicians from ownership appears to be outside the scope of the agency's authority delegated to it by the legislature and for that reason is unconstitutional and void.

There also appears to be no need for such exclusion since there are other precautions against abuse provided in other sections of the proposed Emergency Rules. For instance, to obtain a shared exemption:

(1) The medical equipment must be at least as cost effective as a fixed unit (Section 4.4);

(2) Verified notice must be filed with the state agency, which notice must include:

(a) the fair market value of the equipment;

(b) the capital expenditures to be made;

(c) the hospital's annual operating expenses for each of the first three years of operation of the shared services;

(d) the proposed schedule for the equipment's use at each hospital;

(e) a complete list of all persons and/or entities with an ownership interest in the equipment (this would identify any physicians);

(f) a complete list of all physicians with admitting privileges at the facility (this would allow the agency to identify any physician owners); and

(g) proposed charges to patients for the services.

(3) The agency determines the reasonableness of the exemption after the notification process and after a hearing, if one is requested.

With all of these precautions against abuse of the exemption from a certificate of need process, it is certainly unnecessary to exclude any one type of owner.

KAY, CASTO, CHANEY, LOVE & WISE

Mr. George Rider  
July 11, 1990  
Page 3

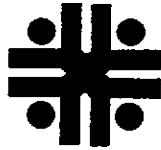
In addition to the precautions against abuse of the exemption in the proposed HCCRA legislative rules, hospitals also have utilization review procedures that are also precautions against abuse and over-utilization by physicians, either owners or non-owners, of the equipment.

Therefore, based upon my initial review of this proposed rule, it is my opinion that Section 4.5 of Legislative Rules, Series 16, Section 4, disallowing an exemption for shared medical equipment owned by physicians is unconstitutional and unnecessary and, therefore, should be struck from the proposed emergency rule. If you have any questions regarding this opinion, please advise.

Very truly yours,

  
Don R. Sensabaugh, Jr.

DRS/jsr



# CABELL HUNTINGTON HOSPITAL

**RECEIVED**

JUL 16 1990

**Certificate of Need**

July 13, 1990

West Virginia Health Care Cost Review Authority  
100 Dee Drive, Suite 201  
Charleston, WV 25311

Dear HCCRA:

This letter is in response to the request for comments on the proposed Legislative Rule for the Exemption of Shared Services.

At the outset, it should be stated that the shared services exemption has worked effectively in the past -- enabling acute care facilities to bring mobilized high technology equipment in a cost effective manner to the communities they serve. It has enabled acute care facilities which might not otherwise be able to justify and afford the capital expenditure for such equipment to offer the services through a shared contracting arrangement. The exemption has also allowed patients to receive services at their local community acute care hospital rather than requiring them to seek such services in a more distant city -- perhaps out of the state.

For these reasons, we support the continuance of the mobile shared services exemption for major medical equipment. We would like to comment, however, on a couple of the proposed changes to the exemption.

First, we would like to express support for the change in Section 4.2 which would enable the four (4) days per month requirement to be waived if three (3) or more acute care facilities share the equipment. This is a reasonable change since the complexity of scheduling arrangements increases proportionately (or perhaps exponentially) to the number of acute care facilities participating in the sharing arrangement.

Second, the provision in Section 4.5 which addresses the issue of physician ownership is unnecessarily restrictive. Specifically, the proposed rule would not permit an acute care facility to obtain an exemption if a physician who has admitting privileges at the facility has complete or partial ownership of the equipment. We object to this restriction on three counts described below.

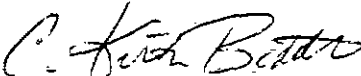
Comments: Legislative Rule for the Exemption of Shared Services

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- 1) The restriction may preclude, in some cases, the opportunity for a community hospital to obtain use of needed high technology equipment which could be cost effectively obtained only through a leasing arrangement with a non-acute care entity in which a local physician has interest. Some community hospitals which need to conserve their capital resources may find that the best, most cost effective means of obtaining such equipment is to lease the equipment from a physician on its staff who individually or in concert with other entrepreneurs possesses the financial resources and the willingness to take the risk to bring the equipment to the community in which he or she practices.
- 2) In some cases the rule may diminish the ability of communities and community hospitals to retain highly skilled physicians. The rule could restrict the ability of physicians and acute care facilities to engage in cooperative ventures around new medical technology which are good for the communities they serve. A physician who has ownership in medical equipment that is being used by the acute care facility at which he or she practices may be more committed to the hospital and the community. This may assist with retention of the physician. Absent this arrangement, some highly skilled physicians may be more likely to seek opportunities in other metropolitan areas in other states.
- 3) Certificate of need should address whether a proposed sharing arrangement appropriately allocates capital resources and promotes cost effectiveness, rather than whether it creates the potential for self-dealing. The issue of self-dealing is more appropriately resolved through statutory restrictions. Recent legislative proposals concerning self-dealing, however, have failed to be enacted at the federal level. The proposed restriction in Section 4.5, therefore, has no basis in current health care law. It is based merely on legislation that has been introduced -- not enacted. Since no statutes currently exist which: a) preclude physician ownership in mobile shared services; and, b) prescribe the role of certificate of need concerning the issue of self-dealing, it is recommended that the restriction proposed in Section 4.5 be deleted.

