

FORMAL OPINION

January 13, 1976

STANLEY C. VAN NESS, ESQ.  
*Public Advocate*  
10-12 North Stockton Street  
Trenton, New Jersey 08625

FORMAL OPINION NO. 3-1976

Dear Mr. Van Ness:

You have asked whether the jurisdiction of the Division of Rate Counsel in the Department of the Public Advocate (N.J.S.A. 52:27E-16 to 20) extends to proceedings before the Commissioners of Health and Insurance wherein rates for hospital reimbursement are established pursuant to N.J.S.A. 26:2H-18, and, if so, whether the Division may assess hospitals for the costs of its involvement in the proceedings. You are advised that the Division of Rate Counsel has the power to participate in hospital rate review proceedings and to charge hospitals for the expense of such participation.

The Health Care Facilities Planning Act (N.J.S.A. 26:2H-1 *et seq.*) provides that the Commissioner of Health, in conjunction with the Commissioner of Insurance shall set the rates paid to a health care facility by government agencies and hospital service corporations. N.J.S.A. 26:2H-18. Payments by government agencies "shall be at rates established by the commissioner [of Health], based on elements of cost approved by him" (N.J.S.A. 26:2H-18(b)); payments by hospital service corporations (Blue Cross) "shall be at rates approved as to reasonableness by the Commissioner of Insurance, with the approval of the Commissioner of Health." N.J.S.A. 26:2H-18(d). See also N.J.S.A. 17:48-7. In joint effort, the Commissioners of Health and Insurance, with the approval of the Health Care Administration Board, have promulgated Guidelines to govern the rate review program for hospitals, N.J.A.C. 8:31-21.1 *et seq.*, 7 N.J.R. 502(b) (1975). These Guidelines describe in detail the factors and accounting mechanics of the process used in reviewing budget submission of health care facilities to determine the reasonableness of the rate requests. The rate established as a result of the review process represents the level at which a hospital's *per diem* inpatient expenditures can be reimbursed by hospital service corporations. The 1976 hospital rate review program Guidelines require health economics analysts in the Department of Health to review budgets and rate requests in accordance with criteria specified in the Guidelines and to develop early in the year an "administrative payment rate" which will serve as the approved interim reimbursement rate throughout the year. This rate is later adjusted, after the end of the year, based on actual costs of services provided. The major assessment of the reasonableness of a hospital's rate request in relation to the elements of cost, however, is reflected in the setting of the interim administrative payment rate rather than in the final rate. Therefore, the 1976 Guidelines allow appeals to be taken to the Commissioners of Health and Insurance after the determination of the administrative payment rate. The hearing on the appeal follows the standard rules of procedure of the Department of Health and is open to the public.

This rate-setting process furnishes a proper occasion for involvement by the Division of Rate Counsel. The Division is empowered to "represent and protect the public interest . . . in proceedings before and appeals from any State department, commission, authority, council, agency or board charged with the regulation or con-

## ATTORNEY GENERAL

trol of any business, industry or utility regarding a requirement that the business, industry or utility provide a service or regarding the fixing of a rate, toll, fare or charge for a product or service," N.J.S.A. 52:27E-18. By virtue of the rate-setting obligations imposed by the Health Care Facilities Planning Act in N.J.S.A. 26:2H-18, the Departments of Health and Insurance certainly are charged with regulation or control "regarding the fixing of a rate, toll, fare or charge for a product or service." The terms "business, industry or utility" are undefined in the Department of the Public Advocate Act of 1974 (N.J.S.A. 52:27E-1 *et. seq.*), but it appears that they were intended to be of wide scope (See Editorial, "The Proposed Department of the Public Advocate," 97 N.J.L.J., 252 (April 11, 1974)), and would include hospitals and health care facilities. The term "business" "has been said to be a very comprehensive term which 'embraces everything about which a person can be employed. . . . That which occupies the time, attention and labor of men for the purpose of a livelihood or profit.'" *Zahn v. Board of Adjustment*, 45 N.J. Super. 516, 520 (App. Div. 1957) (citations omitted). "Industry," too, has been broadly defined as "any department or branch of art, occupation, or business, especially one which employs much labor and capital and is a distinct branch of trade." 43 C.J.S. *Industry* at 39 (1951). In view of the number of people employed, the annual expenditures and amount of assets, the health care facilities system has frequently been described as a trade or industry, composed of various sectors similar in economic attributes, purposes and functions. *American Nursing Home Ass'n. v. Cost of Living Council*, 497 F. 2d 909, 914-915 (T.E.C.A. 1974); *National Labor Relations Board v. Central Dispensary & Emerg. Hosp.*, 145 F. 2d 852, 853 (D.C. Cir. 1944), *cert. denied*, 324 U.S. 847, 65 S. Ct. 864, 89 L. Ed. 1408 (1945); Somers, *Hospital Regulation: The Dilemma of Public Policy* ix (1969). Indeed, the regulatory framework of the Health Care Facilities Planning Act, including the licensing of facilities, the control over expansion of services or plant through the certificate of need program, and the rate-setting provisions, is said to be modeled upon the economic regulatory approach toward traditional public utility industries. Havighurst, "Regulation of Health Facilities and Services by 'Certificate of Need'," 59 Va. L. Rev. 1143, 1153-1154 (1973); Somers, *State Regulation of Hospitals and Health Care: The New Jersey Story* 4 (1973).

