

MEETING OF WORKERS' COMPENSATION  
INDUSTRIAL COUNCIL

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INDUSTRIAL COUNCIL MEMBERS PRESENT:

BILL DEAN, CHAIRMAN  
DAN A. MARSHALL  
WALTER C. PELLISH (via telephone)  
RICHARD SLATER  
BILL KENNY

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DECEMBER 7, 2006  
3:00 P.M.

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CHARLESTON CIVIC CENTER  
ROOMS 207-209  
CHARLESTON, WEST VIRGINIA

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*Certified Court Reporter*

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1 CHAIRMAN DEAN: I'll call the meeting to  
2 order.

3 We'll take the roll. Mr. Marshall is  
4 present and Mr. Pellish is on the phone today.

5 MR. PELLISH: Right.

6 CHAIRMAN DEAN: And I'm Bill Dean and  
7 I'm present.

8 So we need approval of the previous  
9 minutes of the previous meeting.

10 MR. MARSHALL: So moved.

11 MR. PELLISH: Seconded.

12 CHAIRMAN DEAN: Motion made and seconded  
13 to approve the minutes of the previous meeting. Any  
14 questions on the motion? All in favor, aye?

15 MR. MARSHALL: Aye.

16 MR. PELLISH: Aye.

17 CHAIRMAN DEAN: None opposed. The ayes  
18 have it.

19 We're going to the Office of Judges  
20 Report. Judge Leach?

21 MR. LEACH: Mr. Chairman, Mr. Marshall,  
22 Mr. Pellish, Deputy Commissioner, I emailed you the  
23 first four -- or excuse me -- five pages of this  
24 report, the main part of the report, except for the

1 dry numbers, on Tuesday. Realizing the shortage of  
2 time, I apologize for hand-delivering the rest of the  
3 report today. And I will put it out in the mail  
4 tomorrow to the members of the Council that are not  
5 present.

6                   Going over the statistical summary  
7 briefly, we start out with an analysis of the number  
8 of protests acknowledged, which continue to be down  
9 from our historic levels. For the year it looks like  
10 we're going to average around 1,250 protests a month.  
11 That's approximately half of what we did at the high  
12 water mark and about 60, 65 percent of what we're set  
13 up to accommodate.

14                   Consequently, because of the drop in  
15 inventory, the number of issues resolved is down from  
16 25 -- almost 26,000 last calendar year to about -- it  
17 projects to about 19,000 this calendar year.

18                   And in Paragraph C or Chart C, the  
19 number of pending issues is now down to under 9,000,  
20 whereas we were over 18,000 when we were audited by  
21 the Board of Managers in the summer of 2005.

22                   Now, possibly as a consequence of the  
23 drop in the inventory, our performance measures have  
24 increased or improved. In November the protests were

1 acknowledged in a timely fashion in 98.22 percent of  
2 the cases, which is far better than we did last year.  
3 The graph shows that since April it hit or exceeded  
4 what we did for the three years previous to that.

5           Also, turning on to the fourth page, our  
6 final decision timeliness for the year to date is a  
7 bumping 50 percent of all decisions have been done  
8 within 30 days of the assignment to the judge. And  
9 for November, less than one percent were untimely.  
10 For the year to date we're at 96.7 percent compliant  
11 with our rule, which is a slight reduction from the  
12 three figures -- less than one percent from the three  
13 years previous to that.

14           And then the most pleasing statistic is  
15 the final one, and our time standard compliance  
16 overall performance is up to 85.5 percent for the  
17 year to date and that rule requires an 80 percent  
18 mark, so we have a comfortable margin of success  
19 there.

20           I'll then turn to some narrative  
21 matters, and I reported to you that we are undergoing  
22 some assignment changes and some study of our  
23 processes because of the change from BrickStreet  
24 Administrative Services to Cambridge Integrated

1 Services, which took effect December 1.

2           We have set up our software and our  
3 templates to now reflect Cambridge as the  
4 administrator for the old cases and they will receive  
5 mailings addressed to them. There's a process by  
6 which we serve -- we shared information with  
7 BrickStreet, so that when we issued an order or a  
8 notice of any type, it electronically transferred to  
9 BrickStreet Administrative Services. That process I  
10 do not believe will continue with Cambridge; they  
11 don't have the facilities.

12           So I think it looks like we're going to  
13 end up starting to send them mailed copies, paper  
14 copies of our decisions, which is not a problem for  
15 us. Our programmers have already set that up and, in  
16 fact, the one time we had to go out and blank that  
17 out to keep from printing a copy for BrickStreet,  
18 that we did not send to BrickStreet because they got  
19 the electronic version.

20           So we've also been asked to study the  
21 possibility of doing -- picking up BrickStreet's  
22 scanning process, which they used to scan all  
23 documents received by BrickStreet, whether they were  
24 old fund or new fund. We were asked to study the

1 possibility of scanning for the Insurance  
2 Commissioner the old fund documents that would now be  
3 going to Cambridge.

4           So we're making a study of that. It  
5 would obviously involve some additional hardware and  
6 some additional personnel. We will not be adding  
7 employees, but what we would do is take some of our  
8 vacancies that we haven't filled, transferring or  
9 reclassifying those into image operators and then  
10 posting those positions and hiring.

11           The problem that that creates  
12 administratively is that the Civil Service hiring  
13 system, getting the position reclassified, posting  
14 it, receiving applications, scheduling interviews --  
15 before scheduling interviews having the applicants  
16 reviewed to see who is qualified and who may not be,  
17 scheduling interviews, making a selection, notifying  
18 the Division of Personnel and HR, getting that  
19 approved tend to take three to four months. So  
20 during that time we'd have to find temporary staff  
21 and our own resources to do the scanning. It's 8,000  
22 documents a week, and it couldn't sit there and pile  
23 up for three or four months. We'd have to be  
24 scanning with some temporary resources until we could

1 get new employees on board and trained.

2                   So that's the immediate and only  
3 negative that I see to taking on that job duty. And  
4 that, of course, would be a call of the Insurance  
5 Commissioner. We're just telling them what it would  
6 cost for us to do it and what would it be -- what the  
7 cost would be for it so they could make some analysis  
8 of that.

