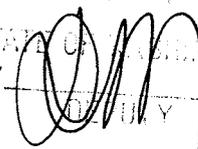


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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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NO. 36919-2-II

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

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.

REPLY BRIEF OF APPELLANTS

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ORIGINAL

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I. INTRODUCTION

The Campaign to Make Health Care Work (The Campaign) has members who will suffer specific, concrete injury as a direct result of the Department of Health's (Department) decision to approve a Certificate of Need for Providence Everett Medical Center (PEMC)—*some of The Campaign's members will pay more for services at PEMC*. These facts were alleged in The Campaign's Petition (CP 60) and are supported by undisputed affidavits and PEMC's own data:

- According to PEMC its per-bed costs will increase as a result of the authorized Certificate of Need. *See* PEMC's Resp. at 28; AR 179-82; 244-46; 549; 834-35; CP 63, 67-68, 426.
- Dr. Harold Cohen, The Campaign's expert, testified that these costs are directly passed on to patients in the form of higher charges, increased premiums and co-insurance. CP 229-242 at ¶ 15.
- SEIU, an *employer* and member of The Campaign, pays for all the health care costs of its employees that use PEMC—their insurance, co-payments, co-insurance, and any out-of-pocket expenses that result. As a result, when PEMC increases its charges, SEIU pays more.
- Stephen Moll, another Campaign member, will likely pay out-of-pocket for some or all of the cost of care he incurs at PEMC, since the hospital is not covered by his insurance. CP 223-225; ¶ 7.
- Kathy Young, another Campaign member, is a PEMC patient who must pay 15% of charges for any hospitalization, in addition to a co-premium. As PEMC's charges increase due to its Certificate

of Need expansion, so will Ms. Young's costs. CP 197-199 at ¶¶ 2-3; 7-8; CP 226-228 at ¶¶ 6-7.¹

PEMC and the Department² raise the following issues in response:

First, instead of taking issue with the above facts, PEMC and the Department attempt to distract the Court with irrelevant arguments that go to the merits, claiming that at this stage, The Campaign must prove its case-in-chief. *See* PEMC Resp. at 29; Dep't. Resp. at 8-12. Both ignore the proper standard for reviewing motions under CR 12(b)(6), as well as the law governing standing. *See* RCW 34.05.530. At this stage, The Campaign need only show "any set of hypothetical facts" consistent with its Petition for Review, that demonstrate standing. *Dilley v. S & R Holdings, LLC*, 137 Wn. App. 774, 778, 154 P.3d 955, 957 (2007). The Campaign has done so.

Second, PEMC argues that The Campaign's allegations are only "generalized grievances" about the Departments' "customary practices."

¹ The Campaign offered affidavits from many other members detailing how they are directly injured by the Department's authorization of PEMC's Certificate of Need. *See* CP 197-228.

See PEMC Resp. at 20-24. A person who pays additional costs as a direct result of inadequate agency action suffers specific and concrete economic harm sufficient for standing. This injury is not a “generalized injury suffered by the public.” Nor is it the kind of “abstract injury” that may only be resolved through the political process. See e.g., *Federal Election Comm'n v. Akins*, 524 U.S. 11, 24, 118 S. Ct. 1777 (1998) (courts cannot ignore “injury-in-fact” simply because legislative action is possible).

Third, the Department argues that The Campaign’s injuries are not caused by the Department’s grant of PEMC’s Certificate of Need, because the Department’s actions were “reasonable.” Dep’t. Resp. at 8-12. This is simply another attempt to argue the merits rather than address standing. At trial, The Campaign will prove that the Department did not conduct the statutorily-required cost-containment review. Whether or not The Department’s actions were “reasonable” has no bearing on standing. *Sierra Club v. Morton*, 405 U.S. 727, 737, 925 S. Ct. 1361 (1972)

(footnote continuation)

² The Department backpedals from its position below that The Campaign had standing. Dep’t. Resp. at 7 n.5; see CP 367; 482. Now the Department asserts that although it took the position that The Campaign had a “right” to an administrative hearing which required exhaustion, that “right” was only to “request” a hearing (not to actually have one). Dep’t. Resp. at 7 n.5. The Department’s claim is inconsistent with its briefing below in its motion to dismiss and reply in support, and makes little sense. See CP 329-30 (a “right to request” a hearing is not a “right”).