Thank you for providing the opportunity to comment on the proposed Legislative Rule for the Exemption of Shared Services. Should you have any questions regarding these comments, please call.

Sincerely,



C. Keith Biddle  
Director of Planning

c: W. Don Smith, II, President and CEO  
Monte Ward, Senior Vice President and CFO  
Paul English Smith, VP Legal Services and Risk Management

BEFORE THE WEST VIRGINIA  
HEALTH CARE COST REVIEW AUTHORITY

IN RE:

TITLE 65  
WEST VIRGINIA LEGISLATIVE RULE  
HEALTH CARE COST REVIEW AUTHORITY  
SERIES 16  
EXEMPTION FOR SHARED SERVICES

TRANSCRIPT OF PROCEEDINGS had and testimony adduced before the West Virginia Health Care Cost Review Authority, taken pursuant to agreement on the 13th day of July, 1990, commencing at 9:30 a.m., at the Authority's Hearing Room, 100 Dee Drive, Suite 201, Charleston, West Virginia.

BEFORE:       LARRY FIZER, Chairman  
              WALTER DALE, Board Member  
              MARIANNE STONESTREET, General Counsel

CHAIRMAN FIZER: I would like to call this hearing to order. The purpose of the hearing this morning is to take comments on the regulations Title 65, Series 16, titled Exemption For Shared Services. I think about everyone has signed that wishes to make a comment this morning, and we will just take them in order as they signed in. First is Mr. Whitler.

MR. WHITLER: Good morning, my name is Bob Whitler, as you know, Vice President for Public Policy Development with the West Virginia Hospital Association. On behalf of the West Virginia Hospital Association and its 63 member hospitals, I appreciate the opportunity to speak this morning on Series 16.

As we all know, the West Virginia Legislative Interim Committee on Health Care Services and Payments studied the current, or the past exemption for mobile shared services and then recommended to the full legislative body that the exemption criteria be tightened up somewhat so that the criteria makes clear that cardiac catheterization is not included; that if a fixed unit is less expensive than a mobile unit then a hospital isn't eligible for exemption criteria; and that it's for existing technology only, not for future technology that is coming down the pike, such as PET.

We've reviewed the Series 16 and believe by and large it is a fair interpretation of the law and does indeed implement legislative intent. We do, however, have problems with one paragraph, and that is Paragraph 4.5 under exemption criteria. The last sentence of that paragraph reads, "Provided that a

physician shall not own in whole or in part any major medical equipment subject to this rule which provides services to any acute care facility at which he or she has admitting privileges." This appears to discriminate against West Virginia physicians. For example, a hospital in West Virginia could contract with a group of physicians from Columbus, Ohio, - Cleveland, Ohio, but not with physicians from their own community.

We believe that the intent behind this proviso is to prevent physicians from over-utilizing diagnostic equipment in which they may have ownership. This is a legitimate concern. However, it is a concern that can be best addressed through existing and future utilization review programs such as concurrent review, which is happening right now in lot of hospitals, and also precertification for expensive outpatient procedures. HCCRA might want to consider adding a special requirement to this exemption such as requiring submission of utilization review plans from the hospital.

In summary, the West Virginia Hospital Association appreciates very much the cooperative spirit that HCCRA showed during the legislative session while we were negotiating this compromise and also appreciates the opportunity to testify this morning. I'll also be glad to answer any questions.

CHAIRMAN FIZER: Mr. Dale, do you have any questions? Ms. Stonestreet? Thank you very much.

Mr. Rider?