9                   The only other matter that I reported is  
10 a matter of particular interest to Mr. Pellish, who  
11 really wants to see me come to the Eastern panhandle.  
12 And I really like that part of the state and I was  
13 hoping to be there maybe in April or May, when the  
14 trees are blossoming, and he said, "Sooner than that,  
15 Judge." So we're trying to work out a tour of the  
16 Eastern panhandle.

17                   We do not think that his audience is  
18 going to be lawyers so much as business leaders and  
19 members of the general public.

20                   So what I'm trying to do is -- with the  
21 help of the Insurance Commissioner's staff, is to put  
22 up a program of a length of maybe an hour and an half  
23 to maybe half a day, depending on what the audience  
24 might require, and to sort of emulate what Workers'

1 Comp did with their Workers' Comp University.

2 At one time they had a tour -- or a  
3 program for Martinsburg scheduled. I don't recall if  
4 they ever did that or not. But it will be something  
5 similar to that only probably a much shorter  
6 presentation, and we would cover our part of it, the  
7 appeal process, but that would only be a small  
8 portion of what we would have people talk about.

9 We think the audience wants to know  
10 about who their carriers are or is, how they would  
11 file a claim, what time limits are on and how  
12 premiums are calculated, what happens if they don't  
13 pay premiums, what happens in cases involving fraud,  
14 how the medical bills get paid and approved, a whole  
15 subject matter which we do not have the expertise to  
16 present, and the Office of Judges would just be part  
17 of it.

18 So that concludes my report to the  
19 Council. I'll be happy to entertain any questions.

20 CHAIRMAN DEAN: Any questions, Mr.  
21 Marshall?

22 MR. MARSHALL: Yes, Mr. Chairman.

23 Judge, could you explain to us a little  
24 bit about how it occurred -- as I understand it, the

1 State now is contracting with BrickStreet to  
2 administer the old claims and now BrickStreet has  
3 subcontracted some of this work to a company called  
4 Cambridge and as a result of that, work that was  
5 previously being done by BrickStreet, particularly  
6 the scanning, is now coming back to your office but  
7 if it was under the original contract with  
8 BrickStreet, why -- is there going to be additional  
9 expenditure here?

10 MR. LEACH: I think that currently  
11 BrickStreet is still doing the scanning. I think  
12 they're looking to get out of that part of it or they  
13 were exploring the possibility, perhaps as part of  
14 negotiations between the three parties, Cambridge,  
15 BrickStreet and the Insurance Commissioner. I'm not  
16 privy to the negotiations. I don't know what's -- I  
17 was just ask, "What would it take for you to provide  
18 those services?"

19 MR. MARSHALL: Ryan, maybe you can  
20 answer this or you could get us the answer, but I'd  
21 like to know if under the original contract between  
22 the Insurance Commissioner and BrickStreet for the  
23 administration of these old claims they were to  
24 undertake this work under a fixed contract, why is it

1 coming back to the state and going to require  
2 expenditure of state funds to do what might have been  
3 under BrickStreet's contract. So if you could inform  
4 us a little bit on that at the next meeting or --

5 MR. KENNY: Mr. Marshall, I can tell  
6 you.

7 MR. MARSHALL: Oh, okay.

8 MR. KENNY: The current BrickStreet  
9 contract expires January 1 of '07, this January 1.  
10 There is clauses to renew it and also clauses to  
11 allow it to be amended. It is our choice in working  
12 with BrickStreet and in agreement with BrickStreet to  
13 move towards removing all of the BrickStreet services  
14 that are a myriad -- beyond the extended TPA  
15 arrangements. They do some computer IT work for us.  
16 They do litigation management. There's a myriad of  
17 services that they perform on our behalf.

18 The Cambridge subcontract, which was  
19 approved by the Insurance Commissioner, merely calls  
20 for what I'll refer to as the standard third-party  
21 administrative type work, you know, adjusting the  
22 claims, monitoring the claims, taking care of the  
23 medical needs of the claimants and, of course,  
24 authorizing checks to be drawn.

1           So the other sundry, miscellaneous-type  
2 services are yet to be determined on how we do that.  
3 Imaging is one of those things, and we have reached  
4 no conclusion on how we're going to do that. One of  
5 the possibilities is have BrickStreet continue to do  
6 so, but obviously, since the contract is being broken  
7 apart, in essence, we have to look at the cost  
8 components so that when we pay BrickStreet the fixed  
9 amount of money that the contract calls for, we know  
10 how much is going to be going to Cambridge for those  
11 services, how much BrickStreet will do and how much  
12 we might take in house, in which case we'd have to  
13 then reduce the amount of money going to BrickStreet.

14           So that's where we are now. It's a  
15 little bit of a puzzle right now, but we're pulling  
16 all the pieces apart, trying to get costing  
17 information on them and then we'll put it back  
18 together again.

19           MR. MARSHALL: So imaging is not  
20 normally within the scope of the TPA?

21           MR. KENNY: It can or cannot be. In  
22 this case the issue arises because the computer  
23 system that we are currently using to track the  
24 claims, a system called WCIS, has automatic imaging.

1 It doesn't require scanning; it just images right  
2 from the computer, itself.

3 Cambridge's claims handling system,  
4 although it has some advantages to us in certain  
5 areas, does not have that feature, so we'll have to  
6 figure out how best to do that. And one way, of  
7 course, is just to go to paper and then scan it, put  
8 it into the imaging system. Another way would be,  
9 and a decision not yet made, is to remain using the  
10 WCIS system and have Cambridge utilize that system as  
11 opposed to their claims handling system. It's a  
12 trade-off scenario.

13 MR. MARSHALL: Thank you.

14 CHAIRMAN DEAN: Mr. Pellish, do you have  
15 any questions for Judge Leach?

16 MR. PELLISH: I'm glad that the question  
17 was asked about that because it does sound like  
18 additional work for the Judge, and I guess my  
19 thinking runs along the same line as the question,  
20 that we shouldn't incur any additional costs to  
21 implement something on the system.