(distinguishing arguments on standing to initiate a judicial review proceeding from arguments on the merits).

Fourth, PEMC and the Department argue that there is no remedy available that would likely address The Campaign's injuries. PEMC Resp. at 33-38; Dep't. Resp. at 15-18. They are wrong. The Department is empowered to impose conditions on Certificates of Need, including conditions designed to protect The Campaign's members from being charged for unnecessary or excessive construction costs. RCW 70.38.015(1); (5); .115(4). Dr. Cohen identified a number of ways in which the Department could remedy The Campaign's injuries if it had conducted the required cost-containment review. CP 229-242 at ¶¶ 25-30.

Fifth, both claim that The Campaign was not denied a procedural right when the Department approved a different Certificate of Need than that which was the subject of the public notice, disclosure and comment process. PEMC Resp. at 39-41; Dep't. Resp. 12-14. PEMC did not disclose its specific "three-phased" project nor the relevant financial data, *until after the conclusion of the public comment process*. AR 637-38. Based upon this previously undisclosed information, the Department approved the "1st phase" of the proposal. CP 164. The Campaign was denied its right to participate in the statutorily-required public comment process on the actual application that the Department ultimately approved.

See e.g., *Southern Maryland Hosp. Center, Inc. v. Fort Washington Community Hosp., Inc.*, 519 A.2d 727, 732 (Md. 1987). For this reason alone, The Campaign has standing.

II. ARGUMENT

A. PEMC's Motion to Dismiss must be reviewed pursuant to Rule 12(b)(6).

Courts “must deny a CR 12(b)(6) challenge to the legal sufficiency of the [Petitioner’s] claim if they can demonstrate any hypothetical facts, consistent with the complaint, that would entitle them to relief.” *Dilley*, 137 Wn. App. at 778, citing to *Halvorson v. Dahl*, 89 Wn.2d 673, 674, 574 P.2d 1190 (1978); *Gorman v. Garlock, Inc.*, 155 Wn.2d 198, 214, 118 P.3d 311 (2005); see also *Burton v. Lehman*, 153 Wn.2d 416, 422, 103 P.3d 1230 (2005). The hypothetical facts considered by the Court need not be included in the record. *Burton*, 153 Wn.2d at 422. “[O]nly in the unusual case in which ... there is some insuperable bar to relief” should a CR 12 (b)(6) motion be granted. *Hoffer v. State*, 110 Wn.2d 415, 421, 755 P.2d 781, 785 (1988). This is true even when standing is challenged in a motion to dismiss. *Bernhardt v. County of Los Angeles*, 279 F.3d 862, 867 (9th Cir. 2002).

PEMC did not originally disclose whether its motion was filed pursuant to CR 12 (b)(6) or CR 56.³ CP 253-54. Only on reply did PEMC clarify that it was not seeking summary judgment, agreeing that the Court could only consider summary judgment at trial, pursuant to Local Rule 56 (b). CP 343-44. At the time, PEMC abandoned its motion to dismiss on standing, and asked that the court consider it at the hearing on the merits:

However, because 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). The Court's decision in advance of the hearing on the merits must be reviewed as a decision under CR 12(b)(6).

Belatedly, PEMC asserts the superior court could consider the motion as summary judgment because Court did not require reference to the administrative record. PEMC Resp. 16-17. PEMC's assertion is nothing more than sophistry. Both PEMC's Motion to Dismiss *and* the

³ Due to PEMC's "hide-the-ball" tactic, The Campaign was forced to submit declarations and references to the administrative record, in case the PEMC motion was filed pursuant to CR 56. See CP 253.

Superior Court's Order relied heavily upon the administrative record. CP 78-82, 96-97, 390-95. Judge Hirsch explicitly stated that the administrative record formed the basis of her decision. *See* CP 395 ("On the basis of the record in this case, on which the court must rely in making its decision...."). PEMC's argument that LR 56 (b) was not "implicated" is simply incorrect. If PEMC's Motion was converted to summary judgment, it was improperly decided in advance of the hearing on the merits.

