

NO. 36919-2-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

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COURT OF APPEALS
DIVISION II
08 FEB 11 PM 1:05
STATE OF WASHINGTON
DEPT. OF JUSTICE

THE CAMPAIGN TO MAKE HEALTH CARE WORK
and its members;
WASHINGTON COMMUNITY ACTION NETWORK
(WASHINGTON CAN!); SERVICE EMPLOYEES
INTERNATIONAL UNION 1199 NORTHWEST; SOCIETY
OF PROFESSIONAL ENGINEERING EMPLOYEES IN
AEROSPACE, INTERNATIONAL FEDERATION OF
PROFESSIONAL AND TECHNICAL ENGINEERS LOCAL
2001; and UNITED FOOD AND COMMERCIAL WORKERS
LOCAL 21,

Appellants,

v.

WASHINGTON STATE DEPARTMENT OF HEALTH,

Respondent.

OPENING BRIEF OF APPELLANTS

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ORIGINAL

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I. NATURE OF THE CASE

This case is about whether hospital consumers should have to pay more to fund the expansion of Providence Everett Medical Center (PEMC). Charges at PEMC are already among the highest in the state. As a direct result of the proposed expansion, charges to patients and third-party payors (such as employers and health insurers) will, undisputedly, increase. In short, PEMC's patients and their employers and insurers will pay more.

Hospitals expansion proposals are reviewed and regulated by the Washington State Department of Health's Certificate of Need program. Certificate of Need was established to address a fundamental problem in our health system—the high and rising cost of care brought on by an oversupply of health facilities (such as hospital beds) in some areas. Containment of patient costs is the bedrock of Certificate of Need review.

The Department of Health's (the "Department") cost containment obligations are explicitly defined in statute. The Department must evaluate "[t]he financial feasibility and the probable impact of [a] proposal on the cost of and charges for providing health services in the community to be served" and "[t]he availability of less costly or more effective alternative methods of providing such services." RCW 70.38.115. Despite this statutory mandate, the Department has habitually failed to

adequately review the required cost-containment criteria in Certificate of Need applications. This problem, among others, was highlighted in a June 26, 2006 audit by the State of Washington Joint Legislative Audit and Review Committee (“JLARC”). AR 947-996. JLARC’s Performance Audit of the Certificate of Need Program found:

- The Department rarely considers the impact of the proposed project on the costs and charges of health care services in the greater community;
- The Department merely reacts to the Certificate of Need applicant’s discussion of possible alternatives, without exploring alternatives potentially offered by competitors or others;
- The Department does not consider detailed utilization and financial information about existing providers and services in the community in order to analyze the community-wide financial impact of the proposed changes to facilities or services;
- The Department does not consider detailed information on the full range of potential options for providing services, including the provision of services by competitors or others.

AR 964-66. The Department concurred with JLARC’s recommendation that it develop new methods to implement the cost containment criteria. AR 989-90.

After the JLARC study, the first big test for the Department came when PEMC sought a Certificate of Need as part of a massive expansion of its facility. The Department failed. Its review of PEMC’s Certificate of

Need application was conducted under the same flawed procedures criticized by the JLARC audit. The Department did not adequately consider the impact of the proposed expansion on PEMC patients and other local health care consumers. Specific cost containment conditions were not a part of the granted Certificate of Need. As a direct result, the costs of the expansion will be passed on to PEMC patients and other payors.

The Campaign to Make Health Care Work (“The Campaign”), a coalition of labor and consumer groups whose members include PEMC patients and third-party payors, participated in the Department’s public comment process related to PEMC’s application. AR 546-556, 595-96, 664, 751. It called upon the Department to properly consider the cost impacts of the proposed expansion. AR 546-56. It was designated by the Department as an “affected party” under WAC 246-310-010(2). AR 751.

When the Department issued a Certificate of Need to PEMC using the same flawed process criticized by the JLARC Report, The Campaign filed a petition in Thurston County Superior Court seeking review of the Department’s decision and process. PEMC intervened in the action, and moved to dismiss the petition on the grounds that The Campaign lacked standing. Although the Department maintained that The Campaign did have standing (and PEMC itself agreed that its motion should be deferred

until the hearing on the merits), the trial court proceeded to adjudicate the standing issue on the motion to dismiss.

The trial court found that The Campaign's petition "highlights some of the apparent problems with DOH's procedure for review of CN [Certificate of Need] applications" and that those issues "are significant and show the need for work by DOH to clarify the procedure it uses in granting CN's, something of great interest and import to the public." CP 395. However, it concluded that The Campaign and its members lacked standing because no individual member demonstrated "injury-in-fact." CP 395. It is that decision that is at issue in this appeal.

II. SUMMARY OF THE ARGUMENT

On a motion to dismiss, the trial court is required to accept, as true, all allegations made in the petition. In addition, the trial court should consider any hypothetical set of facts consistent with those allegations in ruling on a motion to dismiss. Here, the trial court applied the wrong standard. It looked only to the record in the case and failed to consider other facts consistent with the petition, which would support standing. CP 395 ("On the basis of the record in this case, on which the court must rely in making its decision...").

More fundamentally, however, the trial court ignored allegations—and evidence—that the granting of the Certificate of Need would increase

health care costs for members of The Campaign. The Campaign alleged, and PEMC itself conceded, that PEMC's hospital charges would likely increase as a result of the expansion allowed by the Certificate of Need. The Campaign, which has members within PEMC's service area that use its hospital and pay its charges (in addition to paying health insurance premiums and co-insurance charges), has standing to challenge the very act which will result in increased health care costs.

The trial court's rationale for finding no standing—that the harm or potential harm is a generalized injury shared by all members of the public—would effectively render the Department immune from any challenge by hospital patients and third-party payors. Yet, it is the patients and payors that the statute was designed to protect, and it is patients and payors who should be empowered to hold the agency accountable when the statute is not followed.

Finally, special standing rules apply to procedural violations. Where a procedural right has been violated, the violation alone serves as the basis for finding an injury in fact. Here, The Campaign has alleged just such a procedural violation. On a motion to dismiss, that violation must be assumed and this case allowed to proceed.

III. ASSIGNMENT OF ERROR

Appellants assign error to the trial court's dismissal of The Campaign's petition for judicial review for lack of standing. The trial court's decision was codified in its Order of Dismissal (CP 385-95) and Order Denying Petitioners' Motion for Reconsideration (CP 448-53).

IV. STATEMENT OF ISSUES

1. On a motion to dismiss for lack of standing under Civil Rule 12, must the trial court accept as true all allegations made in the petitioner's petition in addition to any hypothetical set of facts consistent with the petition?