22 I've got another question and a comment.  
23 Judge, first, on the program that you're talking  
24 about bringing out to this part of the state, I

1 wanted to let you know I met with the Jefferson  
2 County Development Authority the other day to review  
3 it and their reaction was positive. They're going to  
4 coordinate with Berkeley and Morgan as well, and I  
5 think the presentation will be welcomed out here.

6 The question I have goes back to this  
7 imaging system and the reclassification of positions.  
8 And I don't want to get into a tangential discussion  
9 at this point, but maybe you could send me a note  
10 that would clarify why it takes so long to reclassify  
11 positions and go through the interviewing process.  
12 I'd appreciate being educated about it.

13 MR. LEACH: I'll try to enlighten you.

14 CHAIRMAN DEAN: Any other questions, Mr.  
15 Pellish?

16 MR. PELLISH: No, sir.

17 CHAIRMAN DEAN: Mr. Slater, do you have  
18 any questions for Judge Leach?

19 MR. SLATER: I do not.

20 CHAIRMAN DEAN: Let the minutes show  
21 that Mr. Slater has joined us.

22 Okay, Judge Leach. Thank you.

23 Let the minutes reflect that the agenda  
24 in the back of the room did not have Rule 4 that's on

1 our agenda, the Public Hearing, Title 85, Series 19,  
2 although it was on the Secretary of State's website  
3 and has been on our agenda. I don't know why it was  
4 missed on the agenda in the back of the room, but we  
5 will discuss that.

6 Ryan, would you like to come forward?

7 MR. SIMS: Good afternoon members of the  
8 Industrial Council. We're here today for the public  
9 hearing portion of the amended version of Rule 19,  
10 which we presented to you during the, I believe it  
11 was the October meeting for initial filing. We have,  
12 in fact, filed the initial version of Rule 19. It's  
13 been out for public comment for about a month and it  
14 completes today with the public hearing. We've  
15 received two written comments on the current  
16 amendment to Rule 19.

17 Rule 19, of course, addresses the Self  
18 Insurance Security and Guaranty Risk Pools and how  
19 they are managed, including the assessment  
20 methodologies. Of course, the substantive changes  
21 made to the rule surround the methodology for the  
22 assessments for the guaranty -- self-insured guaranty  
23 fund, which is the fund in place for payment of any  
24 obligations that self-insured employers, for whatever

1 reason, cannot make or would not be able to make on  
2 or after July 1, 2004. And, again, the substantive  
3 changes deal with assessment methodologies.

4 And we're here today to provide the  
5 public an opportunity to comment on this amended rule  
6 and provide you an opportunity to listen to anybody  
7 that wants to comment on it.

8 CHAIRMAN DEAN: And there is one  
9 gentleman that would like to comment, Henry Bowen.

10 MR. BOWEN: Good afternoon, Mr. Dean and  
11 members of the Council. I'm Henry Bowen. I'm  
12 Executive Secretary of the West Virginia Self  
13 Insurers' Association and I have elected to ask for  
14 this opportunity of making public comments about the  
15 proposed changes to Rule 19.

16 This rule is found, of course, in Title  
17 85, Series 19. It's commonly referred to as Rule 19,  
18 dealing with the self-insurance risk pools. It's one  
19 of two rules in the Workers' Compensation system that  
20 apply exclusively to employers that are authorized to  
21 self-insure their Workers' Compensation liabilities  
22 in West Virginia.

23 The rule as written was initially  
24 promulgated by the Workers' Compensation Board of

1 Managers in 2004 to implement required changes of  
2 Senate Bill 2013. It was adopted by the legislature  
3 and became effective on July 1, 2003.

4           Among those changes were mandatory self-  
5 administration for self-insurers, and that's  
6 reflected in the self-administration rule, Rule 18,  
7 and codification of the rules that had been  
8 previously adopted that dealt with the issue of self-  
9 insurance security.

10           Even though the rule speaks in terms of  
11 two pools, if you think in terms of the security  
12 pool, that is how all self-insured obligations are  
13 secured for liabilities with dates of injuries prior  
14 to July 1, 2004. That pool, if you will, contains  
15 primarily commercial surety instruments, letters of  
16 credit, bonds that had been issued for the benefit of  
17 the state of West Virginia to secure those self-  
18 insured liabilities. Parental guarantees are also a  
19 form of security that might be in the security pool.

20           Cash payments that were made by the West  
21 Virginia Legislature in recognition of a significant  
22 unfunded liability at Weirton Steel and other cash  
23 that may have been transferred to it with respect to  
24 other failures for which the security was pooled.

1           The Guaranty Pool is the second of the  
2 two risk pools and it covers liabilities with dates  
3 of injuries on or after July 1, 2004. When that rule  
4 was initially promulgated, the Guaranty Pool was  
5 supposed to reflect a cash alternative pool to  
6 commercial surety instruments. If you I'm sure  
7 recall, after 911 the national market for certain  
8 types of surety instruments tightened considerably  
9 and already for years in West Virginia certain types  
10 of self-insured industries had difficulty cost  
11 effectively purchasing commercial products.

12           So the association made a recommendation  
13 to the Workers' Compensation Commission that a cash  
14 alternative pool similar to that utilized in the  
15 State of Ohio, one of the remaining monopoly states,  
16 be authorized as part of the general way to allow  
17 this combined pooling of assets to secure self-  
18 insurance liabilities.

19           But historically self-insurance  
20 liabilities prior to the 2003 legislation were shared  
21 liabilities within all employers in Workers'  
22 Compensation. They were not joint and several. They  
23 were not segregated.

24           As a policy determination, former

1 Workers' Compensation Board of Managers made a  
2 determination that it preferred self-insured  
3 liabilities to be exclusively the obligations of  
4 self-insured employers and that body segregated self-  
5 insurers and their liabilities from other losses in  
6 the insured community that were mandatory subscribers  
7 to the Workers' Compensation system.

8           The legislature then retroactively  
9 codified that as part of Senate Bill 213. The  
10 concept had already been developed at Workers'  
11 Compensation at the old division, which became in  
12 October 2003 the Workers' Compensation Commission,  
13 but it was quite clear at that point we had a  
14 segregated liability.