MR. RIDER: Good morning. I'm George Rider, Executive Director of the West Virginia State Medical Association, and I certainly appreciate the opportunity to come before you and comment on this particular set of rules. You have before you my brief comments and also an analysis by our legal counsel, Mr. Don Sensabaugh, who is present to respond to any questions. The basic concern we have concerning these rules is, in fact, the apparent discriminatory approach that is being taken concerning physicians and ownership, part ownership, in a local service of some type. I just can't fathom the rationale for that, it is very difficult for me to understand why that would be done. That particular segment of our society would be set out and felt incapable of being a part of a program such as this on mobile shared services, from my position, is the individual who is most interested in obtaining access to technology for a patient. I also feel that if this were to remain as it was written, it could have an adverse impact, especially on the smaller medical facilities in the state in obtaining the technology through shared mobile services. I have no other comment to make, other than the fact that we strongly object to that section or that portion of Section 4.5 that blatantly discriminates against the physicians of our state in accessing the latest technology. I will be happy to answer any questions that you may have.

CHAIRMAN FIZER: Thank you, Mr. Rider. Mr. Dale? Ms. Stonestreet? Thank you, sir, we have your written comments also.

Mr. Nusbaum?

MR. NUSBAUM: My name is Paul Nusbaum, a health care consultant. I've got some general comments not related to anything specifically that I wanted to present to the board. I think I've been involved in as many exemption issues that have been before you all over the past couple of years, and I had some observations on the regulations that I wanted to share with you. Number one had to do with Section 4.4 which talks about "This exemption is not available if the shared services mobile unit is less cost effective than a fixed unit. The state agency shall determine cost effectiveness based upon patient charges". I'm not really sure what that means. If you're saying, if a patient in let's say Elkins, or a hospital in Elkins, comes in for a mobile exemption for MRI -- we know they already have one, but just for discussion purposes -- they came in for a mobile exemption for MRI and that mobile service would have been a patient charge of \$600 per procedure. Yet, in Charleston, the MRI charges \$525 per procedure - is that what you all are getting at? I don't know. I think something needs to be put into the regulations with regard to some of the opportunity costs - that if it's \$75 to \$100 more, but if it's going to cost the patient that much to travel to the area, I think you ought to have that in the regulations or at least spell out how you are evaluate what patient charges are.

I'm not going to say too much on the comments on Section 4.5. I'm just -- most of you know that I was somewhat involved in the initiative I think that sprung up this whole physician ownership issue; and since that time I have been involved with a

group of providers, not only physicians. But I can tell you at least so far what has happened in West Virginia - there really hasn't been abuses. The legal advisors to the physicians group are so scared of what Congress is going to do in terms of Congressman Stark, that they have bent over backwards and have clearly developed written guidelines for their physicians. You can't do -- You can't go out and muster up business unless the patient needs it, and they really do require a very strong utilization review program. I think the comment by the Hospital Association about requiring, or putting in a utilization review requirement, in order for a physician ownership issues. The other kicker is if there is a mobile vendor that is currently in place in the state West Virginia and is providing quality service at lower costs - the simple fact that physicians own all or part of it shouldn't automatically prohibit a hospital from adding to that or becoming a player in that shared service. I guess if it ain't broke, don't fix it is probably the comment in that so far in West Virginia I haven't seen any abuses from the physician owned stand point. The ownership issue is also questionable is that there are some for-profit corporations, stockholder corporations. You know, it is going to be real cute for you all to try to monitor who owns a share of stock in publicly shared corporations and whether or not that is physician ownership or not.

The last comment, and I was authorized to present it on behalf of St. Mary's Hospital in Huntington, with regard to an issue that I had an opportunity to briefly talk over with Ms.

Stonestreet. And that's if a hospital currently has a shared services exemption, does a change in vendor require a hospital to come back to you all and say - hey, we found a better arrangement, a less costly arrangement, a higher quality arrangement, and we would like to simply change vendors. Is that a recording notification, is that something that would require review? I can give you a specific example with regard to St. Mary's, and that is that they have a mobile lithotripsy contract with an out-of-state provider, that is the General Anaesthesia Bath Unit, and that contract expires in January; and they do wish to go with a -- they can or their interest is right now to change vendors to a less costly anaesthesia free unit. The question is, does that fall into the issue of whether or not this is a second exemption for the hospital? One of the provisions in the regulations talked about hospitals are only eligible for one exemption under the issue, and that's why the whole thing was brought up. I would suggest to you that a change in vendors would not require a new exemption, and I would hope that you would so outline that in the regulations. Thank you.

CHAIRMAN FIZER: Thank you, Mr. Nusbaum. Any questions, Mr. Dale? Ms. Stonestreet? Thank you, Mr. Nusbaum.

If we could, there is a question for Mr. Rider.

MR. DALE: Do you remember about half way through your presentation, you used the word discriminate?

MR. RIDER: Discriminatory.

MR. DALE: Discriminatory. What did you have in reference to?

