MINUTES OF THE MEETING HUMAN SERVICES AND AGING COMMITTEE MONTANA STATE HOUSE OF REPRESENTATIVES

January 28, 1985

The meeting of the Human Services and Aging Committee was called to order by Chairperson Nancy Keenan on January 28, 1985 at 3:10 p.m. in Room 312-2 of the State Capitol.

ROLL CALL: All members were present.

SENATE BILL NO. 71: Hearing commenced on Senate Bill No. 71. Senator Tom Hager, District #48, sponsor of the bill, stated that an act to generally revise the procedure for reviewing certificate of need applications for health care facilities; eliminating appeals of the Board of Health and Environmental Sciences was needed.

Proponent William E. Leary, President of the Montana Hospital Association presented his testimony in support of Senate Bill No. 71. Mr. Leary stated that the nursing homes and hospitals in Montana are perhaps more directly affected by the certificate of need process and have over this past year, been concerned with several aspects of the law, including but not limited to the appropriate role for the Montana State Board of Health and Environmental Sciences in the process, as well as extremely lengthy processes an applicant must go through to eventually receive approval from the Board of Health. Leary stated that in August, 1984, the Montana Hospital Association adopted a resolution which expressed to the Governor of Montana, our dissatisfaction with the Montana Board of Health's actions and they also expressed the feeling that the Montana Board of Health to be the first appeals board. The Governor authorized a committee on certificate of need. It was this committee that recommended the removal of the Montana Board of Health from the certificate of need process. Mr. Leary also supplied a witness statement and written testimonial and is attached as Exhibit 1.

Proponent David B. Lackman, Montana Public Health Association indicated that a control of the cost of medical care was needed. Lackman also indicated that in the past, it has not been unusual for the Montana Board of Health and Environmental Sciences to bow to local political pressures; and to reverse decisions of the department. This has resulted in the construction of facilities which are not necessary. The department's decisions are based upon careful study and hearings in the Montana Public Health Human Services and Aging Committee January 28, 1985 Page 2

Association. Mr. Lackman supplied a witness statement and is attached as Exhibit 2. Rose Skoog, Montana Health Care Association supports this bill and wishes to concur that a shortening of the process of the certificate of need would be appropriate and beneficial. Written testimony was supplied by Maureen O'Reilly, Vice President of the Montana Home Health Agencies and is attached as Exhibit 3.

Proponent Ena Simpson, American Association of Retired People indicated that people were not receiving the care Rural areas were suffering. This bill affects they needed. Ms. Simpson provided a witness statement and is everyone. attached as Exhibit 4. Jerome T. Loendorf, representing the Montana Medical Association supplied a witness statement and a day by day chart of the certificate of need process. Between the days of receiving the initial letter of intent until the final process is achieved is 405 days. This needs to be streamlined. Exhibit 5 reflects this process. Joe Upshaw, American Association of Retired People indicated his support. Shirley Thennis, representing the Montana Nurses Association indicated support. Jim Foley, Montana Health Service Association supports this bill. Representative Melvin Williams indicates his support.

Opponents included Dr. John McGregor, a member of the State Board of Health. McGregor stated that this Board consisted of seven members. The certificate of need program, since its inception, has been a cumbersome, expensive, long, drawn-out process. Its efforts to limit health care facility construction and health care cost has been a failure. Exhibit 6 indicates Dr. McGregor's opposition. Howard Toole, a member of the Board of Health, said that Board members had heard seven cases this last year and opposes this bill.

There being no further proponents or opponents, Senator Hager closed the discussion.

Representative Gould questioned Mr. Leary as to whether or not any state had lost any funds because of certificate of need and the answer was no. Representative Wallin questioned Mr. Toole as to whether every case was always considered a new case and the answer was yes. Representative Bergene asked Mr. Leary if it was calculated to keep the Board of Health out of the certificate of need process. The answer is no. Also, could the certificate of need be shortened - the answer being possibly. Human Services and Aging Committee January 28, 1985 Page 2

Representative Wallin questioned the number of members in the Board of Health and was given the figure of seven. Representative Phillips asked if there were any cases that had gone to District Court. Ten cases have gone to the Board of Health and four have gone to court. Representative Hansen questioned Mr. Toole as to the length of time to appeal a case and Mr. Toole responded that cases vary. Representative Simon asked Mr. Toole if he considered that the State Board of Health had saved money by their process and the answer was yes. Representative Gilbert asked if the request for new facilities was a "want" and not necessarily a "need". The response to this question was yes, occasionally.

