WEST VIRGINIA LEGISLATURE
SEVENTY-NINTH LEGISLATURE
REGULAR SESSION, 2009

ENROLLED
COMMITTEE SUBSTITUTE
FOR

Senate Bill No. 321

(Senators Prezioso, Foster, Jenkins, Stollings, Kessler, D. Facemire, Deem, Bowman and Plymale, original sponsors)

[Passed April 3, 2009; in effect ninety days from passage.]
AN ACT to amend and reenact §16-2D-2, §16-2D-3, §16-2D-4, §16-2D-5 and §16-2D-7 of the Code of West Virginia, 1931, as amended, all relating generally to the certificate of need process; eliminating certain services of certificate of need review; defining terms; raising the expenditure minimum amount for a capital expenditure and major medical equipment threshold; eliminating archaic language; providing for legislative rule-making authority; setting forth standards for when certain ambulatory health care facilities are not subject to certificate of review; providing that electronic health records are not subject to certificate of review; providing that nonhealth-related projects are subject to certificate of review; and modifying the fee structure for certificate of review by setting forth a capitated amount for certificate of need fees.
Be it enacted by the Legislature of West Virginia:

That §16-2D-2, §16-2D-3, §16-2D-4, §16-2D-5 and §16-2D-7 of the Code of West Virginia, 1931, as amended, be amended and reenacted, all to read as follows:

ARTICLE 2D. CERTIFICATE OF NEED.

§16-2D-2. Definitions.

Definitions of words and terms defined in articles five-f and twenty-nine-b of this chapter are incorporated in this section unless this section has different definitions.

As used in this article, unless otherwise indicated by the context:

(a) "Affected person" means:

(1) The applicant;

(2) An agency or organization representing consumers;

(3) Any individual residing within the geographic area served or to be served by the applicant;

(4) Any individual who regularly uses the health care facilities within that geographic area;

(5) The health care facilities which provide services similar to the services of the facility under review and which will be significantly affected by the proposed project;

(6) The health care facilities which, prior to receipt by the state agency of the proposal being reviewed, have formally indicated an intention to provide similar services in the future;

(7) Third-party payors who reimburse health care facilities similar to those proposed for services;
(8) Any agency that establishes rates for health care facilities similar to those proposed; or

(9) Organizations representing health care providers.

(b) "Ambulatory health care facility" means a free-standing facility that provides health care to noninstitutionalized and nonhomebound persons on an outpatient basis. For purposes of this definition, a free-standing facility is not located on the campus of an existing health care facility. This definition does not include any facility engaged solely in the provision of lithotripsy services or the private office practice of any one or more health professionals licensed to practice in this state pursuant to the provisions of chapter thirty of this code: Provided, That this exemption from review shall not be construed to include practices where major medical equipment otherwise subject to review under the provisions of this article is acquired, offered or developed: Provided, however, That this exemption from review shall not be construed to include certain health services otherwise subject to review under the provisions of subdivision (1), subsection (a), section four of this article.

(c) "Ambulatory surgical facility" means a free-standing facility that provides surgical treatment to patients not requiring hospitalization. For purposes of this definition, a free-standing facility is not physically attached to a health care facility. This definition does not include the private office practice of any one or more health professionals licensed to practice surgery in this state pursuant to the provisions of chapter thirty of this code: Provided, That this exemption from review shall not be construed to include practices where major medical equipment otherwise subject to review under the provisions of this article is acquired, offered or developed: Provided, however, That this exemption from review shall not be construed to include health services otherwise
subject to review under the provisions of subdivision (1),
subsection (a), section four of this article.

(d) "Applicant" means: (1) The governing body or the
person proposing a new institutional health service who is,
or will be, the health care facility licensee wherein the new
institutional health service is proposed to be located; and
(2) in the case of a proposed new institutional health
service not to be located in a licensed health care facility,
the governing body or the person proposing to provide the
new institutional health service. Incorporators or promot-
ers who will not constitute the governing body or persons
responsible for the new institutional health service may
not be an applicant.

(e) "Bed capacity" means the number of beds licensed
to a health care facility or the number of adult and
pediatric beds permanently staffed and maintained for
immediate use by inpatients in patient rooms or wards in
an unlicensed facility.

(f) "Campus" means the adjacent grounds and build-
ings, or grounds and buildings not separated by more than
a public right-of-way, of a health care facility.

(g) "Capital expenditure" means:

(1) An expenditure made by or on behalf of a health
care facility, which:

(A) (i) Under generally accepted accounting principles
is not properly chargeable as an expense of operation and
maintenance; or (ii) is made to obtain either by lease or
comparable arrangement any facility or part thereof or
any equipment for a facility or part; and

(B) (i) Exceeds the expenditure minimum; or (ii) is a
substantial change to the bed capacity of the facility with
respect to which the expenditure is made; or (iii) is a
substantial change to the services of such facility;
(2) The donation of equipment or facilities to a health care facility, which if acquired directly by that facility would be subject to review;

(3) The transfer of equipment or facilities for less than fair market value if the transfer of the equipment or facilities at fair market value would be subject to review; or

(4) A series of expenditures, if the sum total exceeds the expenditure minimum and if determined by the state agency to be a single capital expenditure subject to review. In making this determination, the state agency shall consider: Whether the expenditures are for components of a system which is required to accomplish a single purpose; whether the expenditures are to be made over a two-year period and are directed towards the accomplishment of a single goal within the health care facility's long-range plan; or whether the expenditures are to be made within a two-year period within a single department such that they will constitute a significant modernization of the department.