2. Is dismissal for lack of standing appropriate where a petition filed by an association has alleged that the challenged action will result in specific, concrete injury to its members?

3. Does the fact that a challenged action by an agency will likely harm a large segment of the public negate standing for a subset of that public who seeks to challenge the action through a petition for review?

4. Is standing proper under *Seattle Bldg. & Const. Trades Council v. Apprenticeship & Training Council*, 129 Wn.2d 787, 794, 920 P.2d 581 (1996), where a procedural violation by an agency is alleged in a petition, because "[w]here an agency refuses to provide a procedure

required by statute or the Constitution, the United States Supreme Court routinely grants standing to a party despite the fact that any injury to substantive rights attributable to failure to provide a procedure is both indirect and speculative”?

V. STATEMENT OF CASE: PROCEDURAL HISTORY

In an application filed on April 12, 2006, PEMC sought a Certificate of Need to expand its facility by 166 hospital beds. The Campaign participated in the Department’s public comment process. AR 751. As part of this process, the Department found that The Campaign met the requisite standards under WAC 246-310-010(2) and (34) as both an “interested party” and an “affected party.” AR 751. PEMC never challenged those designations. AR 851-57.

On December 18, 2006, the Department issued a Certificate of Need to PEMC. AR 748 (Certificate of Need); AR 749-782 (evaluation). The Certificate of Need did not authorize the expansion of PEMC’s facility by 166 beds, but it did approve a 106 bed expansion. On January 16, 2007, The Campaign requested reconsideration of the Department’s issuance of the Certificate of Need. AR 831-843; 870-873; 905-1144. On February 7, 2007, the Department denied the request. AR 867.

The Campaign filed a petition in Thurston County Superior Court challenging the Department's issuance of the Certificate of Need. PEMC was allowed to intervene in the action.

A series of motions followed. The Department moved to dismiss the petition for an alleged failure to exhaust administrative remedies. CP 73-74. PEMC likewise moved to dismiss for an alleged failure to exhaust. CP 77-78. It also argued that The Campaign lacked standing, and initially moved to dismiss on that ground as well. CP 77.

The Campaign responded to PEMC's standing argument by submitting a series of declarations from members of The Campaign detailing injuries likely to be sustained by them, or their organizations, if the Certificate of Need went unchallenged. CP 200-228. A declaration from an expert was also submitted in response. CP 229-242. The Campaign argued that the motion to dismiss should be denied because facts consistent with the petition sufficiently alleged standing. CP 253. The Campaign also argued, in the alternative, that even if the motion to dismiss were brought as a summary judgment motion (which would have

been improper under Thurston County Local Rule 56(b)¹), sufficient evidence raised an issue of material fact concerning standing. CP 253.

The Department took the position that The Campaign had the right to challenge its decision (albeit in a different forum). CP 482. (The Campaign “had the right to request an adjudicative proceeding to challenge the Department’s grant of the CN to Providence.”).

PEMC, in its reply brief, clarified that it was not seeking summary judgment on the standing issue, *see* CP 343, and abandoned its motion to dismiss on the basis of standing. It argued that the standing issue should not be decided on a motion to dismiss, but should be considered at the hearing on the merits:

[B]ecause Petitioners have introduced new evidence, PEMC agrees that Petitioners’ standing should be resolved on summary judgment, and not on a motion to dismiss. In addition to affidavits and other evidence, the Court would likely have to consider evidence in the administrative record to grant summary judgment. ***PEMC therefore agrees with Petitioners that Local Rule 56(b) merges the standing claims into the hearing on the merits scheduled for early December.***

CP 343-44 (emphasis added).

¹ Under Thurston County’s Local Rule 56(b), “[s]ummary judgment motions will not be heard in administrative review cases ... if reference to the administrative record or transcript of the administrative proceeding is required.” As it acknowledged, PEMC’s motion to dismiss relied heavily upon the administrative record. CP 78-82, 96-97 at ¶¶ 3-7, 10.

Notwithstanding PEMC's concession that the standing issue would need to be addressed at the hearing on the merits, the trial court nevertheless proceeded to rule on the standing issue. In a letter opinion, later appended to its order, the trial court first rejected the motions to dismiss based on an alleged failure to exhaust administrative remedies. CP 391-393 ("The Campaign exhausted its limited administrative remedies and thus has the right to Petition this court for review under RCW 34.05.570(4)."). However, when it turned to the standing issue, it concluded that The Campaign lacked standing under the "injury-in-fact" prong of the standing test:

This court finds that, because of their participation in the public hearing and the policies addressed in RCW 70.38, the Campaign meets the requirements of the zone of interest test. However, whether the Campaign can establish a concrete interest that has been harmed is a more difficult issue. The Campaign has not made a showing that DOH's action "has prejudiced or is likely to prejudice" it in a way which is not a generalized injury to all members of the public. RCW 34.05.530(1). Compared to the likely economic impacts upon plaintiffs found in *Trades Council* there has been no showing that Petitioners in this case will suffer any specific impact as a result of DOH's approval of the CN at issue. Absent a concrete interest, Petitioners fail the injury-in-fact prong of standing under the APA.

CP 394. The trial court then turned to the issue of whether The Campaign would have associational standing to represent the interests of its members. While it concluded that The Campaign was seeking to protect the interests of its members, and the participation of the individual members was not

necessary for the relief sought, it concluded that no individual member of

The Campaign would have standing:

The only real question left to this court is whether the individual members of the Campaign would have standing to sue in their own right. On the basis of the record in this case, on which the court must rely in making its decision, there has been no showing by the Campaign that it can establish a concrete interest that has been harmed. Petitioners have not made a showing that DOH's action "has prejudiced or is likely to prejudice" it in a way which is not a generalized injury to all members of the public. Therefore they cannot be found to have standing and the court must grant PEMC's motion on that basis.

CP 395. The trial court, although acknowledging the significant legal issues involved in the petition, proceeded to dismiss it:

This case highlights some of the apparent problems with DOH's procedure for review of CN applications. The issues raised are significant and show the need for work by DOH to clarify the procedure it uses in granting CN's, something of great interest and import to the public. However, in this case the Campaign has failed to establish its standing to appeal DOH's decision in this forum. As such, the petition for judicial review is dismissed.

CP 395. The Campaign moved for reconsideration, which was denied.

CP 448-453. The Campaign thereafter timely appealed its dismissal for lack of standing. CP 454-475. No cross-appeals on the exhaustion issue decided in The Campaign's favor were filed by either the Department or by PEMC.