There being no further discussion, Chairperson Keenan closed the hearing.

EXECUTIVE SESSION

ACTION ON HOUSE BILL NO. 165: An amendment to change the word "shall" to "may" on page 2, line 10 was discussed. A uninimous vote to DO PASS this amendment was decided. Representative Bradley suggested that a sub-committee be formed to discuss this bill into further detail and a meeting was scheduled for January 31, 1985 at 4:30 p.m. in Room 437 with Representative Connolly presiding. Representative Hansen, Simon and Phillips will also serve on this sub-committee.

ADJOURN: There being no further business before the Committee, the meeting was adjourned at 4:56 p.m.

Nancy Keenan NANCY KHENAN, Chair

DAILY ROLL CALL

HUMAN SERVICES AND AGING COMMITTEE

49th LEGISLATIVE SESSION -- 1985

Date January 28, 1985

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NAME	PRESENT	ABSENT	EXCUSED
NANCY KEENAN	Χ		
BUDD GOULD	X		
TONI BERGENE	X		
DOROTHY BRADLEY	X		
JAN BROWN	X		
BUD CAMPBELL	X		
BEN COHEN	Х		
MARY ELLEN CONNELLY	X		
PAULA DARKO	X		
BOB GILBERT	X	- 789	
STELLA JEAN HANSEN	X		
MARIAN HANSON	X		
MARJORIE HART	X	·	
HARRIET HAYNE	X		
JOHN PHILLIPS	X		
BRUCE SIMON	X		
STEVE WALDRON	X		
NORM WALLIN	X		

EXHIBIT 1 January 28, 1985

TESTIMONY ON SB 71 PRESENTED TO HOUSE HUMAN SERVICES AND AGING January 28, 1985

Presented By

William E. Leary, President Montana Hospital Association

Representative Keenan, Members of the Committee: For the record, I am Bill Leary, president of the Montana Hospital Association, the spokesman for the 58 general hospitals in Montana, in support of Senate Bill 71 - amendments to the Montana Certificate of Need law.

The hospitals and the nursing homes in Montana are perhaps more directly affected by the certificate of need process, and have over this past year been concerned with several aspects of the law, including but not limted to, the appropriate role for the State Board of Health in the process, as well as the extremely lengthy process an applicant must go through to eventually receive approval from the State Department of Health.

In addressing the appropriate role of the State Board of Health, we in the hospital field took note of several hearings conducted before the State Board of Health where the State Board did eventually overturn its own Department's recommendation. Most notably was the Missoula General Hospital issue and the approval of an outpatient surgical center in Bozeman. It is not a question of whether the Board of Health members, individually or collectively, were right or wrong in their decisions. Unfortunately they have been placed in a position much like an umpire at a baseball game. No matter how they called the play, 50 percent of the crowd will cheer and 50 percent will boo.

The original concept of the involvement of the State Board of Health on a reconsideration hearing was to make certain the State Department of Health, the Montana Health Systems Agency, and all others involved in the health care planning function, had utilized procedures which were accurate and legal. Further, that the decisions rendered were based upon the evidence presented at the Montana Health Systems Agency subhearing and later at the Governing Board of the HSA.

Among the forty-five states that still have a CON law, it is unusual to find the level of authority available to the Montana Board of Health in these CON proceedings. Specifically, the authority of the Board of Health should have been confined to determining if the process or procedure used in arriving

Testimony-SB 71 - presented by W.E. Leary, MHA/2

at the decision follows the law. If the Board discovers any error or flaw in the process, the Board should only be allowed to remand the matter back to the Health Systems Agency or Department of Health for rehearing.

Many states do not allow the introduction of new evidence at appeal only the record as constituted at the respective public hearings is examined. Unfortunately, in the state of Montana, the State Board of Health in our opinion has gone beyond its authority and conducted de novo hearings and put the Board members, individually and collectively, in a situation ripe for political persuasion, as well as in a position of judge and jury over technical matters about which they had very little specific knowledge. I sympathize with the Board members when they were placed in this position and did eventually take action to overrule their own department. However, I feel they took action based upon very limited legal and significant knowledge of all the facts inolved in the case as the Board was never involved in any of the hearings which are the strong basis of the entire process.