(h) "Expenditure minimum" means $2,700,000 for the calendar year 2009. The state agency shall adjust the expenditure minimum annually and publish an update of the amount on or before December 31 of each year. The expenditure minimum adjustment shall be based on the DRI inflation index published in the Global Insight DRI/WEFA Health Care Cost Review, or its successor or appropriate replacement index. This amount shall include the cost of any studies, surveys, designs, plans, working drawings, specifications and other activities, including staff effort and consulting and other services essential to the acquisition, improvement, expansion or replacement of any plant or equipment.

(i) "Health", used as a term, includes physical and mental health.
(j) "Health care facility" means a publicly or privately owned facility, agency or entity that offers or provides health care services, whether a for-profit or nonprofit entity and whether or not licensed, or required to be licensed, in whole or in part, and includes, but is not limited to, hospitals; skilled nursing facilities; kidney disease treatment centers, including free-standing hemodialysis units; intermediate care facilities; ambulatory health care facilities; ambulatory surgical facilities; home health agencies; hospice agencies; rehabilitation facilities; health maintenance organizations; and community mental health and mental retardation facilities. For purposes of this definition, "community mental health and mental retardation facility" means a private facility which provides such comprehensive services and continuity of care as emergency, outpatient, partial hospitalization, inpatient or consultation and education for individuals with mental illness, mental retardation or drug or alcohol addiction.

(k) "Health care provider" means a person, partnership, corporation, facility, hospital or institution licensed or certified or authorized by law to provide professional health care service in this state to an individual during that individual's medical, remedial or behavioral health care, treatment or confinement.

(l) "Health maintenance organization" means a public or private organization which:

(1) Is required to have a certificate of authority to operate in this state pursuant to section three, article twenty-five-a, chapter thirty-three of this code; or

(2) (A) Provides or otherwise makes available to enrolled participants health care services, including substantially the following basic health care services: Usual physician services, hospitalization, laboratory, X ray,
emergency and preventive services and out-of-area coverage;

(B) Is compensated except for copayments for the provision of the basic health care services listed in paragraph (A) of this subdivision to enrolled participants on a predetermined periodic rate basis without regard to the date the health care services are provided and which is fixed without regard to the frequency, extent or kind of health service actually provided; and

(C) Provides physicians' services: (i) Directly through physicians who are either employees or partners of the organization; or (ii) through arrangements with individual physicians or one or more groups of physicians organized on a group practice or individual practice basis.

(m) "Health services" means clinically related preventive, diagnostic, treatment or rehabilitative services, including alcohol, drug abuse and mental health services.

(n) "Home health agency" means an organization primarily engaged in providing professional nursing services either directly or through contract arrangements and at least one of the following services: Home health aide services, other therapeutic services, physical therapy, speech therapy, occupational therapy, nutritional services or medical social services to persons in their place of residence on a part-time or intermittent basis.

(o) "Hospice agency" means a private or public agency or organization licensed in West Virginia for the administration or provision of hospice care services to terminally ill persons in the persons' temporary or permanent residences by using an interdisciplinary team, including, at a minimum, persons qualified to perform nursing services; social work services; the general practice of medicine or osteopathy; and pastoral or spiritual counseling.
(p) "Hospital" means a facility licensed as such pursuant to the provisions of article five-b of this chapter, and any acute care facility operated by the state government, that primarily provides inpatient diagnostic, treatment or rehabilitative services to injured, disabled or sick persons under the supervision of physicians and includes psychiatric and tuberculosis hospitals.

(q) "Intermediate care facility" means an institution that provides health-related services to individuals with mental or physical conditions that require services above the level of room and board, but do not require the degree of services provided in a hospital or skilled-nursing facility.

(r) "Long-range plan" means a document formally adopted by the legally constituted governing body of an existing health care facility or by a person proposing a new institutional health service which contains the information required by the state agency in rules adopted pursuant to section eight of this article.

(s) "Major medical equipment" means a single unit of medical equipment or a single system of components with related functions which is used for the provision of medical and other health services and costs in excess of $2,700,000 in the calendar year 2009. The state agency shall adjust the dollar amount specified in this subsection annually and publish an update of the amount on or before December 31 of each year. The adjustment of the dollar amount shall be based on the DRI inflation index published in the *Global Insight DRI/WEFA Health Care Cost Review* or its successor or appropriate replacement index. This term does not include medical equipment acquired by or on behalf of a clinical laboratory to provide clinical laboratory services if the clinical laboratory is independent of a physician's office and a hospital and it has been determined under Title XVIII of the Social Security Act to
meet the requirements of paragraphs ten and eleven, Section 1861(s) of such act, Title 42 U. S. C. §1395x. In determining whether medical equipment is major medical equipment, the cost of studies, surveys, designs, plans, working drawings, specifications and other activities essential to the acquisition of such equipment shall be included. If the equipment is acquired for less than fair market value, the term “cost” includes the fair market value.

(t) “Medically underserved population” means the population of an area designated by the state agency as having a shortage of personal health services. The state agency may consider unusual local conditions that are a barrier to accessibility or availability of health services. The designation shall be in rules adopted by the state agency pursuant to section eight of this article, and the population so designated may include the state's medically underserved population designated by the federal Secretary of Health and Human Services under Section 330(b)(3) of the Public Health Service Act, as amended, Title 42 U. S. C. §254.

(u) “New institutional health service” means any service as described in section three of this article.