This Court should review the decision below under the CR 12(b)(6) standard. Nevertheless, under either standard, The Campaign has demonstrated standing.

B. One or more of The Campaign's members will pay more as a direct result of the Department of Health's authorization of a Certificate of Need.

Neither the Department or PEMC take issue with The Campaign's position that paying more for PEMC's services as a direct result of the Department's action is sufficient evidence of injury to demonstrate standing. *See* Dept.'s Resp. at 8 (standing is demonstrated when there is evidence of "economic harm"); PEMC Resp., 23-24 ("where an individual right is concretely and directly invaded" standing is met); 27-32; *see also*, *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”).⁴

Instead, PEMC argues that The Campaign failed to demonstrate that at least one of its members will likely pay more as a result of the Department of Health’s decision. PEMC Resp. 25-32. Its argument, however, is flatly contradicted by allegations in The Campaign’s Petition, PEMC’s own data, the administrative record and declarations submitted by The Campaign.

The Campaign’s Petition specifically alleged that its members include patients and other members of the public whose health care costs will increase as a result of the Department’s authorized Certificate of Need. CP 60. That allegation alone is sufficient for standing at this stage of the litigation. *Bernhardt*, 279 F.3d at 867; *Burton*, 153 Wn.2d at 422. Nevertheless, The Campaign submitted additional sworn testimony regarding the injuries to its members, as described below.

⁴ PEMC dismisses *General Motors Corp.*, and *Nelson v. Appleway Chevrolet, Inc.*, 160 Wn.2d 173, 186, 157 P.3d 847 (2007) as cases involving whether taxes should have been passed on to plaintiffs. PEMC Resp. at 32. Standing requirements are the same, however, whether the dispute involves challenges to actions that result in taxes passed on consumers, or construction costs passed on to patients. All involve “economic injury in fact.” *Nelson*, 160 Wn.2d at 186.

The standing arguments raised by PEMC and the Department are similar to those rejected by the court in *Carman v. Richardson*, 357 F. Supp. 1148, 1158 (D.C. Vt. 1973). In *Carman*, the plaintiff challenged a decision by federal officials to guarantee a Hill-Burton Act loan to a local hospital to finance its construction expansion. The *Carman* court found that the plaintiff had standing to bring the action under the federal Administrative Procedures Act because the plaintiff demonstrated “economic injury in fact.” Like The Campaign’s members, the *Carman* plaintiff alleged that he lived in the area affected, had used the hospital in the past, would likely to use the facility in the future and pay more due to increased costs as a result of the proposed construction. *Id.* at 1156, 1158. The court found that this testimony was sufficient to demonstrate standing. *Id.* at 1158.

1. The Campaign’s members pay more when PEMC’s costs increase.

SEIU, Kathy Young, and Stephen Moll are members of The Campaign who will likely pay more as a result of the Department of Health’s issuance of a Certificate of Need. Their injuries are specific, direct and concrete:

- SEIU, as an employer, pays for all the costs that their employees, such as Neeve Willows, incur when they are treated at PEMC. CP 204-209, ¶¶ 3, 8; CP 200-203 at ¶¶ 5-9. As Dr. Cohen testified, these costs necessarily include the increased costs

resulting from the Certificate of Need approved by the Department of Health. CP 229-242 at ¶ 15.

- Stephen Moll, an SEIU member, would likely pay out-of-pocket for some or all of the cost of care he incurs at PEMC, since the hospital is not covered by his insurance. CP 223-225; ¶ 7. These costs also include the increased costs resulting from the PEMC Certificate of Need. CP 229-242 at ¶ 15.
- Kathy Young is a PEMC patient who must pay 15% of charges for any hospitalization, in addition to a co-premium. As PEMC's charges increase due to its Certificate of Need expansion, so will Ms. Young's costs. CP 197-199 at ¶¶ 2-3; 7-8; CP 229-242 at ¶ 15; CP 226-228 at ¶¶ 6-7.

Neither PEMC nor the Department offered any testimony to dispute the above facts.