The Montana Hospital Association in August of 1984 adopted a resolution which expressed to the Governor of Montana our dissatisfaction with the State Board of Health's actions and further, expressed the feeling that the Montana certificate of need law needed to be amended to remove the obligation of the State Board of Health to be the first appeals board. In that resolution we requested that the Governor appoint a committee to fully investigate the legal responsibilities of all factions of the health planning process and if necessary, draft legislation to remedy the situation. I have enclosed a copy of our resolution for your review.

As a result of our action as well as others in the state, the Governor authorized a committee on certificate of need which met in October of 1984 for the purpose of reviewing the certificate of need law under the auspices of the Statewide Health Coordinating Council and the State Department of Health, along with the support of the Montana Health Systems Agency. These groups met with several providers to see what could be done in addressing this problem. At the first meeting of the committee on October 18, 1984, I was amazed to see that all of the parties, providers, HSA representatives, State Department of Health representatives, members of the staff of SRS and even the staff member from the Governor's Office, were in unanimous agreement to remove the de novo powers of the State Board of Health, and actually, a recommendation for the complete removal of the State Board of Health from the CON process was achieved.

Testimony-SB 71 - presented by W. E. Leary, MHA/3

The committee members also looked at the law in its entirety in an effort to see if some time could be shortened from the process and eventually came up with a proposal which does cut 30 days from the entire process.

Consequently, Senate Bill 71, before you today, is the expression of a number of health care planning officials with adequate involvement of the major provider groups, and will if adopted, establish a new procedure which will shorten the entire process by 30 days and still give the applicant due process. The public is assured that the application, if finally approved, was conducted in a legal manner without emotion and political pressure being exerted on a group of seven individuals.

I would also point out that the law as it was adopted in 1983, requires a July 1, 1987 sunset which is not an unusual approach as our review across the nation of CON laws, shows many of them to be sunseted in the future. There are currently five states that have allowed their CON law to sunset, the latest was Utah on December 31, 1984.

In all fairness to the applicants, the providers, the state of Montana, and more importantly the consumers of health care, Senate Bill 71 should be passed. This will give the State Department of Health the authority to develop the rules so we can put this process back into its original intent and remove it from the political arena. By working together we can all achieve a health care delivery system which is planned by Montanans in Montana for the benefit of all our citizens.

In closing I would remind the members of this committee that Senate Bill 71 passed the Senate on a vote of 46-1.

Staffers aghast at board ruling

By TOM COOK IR State Bureau

The state Health Board granted Missoula General a certificate of need for a new hospital with "complete disregard for the facts," George Fenner, head of the Health Department's hospital and medical facilities division in Helena, said Monday.

Health Department Director John Drynan said the board's Friday decision may leave it on difficult legal ground in the future should it be challenged in court for denying a certificate based on technical data showing it isn't needed.

"The department won't be in that position because we followed the state health plan," he said.

Fenner said the board's decision to grant Missoula General permission for a new hospital despite strong recommendations from Drynan and his staff "has weakened the crectoility of the board."

The certificate-of-need process is designed to help hold down health care costs by using nationally accepted planning and growth formulas to determine whether new medical facilities and equipment is in the best interest of consumers.

The Health Department recommended against the 57-bed request by Missoula General because data showed that there was a need for no more than 30 additional beds in Missoula by the 1990s. The board voted Friday to allow a 50-bed facility, which was suggested as a compromise by Missoula General officials.

Fenner said statements by Health Board Member J. Howard Toole of Missoula about the historical significance of Missoula General and claims that there is "universal support in Missoula" to allow it to be modernized apparently influenced the board.

"We put a lot of time and effort and work into the Missoula General case," Fenner said. "And in the end it was strictly decided on an emotional pitch by Toole with complete disregard for the facts."

Fenner said he intends to begin meeting with health officials and the state Health Systems Agency - a federally supported citizen health care planning group - to determine the ramifications of the board's decision.

"It has definitely hurt the certificate-ofneed process," Fenner said.