VI. STATEMENT OF CASE: FACTS

A. The Campaign to Make Health Care Work.

The Campaign is a coalition of labor and consumer groups that have members who are PEMC patients and/or pay for services for PEMC patients. The Campaign's members came together out of a common concern that PEMC's proposed expansion would result in significantly higher charges for their members. Its members include Washington Community Action Network (Washington CAN!), Service Employees International Union Local 1199 Northwest (SEIU), United Food and Commercial Workers Local 21 (UFCW) and Society Of Professional Engineering Employees In Aerospace, International Federation Of Professional And Technical Engineers Local 2001 (SPEEA). The Campaign pled that its members "include patients of Providence Everett Medical Center (PEMC) and other health care consumers who will be affected by the high cost of PEMC's proposed hospital expansion." CP 60.

1. Service Employees International Union—Local 1199NW

SEIU has more than 300 members living in Everett, Washington, and more than 2000 members in Snohomish County. CP 204-209 at ¶ 3. Many of those members have used PEMC in the past and are likely to use it in the future. *Id.* at ¶ 5; *see* CP 200-203 at ¶¶ 5-7; CP 223-225 at ¶¶ 5, 7.

SEIU is a PEMC third-party payor. The union pays for the health insurance and all out-of-pocket health-related expenses of its employees. CP 204-209 at ¶ 8; CP 200-203 at ¶¶ 8-9. Thus, SEIU pays for all of PEMC's charges when its employees, like Neeve Willows, are patients of the hospital. *Id.* As PEMC's charges increase due to the approved Certificate of Need, so will SEIU's costs for providing health coverage to its employees that are PEMC patients. Thus, SEIU is directly impacted by increases in PEMC's charges due to the Department of Health's grant of a Certificate of Need. CP 204-209 at ¶ 8.

SEIU's members are also directly impacted by PEMC's increased charges. For example, Steve Moll is an SEIU member living in the PEMC area. CP 200-203 at ¶ 3; CP 223-225 at ¶ 3. Mr. Moll has not used PEMC in the past, but he is likely to be taken to the hospital in the event of an emergency. CP 223-225 at ¶¶ 5, 7. Since PEMC is not a contracting hospital with his health insurer, Mr. Moll would likely be required to pay for some or all of any charges for care at PEMC, including increases in charges due to the approved Certificate of Need. *Id.* at ¶¶ 7-8.

2. Washington Community Action Network!

Washington CAN! is a statewide grassroots organization that focuses on health care rights for people who are uninsured and underinsured. CP 217-222 at ¶¶ 3-4. Washington CAN! has more than 700

members in Everett, Washington and over 4000 in Snohomish County. *Id.* at ¶ 3. Some of these members have used PEMC in the past and expect to do so in the future. CP 217-222 at ¶¶ 3, 12. Many Washington CAN! members are uninsured or underinsured, and, therefore, pay out-of-pocket for their health care. AR 832. As PEMC's charges increase due to the Certificate of Need expansion, Washington CAN! members will likely pay more.

Recently, Washington CAN! conducted a survey of some of its Everett members. It discovered that many of its members, especially those who are uninsured, have been adversely impacted by PEMC's high charges. *Id.* at ¶ 12. These same members will be injured by additional increases in PEMC's charges due to the Certificate of Need expansion.

3. United Food and Commercial Workers, Local 21

UFCW has more than 850 members in Everett (including nearly 300 that work at PEMC) and more than 3500 members in Snohomish County. CP 226-228 at ¶ 3. Many of these members are patients of PEMC. *Id.* Many of UFCW's members receive coverage through the United Food and Commercial Workers Local 21 Retail Clerks Welfare Trust. CP 226-228 at ¶ 6; CP 197-199 at ¶ 7.

Kathy Young is a UFCW member who is affected by PEMC's increased charges due to the CON expansion. CP 197-199 at ¶¶ 2-3. Under

the terms of the trust, Ms. Young must pay 15% of charges for any hospitalization and a premium of \$18 a month. *Id.*, ¶ 7. Ms. Young and her family have used PEMC approximately 10 times in the past and she anticipates that they will need to use PEMC in the future. *Id.*, ¶5. As a direct result of the approved Certificate of Need, Ms. Young will likely pay more for her share of PEMC's charges. *Id.* at ¶ 8; CP 229-242 at ¶ 15.

**4. Society OF Professional Engineering Employees
In Aerospace, International Federation Of
Professional And Technical Engineers Local
2001**

SPEEA has approximately 8500 members that work in Everett. CP 209-212 at ¶ 3. Many SPEEA members also live in the Everett area and use PEMC. Kurt Schuetz is one example. CP 213-216 at ¶ 3. Mr. Schuetz has used PEMC facilities a few times during the past ten years, and anticipates that he will need to be hospitalized for hip surgery in the next few years. *Id.* at ¶ 4.

Although Mr. Schuetz and some SPEEA members are currently covered for 100% of their hospital charges and do not pay any portion of their premium, they are still affected by increases in PEMC's charges due to the approved Certificate of Need. Every additional dollar that Boeing pays for health care impacts the package of wages and benefits that SPEEA is able to negotiate with Boeing. CP 213-216 at ¶ 7; CP 209-212 at ¶¶ 6-7. CP 229-242 at ¶¶ 23-24. "[A] dollar for dollar tradeoff" exists

between what an employer will pay for health care and what it will pay for wages. *Id.* at ¶ 24. Thus, as PEMC's charges increase to pay for the approved expansion, SPEEA's members suffer a related decrease in wages and health care coverage. *Id.*

Many other SPEEA members are enrolled in health care plans where they pay 12% of their premiums. CP 209-212 at ¶ 5. Every year, Boeing recalculates the premiums, based upon past claims experience, which incorporates increased charges by PEMC for services provided to SPEEA members. *Id.* at ¶ 6. Thus, the premiums paid by SPEEA members are directly and adversely impacted by increases in PEMC's charges due to the approved Certificate of Need. *Id.*

B. PEMC's expansion will lead to higher charges.

The Campaign's concerns about the effect of PEMC's proposed expansion on patient and payor charges were well-founded. When The Campaign reviewed the April 11, 2006 PEMC application for a Certificate of Need to expand its hospital facility (AR 2), PEMC's submission revealed that its expansion would lead to higher charges:

- PEMC submitted two appendices with its Certificate of Need application, Appendix 17 and 18, which compared costs at the hospital with and without the proposed expansion. AR 179-82; 244-246.
- Comparing the two charts, PEMC reveals that health care costs at the facility will likely increase \$174 to \$249 (or more) per day as a result of the proposed

hospital expansion. AR 179-82; AR 244-246; AR 834. These costs are in addition to the costs already borne by PEMC's patients for a hospital stay. AR 179-82; 244-246; AR 834; AR 549; 834-35; CP 63, 67-68.