Ignoring these undisputed facts, PEMC argues that many "forces" impact the costs of care paid by patients, employers and union members in a manner that is so "complex" as to preclude standing.⁵ PEMC Resp. at 31. PEMC offers no testimony, expert or otherwise, for this claim.

⁵ PEMC carries this claim to the absurd extreme in a point heading, "Hospitals Cannot Pass Their Costs Directly to Patients." PEMC Resp. at 31. PEMC never discloses the basis for this extraordinary claim. Moreover, it is belied by Dr. Cohen's testimony. See CP 229-242 at ¶¶ 8-10; 18-22 (describing how uninsured patients are affected by increases in PEMC's costs); see also, Ostrom, Carol, "Hospital Systems sued over charity case fees," Seattle Times, September 30, 2004, <http://community.seattletimes.nwsourc.com/archive/?date=20040930&slug=hospitalmarkups30m> (last visited on May 3, 2008) (describing a lawsuit against Providence Health System (PEMC's parent) over excessive charges to uninsured patients).

PEMC seems to assume that the relationship between hospital costs and charges paid by patients and other payors is so mysterious and irrational as to resist any reasoned analysis.⁶ PEMC ignores decades of analyses by health economists.

“Roemer’s Law” is the economic theory that additional hospital services (including new hospital beds) lead to increased use of those services which can result in greater costs to patients and other payors. CP 229-242 at ¶ 8. In addition, increased costs due to hospital construction also result in increased charges to patients and increased insurance premiums. *Id.* at ¶ 13. In fact, patient charges and insurance premiums are, over the long-term, “driven” by increases in hospital costs. *Id.* Thus, when a hospital spends more on construction and adds hospital beds, the result is an increase in costs and charges for its services. As charges increase, so do the amounts paid by patients, employers and other third parties, like SEIU, Kathy Young and Stephen Moll. CP 229-242 at ¶¶ 13, 15, 24.

⁶PEMC’s “illustration” attempts to cloak their unfounded claim with a veneer of rationality. PEMC Resp. at 27-28. Under their analysis, *any* seven-step process, each step of which has a 50% probability of occurring yields a less than 1% probability that the seven-step sequence will occur. This “illustration” ignores the facts that are entirely undisputed—SEIU, Kathy Young, Stephen Moll and other Campaign members pay *directly* for services at PEMC.

2. Charges to PEMC patients and other payors will increase as a result of the Department's authorization of PEMC's Certificate of Need.

PEMC admits that its costs will increase as a result of the Certificate of Need. PEMC Resp. 28 (“accounting projections that Providence Everett submitted with its Certificate of Need application [show] that the capital costs for each of the approved new beds *will increase* during the first few years the new tower is open.”); *see also* AR 179-82; 244-46; 549; 834-35; CP 63, 67-68, 426 (PEMC assumes “the fact of increased costs”).

Dr. Cohen testified that these increased costs will be directly borne by PEMC's patients, employers and other payors. CP 229-242 at ¶¶ 13-24. Dr. Cohen's testimony, undisputed by the Department or PEMC, makes logical sense. As stated in The Campaign's opening brief, these increased costs do not simply disappear into the ether. They are paid for by someone. PEMC identifies no other source to pay for the increased capital costs—no grants or governmental allocation. Instead, as Dr. Cohen testified, those costs are passed on to patients (like Kathy Young and Stephen Moll), employers (like SEIU) and other payors. PEMC offers no testimony to the contrary.

PEMC counters that “The Campaign must prove its “into the ether” assertion. PEMC Resp. at 29. PEMC confuses what must be

demonstrated for standing in a motion to dismiss, and what The Campaign will show at trial. At this stage of the litigation, “proof” is not required. All that The Campaign must do is show that there is some hypothetical raised by the Petition under which The Campaign has standing.⁷ *Bravo v. Dolsen Companies*, 125 Wn.2d 745, 750, 888 P.2d 147 (1995).