15           Not one employer that is insured in West  
16 Virginia or its carriers can be legally turned to to  
17 pay a dollar of self-insurance liability.

18           Now, with respect to the rule as it was  
19 adopted, please remember that when it was adopted in  
20 2004 it was one year prior to the authorization where  
21 our systems become privatized, and that is critical  
22 because at the time of the adoption of Rule 19 and  
23 some of the decisions that were made at that time,  
24 the old Workers' Compensation Commission had the

1 statutory responsibility to administer the Workers'  
2 Compensation system for all employers and to regulate  
3 over all employers, including self-insurance, all  
4 benefits, all required documentation that had to be  
5 filed and so forth. So the rule was drafted by  
6 individuals who were a part of that state regulatory  
7 agency.

8           Now, with respect to the cleanup, very  
9 little cleanup has taken place on Rule 19 in 2005.  
10 It simply reflected the recognition of the 2005  
11 legislation and the conversion of the system to a  
12 privatized system, which became in effect on January  
13 1, 2006.

14           Now, the rule had in it a funding  
15 mechanism which was extremely important to the  
16 Guaranty Fund and a legal obligation which was  
17 equally as important to the regulator of the self-  
18 insured community. First and foremost, by June 30,  
19 2006 all self-insurers had to be fully secured for  
20 all liabilities, and that meant in the security  
21 portion of it, if there had been an unsecured self-  
22 insurer identified in 2004 as being unsecured, that  
23 self-insured employer, working with the former  
24 Commission and currently with the Insurance

1 Commission, had to establish a plan that was  
2 implemented to bring that self-insurer to a full  
3 security for all obligations with dates of injuries  
4 prior to July 1, 2004.

5           Subsequently, after that rule was  
6 adopted the Commission, in one of -- I think one of  
7 its real success stories for the former  
8 administration of the Workers' Compensation  
9 Commission, closed the gap, the rule was implemented  
10 and the self-insured community which had members that  
11 for years had been unsecured was, in fact, brought up  
12 to full security.

13           Please recall that the most significant  
14 division that the legislature then made was its  
15 determination that on a going forward basis the self-  
16 insured community remain solely responsible for self-  
17 insured default, although the regulator has statutory  
18 authority to seek legislative assistance if its  
19 necessary.

20           So even though the initial rule was  
21 being discussed at the time of the failure of Weirton  
22 Steel Corporation, had it not been for the  
23 intervention of the legislature, the self-insured  
24 community would have solely been responsible for

1 paying that unfunded liability, but fortunately, the  
2 legislature saw that that was not fair and equitable  
3 and they intervened.

4           Now, as part of the funding of the  
5 initial Guaranty Fund, discussions that took place in  
6 2004 identified a level of security for the cash pool  
7 that was felt to be required because of the estimated  
8 liabilities that self-insured carries. Those  
9 estimated liabilities did not factor in any of the  
10 significant reforms that were adopted by the  
11 legislature in 2003.

12           As we have all come to realize, all  
13 employer liabilities since the 2003 legislation and  
14 its enactment have seen a dramatic decrease in the  
15 cost of providing benefits for injuries in West  
16 Virginia. Not only are claims down in the entire  
17 system, but the cost of those claims are down as  
18 well.

19           So as a consequence, we went to the  
20 Insurance Commissioner and urged her to reconsider  
21 the current language and the current requirement that  
22 beginning in fiscal year 2007, last July 1, that the  
23 funding in the current rule requires funding at a  
24 level of 5 percent of the estimated liabilities with

1 the corpus still targeted to be \$30 million.

2 Now, there are two reasons we feel that  
3 the proposal that the Commissioner agreed to is fair  
4 and reasonable.

5 First and foremost is the impact of the  
6 2003 legislation and the subsequent decisions that  
7 are commonly referred to as the Wampler decisions in  
8 2004 where the Supreme Court upheld the retroactive  
9 application of the 2003 reforms to orders entered on  
10 or after July 1, 2003.

11 That was key not only to the old  
12 Workers' Compensation Commission and eliminated  
13 approximately a billion dollars of liability that the  
14 Workers' Compensation system would have had to absorb  
15 had the Supreme Court not allowed the legislature to  
16 apply the 2003 reforms in the manner in which they  
17 were ultimately applied.

18 Secondly, the Insurance Commissioner,  
19 exercising her discretion as the regulator -- the  
20 transferred regulation of self-insurance went to her  
21 on January 1 -- her self-insurance unit continues to  
22 administer both Rule 18 and Rule 19, and even though  
23 I might personally disagree with their decision,  
24 their policy and practice has been to apply a

1 financial test to self-insurers as part of the annual  
2 review of the financial capability of the self-  
3 insurer that's required under the West Virginia law  
4 in Chapter 23, Article 2, Section 9 of the law, and  
5 that requires the annual review of the self-insurer.  
6 And as part of that review, the Insurance Commission  
7 applies a financial test that's proprietary to it to  
8 the financial information supplied by the self-  
9 insurer. And if it determines that the financial  
10 test score is not what it believes is sufficient,  
11 then it is requiring additional commercial surety or  
12 security to be posted by that self-insurer to meet  
13 its prospective Guaranty Pool obligations.

14 So if you'll follow and allow me to  
15 suggest an easy chart or graph.

16 We have security obligations that are  
17 real security instruments covering dates of injuries  
18 July 1, 2004 -- before that date -- excuse me -- June  
19 30, 2004 and before. July 1, 2004 and after that  
20 date we have a pool of cash and you also have  
21 security instruments.

22 Now, what's the difference? Security is  
23 siloed security. The surety instruments that are  
24 commercially obtainable are for the benefit of the

1 Insurance Commission but they're only issued to  
2 protect against default from the individual self-  
3 insurer that purchases it.

4           The cash pool, if you will, is a joint  
5 and several cash pool. It is not siloed. And if the  
6 agency needs the money to pay for self-insured  
7 defaults, those obligations can be met by taking the  
8 pool proceeds, and if they are determined to be  
9 inadequate, the Insurance Commission has clear  
10 regulatory and statutory authorization to assess  
11 self-insurers for that. And, again, it's a stand-  
12 alone self-insured obligation absent any legislative  
13 intervention or alternative payments.

