

Virginia Department of Health
Certificate of Public Need (“COPN”)
Informal Fact Finding (“IFFC”) Policies and Procedures

1. Purpose: Consistent with the requirements of Article 1.1 of Chapter 4 of Title 32.1 of the Code of Virginia, applicants seeking a COPN routinely appear at IFFCs under circumstances prescribed therein and in regulation. This document sets forth the Department’s Adjudication Unit’s policies and procedures for IFFCs conducted on or relating to COPN applications.

2. General Policies:

A. IFFCs on COPN applications will be conducted with the highest level of administrative due process allowed by resources and reasonableness under the circumstances, and consistent with applicable Virginia law, including the Virginia Administrative Process Act (Va. Code Section 2.2-4000 *et seq.*) and Section 32.1-102.6 of the Code of Virginia. Applicants and good cause petitioners may, but need not be, represented by legal counsel;

B. Whenever possible, applicants should allow IFFCs to be conducted on the date identified in the Division of Certificate of Public Need’s (“DCOPN’s”) customary letter acknowledging receipt of an applicant, or applicants’, responses to completeness review questions, in conformance with subsection I of Section 32.1-102.6 of the Code of Virginia (which gives only the applicant, or applicants, the authority to “extend any time period” relating to the agency’s review of an application, or applications);

C. When an applicant notifies, or applicants notify, the adjudication officer of an intent to continue the IFFC, *i.e.*, hold it on an later date, the applicant, or applicants, **will be required to agree that any extensions** of time involved or made necessary by continuing an IFFC **will not be the cause of a statutory deemed approval** of any application (otherwise, the IFFC must be held on the date identified in the letter acknowledging responses to completeness questions);

D. Brevity in the submission of written submittals, discussion and testimony elicited by counsel at an IFFC is encouraged. Presenting concise cases (at the IFFC and in written submittals), free of cumulative or unnecessary evidence and argument, generally leads to more timely case decisions on applications for a COPN;

E. While no rules of evidence apply to IFFCs, all evidence and argument presented orally or in writing should be relevant and germane to the issues involved in making a public need determination under the law;

F. The adjudication officer reserves the right to manage the oral proceedings, and to make calls on procedural issues, or other ad hoc matters, as they are presented or otherwise arise before, during or after an IFFC or in relation to post-IFFC submittals, require and are appropriate for immediate resolution, or when resolution would result in the effective conduct of adjudication. The adjudication officer states his intent to do so (i) consistent with historical, customary practice that has been followed for conducting and holding IFFCs and overseeing the receipt and distribution of post-IFFC submittals, and (ii) in conformance with overriding principles of administrative due process;

G. Requests for subpoenas or requests for the production of other evidence, made pursuant to Section 2.2-4022 of the Code of Virginia, should be made in writing and submitted to the adjudication officer as soon as is practicable, but in no case less than four working days before an anticipated IFFC is to occur.

3. Policies and Procedures for the Conduct of an IFFC on a COPN application, or COPN applications:

A. In order to comply with Section 2.2-4019 (B) of the Code of Virginia, the administrative record regarding an application, or applications, as routinely compiled by DCOPN during review and as it exists at the time of the IFFC, will be made available to an applicant, or applicants, on the day of the IFFC, and will be produced to the adjudication officer at the same time, unless workload in DCOPN requires it to be produced shortly thereafter, *i.e.*, within several working days and well before the close of the administrative record.

B. All persons participating in, attending or observing an IFFC will be asked to identify themselves in writing on an attendance roster;

C. IFFCs on COPN applications will be transcribed, as has been customary and deemed necessary by applicants and the Department for years;

D. The adjudication officer will convene and conduct an IFFC. He may make brief introductory and context-defining comments, and may, at any time during the IFFC, ask questions intended to make the IFFC predictable and economical or to clarify evidence and argument;

E. The adjudication officer will acknowledge counsel and witnesses before they speak;

F. No cross-examination of witnesses or argument between counsel or parties will occur;

G. Any objection raised will be taken under advisement, and will be addressed in the adjudication officer’s recommended decision, as appropriate;

H. In an IFFC on a single application, the applicant will be provided an opportunity to present sworn testimony of witnesses and written exhibits (which will become part of the record);