PEMC also argues that the projected increase in costs somehow doesn’t count as an “injury” since by their accounting, by 2016, the costs will decrease. PEMC Resp. at 30. Whether PEMC’s accounting figures are correct remains to be tested at trial. Dr. Cohen testifies that the methodology used by the Department and PEMC results in excess capacity (*i.e.*, more hospital beds than needed). This, in turn, results in increased costs, which have not been properly accounted for. CP 229-242 at ¶¶ 28-30. The Campaign anticipates that this and other problems with PEMC’s accounting methodology will be the subject of much testimony at trial.

Nevertheless, the undisputed fact that PEMC’s costs *will increase*, even if only in the short-term, is sufficient to demonstrate injury. The Campaign’s members will likely pay more for PEMC’s services during

⁷ Even if considered under a summary judgment standard, The Campaign need only prove that there is a genuine issue of material fact regarding standing raised by the affidavits submitted by The Campaign. *See Suquamish Indian Tribe v. Kitsap County*, 92 Wn. App. 816, 831, 965 P.2d 636 (1998).

that time period. For standing purposes, this is enough evidence of injury. *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 183-184, 120 S. Ct. 693 (2000); *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 n.14, 93 S. Ct. 2405 (1973) (evidence of injury amounting to an “identifiable trifle” is sufficient).⁸ Here, paying \$174 to \$249 (or more) per day as a result of the issuance of the Certificate of Need is no “trifle.” AR 179-82; 244-46; 834.

C. The Campaign’s injury is not a “generalized grievance.”

Paying more for PEMC’s services as a result of the Department’s issuance of a Certificate of Need is not a generalized harm. It is specific, direct and concrete. Some of The Campaign’s members will pay more when they or their employees go to PEMC for treatment. The fact that many others will also pay more is immaterial. *Center for Auto Safety v. National Highway Traffic Safety Admin.*, 793 F.2d 1322, 1334 (D.C. Cir. 1986) (the “widespread nature of a harm is irrelevant” to the Art. III standing inquiry).

⁸ PEMC calls into question the viability of *SCRAP*. See PEMC Resp. at 32. *SCRAP* is solid Supreme Court precedent, and was recently relied upon by the Ninth Circuit in *Williams v. Boeing*, 517 F.3d 1120, 1127 (9th Cir. 2008) (citing to *SCRAP* as basis for finding plaintiff’s allegations regarding injury to be sufficient to withstand a motion to dismiss).

PEMC argues that The Campaign's injury is nothing more than a "generalized grievance." PEMC Resp. at 20-23. PEMC confuses The Campaign's injury (paying more) with the cause of it's injury (the Department's "customary" failure to conduct its statutorily-required cost containment review).⁹ None of the cases cited by PEMC stand for the proposition that standing cannot be met when the cause of the injury is an agency's general or "customary practice."¹⁰ The Campaign does not claim that simply disputing the Department's application of the law is sufficient to demonstrate "injury." Rather, The Campaign has alleged and offered testimony regarding the specific injuries suffered by a number of its members, resulting from the Department's grant of the PEMC Certificate of Need.

The Supreme Court has found standing in a similar circumstance. *See Federal Election Commission v. Akins*, 524 U.S. 11, 118 S. Ct. 177

⁹ PEMC complains that The Campaign does not allege that the Department failed to comply with its "customary procedures." PEMC Resp. at 19. Whether the Department complied with its "customary" review process is irrelevant. What is relevant is whether the Department complied with ***the statutory-required procedures***. Indeed, The Campaign alleged that the Department applied its "customary procedures" when reviewing the PEMC Certificate of Need application ***in violation of the Certificate of Need statute***. CP 65-67.

(1998), cited by PEMC. PEMC Resp. at 21. In *FEC*, a group of voters sought to require the Federal Election Commission, an administrative agency to reconsider a regulatory decision impacting a third party, American Israel Public Affairs Committee (AIPAC), the object of regulated action. The Supreme Court found that the voters had standing, despite the potentially broad impact of the case, including its impact on the FEC's future practices. Just as The Campaign does here, the voters in *FEC* identified the specific ways in which the agency's regulatory decision caused them injury. *Id.* at 21. That injury was sufficient. *Id.* at 24.