Drynan said his department will continue to deal with certificate-of-need requests as it has in the past. "By law, the board's decision becomes the decision of the department," he said.

The department found that only 30 more general medicine and surgery beds, which are the type of beds planned for Missoula General, are needed to supplement the existing 210 such beds in Missoula's other two hospitals — St. Patrick and Missoula Community. Those two hospitals also are licensed for 122 other beds for specialty health care needs.

RESOLUTION

WHEREAS, the Montana Hospital Association and its respective member hospitals have been and are in support of effective health care planning through the CON legislation; and

WHEREAS, the Montana State Board of Health has taken recent action to overturn the State Department of Health's recommendations on several CON proposals; and

WHEREAS, this action has literally destroyed the effectiveness of the grassroots health planning functions in the state of Montana, the Montana State Department of Health, the Certificate of Need law, and has placed health care planning in the hands of seven individuals appointed by the Governor of the State of Montana;

NOW, THEREFORE, BE IT RESOLVED, that the president of the Montana Hospital Association be authorized to express to the Governor of the State of Montana our dissatisfaction with the State Board of Health's actions and express the feeling that the Montana Certificate of Need law needs to be amended to remove the obligation of the State Board of Health to be the first appeals board;

AND, FURTHER, to express the view of the Montana Hospital Association membership that a Governor's study be commissioned to fully investigate the legal responsibility of all factions of the health planning process, and, if necessary, draft legislation to remedy the situation.



Montana Hospital Association

(406) 442-1911 • P.O. BOX 5119 • HELENA, MONTANA 59604

September 18, 1984

Governor Ted Schwinden Executive Office, Room 204 State Capitol Helena, Montana 59620

Dear Governor Schwinden:

The Board of Trustees of the Montana Hospital Association, the elected leadership of the hospital industry in the state, have requested that I convey to you our concerns regarding this past year's actions of the <u>State Board of Health</u> in overturning several decisions of the State Department of Health on Certificate of Need applications.

The MHA Board was unanimous in expressing a feeling that the <u>State Board</u> of <u>Health</u> has gone beyond its authority in conducting de novo hearings as it is our understanding that other state boards primarily consider findings, rather than conducting a completely new hearing.

We are also concerned that the actions of the State Board of Health have literally destroyed the effectiveness of the grassroots health planning functions in the state of Montana and have certainly decreased the effectiveness of the State Department of Health in conducting a reasonable planning effort for the health care facilities and the people of the state. It is obvious to us that the Montana Certificate of Need law has lost considerable credibility with the providers, the public, and a number of legislators, who have privately expressed the feeling that perhaps this entire law needs to be repealed.

It is not the current position of the Montana Hospital Association to seek a repeal of the CON law, although if such a bill is introduced, I know a number of our hospital administrators and trustees would encourage our support of a repeal. Rather than seeking an outright repeal, it is the position of the Board of Trustees of the Montana Hospital Association that you establish a special Governor's study of the health care planning process to fully investigate the legal responsibility of all factions of the health planning process and, if necessary, draft legislation to remedy the situation. This Association's first position is that an amendment needs to be presented which would remove the obligation of the State Board of Health as the first appeals board. This infers the State Board of Health's role should be completely eliminated from the Certificate of Need law, and a provider receiving a denial from the State Department of Health could immediately go to court and request a reversal of the Department's decision.

Governor Ted Schwinden

I respectfully request that if you should establish a special commission to study this whole complex health care planning process, that you invite representatives of major health care provider groups as members of such a commission. I would suggest you specifically invite representatives from the Montana Hospital Association, Montana Medical Association and the Montana Health Care Association, along with your own State Department of Health officials, to attempt to arrive at some reasonable and workable amendments. The advice we in the provider sector could offer towards rectifying what has become an emotional and political problem, would be invaluable.

For your review, 1 am enclosing a letter, a newspaper article and the resolution adopted by the Montana Hospital Association Board of Trustees.

I hope to hear from you in the near future.

Sincerely yours, William E. Learv President

WEL:ml Enclosures cc: John Drynan, M.D. Jim Foley, MHSA Brian Zins, MMA Rose Skoog, MHCA MHA Board of Trustees



TED SCHWINDEN GOVERNOR State of Montana Office of the Governor Helena, Montana 59620

October 4, 1984

Mr. William E. Leary, President Montana Hospital Association P.O. Box 5119 Helena, MT 59604 Dear Mp Deart.