14           So the proposed rule would lower the  
15 corpus to \$10 million. And the reason we feel that  
16 it is completely adequate, the \$10 million, because  
17 the financially weak self-insurers are the only ones  
18 that pose probability of default and they are fully  
19 secured with security fund surety, they are fully  
20 secured by surety obligations being paid in addition  
21 -- or posted in addition to Guaranty Fund payments.  
22 In effect, they're paying twice for that prospective  
23 security. If a financially healthy self-insurer  
24 poses no risk, it is allowed to contribute cash into

1 the fund.

2 Now, if you recall, as I remarked a  
3 moment ago, the 2003 legislation dramatically altered  
4 the self-insured liabilities, as they altered the  
5 liabilities of the entire Workers' Compensation  
6 system. That law has been affirmed in Court and  
7 unless the legislature changes it on a going forward  
8 basis, we have no reason to anticipate that we will  
9 find ourselves in a situation where that small number  
10 of West Virginia employers, approximately 120,  
11 including five cities, will find themselves  
12 dramatically unsecured, imposing a risk to one  
13 another.

14 So we have siloed security instruments  
15 that are commercially issued available to cover  
16 certain discreet employers who purchase them. We  
17 have a cash pool that's available whenever the agency  
18 needs it and we have other security posted.

19 So is the \$30 million necessary now? In  
20 our view, it is not. Now, we understand and quite  
21 honestly I understand why as a matter of public  
22 policy it would be a concern. We all want  
23 BrickStreet to be successful. We don't consider, the  
24 self-insured community, a small number of authorized

1 self-insurers certainly don't feel that are in  
2 competition with BrickStreet.

3 As a matter of public policy, you know,  
4 if you retain the security corpus of the Guaranty  
5 Fund at a high level that's unnecessary, it just  
6 drives up cost of doing business in West Virginia.

7 And the Office of the Insurance  
8 Commissioner was good enough to meet with our  
9 association and its representatives and disclose to  
10 us what we feared all along, was that if the current  
11 rule were implemented, it would require an increase  
12 this fiscal year of approximately \$10 million into  
13 the pool.

14 Now, if there was a public policy  
15 justification for saddling these self-insurers with  
16 an additional \$10 million, then you'll make that  
17 determination, but I submit to you there is no  
18 justification for it, nor is accepting the Insurance  
19 Commission's reasoned approach to keeping a pool  
20 corpus at a maintained level that would be perfectly  
21 adequate should cause no angst for anyone. There is  
22 absolutely no reason for unnecessary fearfulness that  
23 the self-insured community, which is our state's  
24 largest employers, five cities, our largest

1 retailers, our largest hospitals, our largest  
2 utilities, they're obviously not all going to fail at  
3 one time. In fact, some of them cannot possibly fail  
4 just because of the nature of their very  
5 organizations. I doubt seriously anybody would  
6 expect American Electric Power or any of those other  
7 utilities to have a catastrophic failure.

8           So in summary, there are a number of  
9 other technical issues that we have concerns about  
10 that we would invite you to assess. Again, the rule  
11 was written at a time when the state had every  
12 interest in maintaining firm regulatory control.

13           Self-insurance is now just one of  
14 several products that are available for employers to  
15 meet their statutory obligations. The majority of  
16 those obligations will be met through the purchase of  
17 commercial insurance for Workers' Compensation. Some  
18 employers will continue to look at this as an  
19 opportunity to direct pay benefits and avoid certain  
20 obligations and costs and will look and see that  
21 self-insuring is financially worth the risk of  
22 handling that.

23           And all that we're asking in the  
24 regulatory oversight is that it be fair and

1 equitable, that the pools that have been established  
2 be funded but be funded in a fair and equitable way.  
3 We respectfully suggest that this proposed rule meets  
4 those concerns and we hope when the rule is  
5 ultimately presented to you, that you will act  
6 affirmatively to implement those provisions of it.

7           The last thing that I would like to  
8 suggest is more in the nature of cleanup. The  
9 Insurance Commission doesn't have a great deal of  
10 experience in dealing with the issue of Workers'  
11 Compensation default, but the statutory default  
12 scheme has always had a bifurcated component to it.  
13 An employer, if it fails to do something, like file a  
14 report, becomes delinquent first, then the agency was  
15 required to give notice of delinquency. And if the  
16 notice of delinquency did not lead to a cure of that  
17 delinquency, then employer default had resulted.

18           That's how it happened when the state  
19 was not the regulator of the Workers' Compensation  
20 system. If you didn't file a report, you were in  
21 trouble, and if you didn't cure that report, you  
22 could then get the loss of your employer immunity.

23           Default is a term of art. It has  
24 significance legally. It means you have no exclusive

1 remedy. It means you have no immunity from suit,  
2 civil immunity.

3 This rule still has in it a reference to  
4 a default mechanism that if a self-insurer is not  
5 fully secured, then it is in default.

6 We would simply ask that you consider  
7 having this section rewritten. Rule 18 has an  
8 involuntary revocation proceeding, under 85-18,  
9 Section 19 of that rule. We suggest that the  
10 Insurance Commission doesn't need a separate default  
11 revocation proceeding for self-insurance risk pools.  
12 It would make sense just to use the one in Rule 18.

13 This does have a automatic default with  
14 the authority in the rule of giving you all an  
15 opportunity to serve as an appellate body. I don't  
16 know if that's something you're interested in or not,  
17 but it's a carryover provision from the old rule.  
18 It's a carryover provision from the Workers'  
19 Compensation Commission. It's a carryover provision  
20 from the prior compensation program's Performance  
21 Council.

22 In terms of that council and its role in  
23 oversight of the Commission, you all are in a totally  
24 different role than that body was, and the Insurance

1 Commission isn't the Workers' Compensation  
2 Commission, and this is only one of multiple  
3 insurance disciplines they have to administer.