I. In an IFFC on competing applications, each applicant will be provided an opportunity to present sworn testimony of witnesses and written exhibits (which will become part of the record). Applicants will present their cases in an order determined by their assigned COPN Request Numbers;

J. Following the presentation of an applicant’s case, or applicants’ cases, any representative of an appropriate regional health planning agency will be provided an opportunity to present orally the recommendation, or recommendations, of that regional agency’s board, and to discuss the application, or applications, generally;

K. The health planning project analyst who wrote DCOPN’s staff report on an application, or applications, or another representative of, the Department’s Division of Certificate of Public Need (“DCOPN”) will be provided an opportunity to present orally the staff recommendation, and to discuss the application, or applications, generally;

L. Toward the end of an IFFC, the adjudication officer, in light of existing adjudicatory workload at the Department and the volume of testimony and written exhibits submitted in the IFFC, may ask the applicant, or applicants, whether the statutory deadlines for subsequent submittals, the close of the adjudicatory record, and the due date for the Commissioner's case decision may be extended to later dates;

M. In an IFFC on a single application, (i) a date for the close of the record (by which date the applicant may submit additional information and proposed findings of fact and conclusions of law), and (ii) a date by which the Commissioner's case decision is to be made will be discussed, identified and memorialized toward the end of the IFFC transcript;

N. In an IFFC on competing applications, a schedule of dates for the sequential submittal of (i) additional written information from the applicants, (ii) proposed findings of fact and conclusions of law prepared by the applicants, (iii) any rebuttal seen as necessary for submittal by an applicant (which will define the close of the adjudicatory record), and a date by which the Commissioner's case decisions are to be made will be discussed, identified and memorialized toward the end of the IFFC transcript.

4. Policies and Procedures for the Conduct of an IFFC on a Good Cause Petition: An IFFC to hear a petitioner attempting to show good cause shall precede an IFFC on an application or applications. It should be brief. The petitioner will be allowed to address directly, and discuss concisely, only those issues raised in the petition; such IFFCs will be held distinct and separate from an IFFC to on an application or applications. A person attempting to show good cause will be notified if their petition is successful before the review of the application, or applications, on their merits, is undertaken.

5. Policies and Procedures for the Process Following an IFFC:

A. The applicants, DCOPN and any other party to the IFFC will receive a copy of a transcript of the IFFC with sufficient time to review and reference it in making post-IFFC submittals according to an agreed-to schedule;

B. The adjudication officer will have no discussion regarding any application with any applicant or counsel to an applicant (or good cause petitioner), unless an applicant, or all applicants (and any other parties to the proceeding) are included in any such discussion;

C. Applicants will file the subsequent submittals as discussed above (with all competing applicants and other parties to an IFFC, including DCOPN, provided with concurrently sent copies);

D. Post-IFFC submittals may be made by hard copy, or by email, and **must be received physically or electronically by the Adjudication Unit of the Office of the State Health Commissioner by 5 p.m. on the date of the agreed-upon close of the record** in order to be considered in the preparation of an adjudicated recommended decision. **(Physical mailing address: Douglas R. Harris, Adjudication Officer, Virginia Department of Health, Madison Building, 13th Floor, 109 Governor Street, Richmond, VA 23219; email address: doug.harris@vdh.virginia.gov.)** If a submittal is made by email, it should be readily identifiable as coming from a recognized counsel's email account, or identified in the body of the email as filed on behalf of recognized counsel, identified by name. If a submittal is made by email only, a statement to that effect should be in the body of the transmitting email. Hard copy submittals are appreciated;

E. After the close of the record, the adjudication officer will review the adjudicatory record as it stands and will prepare a written recommended decision for the Commissioner, allowing sufficient time for the Commissioner's review and consideration of a recommended decision on the merits of an involved application, or applications;

F. The Commissioner will issue a case decision on an application, or applications, by the initial date on which such a decision is, or decisions are, due to be issued, as agreed-to and memorialized in the IFFC transcript as discussed above, unless an extension of an additional 25 days, upon appropriate notice, is necessary to allow the Commissioner time for full consideration (as is permissible by statute).