(v) “Nonhealth-related project” means a capital expenditure for the benefit of patients, visitors, staff or employees of a health care facility and not directly related to preventive, diagnostic, treatment or rehabilitative services offered by the health care facility. This includes, but is not limited to, chapels, gift shops, news stands, computer and information technology systems, educational, conference and meeting facilities, but excluding medical school facilities, student housing, dining areas, administration and volunteer offices, modernization of structural components, boiler repair or replacement, vehicle maintenance and storage facilities, parking
facilities, mechanical systems for heating, ventilation
systems, air conditioning systems and loading docks.

(w) "Offer", when used in connection with health
services, means that the health care facility or health
maintenance organization holds itself out as capable of
providing, or as having the means to provide, specified
health services.

(x) "Person" means an individual, trust, estate, partnership,
committee, corporation, association and other
organizations such as joint-stock companies and insurance
companies, a state or a political subdivision or instrument-
tality thereof or any legal entity recognized by the state.

(y) "Physician" means a doctor of medicine or osteopathy
legally authorized to practice by the state.

(z) "Proposed new institutional health service" means
any service as described in section three of this article.

(aa) "Psychiatric hospital" means an institution that
primarily provides to inpatients, by or under the supervi-
sion of a physician, specialized services for the diagnosis,
treatment and rehabilitation of mentally ill and emotion-
ally disturbed persons.

(bb) "Rehabilitation facility" means an inpatient
facility operated for the primary purpose of assisting in
the rehabilitation of disabled persons through an inte-
grated program of medical and other services which are
provided under competent professional supervision.

(cc) "Review agency" means an agency of the state,
designated by the Governor as the agency for the review of
state agency decisions.

(dd) "Skilled nursing facility" means an institution, or
a distinct part of an institution, that primarily provides
inpatient skilled nursing care and related services, or rehabilitation services, to injured, disabled or sick persons.

"State agency" means the Health Care Authority created, established and continued pursuant to article twenty-nine-b of this chapter.

"State health plan" means the document approved by the Governor after preparation by the former statewide health coordinating council or that document as approved by the Governor after amendment by the former health care planning council or the state agency.

"Substantial change to the bed capacity" of a health care facility means any change, associated with a capital expenditure, that increases or decreases the bed capacity or relocates beds from one physical facility or site to another, but does not include a change by which a health care facility reassigns existing beds as swing beds between acute care and long-term care categories: Provided, That a decrease in bed capacity in response to federal rural health initiatives is excluded from this definition.

"Substantial change to the health services" of a health care facility means: (1) The addition of a health service offered by or on behalf of the health care facility which was not offered by or on behalf of the facility within the twelve-month period before the month in which the service is first offered; or (2) the termination of a health service offered by or on behalf of the facility: Provided, That "substantial change to the health services" does not include the providing of ambulance service, wellness centers or programs, adult day care or respite care by acute care facilities.

"To develop", when used in connection with health services, means to undertake those activities which upon their completion will result in the offer of a new institu-
§16-2D-3. Certificate of need; new institutional health services defined.

(a) Except as provided in section four of this article, any new institutional health service may not be acquired, offered or developed within this state except upon application for and receipt of a certificate of need as provided by this article. Whenever a new institutional health service for which a certificate of need is required by this article is proposed for a health care facility for which, pursuant to section four of this article, no certificate of need is or was required, a certificate of need shall be issued before the new institutional health service is offered or developed. A person may not knowingly charge or bill for any health services associated with any new institutional health service that is knowingly acquired, offered or developed in violation of this article and any bill made in violation of this section is legally unenforceable.

(b) For purposes of this article, a proposed "new institutional health service" includes:

(1) The construction, development, acquisition or other establishment of a new health care facility or health maintenance organization;

(2) The partial or total closure of a health care facility or health maintenance organization with which a capital expenditure is associated;

(3) Any obligation for a capital expenditure incurred by or on behalf of a health care facility, except as exempted in section four of this article, or health maintenance organization in excess of the expenditure minimum or any obligation for a capital expenditure incurred by any person to acquire a health care facility. An obligation for
a capital expenditure is considered to be incurred by or on behalf of a health care facility:

(A) When a contract, enforceable under state law, is entered into by or on behalf of the health care facility for the construction, acquisition, lease or financing of a capital asset;

(B) When the governing board of the health care facility takes formal action to commit its own funds for a construction project undertaken by the health care facility as its own contractor; or

(C) In the case of donated property, on the date on which the gift is completed under state law;

(4) A substantial change to the bed capacity of a health care facility with which a capital expenditure is associated;

(5) The addition of health services as specified by the state agency which are offered by or on behalf of a health care facility or health maintenance organization and which were not offered on a regular basis by or on behalf of the health care facility or health maintenance organization within the twelve-month period prior to the time the services would be offered: Provided, That lithotripsy services are not subject to certificate of need review. The state agency shall specify by rule those health services subject to certificate of need review.

(6) The addition of ventilator services for any nursing facility bed by any health care facility or health maintenance organization;

(7) The deletion of one or more health services previously offered on a regular basis by or on behalf of a health care facility or health maintenance organization which is associated with a capital expenditure;
(8) A substantial change to the bed capacity or health services offered by or on behalf of a health care facility, whether or not the change is associated with a proposed capital expenditure, if the change is associated with a previous capital expenditure for which a certificate of need was issued and if the change will occur within two years after the date the activity which was associated with the previously approved capital expenditure was undertaken;

(9) The acquisition of major medical equipment;

(10) A substantial change in an approved new institutional health service for which a certificate of need is in effect. For purposes of this subsection, "substantial change" shall be defined by the state agency in rules adopted pursuant to section eight of this article; or

(11) An expansion of the service area for hospice or home health service, regardless of the time period in which the expansion is contemplated or made.