Participation in the hospital rate review process therefore is well within the jurisdiction of the Division of Rate Counsel, and may even be essential if the Division is to play a significant role in proceedings concerning applications by Blue Cross for rate increases. Over 90% of all Blue Cross premium income is devoted to payments to hospitals (Somers, *Hospital Regulation: The Dilemma of Public Policy*, *supra*, at 164), yet the hospital reimbursement rate is determined through the review program of the Commissioners of Health and Insurance and is uncontestable at the proceedings on a Blue Cross rate increase application. By participating in the process by which hospital reimbursement rates are established the Division of Rate Counsel will represent the interest of taxpayers and Blue Cross subscribers alike, as well as assist the Commissioners of Health and Insurance, in ensuring that the lowest premiums or amounts necessary for the efficient delivery of health care services are paid. See Lynch, "Reimbursement of Hospitals by Blue Cross: The Need for Subscriber Participation," 11 Colum. J.L. & Social Prob. 189, 215-216 (1975).

Certain characteristics of the hospital rate review process, while not detracting from the power of the Division of Rate Counsel to participate, do affect the timing of that participation. The interim rate is developed in the first instance by a Health

FORMAL OPINION

Department analyst who applies the specific, uniform standards incorporated in the Guidelines to the budget and requested rate submissions. A hearing open to the public is not held unless and until an appeal from the administrative payment rate is taken. It is at this stage of appeal, where there is the usual expectation of obtaining a rate in excess of that computed through the analyst's application of the Guidelines, that the Division of Rate Counsel may make appropriate and effective contributions. Indeed, the 1976 hospital rate review program Guidelines recognize the right of the Division to participate in an appeal and to take the appeal on its own accord, and provide that requests for an appeal by hospitals or their payors must be filed with the Division of Rate Counsel as well as with the Department of Health. 1976 Guidelines, p. G-15 to G-16, 7 N.J.R. 502(b) (1975).

In your request for advice you have also presented the question of reimbursement of the costs of the Division of Rate Counsel's participation in the hospital rate setting process. Funding of the work and activities of the Division is provided solely through an assessment which the Division is permitted to make upon a business, industry or utility whenever the Division is involved "in a proceeding initiated by application of a business, industry or utility . . . for authority to increase the rate, toll, fare or charge charged by it for any product or service . . ." N.J.S.A. 52:27E-19(a). No exception from some form of payment to the Division is mentioned in the statute, and since the hospital rate review process pursuant to N.J.S.A. 26:2H-18 is initiated by the hospitals' submission of a budget and rate request, the expenses of the Division's participation in the process should be borne by those hospitals which in their budget submissions request an increase in the rate approved for the previous year and which are involved in an appeal from the administrative payment rate wherein the Division participates.

The assessment which the Division is allowed to make upon the business, industry or utility may amount to "up to 1/10 of 1% of its revenues derived from its intrastate sales of the product supplied or intrastate service rendered, the rate, toll, fare or charge for which . . . is the subject matter of such proceeding . . ." N.J.S.A. 52:27E-19(a). Because the rate which is the subject matter of the hospital rate review program refers only to the amount reimbursable by government agencies and hospital service corporations, the revenue percentage permitted by N.J.S.A. 52:27E-19(a) cannot apply to the total revenues of a hospital but only to the revenues received from Blue Cross and government agencies.

In summary, you are advised that the Division of Rate Counsel is fully empowered to participate in the hospital rate review program at the time when an appeal from the interim administrative payment rate is taken, and, that the Division may charge those hospitals applying for approval of rate increases for the costs of its participation in the proceeding.

Very truly yours,  
WILLIAM F. HYLAND  
*Attorney General of New Jersey*  
By: CHARLOTTE KITLER  
*Deputy Attorney General*