- Although PEMC claims that projected "efficiencies" and higher patient volumes make up for increased costs, its own data reveal that at least until 2014, costs will increase as a direct result of the hospital's expansion, despite any alleged "efficiencies." AR 852-53.

Increased costs due to PEMC's expansion are not absorbed into the ether. These costs directly affect hospital charges, either through higher direct charges to patients or through increased insurance premiums for third-party payors, or both. CP 229-242 at ¶¶ 13-24.

C. The Department's Review and The Campaign's Petition.

In response to PEMC's application, The Campaign and its members participated in the public comment process, offering oral and written comments to the proposed expansion. AR 546-556; AR 595-96; AR 664; AR 864-65.

On December 18, 2006, the Department rejected PEMC's application for a 166-bed expansion. AR 746-47. It did, however, approve a 106-bed expansion. *Id.* Both PEMC and The Campaign requested that the Department reconsider its decision. AR 870-73; 898-1142. The Department declined to do so. AR 867-68. The Campaign filed its Petition for review of the Department's decision on December 11,

2007. CP 7-58. An Amended Petition was filed on March 5, 2007. CP 59-72.

The Amended Petition set forth The Campaign's position that the Department did not adequately apply the statutory cost-containment standards nor its own forecasting methodology. CP 65-67. It also argued that the Department ignored undisputed evidence that the expansion would drive up patient costs, *see* CP 67-68, and that it failed to protect patients from those excessive costs. CP 68-70. Finally, it set forth a significant procedural problem with the Department's "approval" of a 106-bed expansion. CP 70. No application was ever made for a 106-bed expansion. Significantly reducing the number of beds approved transformed the project itself, changed the data related to cost-containment, and impacted the Department's findings. It also prevented The Campaign and other members of the public from commenting on a 106-bed expansion. Consistent with *Southern Maryland Hosp. Center, Inc. v. Fort Washington Community Hosp., Inc.*, 519 A.2d 727, 732 (Md. 1987), a new Certificate of Need application should have been filed and reviewed. The Department's approval of an expansion that was never requested (or commented on) violates the statutory process.

VII. STANDARD OF REVIEW

This Court reviews a motion to dismiss *de novo* by undertaking the same inquiry as the trial court. *Burton v. Lehman*, 153 Wn.2d 416, 422, 103 P.3d 1230 (2005). Plaintiff's allegations are taken as true, and the court should "consider hypothetical facts that are not included in the record." *Id.* at 422.

The inquiry is no different when standing is challenged in a motion to dismiss:

For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party. We need not, and do not, speculate as to the plausibility of plaintiff's allegations.

Bernhardt v. County of Los Angeles, 279 F.3d 862, 867 (9th Cir. 2002) (internal quotations and citations omitted). Detailed allegations of injury are not necessary – a general allegation of harm is sufficient to confer standing because specific underlying facts must be presumed on a motion to dismiss:

At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice [to establish standing], for on a motion to dismiss we "presum[e] that general allegations embrace those specific facts that are necessary to support the claim."

Lujan v. Defenders of Wildlife, 504 U.S. 555, 561, 112 S. Ct. 2130, 2137 (1992) (citation omitted).

VIII. ARGUMENT

A. The Campaign has standing to maintain the petition for review on behalf of its individual members.

Under the APA, a “person” who is “aggrieved or adversely affected” by a state agency has standing to seek judicial review of the action. RCW 34.05.530; *St. Joseph Hosp. and Health Care Center v. Dept. of Health*, 125 Wn.2d 733, 739, 887 P.2d 891 (1995). An unincorporated association, even a coalition composed of other organizations, is a “person” able to pursue administrative procedures and judicial review. RCW 34.05.010(14) (“person” includes “any ... association ... or entity of any character”); *see also Save a Valuable Environment (SAVE) v. City of Bothell*, 89 Wn.2d 862, 866, 576 P.2d 401 (1978) (individuals with a common interest may band together in an unincorporated association to challenge an agency action).

Even if the association itself does not independently meet the test for standing, it may still maintain an action on behalf of its members. *United Automobile Workers v. Brock*, 477 U.S. 274, 281-82, 106 S. Ct. 2523 (1986) (“Even in the absence of injury to itself, an association may have standing solely as the representative of its members.”). A three-part test is employed to determine whether the association has standing to sue on behalf of its members:

[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires participation of the individual members in the lawsuit.

Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 342-43, 97 S. Ct. 2434 (1977).

In applying this test, the trial court correctly determined that The Campaign was asserting interests germane to its purpose, and that neither the claim asserted nor the relief requested required the participation of the individual members of The Campaign. CP 395. The trial court went astray, however, in concluding that the individual members would not have standing to sue in their own right. If only a single member of The Campaign would have standing to bring the petition, then The Campaign itself has standing. *See Save a Valuable Environment (SAVE) v. City of Bothell*, 89 Wn.2d 862, 867, 576 P.2d 401 (1978) (“We agree that a nonprofit corporation or association which shows that one or more of its members are specifically injured by a government action may represent those members in proceedings for judicial review.”).

B. Individual Members of The Campaign would have standing to bring the petition in their own right.

Under the APA, a person is “aggrieved or adversely affected” sufficient to have standing when:

(1) The agency action has prejudiced or is likely to prejudice that person;

(2) That person's asserted interests are among those that the agency was required to consider when it engaged in the agency action challenged; and

(3) A judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the agency action.

RCW 34.05.530. This statutory definition of standing was “an effort to reduce both the complexity and the confusion [of judge-made standing law] by stating some basic principles in the text of the [Administrative Procedures] Act itself.” William R. Andersen, *The 1988 Washington Administrative Procedure Act—An Introduction*, 64 WASH. L. REV. 781, 823 (1989). Inclusion of these basic principles was designed to ensure that all judges would have the same starting point when considering whether a party has standing to pursue judicial review under the APA. *Id.* Thus, the specific statutory language, and the determinations of the state agency, must be the Court’s first consideration. *St. Joseph Hosp.*, 125 Wn.2d at 735.

1. The first APA standing prong: “The agency action has prejudiced or is likely to prejudice that person.”

The trial court determined that the first prong of the standing test had not been met because “The Campaign has not made a showing that DOH’s action ‘has prejudiced or is likely to prejudice’ any of its members

in a way which is not generalized injury to all members of the public.” CP 395. This decision was in error for at least three reasons.