D. The Campaign's injury is caused by the Department's decision.

The Department argues that The Campaign's injuries do not result from the Department's actions because its actions were "reasonable." Dep't. Resp. at 8-12. The Department does not dispute the financial projections from PEMC revealing that costs will increase by as much as \$174 to \$249 (or more) per day as a result of the issuance of the Certificate of Need. AR 179-82, 244-46, 834. It does not dispute that

(footnote continuation)

¹⁰ See e.g., *Kadorian v. Bellingham Police Dep't.*, 119 Wn.2d 178, 191, 829 P.2d 1061 (1992) (plaintiff failed to allege any actual injury from the implementation of the statute); *State v. Human Relations Research Foundation*, 64 Wn.2d 262, 269, 391 P.2d 513 (1964) (the state failed to allege actual injury from implementation of the statute it sought to challenge).

these costs will be passed on to PEMC's patients in the form of increased charges, premiums and co-insurance. CP 229-242 at ¶¶ 13-24. Nor does the Department dispute that The Campaign's members include individuals and at least one employer who will pay more as a result. CP 197-242.

Instead, the Department argues that, in addition to showing these injuries resulting from the Department's action, The Campaign must show that the Department's action was "unreasonable." *See* Dep't. Resp. at 8-9. Whether or not the agency's action was "reasonable" or consistent with statutory requirements, is a matter to be decided at trial.¹¹

[T]he fact of economic injury is what gives a person standing to seek judicial review under the statute, but once review is properly invoked, that person may argue the public interest in support of his claim that the agency has failed to comply with its statutory mandate.

Sierra Club, 405 U.S. at 737.

Here, The Campaign need only show that the issuance of the Certificate of Need "has prejudiced or is likely to prejudice" one or more of its members. RCW 34.05.530(1). As the Department concedes, "economic harm" (paying more) as a direct result of an agency's action is prejudice. *See e.g., St. Joseph Hosp. and Health Care Center v. Dept. of*

¹¹ Contrary to the Department's claims, The Campaign does contest the validity of the Department's review of the PEMC Certificate of Need application, including the methodology used. *See* Dep't. Resp. at 9, n.6; CP 65-68; CP 229-242 at ¶¶ 25-30.

Health, 125 Wn.2d 733, 739, 887 P.2d 891 (1995) (the Department conceded that economic harm to a competitor hospital met the “injury-in-fact” standard); *Kucera v. State, Dept. of Transp.*, 140 Wn.2d 200, 213, 995 P.2d 63 (2000) (“The injury in fact element is satisfied when a plaintiff alleges the challenged action will cause specific and perceptible harm”). *See, e.g., Carman*, 357 F. Supp. at 1158.

The Campaign has demonstrated—and the Department does not dispute—that as a direct result of the Department’s decision, many of The Campaign’s members will pay more for services at PEMC. This likely economic harm, stemming from the Department’s issuance of a Certificate of Need, is sufficient prejudice to constitute “injury in fact.”

E. A Favorable Decision will likely remedy The Campaign’s injury.

The purpose of Certificate of Need is to control health care costs passed on to patients. RCW 70.38.015; *St. Joseph Hosp.*, 125 Wn.2d at 735. Department has a number of means by which it can control health care costs. It can deny an application, approve it outright, or issue a conditional Certificate of Need. RCW 70.38.115(4). The plain language of the statute includes broad regulatory powers when establishing conditions:

The department in making its final decision may issue a conditional certificate of need if it finds that the project is justified only under specific circumstances. The conditions

shall directly relate to the project being reviewed. The conditions may be released if it can be substantiated that the conditions are no longer valid and the release of such conditions would be consistent with the purposes of this chapter.

Id.

Despite the clear language of the statute, PEMC and the Department claim that the Department cannot place conditions on the charges to patients resulting from a Certificate of Need project.¹² *See* PEMC Resp. at 34-35; Dep't. Resp. at 17. They are incorrect. No limitations are placed on the "conditions" that the Department may require, except that the conditions be directly related to the project reviewed.¹³

PEMC also argues that The Campaign does not offer any conditions that could "better contain costs" than what the Department

¹² Reliance on legislative history by both PEMC and the Department (PEMC Resp. at 34-35 and Dep't. Resp. at 17) is improper since the statute is unambiguous and clear on its face. *Waste Management of Seattle, Inc. v. Utilities and Transp. Com'n*, 123 Wn.2d 621, 629, 869 P.2d 1034 (1994).