4 We would urge that you consider looking  
5 at that section dealing with your opportunity to  
6 grant a stay and an automatic revocation and simply  
7 agree that it should be deleted and references made  
8 to the other rule and so we could have consistent --  
9 You have two ways of dealing with that. You can  
10 revoke a self-insurer if they abuse the privilege of  
11 self-insuring or you can simply not renew them.

12 The agency has plenty of regulatory  
13 sticks available if it chooses to club a self-insurer  
14 for noncompliance with the law.

15 All we're asking is a scheme so that  
16 self-insured employers will be treated the same way  
17 as insurance companies that fail to do something  
18 that's in compliance or required by West Virginia law  
19 as well. I mean, we've simply got to move away from  
20 this mentality that we have a monopoly Workers'  
21 Compensation system run by a state agency and that  
22 we're going to accept out of their responsibility  
23 self-insurance and come to the recognition that we're  
24 on our way to a full open market privatized Workers'

1 Compensation system and there's no real regulatory  
2 justification for treating 112 employers or 120  
3 employers one way and treating the insurance industry  
4 in another way.

5 Thank you very much for the opportunity.  
6 I'd be happy to answer any questions if there are  
7 any.

8 CHAIRMAN DEAN: Do you have any  
9 questions?

10 MR. MARSHALL: Mr. Pellish, do you have  
11 a question or anything?

12 MR. PELLISH: No. No questions. It was  
13 a good comment.

14 CHAIRMAN DEAN: Mr. Slater, do you have  
15 any questions?

16 MR. SLATER: No.

17 CHAIRMAN DEAN: Would anybody else like  
18 to speak on Title 85, Series 19?

19 MR. WHITE: Thank you, Mr. Chairman.  
20 Steve White with the ACT Foundation. I'll be very  
21 brief.

22 I don't claim to be an expert on self-  
23 insurance, but there's one area I'd just like to  
24 focus here on. And Mr. Bowen spent some time on it,

1 but the guaranty pool going from \$30 million to \$10  
2 million troubles me.

3 I'll give you two words why, "Weirton  
4 Steel." Maybe I should add another phrase, "\$70  
5 million."

6 When Weirton Steel defaulted it was the  
7 taxpayers who ended up paying the \$70 million because  
8 there was enough guaranty in place.

9 Well, I think with more of a track  
10 record, Mr. Bowen's comment would be very  
11 appropriate. I just don't think we've got the track  
12 record yet. I don't think we've -- I don't have the  
13 comfort level in place of the mechanisms to protect  
14 the public from defaults that might occur in the  
15 self-insured industry.

16 I'd be happy to share with you  
17 historically some of the defaults that we faced  
18 beyond Weirton Steel, which are quite significant.  
19 So my suggestion would be to restore the \$30 million  
20 guaranty pool, review it at a later date when we're  
21 all more comfortable with lowering it that amount.

22 Thank you very much.

23 CHAIRMAN DEAN: Would anybody else like  
24 to speak?

1 MS. BENSE: Hi. My name is Jill Bense  
2 and I am president of the West Virginia Insurance  
3 Federation. The West Virginia Insurance Federation  
4 is the trade association for property and casualty  
5 insurance companies doing business in West Virginia.  
6 And in that role I represent member companies who are  
7 really, in my view, uniquely situated as companies  
8 who currently write Workers' Compensation outside of  
9 West Virginia and who are looking at the development  
10 of our private Workers' Compensation system to see  
11 whether or not it's a sufficiently attractive market,  
12 meaning, will it be stable, will it be secure, will  
13 it be fair to insurance companies who are thinking  
14 about coming into West Virginia and writing Workers'  
15 Compensation.

16 So when we talk about privatizing the  
17 Workers' Compensation market in 2008, I represent the  
18 companies who would permit it to be fully privatized.  
19 And these companies have been watching closely and  
20 monitoring this Council's activities as you all have  
21 considered the regulatory framework under which the  
22 companies would write Workers' Compensation.

23 So this has been the first rule where  
24 our -- the Federation's member companies have said,

1 "Whoa, stop, hold on. We're very interested in what  
2 these self-insurance risk pools" -- "the regulations  
3 relating to this issue, what the implications of that  
4 would be on the private writers of Workers' Comp.

5           And we really -- we did file written  
6 comments earlier this afternoon, so at some point I'm  
7 certain that you would be privy to those, but just to  
8 really highlight a few of our concerns, and I'll echo  
9 what Mr. White just said, too, which is the \$30  
10 million -- the reduction in the \$30 million to the  
11 \$10 million is very concerning for companies. We  
12 also -- in fact, I indicated in the written comments  
13 on behalf of the Federation earlier today that it is  
14 concerning. We think it's premature and at this  
15 point overly aggressive.

16           Weirton Steel, you know, I'll say that,  
17 too. I mean, Weirton Steel was a \$70 million  
18 bankruptcy that forced the state to turn to the  
19 private business community to fund that liability.  
20 That's very concerning.

21           From our perspective, too, again, the  
22 private insurance market perspective, you know, we're  
23 taking essentially \$20 million out of the written  
24 premium that's available, and we want, as an

1 industry, for there to be premium dollars to write.  
2 We want I think as West Virginians to say to  
3 companies who are looking at West Virginia in the  
4 Workers' Comp market, you know, "Come here, write  
5 Workers' Comp, we will make this an attractive and  
6 competitive market."

7           That benefits them, of course, but  
8 importantly, I think Mr. Bowen said earlier for the  
9 self-insured employer community, you know, this is a  
10 cost of doing business. Well, arguably, Workers'  
11 Compensation insurance is a cost of doing business  
12 for every single business in this state. Insurance  
13 is a cost of doing business for every business doing  
14 business in this state.

15           We want it to be a competitive, thriving  
16 market. Why? So companies can compete against each  
17 other for competitive rate, and that benefits all of  
18 our businesses and, in turn, in my view, we, as West  
19 Virginians.

20           Along those same lines, there's a  
21 proposed revision to Rule 9.1 and Mr. Bowen touched  
22 on it as well. Currently, the self-insured employer  
23 would be assessed two percent of \$800,000.00, and  
24 beginning fiscal year 2007, which actually should

1 have started July 1 of 2006 and I don't think it did,  
2 which that is a past date requirement, but annual  
3 assessments shall be based on five percent and  
4 there's a proposal to strike that and maintain it at  
5 the two percent level.