(c) Notwithstanding any other provisions of this article to the contrary, the construction, development, acquisition or other establishment of an institutional health service outside of this state and within a county contiguous to the border of this state by or on behalf of a person that would otherwise be subject to review under the provisions of this section is not subject to certificate of need review. A hospital subject to review of the West Virginia Health Care Authority that constructs, develops or acquires any health care service or facility outside of West Virginia may not use the financial condition or performance of the newly constructed, developed, acquired or established health care service or facility as a basis or justification for obtaining a rate adjustment pursuant to article twenty-nine-b of said chapter.

§16-2D-4. Exemptions from certificate of need program.
(a) Except as provided in subdivision (9), subsection (b), section three of this article, nothing in this article or the rules adopted pursuant to the provisions of this article may be construed to authorize the licensure, supervision, regulation or control in any manner of the following:

(1) Private office practice of any one or more health professionals licensed to practice in this state pursuant to the provisions of chapter thirty of this code: Provided, That such exemption from review of private office practice shall not be construed to include such practices where major medical equipment otherwise subject to review under the provisions of this article is acquired, offered or developed: Provided, however, That such exemption from review of private office practice shall not be construed to include the acquisition, offering or development of one or more health services, including ambulatory surgical facilities or centers, lithotripsy, magnetic resonance imaging and radiation therapy by one or more health professionals. The state agency shall adopt rules pursuant to section eight of this article which specify the health services acquired, offered or developed by health professionals which are subject to certificate of need review;

(2) Dispensaries and first-aid stations located within business or industrial establishments maintained solely for the use of employees: Provided, That such facility does not contain inpatient or resident beds for patients or employees who generally remain in the facility for more than twenty-four hours;

(3) Establishments, such as motels, hotels and boarding-houses, which provide medical, nursing personnel and health-related services;

(4) The remedial care or treatment of residents or patients in any home or institution conducted only for those who rely solely upon treatment by prayer or spiritual
means in accordance with the creed or tenets of any recognized church or religious denomination;

(5) The creation of new primary care services located in communities that are underserved with respect to primary care services: Provided, That to qualify for this exemption, an applicant must be a community-based nonprofit organization with a community board that provides or will provide primary care services to people without regard to ability to pay: Provided, however, That the exemption from certificate of need review of new primary care services provided by this subdivision shall not include the acquisition, offering or development of major medical equipment otherwise subject to review under the provisions of this article or to include the acquisition, offering or development of ambulatory surgical facilities, lithotripsy, magnetic resonance imaging or radiation therapy. The Office of Community and Rural Health Services shall define which services constitute primary care services for purposes of this subdivision and shall, to prevent duplication of primary care services, determine whether a community is underserved with respect to certain primary care services within the meaning of this subdivision. Any organization planning to qualify for an exemption pursuant to this subdivision shall submit to the state agency a letter of intent describing the proposed new services and area of service; and

(6) The creation of birthing centers by nonprofit primary care centers that have a community board and provide primary care services to people in their community without regard to ability to pay or by nonprofit hospitals with less than one hundred licensed acute care beds: Provided, That to qualify for this exemption, an applicant shall be located in an area that is underserved with respect to low-risk obstetrical services: Provided, however, That if a primary care center attempting to qualify for this exemption is located in the same county as
a hospital that is also eligible for this exemption, or if a
hospital attempting to qualify for this exemption is
located in the same county as a primary care center that is
also eligible for this exemption, then at least one primary
care center and at least one hospital from said county shall
collaborate for the provision of services at a birthing
center in order to qualify for this exemption: Provided
further, That for purposes of this subsection, a “birthing
center” is a short-stay ambulatory health care facility
designed for low-risk births following normal uncompli-
cated pregnancy. Any primary care center or hospital
planning to qualify for an exemption pursuant to this
subdivision shall submit to the state agency a letter of
intent describing the proposed birthing center and area of
service.

(b) (1) A health care facility is not required to obtain a
certificate of need for the acquisition of major medical
equipment to be used solely for research, the addition of
health services to be offered solely for research or the
obligation of a capital expenditure to be made solely for
research if the health care facility provides the notice
required in subdivision (2) of this subsection and the state
agency does not find, within sixty days after it receives
such notice, that the acquisition, offering or obligation
will or will have the effect to:

(A) Affect the charges of the facility for the provision of
medical or other patient care services other than the
services which are included in the research;

(B) Result in a substantial change to the bed capacity of
the facility; or

(C) Result in a substantial change to the health services
of the facility.

(2) Before a health care facility acquires major medical
equipment to be used solely for research, offers a health
105 service solely for research or obligates a capital expendi-
106 ture solely for research, such health care facility shall
107 notify in writing the state agency of such facility's intent
108 and the use to be made of such medical equipment, health
109 service or capital expenditure.

110 (3) If major medical equipment is acquired, a health
111 service is offered or a capital expenditure is obligated and
112 a certificate of need is not required for such acquisition,
113 offering or obligation as provided in subdivision (1) of this
114 subsection, such equipment or service or equipment or
115 facilities acquired through the obligation of such capital
116 expenditure may not be used in such a manner as to have
117 the effect or to make a change described in paragraphs (A),
118 (B) and (C) of said subdivision unless the state agency
119 issues a certificate of need approving such use.