I understand that a committee on certificate of need, similar to what you proposed, was formed at last week's meeting of the Health Systems Agency (HSA) and the State Health Coordinated Council (SHCC). I also understand that the Montana Hospital Association will be represented on that committee.

I look forward to seeing this committee's recommendations on the CON process. Thanks for the suggestion.

Sincerely,

and

TED SCHWINDEN Governor

SURVEY OF MHA MEMBERS' POSITIONS ON CHANGES TO THE MONTANA CON STATUTE

- 1. The Department of Health is considering a number of changes to the CON process. What is your position on the following proposals:
 - A. Eliminate the function of the State Board of Health in the CON process and have appeals of Department decisions go directly to district court.

Support X Oppose

Other comments: The past decisions of the Board of Health have consisted mainly of reversals of decisions made at the local, subarea level and at the State Department of Health level.

The Board has not acted in a manner that promotes consistency with the State Health Plan. The past decisions of the Board seem to be more political than appellate in nature.

When reviewing the appeals heard before it, the Board seems to choose not to address whether or not the appellant was aggrieved during the CON process. The Board appears to rely upon the expertise of the DHES and MHSA staff as conveyed through their recommendations about each CON proposal.

They appear to allow another hearing to be held and make a decision that has no substantial basis.

Section 50-5-306 (3) of the CON law stipulates that the Board make and issue its decision supported by written findings of fact and conclusions of law.

It does not appear that the members of the Board have the qualifications or expertise to carry out this task. A district court is charged with the same task and does have the expertise to complete it.

The appellate duties assigned to the Board of Health seems to be an unnecessary level of decision making authority in the CON process.

Many of these concerns were voiced by Ed Zaideicz who resigned from the Board (Standard, October 13, 1984).

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EXHIBIT 2 January 28, 1985

WITNESS STATEMENT

NAME DAVID B. LACKMAN BILL NO. SB71 ADDRESS 1400 WINNE AUE. HELENA MT 5961/DATE 1/28/85 WHOM DO YOU REPRESENT? Montana Public Health ASSN. OPPOSE SUPPORT X _____ AMEND PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY. Comments: I am David LACKMAN, /obbyist for the Mont. Public Health Assn. We support SB71. It is important to the Controlling of the Cost of Medical Care. In the past it has not been Lenusual In the past it has not been Lenusual for The Board of #1th. & Ewu. Sci, To bow to local political pressures; and to veverse decisions of the Department. This has resulted in the construction of facilities which are not necessary, he Dept's decisions are based on Careful study y hearings. Competition among medical cave facilities does not lower costs.

EXHIBIT 3 January 28, 1985

SENATE BILL 71

"AN ACT TO GENERALLY REVISE THE PROCEDURE FOR REVIEWING CERTIFICATE OF NEED APPLICATIONS FOR HEALTH CARE FACILITIES; ELIMINATING APPEALS TO THE BOARD OF HEALTH AND ENVIRONMENTAL SCIENCES: AMENDING SECTIONS 50-5-302 AND 50-5-306, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

Senate Bill 71 has been introduced to bring to light the problem with the current monitoring system granting the right to initiate health care facilities in communities where the need is not met.

The Montana Association of Home Health Agencies supports SB71. The Association members feel that the current process is too lengthy and drawn out. By eliminating appeals to the Board of Environmental Sciences the process will be shortened and therefore less confusing and more effective. The Board of Health and Environmental Sciences need not be involved in reiterating the same testimony and process the Department of Health and Environmental Sciences had just completed. If there is still disagreement with the Department of Health and Environmental Sciences decision then the case should be taken out of the States hands and into civil court. There is no reason for the State to be pouring money into duplication. Thank you for your time and consideration in this important matter.