6                   Again, the Insurance Federation's  
7 concern is the same as it is with the reduction in  
8 the 30 to \$10 million level to maintain the fund.  
9 And specifically, at this point we just think it's  
10 overly aggressive and it's concerning to us that the  
11 fund would in some way, in any way be insecure,  
12 unstable in some way.

13                   We also, in the written comments,  
14 provided a suggestion for just really a technical  
15 cleanup. There is a proposed section 9.3 that  
16 permits the Insurance Commissioner to develop  
17 different methodologies for assessing -- for imposing  
18 assessments to fund the pool whenever he or she deems  
19 it necessary. And while I think it's probably very  
20 clear that that assessment would only be, obviously,  
21 on the self-insured employer community, I think past  
22 practice tells us in dealing with some of these  
23 liabilities that oftentimes there has been a turning  
24 to the private community to help fund these

1 liabilities, and we would suggest a clarification of  
2 that, and I actually, in the written comments,  
3 suggested such language.

4 So I'll rest on my written comments and  
5 be more than happy to answer any questions.

6 CHAIRMAN DEAN: Any questions, Mr.  
7 Marshall?

8 MR. MARSHALL: No, Mr. Chairman.

9 CHAIRMAN DEAN: Mr. Pellish, do you have  
10 any questions?

11 MR. PELLISH: No questions.

12 CHAIRMAN DEAN: Mr. Slater?

13 MR. SLATER: I do have questions, I'm  
14 just not sure they're directed to Jill. I'd like to  
15 -- If we're going to Jill, I have no questions for  
16 her.

17 CHAIRMAN DEAN: No questions. Thank  
18 you.

19 MS. BENSE: Thank you.

20 MR. SLATER: I was going to ask Bill.  
21 Bill's gone. Ryan, can you address the Insurance  
22 Commission's view on all this and how we kind of got  
23 to -- well, there's all kind of questions. Let me  
24 just start with that one first.

1                   MR. SIMS: I guess what I'll say is -- I  
2 can't tell if this is picking me up -- but really,  
3 you know, I think from a legal perspective, we've  
4 drafted the rule as we were directed to by agency  
5 leadership. It was the belief of the agency  
6 leadership that this methodology for the assessment  
7 amount -- the amount needed to be placed in the  
8 Guaranty Fund at this time called for the methodology  
9 that's reflected in this amended rule, which is  
10 reducing the percentage and looking towards the  
11 indemnity payments rather than the previous language  
12 or the language of the current rule, which  
13 anticipates all liabilities for the year and, as  
14 well, reducing the target amount from \$30 million to  
15 \$10 million.

16                   As far as why, I think those are  
17 financial actuarial and other related issues that I'm  
18 really not qualified to tell you. I would maybe  
19 defer to Melinda Kiss on that or perhaps even Joyce  
20 Shepherd to maybe fill you in a little bit more on  
21 that. But to be honest with you, I didn't -- I  
22 wasn't -- It's really a policy call, I guess is what  
23 I'm trying to tell you, based on financial and, you  
24 know, those type of related issues. And, again, I

1 don't feel like I'm the one maybe to address that.

2 MS. KISS: Good afternoon. I can tell  
3 you some of the things, but I'm going to make an  
4 apology. I'm deep in the throes of preparing not one  
5 but two sets of financial statements, the final ever  
6 for the Workers' Compensation Commission and the  
7 first ever for the offices of the Insurance  
8 Commission. And I actually haven't seen other people  
9 for about a month.

10 So I'm going to try to back up and  
11 recall where we were when we came in here in October  
12 with our original proposal of Rule 19.

13 Exactly, I guess to go to the immediate  
14 comment on the 10 to the 30, I think Mr. Kenny is  
15 back and he can discuss that.

16 What I can tell you is, you know,  
17 basically, what we were trying to come up with was,  
18 and when we presented this rule we said, "We have to  
19 do some technical cleanup and we have been working  
20 with the self-insureds and the question becomes, do  
21 we truly need to make this assessment at this point?"  
22 Going back to Mr. Bowen's point, there is one source  
23 of revenue for the guaranty pool, and that is the  
24 self-insured community.

1                   Certainly deferring to Ms. Bense, if  
2 it's at all ambiguous, there is one source of  
3 revenue. So in working with them, the policy  
4 decision is do we need to take this money out this  
5 rapidly. And the main problem from the actuarial  
6 perspective, the main problem with the current Rule  
7 19 doesn't deal with two percent versus five percent  
8 and it doesn't deal with 10 million versus 30  
9 million. What is not workable in the current rule is  
10 five percent of the projected aggregate liabilities  
11 of the self-insured community, because if we kept the  
12 current version of Rule 19 in place and did not make  
13 some alteration or accommodation, we would achieve  
14 that \$30 million funding level within a two-year  
15 period. That goes from -- I guess we've been  
16 assessing since 2004. We have about \$2 million, 2.8.  
17 Okay. We have 2.8 and that's what we have assessed  
18 thus far at two percent of indemnity.

19                   The other thing, and I think the one  
20 thing to keep in mind and that is markedly different  
21 and I think that's where we need to focus and where  
22 this Council may want to focus is what's different  
23 now, you know. You've heard some comments about  
24 Weirton and how you got there. If Weirton had had

1 proper security in place, we would not have been --  
2 the self-insured community at large would not have  
3 been on the hook and certainly the legislature would  
4 not have been asked to try to help them come up with  
5 what was necessary.

6           Every time we come up here and you all  
7 will recall in very recent history we faced a  
8 difficult decision and some criticism for enforcing  
9 that all self-insured employers, if they fail the  
10 financial test, be required to post prospective. The  
11 Insurance Commissioner had stood firm in that they  
12 will post prospective and be indemnified. And I'm as  
13 surprised as anyone who has had to work with self-  
14 insurance for a long that they're all fully  
15 collateralized.