120 (4) For purposes of this subsection, the term "solely for
121 research" includes patient care provided on an occasional
122 and irregular basis and not as part of a research program.

123 (c) (1) The state agency may adopt rules pursuant to
124 section eight of this article to specify the circumstances
125 under which a certificate of need may not be required for
126 the obligation of a capital expenditure to acquire, either
127 by purchase or under lease or comparable arrangement, an
128 existing health care facility: Provided, That a certificate
129 of need is required for the obligation of a capital expendi-
130 ture to acquire, either by purchase or under lease or
131 comparable arrangement, an existing health care facility
132 if:

133 (A) The notice required by subdivision (2) of this
134 subdivision is not filed in accordance with said subdivision
135 with respect to such acquisition; or

136 (B) The state agency finds, within thirty days after the
137 date it receives a notice in accordance with subdivision (2)
138 of this subsection, with respect to such acquisition, that
the services or bed capacity of the facility will be changed by reason of said acquisition.

(2) Before any person enters into a contractual arrangement to acquire an existing health care facility, such person shall notify the state agency of his or her intent to acquire the facility and of the services to be offered in the facility and its bed capacity. Such notice shall be made in writing and shall be made at least thirty days before contractual arrangements are entered into to acquire the facility with respect to which the notice is given. The notice shall contain all information the state agency requires.

d) The state agency shall adopt rules 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 shared services between two or more acute care facilities providing services made available through existing technology that can reasonably be mobile. The state agency shall specify the types of items in the rules and under what circumstances mobile MRI and mobile lithotripsy may be so exempted from review. In no case, however, will mobile cardiac catheterization be exempted from certificate of need review. In addition, if the shared services mobile unit proves less cost effective than a fixed unit, the acute care facility will not be exempted from certificate of need review.

On a yearly basis, the state agency shall review existing technologies to determine if other shared services should be included under this exemption.

e) The state agency shall promulgate rules for legislative approval in accordance with the provisions of article three, chapter twenty-nine-a of this code to specify the circumstances under which, and the procedures by which, a certificate of need may not be required for the construc-
tion, development, acquisition or other establishment by a hospital of an ambulatory health care facility. Certificate of need may not be required if:

1. The ambulatory health care facility is located in the same county as the hospital;
2. Employs five or less physicians licensed to practice in this state pursuant to either article three or article fourteen, chapter thirty of this code;
3. The total capital expenditure does not exceed the expenditure minimum set forth in subsection two of this section; and
4. The construction, development, acquisition or other establishment of an ambulatory health care facility is not opposed by an affected person after substantive public notice pursuant to the provisions of article three, chapter fifty-nine of this code has been given by the Health Care Authority.

(f) The Health Care Authority shall provide at least thirty days' notice to the public of the intent of a health care facility to construct, acquire or develop an ambulatory health care facility. The Health Care Authority shall cause a Class II legal advertisement to be published in a qualified newspaper of general circulation where the construction, acquisition or development of the ambulatory health care facility is or will be geographically located. The thirty-day notice shall commence with the first date of publication. Additionally, if the county in which the ambulatory health care facility is or will be geographically located contains a daily newspaper, a legal advertisement shall also be placed at least once in the daily newspaper. Any public notice shall include the name of the hospital seeking to develop, acquire or construct an ambulatory health care facility, the kind of practice to be developed, acquired or constructed, the geographic
location of the ambulatory health care facility and the address where protests may be submitted or filed.

(g) The state agency shall promulgate emergency rules pursuant to the provision of chapter twenty-nine-a of this code by July 1, 2009, to establish an exemption process for such projects.

(h) The acquisition, development or establishment of a certified interoperable electronic health record or electronic medical record system is not subject to certificate of need review.

(i) A health care facility is not required to obtain a certificate of need for any nonhealth-related project that does not exceed:

(1) Five million dollars for a hospital with less than one hundred licensed acute care beds;

(2) Ten million dollars for a hospital with one hundred or more licensed acute care beds; or

(3) Five million dollars for any other project.

(j) A certificate of need is not required for a psychiatric hospital operated by state government for the purpose of constructing forensic beds.

(k) Any behavioral health care service selected by the Department of Health and Human Resources in response to its request for application for services intended to return children currently placed in out-of-state facilities to the state or to prevent placement of children in out-of-state facilities is not subject to a certificate of need.

§16-2D-5. Powers and duties of state agency.
(a) The state agency shall administer the certificate of need program as provided by this article.

(b) The state agency is responsible for coordinating and developing the health planning research efforts of the state and for amending and modifying the state health plan which includes the certificate of need standards. The state agency shall review the state health plan, including the certificate of need standards and make any necessary amendments and modifications. The state agency shall also review the cost effectiveness of the certificate of need program. The state agency may form task forces to assist it in addressing these issues. The task forces shall be composed of representatives of consumers, business, providers, payers and state agencies.

(c) The state agency may seek advice and assistance of other persons, organizations and other state agencies in the performance of the state agency's responsibilities under this article.

(d) For health services for which competition appropriately allocates supply consistent with the state health plan, the state agency shall, in the performance of its functions under this article, give priority, where appropriate to advance the purposes of quality assurance, cost effectiveness and access, to actions which would strengthen the effect of competition on the supply of the services.