MR. RIDER: Well, basically, the fact that this one segment of our society has been identified in your rules as being ineligible to be a participant in ownership because they happen to have privileges in a hospital that is asking for the exemption in the shared services. You could expand that to any employee of that hospital, possibly, should not have ownership because they can indirectly or directly influence utilization. My question really is, what is the rationale for that statement? I'm not sure that I understand why that is in the rules, that physicians who have privileges in a particular hospital cannot have ownership. That's the basic question.

MR. DALE: Do you want to add to the -- Do you want to add to that?

MR. RIDER: Add -- Add what? To my question?

MR. DALE: Yes.

MR. RIDER: Well, my basic question is - Why are physicians pointed out to be ineligible to participate in ownership for these technologies under the shared services concept? That's my basic question. I don't know what the assumption was that was made to have that in the rules. And so I am asking the question back to the Authority.

CHAIRMAN FIZER: If I may, in response to that, Mr. Rider. It is the concern, basically, as Mr. Whitler emphasized, which is stemming from the national level and at the state level also when we had the first involvement with a mobile service that was owned by the physicians and so forth, the potential of

over-utilization of those. I would also point out to you that as you go through these, the machinery is owned by non-acute care facilities all the way through in these, if you look at them.

MR. RIDER: I'm not sure ...

CHAIRMAN FIZER: Where it says non-acute facilities. I guess the question that I'm asking, when you put it in the basis of a discriminatory fashion. You know, if the hospital was to go out and buy it itself -- But that was the original concern about the physicians component in trying to eliminate the over-utilization in that.

MR. RIDER: Do you -- Is there facts that indicate that there had been over-utilization in any of the programs that are now in existence - has that happened?

CHAIRMAN FIZER: As I stated, it is stemming from the national concern over the over-utilization. No, there is no statistical information in this state that would reflect that. But I think it is a growing problem that we will be confronted with in the future in the state, and as these regs were developed, that's what was driving us to preventing that.

MR. RIDER: That's why I think that it is probably discriminatory in that an assumption is made that something can happen that there is no indication that it has in fact happened. It would appear to me that as the attorney has indicated in his analysis, our attorney has indicated, that this is really unconstitutional probably from the standpoint of the rights of the individual physician. If there is facts to justify this

then I think they should be presented; if it is an assumption that this is going to happen, I think it is inappropriate to have it in the rules.

CHAIRMAN FIZER: Any additional questions for Mr. Rider? Thank you very much, sir.

Any others? Any additional comments as they relate to the rules?

Mr. Sensabaugh, you've been very quiet this morning.

MR. SENSABAUGH: Well, I might say something. I'm Don Sensabaugh, counsel for the Medical Association. I have looked at the -- at Series 16 and particularly Section 4.5. I believe it is discriminatory in that other persons, other than hospitals, who are under the purview of the HCCRA could own it. Any other types of persons -- the only persons who are now liable are physicians, and I don't think there is any rational basis at this point for excluding physicians from ownership. In fact, there are other persons who could own and be entitled to the exemption who could influence the use of that equipment. Hospital administrators, for instance, they are not excluded. If you think, just off the top of your head, millions of different types of people who could benefit from that -- not millions, but other people. For instance, hospital administrators come right to mind -- I mean, they can influence the use of the machine and they can own it in conjunction with other private individuals and tend to make a profit. So that it seems to me unless there is really abuse, as I pointed out in my letter. In addition, I don't know that that's necessarily what

the legis-- the authority the legislature gave to come up with these rules had anything to do with the ownership of that equipment -- as to whether that is anything. I think the exemption really deals with whether or not a hospital -- the Certificate of Need process deals with whether or not its needed and whether or not the services are reasonable in cost. And those things are addressed in the rules that are in the statute, and I don't know whether ownership can make any difference. If its necessary and its cheaper and it provides access that wouldn't otherwise be there, what difference does it make who owns it. Particularly when, as I pointed out in my letter, and as Mr. Whitler pointed out, there are utilization review procedures in place which take care of any fears or should take care of any fears that there is over-utilization merely for a profit. And those are basically my comments and summary of my letter that I wrote to Mr. Rider after looking at the -- after looking at the rules. Thank you.

CHAIRMAN FIZER: Are there any questions for Mr. Sensabaugh? Mr. Dale? Ms. Stonestreet?

Any others that wish to make a comment this morning?

(No response)

CHAIRMAN FIZER: Being none, we will bring to a close the hearing on Title 65, Series 16 regulations. I want to thank you for your comments this morning. We will give them very serious evaluation in the finalization of these regulations. Thank you very much.

(WHEREUPON, the hearing was closed.)