First, The Campaign has alleged—which must be accepted as true on a motion to dismiss—that PEMC’s proposed expansion will result in increased charges to patients and their payors, including many of The Campaign’s members. In fact, The Campaign demonstrated that it has members that reside in that geographic service area that will pay more for health care, insurance premiums or co-insurance due to these increased rates. This is not, as the trial court concluded, a “generalized injury to all members of the public.” Rather, it is a specific economic injury which will be visited upon members of The Campaign who are PEMC patients and/or who pay for PEMC charges to patients.

Second, the fact that a large number of people residing in PEMC’s service area will be adversely affected by the decision to grant the Certificate of Need is hardly a basis to withdraw standing for a subset of those people who wish to challenge the decision. This is particularly true where many of the individuals and groups will suffer a direct and tangible injury if the Department’s decision is allowed to stand. Furthermore, many members of The Campaign will suffer injuries that are different, and more acute, than members of the general public.

Third, the trial court’s decision immunizes the Department’s decision, and any future decision to grant PEMC Certificates of Need, from any scrutiny whatsoever. Under the trial court’s reasoning, no individual or entity within PEMC’s service area would have standing to challenge the Department’s decision. This stands the very purpose of RCW 70.38.115—to protect members of the public from excessive health care costs—on its head.

These three errors are explained below.

- a. *An injury-in-fact exists because the Campaign’s members will be forced to pay more for health care, insurance and cost sharing if the Certificate of Need goes unchallenged.***

No particular level of injury must be demonstrated in order to establish standing. *Chelan County v. Nykreim*, 146 Wn.2d 904, 934-935, 52 P.3d 1 (2002); *Suquamish Indian Tribe v. Kitsap Co.*, 92 Wn. App. 816, 832, 965 P.2d 636 (1998). “[A]n identifiable trifle is enough for standing to fight out a question of principle.” *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 n.14, 93 S. Ct. 2405 (1973). Sufficient “injury” is shown when an affected person demonstrates “immediate, concrete, and specific damage to property, even though the allegations may be speculative and

undocumented.” *Kucera v. State, Dept. of Transp.*, 140 Wn.2d 200, 213, 995 P.2d 63 (2000).

The standing issue came before the trial court on a motion to dismiss pursuant to CR 12(b)(6). CP 343. Accordingly, the Court should have not simply looked to the record, *see* CP 395, but should have determined whether any “hypothetical situation conceivably raised by the complaint” existed such that standing could be found. *Bravo v. Dolsen Companies*, 125 Wn.2d 745, 750, 888 P.2d 147 (1995). The Petition specifically alleges that The Campaign’s members include patients and other members of the public whose health care costs will increase as a result of the PEMC expansion approved by the Department of Health. CP 60. That allegation alone is sufficient to demonstrate a sufficient injury at this stage of litigation. *Bernhardt*, 279 F.3d at 867.

Moreover, The Campaign relied upon more than just hypothetical facts in demonstrating that the Department’s action “has prejudiced or is likely to prejudice” its members. The record before the trial court demonstrated that:

- Increased costs will result from the disputed Certificate of Need. *See* page 16-17, *supra*. *See also* CP 426 (assuming “the fact of increased costs”); *see also* AR 179-82;244-246; 834; 852-53.
- These increased costs will be directly borne by PEMC’s patients and its third-party payors. CP 229-242 at ¶¶ 13-24.

- The Campaign's members include patients and third party payors that will pay higher charges as a result of the approved Certificate of Need. See page 13-16, *supra*.

For example,

- SEIU is a third-party payor of health services at PEMC for its employees, like Neeve Willows, who are also PEMC patients. The union pays for all of Ms. Willows' care at PEMC, including her insurance premiums and out-of-pocket co-payments and other charges. CP 204-209 at ¶¶ 3, 8; CP 200-203 at ¶¶ 5-9. These costs necessarily -- and undisputedly -- include the increased costs resulting from the Certificate of Need approved by the Department of Health. CP 229-242 at ¶ 13.
- Kathy Young, a UFCW member, is also a PEMC patient. CP 197-199 at ¶¶ 2-3; 5; CP 226-228 at ¶3. Ms. Young must pay 15% of charges for any hospitalization and a premium of \$18 a month. CP 197-199 at ¶ 7. As PEMC's charges increase due to its Certificate of Need expansion, so will Ms. Young's costs. *Id.*, CP 197-199 at ¶ 8; CP 229-242 at ¶ 15; CP 226-228 at ¶¶6-7.
- Kurt Schuetz, a SPEEA member, is a PEMC patient. CP 213-216 at ¶¶ 3, 4. Mr. Schuetz is directly affected by the Department of Health's approval of PEMC's proposed expansion because every dollar that Boeing (his employer) pays in higher health insurance premiums due to increased costs from PEMC's expansion impacts the package of wages and benefits that SPEEA is able to negotiate with Boeing on behalf of Mr. Schuetz and others. CP 21-216 at ¶ 7; CP 209-212 at ¶¶ 6-7; CP 229-242 at ¶¶ 23-24.
- The many uninsured and underinsured PEMC patients that are Washington CAN! Members are already adversely impacted by PEMC's high charges. CP 217-222 at ¶¶ 3, 12. These individuals will suffer injury when they are forced to pay more as a result of the

Department's grant of a Certificate of Need for PEMC's expansion.

These interests are more than sufficient to meet the first prong of the test. A customer's interest in avoiding excessive or improper charges is not merely "the abstract interest of the general public in having others comply with the law." *Vovos v. Grant*, 87 Wn.2d 697, 699-700, 555 P.2d 1343 (1976). This is true even when PEMC's customers include many members of the local public. Increased costs passed on to customers constitute a direct, specific and concrete harm. *General Motors Corp. v. Tracy*, 519 U.S. 278, 286, 117 S. Ct. 811 (1997) ("Consumers who suffer this sort of injury [paying higher prices as a result of agency action] satisfy the standing requirements of Article III"); see e.g., *Nelson v. Appleway Chevrolet, Inc.*, 160 Wn.2d 173, 186, 157 P.3d 847 (2007) (customer who had to pay more as a result of defendant's actions suffered an "injury-in-fact" and had standing); *Jewell v. Washington Utilities and Transp. Commission*, 90 Wn.2d 775, 776, 585 P.2d 1167 (1978) (Petition for Judicial Review decided on the merits where petitioners were "subscribers and therefore ratepayers" of the telecommunications company that sought agency authorization of proposed rate hike).