(e) For health services for which competition does not or will not appropriately allocate supply consistent with the state health plan, the state agency shall, in the exercise of its functions under this article, take actions, where appropriate to advance the purposes of quality assurance, cost effectiveness and access and the other purposes of this article, to allocate the supply of the services.
(f) Notwithstanding the provisions of section seven of this article, the state agency may charge a fee for the filing of any application, the filing of any notice in lieu of an application, the filing of any exemption determination request or the filing of any request for a declaratory ruling. The fees charged may vary according to the type of matter involved, the type of health service or facility involved or the amount of capital expenditure involved: Provided, That any fee charged pursuant to this subsection may not exceed a dollar amount to be established by procedural rule. The state agency shall evaluate and amend any procedural rule promulgated prior to the amendments to this subsection made during the 2009 regular session of the Legislature. The fees charged shall be deposited into a special fund known as the Certificate of Need Program Fund to be expended for the purposes of this article.

(g) A hospital, nursing home or other health care facility may not add any intermediate care or skilled nursing beds to its current licensed bed complement. This prohibition also applies to the conversion of acute care or other types of beds to intermediate care or skilled nursing beds: Provided, That hospitals eligible under the provisions of section four-a of this article and subsection (i) of this section may convert acute care beds to skilled nursing beds in accordance with the provisions of these sections, upon approval by the state agency. Furthermore, a certificate of need may not be granted for the construction or addition of any intermediate care or skilled nursing beds except in the case of facilities designed to replace existing beds in unsafe existing facilities. A health care facility in receipt of a certificate of need for the construction or addition of intermediate care or skilled nursing beds which was approved prior to the effective date of this section shall incur an obligation for a capital expenditure within twelve months of the date of issuance of the
certificate of need. Extensions may not be granted beyond the twelve-month period. The state agency shall establish a task force or utilize an existing task force to study the need for additional nursing facility beds in this state. The study shall include a review of the current moratorium on the development of nursing facility beds; the exemption for the conversion of acute care beds to skilled nursing facility beds; the development of a methodology to assess the need for additional nursing facility beds; and certification of new beds both by Medicare and Medicaid. The task force shall be composed of representatives of consumers, business, providers, payers and government agencies.

(h) An additional intermediate care facility for the mentally retarded (ICF/MR) beds may not be granted a certificate of need, except that prohibition does not apply to ICF/MR beds approved under the Kanawha County Circuit Court order of August 3, 1989, civil action number MISC-81-585 issued in the case of E. H. v. Matin, 168 W. V. 248, 284 S. E. 2d 232 (1981).

(i) Notwithstanding the provisions of subsection (g) of this section and further notwithstanding the provisions of subsection (b), section three of this article, an existing acute care hospital may apply to the Health Care Authority for a certificate of need to convert acute care beds to skilled nursing beds: Provided, That the proposed skilled nursing beds are Medicare-certified only: Provided, however, That any hospital which converts acute care beds to Medicare-certified only skilled nursing beds shall not bill for any Medicaid reimbursement for any converted beds. In converting beds, the hospital shall convert a minimum of one acute care bed into one Medicare-certified only skilled nursing bed. The Health Care Authority may require a hospital to convert up to and including three acute care beds for each Medicare-certified only skilled nursing bed: Provided further, That a hospital designated or provisionally
designated by the state agency as a rural primary care hospital may convert up to thirty beds to a distinct-part nursing facility, including skilled nursing beds and intermediate care beds, on a one-for-one basis if the rural primary care hospital is located in a county without a certified freestanding nursing facility and the hospital may bill for Medicaid reimbursement for the converted beds: And provided further, if the hospital rejects the designation as a rural primary care hospital, the hospital may not bill for Medicaid reimbursement. The Health Care Authority shall adopt rules to implement this subsection which require that:

1. All acute care beds converted shall be permanently deleted from the hospital’s acute care bed complement and the hospital may not thereafter add, by conversion or otherwise, acute care beds to its bed complement without satisfying the requirements of subsection (b), section three of this article for which purposes an addition, whether by conversion or otherwise, shall be considered a substantial change to the bed capacity of the hospital notwithstanding the definition of that term found in subsection (ff), section two of this article.

2. The hospital shall meet all federal and state licensing certification and operational requirements applicable to nursing homes including a requirement that all skilled care beds created under this subsection shall be located in distinct-part, long-term care units.

3. The hospital shall demonstrate a need for the project.

4. The hospital shall use existing space for the Medicare-certified only skilled nursing beds. Under no circumstances shall the hospital construct, lease or acquire additional space for purposes of this section.
(5) The hospital shall notify the acute care patient, prior to discharge, of facilities with skilled nursing beds which are located in or near the patient's county of residence. Nothing in this subsection negatively affects the rights of inspection and certification which are otherwise required by federal law or regulations or by this code or duly adopted rules of an authorized state entity.

(j) (1) Notwithstanding the provisions of subsection (g) of this section, a retirement life care center with no skilled nursing beds may apply to the Health Care Authority for a certificate of need for up to sixty skilled nursing beds provided the proposed skilled beds are Medicare-certified only. On a statewide basis, a maximum of one hundred eighty skilled beds which are Medicare-certified only may be developed pursuant to this subsection. The state health plan is not applicable to projects submitted under this subsection. The Health Care Authority shall adopt rules to implement this subsection which shall include a requirement that:

(A) The one hundred eighty beds are to be distributed on a statewide basis;

(B) There be a minimum of twenty beds and a maximum of sixty beds in each approved unit;

(C) The unit developed by the retirement life care center meets all federal and state licensing certification and operational requirements applicable to nursing homes;

(D) The retirement center demonstrates a need for the project;

(E) The retirement center offers personal care, home health services and other lower levels of care to its residents; and

(F) The retirement center demonstrates both short- and long-term financial feasibility.
(2) Nothing in this subsection negatively affects the rights of inspection and certification which are otherwise required by federal law or regulations or by this code or duly adopted rules of an authorized state entity.