¹³ It is unclear what PEMC and the Department mean when they assert that hospitals are not "regulated." *See* Dep't. Resp. at 12, n.9; PEMC Resp. at 31-32. While hospitals are not public-utilities, they must still comply with a host of regulations and statutory requirements, including Certificate of Need. The Department's specific enforcement authority includes the power to impose conditions on Certificates of Need in order to protect patients from excessive increases in health care costs. RCW 70.38.015(1); (5); .115(4). Nothing prevents these conditions from including restrictions on charges to patients and payors for excessive Certificate of Need-related construction costs.

already approved. PEMC Resp. at 35-36. PEMC ignores Dr. Cohen's undisputed testimony. He identifies a number of ways the Department could have acted that would provide redress to The Campaign's injuries. It could have used a different methodology that would better reflect the efficiencies to be gained by PEMC's proposed use of all-private rooms; it could have imposed conditions on the charges to patients and other payors as a result of the construction;¹⁴ it could have imposed limits related to the provision of charitable care.¹⁵ CP 229-242 at ¶¶ 25-30.

PEMC argues, again without any support or citation, that the cost of delay caused by this litigation will necessarily wipe out any cost-containment conditions that the Department could impose. PEMC Resp. at 38; *see also* Dep't. Resp. at 12. As PEMC admits, *nothing* has been delayed due to this litigation. PEMC Resp. at 14. Nor is there any basis for its claim that proper exercise of the Department's statutorily required

¹⁴ Both PEMC and the Department argue that such a condition would constitute "rate regulation." PEMC Resp. at 33-35; Dep't. Resp. at 17. It is unknown how they define "rate regulation" nor why they believe that conditions related to charges to patients are impermissible. However, it is worth noting that any such condition could only apply to Certificate of Need-related costs. RCW 70.38.115(4). Other hospital costs and charges would not be affected.

¹⁵ The Department takes issue with Dr. Cohen's testimony regarding the faulty methodology by which the Department assessed PEMC's provision of charity care. Dep't. Resp. at 15-16; *see* CP 229-242 at ¶¶ 18-22. This argument is on the merits of the case and is appropriately left for trial. It has no bearing on whether standing is met.

cost-containment review would increase costs. Dr. Cohen points out that costs due to any litigation-related delay would likely be more than offset by savings from the imposition of proper cost containment conditions. CP 229-242 at ¶ 11.

F. The Campaign was denied its procedural rights when the Department approved a different Certificate of Need than the one for which PEMC applied.

The Washington Supreme Court has recognized that “[w]here an agency refuses to provide a procedure required by statute or the Constitution, the United State Supreme Court routinely grants standing to a party.” *Seattle Bldg. and Const. Trades Council v. Apprenticeship and Training Council*, 129 Wn.2d 787, 794, 920 P.2d 581 (1996). As the Court found:

There is much truth to the assertion that “procedural rights” are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy.

Id. at 794-95. Although the “normal standards” for standing may be relaxed in cases involving procedural rights, a party must still demonstrate a “concrete interest” affected by the procedural right. *Id.* at 795, citing to *Yesler Terrace Community Council v. Cisnersos*, 37 F.3d 442, 445-47 (9th Cir. 1994) (“To have standing, a plaintiff must be seeking to enforce a

procedural requirement the disregard of which could impair a separate concrete interest).

Here, The Campaign demonstrates a “concrete injury” resulting from Department’s approval of the 106-bed Certificate of Need without the required public notice, disclosure and comment process.¹⁶ *See* RCW 70.38.115(9); *Yesler Terrace*, 37 F.3d at 446. The Campaign has members who live in the affected area and will likely pay more when receiving services from PEMC as a result of the Department’s action. The Campaign commented on the original 166-bed application. It, however, never had the opportunity to comment on the actual 106-bed Certificate of Need that was approved.