Jewell involved a case very similar to this one. There, customers of a telephone company objected to a regulatory decision by the Washington Utilities and Transportation Commission to permit the

telephone company to include in its rates charged to customers the costs of the company's charitable donations. *Id.*, 90 Wn.2d at 776. Telephone companies, like hospitals, are subject to extensive regulation by a Washington state agency in order to protect consumers from improper costs passed on by the companies. *Id.* When the state regulatory agency permitted the telephone company to include charitable contributions in its proposed rates, the telephone company's customers (not general taxpayers) had standing to appeal the agency's decision. *See id.* (reaching the merits of the customers' claims). *See e.g., US West Communications, Inc. v. Washington Utilities and Transp. Comm'n*, 134 Wn.2d 48, 60, 949 P.2d 1321 (1997); *Washington Independent Telephone Ass'n v. Telecommunications Ratepayers Ass'n for Cost-Based and Equitable Rates (TRACER)*, 75 Wn. App. 356, 362, 880 P.2d 50 (1994) (In both cases, an association of telecommunications customers had standing to participate in petitions for judicial review).

Here, the effect of the Department of Health's authorization of a Certificate of Need for PEMC's expansion is the same as that in *Jewell*. It is undisputed that as a result of the approved Certificate of Need costs to PEMC's customers will increase. Thus, PEMC's customers—its patients and third-party payors—have standing to object to the agency's decision.

Similarly, in *Nelson*, a purchaser of a car had standing to object to improper costs passed on by a car dealer. In that case, the car dealer attempted to pass on the cost of the dealer's "Business and Operations" tax, after the price of the car had been negotiated. *Id.*, 160 Wn.2d at 178. The Court found that the car dealer's customers were not taxpayers, because the relevant statute expressly forbid dealers from passing the tax on to customers. *Id.* at 180-81. Because the plaintiff was a customer and not a taxpayer, he was injured by the imposition of additional costs:

Appleway also maintains there is no injury in fact because Nelson would have to pay the tax as part of the overhead expense. This is incorrect as the market sets the price, not the overhead.... Nelson paid \$79.23 more than the negotiated price. This is economic injury in fact and Nelson satisfies both standing requirements.

Id. at 186. In this case, just as in *Nelson*, paying more improperly constitutes "injury-in-fact."

The economic harm suffered by the Campaign's members (paying more) must merely be "fairly traceable" to the increased costs resulting from the Department's approval of the disputed Certificate of Need. *See e.g., Federal Election Comm'n v. Akins*, 524 U.S. 11, 25, 118 S. Ct. 1777 (1998); *High Tide Seafoods v. State*, 106 Wn.2d 695, 702, 725 P.2d 411 (1986). Here, there is a direct connection between PEMC's increased costs and its charges to patients and third-party payers. CP 229-242,

¶¶ 13-24. Indeed, under the standard applicable to a motion to dismiss the trial court was required to accept this connection as true.

The Legislature similarly found a direct connection between increased costs and patient charges when it authorized the Certificate of Need statute. In fact, the relationship between increased hospital costs due to expansion and charges borne by patients and third party payors underlies the entire Certificate of Need review. *See* RCW 70.38.015; .115(2)(e). AR 953; 964-65. It was the Department’s failure to perform an adequate inquiry into this legislatively recognized connection that formed the basis of this litigation. CP 61 (“The increased charges patients will pay as a result of hospital expansion costs should be disclosed, fully investigated, publicly debated and widely understood before any hospital expansion is approved. Otherwise the expansion results in a “hidden tax” where the costs are passed on to patients in the form of higher hospital charges and higher insurance premiums.”)

Those patients and third-party payors who will likely pay more as a result of PEMC’s expansion—including members of The Campaign—have standing.

b. The trial court’s “generalized injury” rationale was flawed.

Neither the APA nor Article III standing requires a showing that the harm complained of by The Campaign and its members does not also

affect the general public. CP 394. However, “the fact that many persons shared the same injury [is not] sufficient reason to disqualify from seeking review of an agency's action any person who had in fact suffered injury.” *United States v. SCRAP*, 412 U.S. at 686. The trial court erred in holding otherwise.

In *SCRAP*, an organization of five law students challenged a freight rate increase. 412 U.S. at 678. The law students claimed that they were injured because the agency action would cause an increase in the use of non-recycled materials resulting in more refuse that might be discarded in national parks in the Washington area frequented by the law students. *Id.* at 688. Although the Supreme Court called the members’ claimed injury “attenuated,” it still found standing. *Id.* at 690.

The Supreme Court rejected the argument that standing could not be established because the law students’ injuries were no different from other members of the public who used national parks. “[S]tanding is not to be denied simply because many people suffer the same injury.” *Id.* at 687. Because “[t]o deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody.” *Id.* at 688. “[T]he fact that particular [interests] are shared by

the many rather than the few does not make them less deserving of legal protection through the judicial process.” *Id.* at 686.

This issue was directly addressed in *Center for Auto Safety v. National Highway Traffic Safety Admin.*, 793 F.2d 1322, 1330 (D.C. Cir. 1986). In that case, four consumer organizations sought judicial review of an administrative action that established lower fuel efficiency standards for motor vehicles. The administrative agency claimed that the petitioners did not establish an injury distinct from that generalized to the public at large. *Id.* The Court disagreed:

The question of *how many suffer* from an injury is logically unrelated to the question of *whether there is* an injury and has nothing to do at all with the fitness of a particular party to bring a claim. There is abundant precedent that makes it plain that the widespread nature of a harm is irrelevant to the Article III standing requirement of injury.

Id. at 1334 (emphasis in original).

The prejudice likely to be imposed on members of The Campaign go beyond generalized grievances about government. So long as some injury—or potential injury—is alleged, standing exists.

For example, in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 183-184, 120 S. Ct. 693 (2000), the plaintiff filed a lawsuit under the Clean Water Act against Laidlaw regarding the improper discharge of mercury into local waters. Laidlaw argued that Friends of the Earth did not have “injury in fact” to

pursue the litigation. *Id.* at 181. The Court disagreed. It found that the sworn statements and affidavits from members of Friends of the Earth detailing their “recreational, aesthetic and economic interests” related to the effects of the defendant’s actions were sufficient to demonstrate standing. *Id.*, 528 U.S. at 183. In so holding, the Court distinguished *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S. Ct. 2130 (1992):

These submissions [plaintiff’s affidavits] present dispositively more than the mere “general averments” and “conclusory allegations” found inadequate in *National Wildlife Federation*. Nor can the affiants’ conditional statements—that they would use the nearby North Tyger River for recreation if Laidlaw were not discharging pollutants into it—be equated with the speculative “‘some day’ intentions” to visit endangered species halfway around the world that we held insufficient to show injury in fact in *Defenders of Wildlife*.

...