(k) The state agency may order a moratorium upon the offering or development of a new institutional health service when criteria and guidelines for evaluating the need for the new institutional health service have not yet been adopted or are obsolete. The state agency may also order a moratorium on the offering or development of a health service, notwithstanding the provisions of subdivision (5), subsection (b), section three of this article, when it determines that the proliferation of the service may cause an adverse impact on the cost of health care or the health status of the public. A moratorium shall be declared by a written order which shall detail the circumstances requiring the moratorium. Upon the adoption of criteria for evaluating the need for the health service affected by the moratorium, or one hundred eighty days from the declaration of a moratorium, whichever is less, the moratorium shall be declared to be over and applications for certificates of need are processed pursuant to section six of this article.

(l) (1) The state agency shall coordinate the collection of information needed to allow the state agency to develop recommended modifications to certificate of need standards as required in this article. When the state agency proposes amendments or modifications to the certificate of need standards, it shall file with the Secretary of State, for publication in the State Register, a notice of proposed action, including the text of all proposed amendments and modifications, and a date, time and place for receipt of general public comment. To comply with the public comment requirement of this section, the state agency may hold a public hearing or schedule a public comment period for the receipt of written statements or documents.
(2) When amending and modifying the certificate of need standards, the state agency shall identify relevant criteria contained in section six of this article or rules adopted pursuant to section eight of this article and apply those relevant criteria to the proposed new institutional health service in a manner that promotes the public policy goals and legislative findings contained in section one of this article. In doing so, the state agency may consult with or rely upon learned treatises in health planning, recommendations and practices of other health planning agencies and organizations, recommendations from consumers, recommendations from health care providers, recommendations from third-party payors, materials reflecting the standard of care, the state agency's own developed expertise in health planning, data accumulated by the state agency or other local, state or federal agency or organization and any other source deemed relevant to the certificate of need standards proposed for amendment or modification.

(3) All proposed amendments and modifications to the certificate of need standards, with a record of the public hearing or written statements and documents received pursuant to a public comment period, shall be presented to the Governor. Within thirty days of receiving the proposed amendments or modifications, the Governor shall either approve or disapprove all or part of the amendments and modifications and, for any portion of amendments or modifications not approved, shall specify the reason or reasons for nonapproval. Any portions of the amendments or modifications not approved by the Governor may be revised and resubmitted.

(4) The certificate of need standards adopted pursuant to this section which are applicable to the provisions of this article are not subject to article three, chapter twenty-nine-a of this code. The state agency shall follow the provisions set forth in this subsection for giving notice.
to the public of its actions, holding hearings or receiving comments on the certificate of need standards. The certificate of need standards in effect on November 29, 2005, and all prior versions promulgated and adopted in accordance with the provisions of this section are and have been in full force and effect from each of their respective dates of approval by the Governor.

(m) The state agency may exempt from or expedite rate review, certificate of need and annual assessment requirements and issue grants and loans to financially vulnerable health care facilities located in underserved areas that the state agency and the Office of Community and Rural Health Services determine are collaborating with other providers in the service area to provide cost effective health care services.

§16-2D-7. Procedures for certificate of need reviews.

(a) Prior to submission of an application for a certificate of need, the state agency shall require the submission of long-range plans by health care facilities with respect to the development of proposals subject to review under this article. The plans shall be in such form and contain such information as the state agency requires.

(b) An application for a certificate of need shall be submitted to the state agency prior to the offering or development of all new institutional services within this state. Persons proposing new institutional health services shall submit letters of intent not less than fifteen days prior to submitting an application. The letters of intent shall be of such detail as specified by the state agency.

(c) The state agency may adopt rules pursuant to section eight of this article for:

(1) Provision for applications to be submitted in accordance with a timetable established by the state agency;
(2) Provision for such reviews to be undertaken in a timely fashion; and

(3) Except for proposed new institutional health services which meet the requirements for consideration under subsection (f), section nine of this article with regard to the elimination or prevention of certain imminent safety hazards or to comply with certain licensure or accreditation standards, provision for all completed applications pertaining to similar types of services, facilities or equipment to be considered in relation to each other at least three times a year.

(d) An application for a certificate of need shall specify the time the applicant will require to make such service or equipment available or to obligate such expenditure and a timetable for making such service or equipment available or obligating such expenditure.

(e) The application shall be in such form and contain such information as the state agency establishes by rule, but requests for information shall be limited to only that information which is necessary for the state agency to perform the review.

(f) Within fifteen days of receipt of application, the state agency shall determine if the application is complete. The state agency may request additional information from the applicant.

(g) The state agency shall provide timely written notice to the applicant and to all affected persons of the beginning of the review and to any person who has asked the state agency to place the person's name on a mailing list maintained by the state agency. Notification shall include the proposed schedule for review, the period within which a public hearing during the course of the review may be requested by affected persons, which period may not be less than thirty days from the date of the written notifica-
tion of the beginning of the review required by this section, and the manner in which notification will be provided of the time and place of any public hearing so requested. For the purposes of this subsection, the date of notification is the date on which the notice is sent or the date on which the notice appears in a newspaper of general circulation, whichever is later.