Maureen O'Reilly Vice President of MAHHA P.O. Box 5059 Helena, Montana 59604 443-4140

EXHIBIT 4 January 28, 1985

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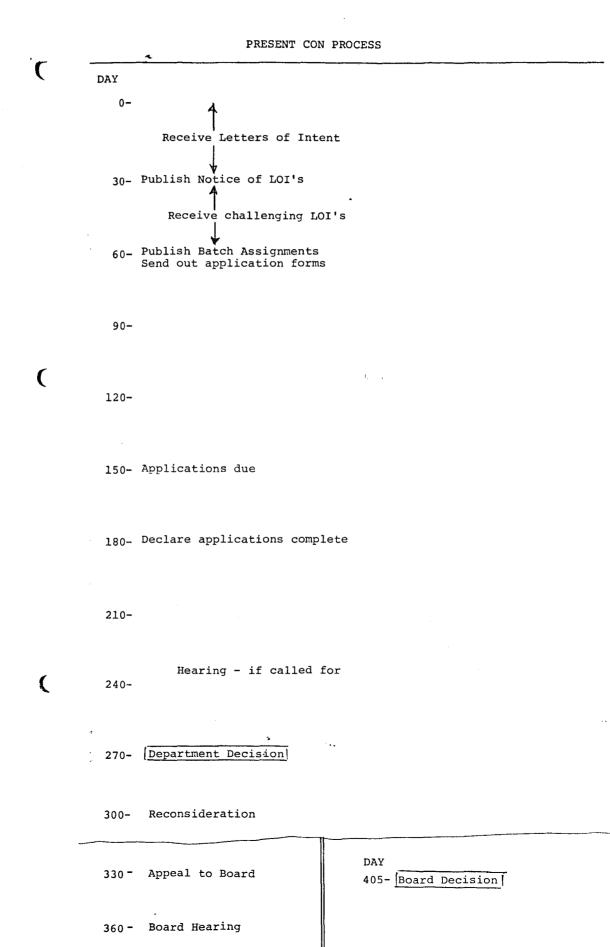
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WITNESS STATEMENT

NAME Loendort, Jerome T.	
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EXHIBIT 5 January 28, 1985



Madam Chairman and Members of the Health and Human Services Committee:

I am Dr. John McGregor from Great Falls, Montana. I appear before you today in opposition to Senate Bill #71, the contents of which I am sure you are all familiar with. On January 18, at our last board meeting, we found that this bill had cleared the Senate Public Health and Welfare Committee and had been approved by that body. It became quite imperative when we learned the contents of this bill that we, as board members and myself as Chairman, appear before your committee to explain our position regarding this loss of appeal authority in the Certificate of Need Program. As you know, in past years, the State Board of Health has been the appeal board for many decisions including the Certificate of Need Program. Lately it seems that we have had to reverse decisions made by the Department, some of which have been quite controversial and, incidentally, some have been in the City of Helena. This, it seems has resulted in an effort to remove the State Board of Health as a final appeal board and refer all CON matters to the district court. This, I think, would be a mistake.

First of all, let me give you the composition of the State Board of Health. We are seven members consisting of two doctors, two lawyers, a veterinarian, and two people who are interested in health care. We feel that as appointees by the Governor, we represent the people of the State of Montana, and I am sure you committee members feel the same way. The Certificate of Need Program, since its inception, has been a cumbersome, expensive, long drawn out procedure. Its efforts to limit health care facility construction and health care cost in my opinion, has been a failure. Fortunately, of late there has been some consolidation of the CON mechanism by the combination of department and HSA hearings in an effort to expidite the process. Also, I might add that the CON mechanism terminates in 1987. As you know, at the present time, decisions by the Board can be appealed to the district court, if the applicant so desires. This does not happen too often. Senate Bill #71 refers all CON appeals to the district court rather than to our board. It does not designate whether this will be a formal hearing or findings of fact and conclusion as determined by a district judge. The appeal to our board is a formal hearing in which witnesses testify and both parties have an open form to present their case.

You must realize that as board members, we have spent considerable time and effort in rendering these decisions and feel that at no time should we rubber stamp all decisions by the department. We members feel that we have performed to the best of our ability in our obligation as an appeal board. Therefore, I wish you, as members of this committee, would consider Senate Bill #71 as totally unnecessary in its efforts to remove the board as an appeal body for the CON program.

WITNESS STATEMENT

NAME	Dr John MLGregor	BILL NO.
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VISITOR'S REGISTER

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IF YOU CARE TO WRITE COMMENTS, ASK SECRETARY FOR LONGER FORM.

WHEN TESTIFYING PLEASE LEAVE PREPARED STATEMENT WITH SECRETARY.