[W]e see nothing “improbable” about the proposition that a company’s continuous and pervasive illegal discharges of pollutants into a river would cause nearby residents to curtail their recreational use of that waterway and would subject them to other economic and aesthetic harms. The proposition is entirely reasonable, the District Court found it was true in this case, and that is enough for injury in fact.

Id., 528 U.S. at 184-85 (internal citations omitted).

Using the same reasoning, there is nothing “improbable” about the proposition that PEMC’s undisputed increased costs due to construction will be passed on to its patients and their third party payors. The Campaign’s members include thousands of people who live and work in

Everett, Washington—a “health service area” that includes only one acute care hospital—PEMC. WAC 246-310-010(28); AR 756. PEMC projects that its costs will increase as a result of the project authorized by the Department of Health. As a result, many of The Campaign’s members will likely pay more for PEMC health services. CP 229-242 at ¶¶ 13-24. For “standing” purposes, it is irrelevant that this same injury will also be shared by thousands of other Everett residents.

Furthermore, there are injuries that will be sustained by members of The Campaign that are not generally shared by every member of the public. Of course, every member of the general public does not live in PEMC’s service area. The harm caused by increased costs will be borne not by all Washington residents, but only by residents in a specific geographic region. Not every member of the general public seeks care at PEMC. Not every member of the general public is an employer that pays for all health care costs (both insurance premiums and out-of-pocket expenses) of its employees, as does SEIU. CP 204-209 at ¶8. The general public does not, as SPEEA’s 8,500 Everett members do, have health insurance that is, “dollar for dollar” affected by increases in PEMC’s charges. CP 209-212 at ¶¶7-8 (“Because we have so many members living in Everett that use PEMC, any increase in PEMC’s costs has a direct effect on our members’ health care benefits and wages.”). The trial court’s erred

in dismissing the petition because “Petitioners have not made a showing that DOH’s action ‘has prejudiced or is likely to prejudice’ it in some way which is not a generalized injury to all members of the public.” CP 395.

c. The trial court’s standing decision effectively immunizes the Department of Health’s decision from challenge.

The trial court correctly recognized that the issues raised by The Campaign are “significant” and are of “great interest and import to the public.” CP 395. This conclusion should have caused the trial court to analyze the standing issue before it with liberality. “Where a controversy is of serious public importance the requirements for standing are applied more liberally.” *City of Seattle v. State*, 103 Wn.2d 663, 668, 694 P.2d 641 (1985); *Washington Natural Gas Co. v. Public Utility Dist. No. 1 of Snohomish County*, 77 Wn.2d 94, 96, 459 P.2d 633 (1969). Yet, the end result of the trial court’s decision is to immunize the Department from public scrutiny. If, as the trial court held, The Campaign’s evidence is insufficient to demonstrate standing, then it is unknown how patients and other health care payors can ever challenge improper Certificate of Need decisions. As a result, only applicants and their competitors could challenge Certificate of Need decisions. *See St. Joseph Hosp.*, 125 Wn.2d at 742.

If an applicant had no competitor in its service area, then nobody could challenge the decision. Here, PEMC is the sole acute care hospital in its health service area—the “Central Snohomish planning area.” AR 756. In 1993, PEMC merged with its only direct local competitor. AR 1124-36. As a result, no competing hospital may dispute a Certificate of Need issued to PEMC by exercising administrative appeal rights.²

Moreover, competitors cannot be counted upon to be a “proxy” for the interests of patients and other health care consumers. *See St. Joseph Hosp.*, 125 Wn.2d at 742 (reasoning that, in some situations, competitors’ interests were “parallel” to that of the public). Competitors’ concerns are often very different from that of patients. For example, Valley General Hospital participated in the public comment process on PEMC’s proposed expansion. It initially expressed and then retracted concerns about PEMC’s expansion because it might suffer a *competitive disadvantage* if, as part of the PEMC expansion, Providence Physicians, a primary care physician group in Monroe, Washington, directed referrals to PEMC rather than Valley General. AR 608-13. Valley General raised no concerns

² Valley General Hospital, which the Department of Health granted “affected party” status, is not physically located within the same “health service area” as PEMC. Thus, the hospital does not meet the definition of an “affected party,” nor could it have sought administrative appeal. *See* WAC 246-310-010(2); 246-310-610(4); RCW 70.38.115(10)(b).

regarding the projected increased costs to patients as a result of the expansion.

Thus, the *only* persons or organizations in the relevant “health service area” that could challenge this Certificate of Need decision are patients, local health care consumers, third-party payors and the organizations that represent them. The trial court’s decision has ruled them out. Unless the trial court’s decision is reversed, PEMC and the Department are insulated from any challenges to its present or future Certificates of Need.

Protecting health facilities at the expense of patients and other health consumers is inconsistent with the purpose of Washington’s Certificate of Need law. Washington’s legislation was passed in response to the National Health Planning and Resources Development Act of 1974, Pub. L. No. 93-641, 88 Stat. 2225 (repealed 1986). *St. Joseph Hosp.*, 125 Wn.2d at 735. As the Court noted,

One purpose of the federal law was to control health care costs. Congress was concerned that marketplace forces in this industry failed to produce efficient investment in facilities and to minimize the costs of health care.

Id. at 735-36. Washington’s Certificate of Need statute was established to protect patients and other third-party payors from unnecessary costs related to hospital expansions. *See generally* RCW 70.38.015; 70.38.115(2)(e). The trial court’s decision undermines the very purpose of the Certificate of

Need process, and prevents the very people whose interests the statute was designed to protect from seeking to ensure that the process is followed correctly.

2. The second APA standing prong: “That person's asserted interests are among those that the agency was required to consider when it engaged in the agency action challenged.”

The trial court correctly determined that The Campaign and its members met the second prong of the APA standing statute—the “zone of interest” test—as described in RCW 34.05.530(2). CP 394. Indeed, PEMC did not dispute that the patients and local health care consumers represented by The Campaign are within the “zone of interest.” CP 246. Nor could it have done so, given that the Supreme Court has already found that the Department is required to protect the interests of patients and other health care consumers when conducting Certificate of Need reviews. *St. Joseph Hosp.*, 125 Wn.2d at 741-42.

3. The third APA standing prong: “A judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the agency action.”

The Department is empowered by the Legislature to control health care costs to consumers through its Certificate of Need review process. RCW 70.38.015; *St. Joseph Hosp.*, 125 Wn.2d at 735. The Legislature determined that Certificate of Need review, even if it covers only the

“expansion” portion of an overall construction project, is an appropriate vehicle for addressing and controlling excessive health care costs to consumers. RCW 70.38.015; *St. Joseph Hosp.*, 125 Wn.2d at 735; *Children's Hosp. and Medical Center v. Washington State Dept. of Health*, 95 Wn. App. 858, 865, 975 P.2d 567 (1999). Thus, proper review by the Department of the required cost containment criteria is an effective means of controlling consumer health care costs.