(h) Written notification to members of the public and third-party payers may be provided through newspapers of general circulation in the applicable health service area and public information channels; notification to all other affected persons shall be by mail which may be as part of a newsletter.

(i) If, after a review has begun, the state agency requires the person subject to the review to submit additional information respecting the subject of the review, such person shall be provided at least fifteen days to submit the information and the state agency shall, at the request of such person, extend the review period by fifteen days. This extension applies to all other applications which have been considered in relation to the application for which additional information is required.

(j) The state agency shall adopt schedules for reviews which provide that no review may, to the extent practicable, take longer than ninety days from the date that notification, as described under subsection (g) of this section, is sent to the applicant to the date of the final decision of the state agency and in the case of expedited applications, may, by rules adopted pursuant to section eight of this article, provide for a shortened review period.

(k) The state agency shall adopt criteria for determining when it would not be practicable to complete a review within ninety days.

(l) The state agency shall provide a public hearing in the course of agency review if requested by any affected
person and the state agency may on its own initiate such a public hearing:

(1) The state agency shall, prior to such hearing, provide notice of such hearing and shall conduct such hearing in accordance with administrative hearing requirements in article five, chapter twenty-nine-a of this code and its procedure adopted pursuant to this section.

(2) In a hearing any person has the right to be represented by counsel and to present oral or written arguments and evidence relevant to the matter which is the subject of the hearing. Any person affected by the matter which is the subject of the hearing may conduct reasonable questioning of persons who make factual allegations relevant to such matter.

(3) The state agency shall maintain a verbatim record of the hearing.

(4) After the commencement of a hearing on the applicant's application and before a decision is made with respect to it, there may be no ex parte contacts between:
   (A) The applicant for the certificate of need, any person acting on behalf of the applicant or holder of a certificate of need or any person opposed to the issuance of a certificate for the applicant; and (B) any person in the state agency who exercises any responsibility respecting the application.

(5) The state agency may not impose fees for such a public hearing.

(m) If a public hearing is not conducted during the review of a new institutional health service, the state agency may, by rules adopted pursuant to section eight of this article, provide for a file closing date during the review period after which date no other factual information or evidence may be considered in the determination of
the application for the certificate of need. A detailed itemization of documents in the state agency file on a proposed new institutional health service shall, on request, be made available by the state agency at any time before the file closing date.

(n) The extent of additional information received by the state agency from the applicant for a certificate of need after a review has begun on the applicant's proposed new institutional health service, with respect to the impact on such new institutional health service and additional information which is received by the state agency from the applicant, may be cause for the state agency to determine the application to be a new proposal, subject to a new review cycle.

(o) The state agency shall in timely fashion notify, upon request, providers of health services and other persons subject to review under this article of the status of the state agency review of new institutional health services subject to review, findings made in the course of such review and other appropriate information respecting such review.

(p) The state agency shall prepare and publish, at least annually, reports of reviews completed and being conducted with general statements about the status of each review still in progress and the findings and rationale for each completed review since the publication of the last report.

(q) The state agency shall provide for access by the general public to all applications reviewed by the state agency and to all other pertinent written materials essential to agency review.

(r) (1) Any person may request in writing a public hearing for purposes of reconsideration of a state agency decision. No fees may be imposed by the state agency for
the hearing. For purposes of this section, a request for a public hearing for purposes of reconsideration shall be considered to have shown good cause if, in a detailed statement, it:

(A) Presents significant, relevant information not previously considered by the state agency and demonstrates that with reasonable diligence the information could not have been presented before the state agency made its decision;

(B) Demonstrates that there have been significant changes in factors or circumstances relied upon by the state agency in reaching its decision;

(C) Demonstrates that the state agency has materially failed to follow its adopted procedures in reaching its decision; or

(D) Provides such other bases for a public hearing as the state agency determines constitutes good cause.

(2) To be effective, a request for such a hearing shall be received within thirty days after the date of the state agency decision and the hearing shall commence within thirty days of receipt of the request.

(3) Notification of such public hearing shall be sent, prior to the date of the hearing, to the person requesting the hearing, the person proposing the new institutional health service and to others upon request.

(4) The state agency shall hold public reconsideration hearings in accordance with the provisions for administrative hearings contained in:

(A) Its adopted procedures;

(B) Ex parte contact provisions of subdivision (4), subsection (l) of this section; and
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186  (C) The administrative procedures for contested cases
187  contained in article five, chapter twenty-nine-a of this
188  code.

189  (5) The state agency shall make written findings which
190  state the basis for its decision within forty-five days after
191  the conclusion of such hearing.

192  (6) A decision of the state agency following a reconsider-
193  ration hearing shall be considered a decision of the state
194  agency for purposes of sections nine and ten of this article
195  and for purposes of the notification of the status of review,
196  findings and annual report provisions of subsections (o)
197  and (p) of this section.

198  (s) The state agency may adopt rules pursuant to section
199  eight of this article for reviews and such rules may vary
200  according to the purpose for which a particular review is
201  being conducted or the type of health services being
202  reviewed.

203  (t) Notwithstanding other provisions of this article, the
204  state agency shall adopt rules for determining when there
205  is an application which warrants expedited review.
The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Chairman Senate Committee

Chairman House Committee

Originated in the Senate.

In effect ninety days from passage.

Clerk of the Senate

Clerk of the House of Delegates

President of the Senate

Speaker House of Delegates

The within..............................this the... Day of.............................., 2009.