The reduction of the project by 60 beds was not a minor revision of the application. *All* of the financial data and projections changed (and changed dramatically) when the project was reduced by 60 beds. *See* Opening Br. At 40-44; AR 768 (the Department estimated a significant *increase* in the per-bed cost of project as a result of the Department’s authorization of a 106-bed Certificate of Need). No public notice or opportunity for comment on this change was permitted.

¹⁶ Strangely, PEMC claims that The Campaign has not identified any specific procedure it was denied. PEMC Resp. at 40. It is wrong. This issue was first alleged in The Campaign’s Petition. CP 70.

PEMC points out that, by rule, the Department is authorized to take action on separate portions of a proposed project. PEMC Resp. at 40-41; *see* WAC 246-310-490(2). That rule, however, presumes that the proper pre-decisional notice and public comment process has occurred *on the proposed phases*. Were it otherwise, an applicant could undermine any meaningful public comment and hearing process by artificially inflating its original Certificate of Need application, and withholding information about the actual proposal (later presented as a “phase 1”) until after the public process concluded. If the phases are properly identified, and the public provided with the relevant financial data and projections for each phase, then the public is on notice that the Department could review the separate phases differently.

Here, however, PEMC first disclosed its “three-phase” project in its response to public testimony, submitted *after the public comment period concluded*. AR 637-38. The after-the-fact disclosure of the three-phase proposal, based upon data that was not included in the original application, prevented The Campaign from participating in a notice and public comment process on the actual Certificate of Need that was eventually approved. The Certificate of Need application became a moving target that neither The Campaign nor other members of the public could comment on in its final form. Thus, approval of the Certificate of

Need was improper and denied The Campaign (and others) their procedural rights.

Southern Maryland Hosp. Center, Inc. v. Fort Washington Community Hosp., Inc., 519 A.2d 727, 732 (Md. 1987) is precisely on point. As PEMC notes, in that particular case, like here, the applicant did not originally propose a phased project. As a result the public hearing only addressed the original proposal, not a phased project. *Id.* at 732. When the Certificate of Need agency approved a different project (37 beds instead of 120 beds), all of the required financial data and projections were missing. *Id.* Without that data, the agency could not make the statutorily-required findings. *Id.* Moreover, the hearing process was fatally flawed, since it related primarily to the original application. *Id.* As a result, the Maryland Supreme Court required the applicant to submit a new application for the different project. *Id.*

III. CONCLUSION

“[T]he fact of economic injury is what gives a person standing to seek judicial review...” *Sierra Club*, 405 U.S. at 737. The Campaign has alleged and offered testimony demonstrating that some of its members will pay more as a result of the Department’s authorization of the PEMC Certificate of Need. Some of The Campaign’s members live in the affected community and will likely use PEMC in the future. These

members will pay more when they use PEMC as a result of the Department's actions. Neither PEMC nor the Department offer any testimony to the contrary. Like the plaintiff in *Carman*, The Campaign has demonstrated standing. 357 F. Supp. at 1158. This case should be reversed and remanded to proceed to the merits.

DATED: May 8, 2008.

SIRIANNI YOUTZ
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A handwritten signature in cursive script, appearing to read "Eleanor Hamburger", written over a horizontal line.

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Certificate of Service

I certify, under penalty of perjury pursuant to the laws of the State of Washington, that on May 9, 2008, a true copy of the foregoing REPLY BRIEF OF APPELLANTS was served upon counsel of record as indicated below:

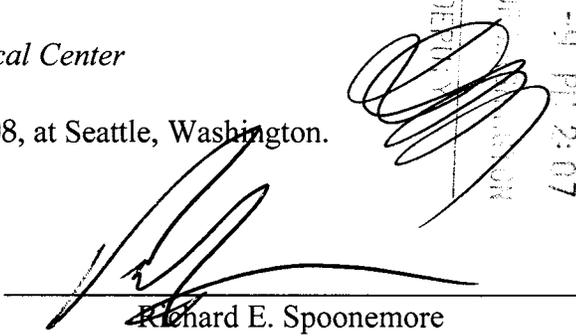
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