The Department has many tools at its disposal to ensure cost containment. After conducting the required cost containment review, the Department could deny the proposed expansion, issue a Certificate of Need conditionally, subject to certain specific requirements, or approve the proposal outright. RCW 70.38.115(4); *see e.g., St. Joseph Hosp.*, 125 Wn.2d at 737. The Department has issued conditional Certificates of Need in roughly two-thirds of the decisions issued. AR 963. These conditions can include provisions that ensure that the construction project fully complies with the Certificate of Need cost-containment requirements, such as requiring PEMC to absorb any excessive construction costs, rather than passing those costs on to its patients. Certificate of Need review, if properly done, can result in lower costs to patients and other local health care consumers.

In this particular dispute, whether or not a properly conducted Certificate of Need review would result in reduced costs to patients and other local consumers is a question of material fact to be decided on the merits. There is overwhelming evidence to support The Campaign's position, which must be taken as true on a motion to dismiss. For example, Dr. Cohen identifies a number of ways in which the Department could have acted to secure lower costs to consumers. CP 229-242 at ¶ 25. It could have put in place conditions to ensure the provision of services at or below cost to low-income consumers. It could have established a ceiling on charges to individual and/or third party payors. It could have undertaken a more searching analysis of PEMC's application in order to ensure that the efficiencies PEMC claims will be achieved by the expansion actually result in lower, not higher, charges to patients. CP 229-242 at ¶¶ 25-26. Whether health care consumers can be adequately protected from PEMC's excessive costs must be fully explored at trial.

C. The Campaign's members also suffered a direct, procedural injury which satisfies the standing requirement.

Seattle Bldg. and Const. Trades Council holds that standing may be found where an agency has failed to comply with procedural requirements. *Id.*, 129 Wn.2d at 794. "[P]rocedural rights are special." *Id.* Standing to challenge agency decisions affecting procedural rights may

be asserted “without meeting all the normal standards for redressability and immediacy.” *Id.* at 794-95, citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n. 7, 112 S. Ct. 2130 (1992); *see also Earth Island Institute v. Ruthenbeck*, 490 F.3d 687, 693-694 (9th Cir. 2007) (“Procedural and informational injuries may be the basis for injury in fact for standing purposes”). “Where an agency refuses to provide a procedure required by statute or the Constitution, the United States Supreme Court routinely grants standing to a party despite the fact that any injury to substantive rights attributable to failure to provide a procedure is both indirect and speculative.” *Seattle Bldg. & Const. Trades Council*, 129 Wn.2d at 794.

For example, in *Earth Island Institute*, the Ninth Circuit found that several nonprofit environmental organizations had suffered an “injury-in-fact” when the administrative agency changed its administrative procedures to foreclose notice, comment and appeal procedures for a category of environmental reviews. *Id.* at 692. The Court held that the relevant statute was “essentially a procedural statute designed to ensure that environmental issues are given proper consideration in the decision making process.” *Id.* at 693. Allegations that procedural rights were violated (no notice, comment or appeal procedures) conferred standing. *Id.* at 693; *see also Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1514 (9th Cir. 1992), both cases citing to *Friends of the Earth v. United*

States Navy, 841 F.2d 927, 931 (9th Cir. 1988) (“This court has long recognized that failure to follow procedures designed to ensure that the environmental consequences of a project are adequately evaluated is a sufficient injury in fact to support standing.”).

Here, The Campaign alleges that the Department violated Chapter 70.38 RCW, the Certificate of Need statute, when it failed to conduct its review under the statutorily mandated cost containment requirements and when it authorized a Certificate of Need for which no application had been submitted. CP 65-69, 70. Both are allegations that the proper procedural requirements were not met. The statutory cost containment requirements are procedural—they exist in order to ensure that cost-containment issues are given “proper consideration in the decision making process.” *See Earth Island Institute*, 490 F.3d at 693.

The Department’s decision to rule on a 106-bed expansion, as opposed to the 166-bed project for which PEMC applied, also deprived The Campaign of its procedural rights. The Campaign and other health care consumers in PEMC’s health service area are entitled to participate in a pre-decisional notice and public comment process. *See* RCW 70.38.115(9). All of the public comments received by the Department of Health addressed PEMC’s 166 bed application. *No* comments addressed the impact of a project involving 106 beds. Nor could they, since no

one—not PEMC nor the Department—indicated that a different 106-bed project was under consideration and no such application had been filed.

This is not a mere “technicality.” When the proposed project was reduced by 60 beds, the financial data and projections changed. *See e.g.*, AR 768 (estimating the increased per-bed cost as a result of the Department of Health’s approval of a 106-bed project). There was no opportunity for public notice, disclosure, investigation and comment on the impact of these changes. The Department of Health’s authorization of what is essentially a different Certificate of Need is a clear procedural violation. At the very least, this allegation is sufficient to confer standing when challenged in a motion to dismiss.

The allegation is well-founded. In *Southern Maryland Hosp. Center, Inc. v. Fort Washington Community Hosp., Inc.*, 519 A.2d 727, 732 (Md. 1987), Maryland’s highest court required a hospital to submit a new Certificate of Need application in this same situation. Without new information based upon the different project, the court found that the agency could not make the findings required by statute. *Id.* Significantly reducing the number of beds approved transformed the project itself, changed all the data related to cost-containment, and impacted each of the Department’s findings. In effect, unless a new application is filed, together with new cost containment data, the Department cannot complete

its statutorily-mandated review. Just as importantly, the public cannot properly participate in the notice and comment process, if it is never informed that a different project is under consideration and the relevant data is not disclosed.

IX. CONCLUSION

Members of The Campaign to Make Health Care Work will likely pay more for services at PEMC as a result of the Certificate of Need authorized by the Department of Health. These members have also been denied their procedural rights when the Department approved a Certificate of Need other than the 166-bed project for which PEMC applied. Standing to pursue this action exists. The trial court's Order dismissing The Campaign's petition for lack of standing should be reversed, and the case should be remanded back to the trial court with instructions to proceed to the merits raised by this important litigation.

DATED: February 11, 2008.

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Certificate of Service

I certify, under penalty of perjury pursuant to the laws of the State of Washington, that on February 11, 2008, a true copy of the foregoing OPENING BRIEF OF APPELLANTS was served upon counsel of record as indicated below:

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