16           So I think the questions you have to ask  
17 are -- you know, I'm holding security for those  
18 people that, based on financial review, we believe  
19 are not as strong as we would like them to be, so  
20 we've already made them give us security out there  
21 that we're holding for the use and benefit of that  
22 pool, so we don't even have to assess the self-  
23 insured community.

24           The question is do we want to just

1 assess the self-insured community somewhat  
2 arbitrarily, as a matter of course, to get money that  
3 we may or may not need or do we wait until we  
4 actually have a problem and then we're going to  
5 assess them. So it's your all's call. It is very  
6 much a policy call.

7 Does that help at all?

8 MR. SLATER: Yes, some.

9 MS. KISS: Do I get to sit down?

10 CHAIRMAN DEAN: Yes. Thank you.

11 MR. SLATER: Bill, we started with you  
12 and you weren't here. And Ryan took a shot and then  
13 Ms. Kiss took a shot and now we're going to get back  
14 to you.

15 The 30 million to the 10 million,  
16 certain this wasn't an arbitrary figure that was  
17 arrived at. I'm sure the Insurance Commission and  
18 the self-insurance community went through some pretty  
19 strong analyticals and actuarial computations to get  
20 there.

21 Can you elaborate on how the proposed  
22 rule has been -- has went from 30 million to 10  
23 million since the initial adoption, I guess?

24 MR. KENNY: The 30 million was not our

1 number, that was what was in the old -- in the  
2 legislation prior to us getting involved. So we  
3 really looked at the 30 million and looked at the  
4 adequacy and what we felt we needed. Thirty million  
5 is a huge amount of money, a huge chunk from what's  
6 in there now. I think Melinda told you there was a  
7 little over \$2 million in that fund now. So that's a  
8 very large increase.

9                   And when we looked at the securitization  
10 requirements now where all companies essentially have  
11 to be a hundred percent secured, we could not  
12 rationalize in our mind why we would need such a  
13 large sum of money in a pool. So we felt there was  
14 no real reason to assess such a hardship number as 30  
15 million.

16                   So the \$10 million is the number that we  
17 have looked at that we think is actuarially sound and  
18 secure enough to secure that pool, given the fact  
19 that all self-insureds now have to be a hundred  
20 percent collateralized and that was not the case in  
21 Weirton and that's what really caused that issue.

22                   So as long as we require the  
23 securitization on an individual basis, one could  
24 argue there's no need for a pool at all. We would

1 argue that we should have some amount in the pool and  
2 10 million would be sufficient.

3 MS. KISS: Mr. Kenny, Angie reminds me  
4 where 10 million comes from. Ten million is more  
5 than adequate to meet one year's cash payout even in  
6 the event of the default of our largest self-insured  
7 employer, meaning you'd have plenty of time to come  
8 in here and pass the assessment and get everybody  
9 assessed if they need to be.

10 So that's why we wanted to make certain  
11 we had cash on hand so that the state could exercise  
12 its responsibilities, which is to immediately step in  
13 in the event of self-insured default and make sure  
14 the claimants get paid and that everybody gets  
15 everything that is supposed to be coming to them.  
16 And then you all would have to pass -- you know, get  
17 the assessments worked out and that gives you enough  
18 cash.

19 The \$30 million, I couldn't remember  
20 because I was over at Comp when they came up with \$30  
21 million. Where did that come from? And it took me  
22 quite a while and I finally remembered and found it  
23 came from a financial model that was built over  
24 there, and basically what it was keying off of was a

1 routine accounting recognition and actual booking of  
2 potential self-insured loss, just like you will do a  
3 bad debt allowance. You would just look at the  
4 aggregate liabilities of self-insureds and routinely  
5 book them to the actual financials.

6 We are in the throes of working with our  
7 auditors. We will not be doing that as a matter of  
8 course. It isn't appropriate to do so. FASB 5 --  
9 and I can really bore you all now -- but it tells you  
10 the criteria for recognizing losses on your financial  
11 statements and clearly it's got to be profitable.  
12 You can't really say that. So we will not be doing  
13 that as a matter of course on our financials. So  
14 that's where that 30 originally comes from. Thank  
15 you.

16 MR. SLATER: Back to 9.1(b), what was  
17 alluded to by several, that the five percent is  
18 currently in place and was effective July 1<sup>st</sup> of '06  
19 but isn't being adhered to, is that a factual  
20 statement? Does anyone know? 9.1(b). Where we talk  
21 about beginning fiscal year 2007 --

22 MS. KISS: Oh, no, no.

23 MR. SLATER: It's in the law but it's  
24 not being followed; is that what you're saying?

1 MS. KISS: As a general rule.

2 MR. SLATER: And does anyone know why  
3 it's not being followed?

4 MS. KISS: I guess I can offer I guess  
5 my take on that. In looking at that and trying to  
6 get ready for the rule change, we did a variety of  
7 calculations. The issue with the five percent,  
8 everybody can do five percent but on how are you  
9 going to assess and how are you going to calculate  
10 the liability, many things have also changed since  
11 the original passage of Rule 19 and one of those  
12 things is self-administration for self-insured  
13 employers.

14 When Rule 19 and 18 were originally  
15 written, the Workers' Compensation Division, slash,  
16 Commission was the administrator of self-insured  
17 claims. Heretofore they had perfect data for  
18 indemnity claims. Some self-insured self-  
19 administered their medical already. But if self-  
20 insured was hanged and indemnity claimed, they  
21 received a pay order from the state telling it  
22 exactly how much to pay and who had to pay it. So we  
23 had within our computer system the data surrounding  
24 all indemnity benefits.

1           With self-administration, we no longer  
2 have that. The state didn't -- Workers' Comp didn't  
3 even before the split where the Insurance Commission  
4 is regulating self-insured and BrickStreet is selling  
5 insurance. What we do have is a transmission data  
6 called EDI. And I will let Angie -- I'm just dying  
7 to get her up anyway -- talk at length about EDI.

8           But there are significant differences in  
9 that and exactly the information you have by which to  
10 calculate reserves. I went through a rather  
11 extensive gyration of how you could calculate or  
12 approximate the liabilities in the future because you  
13 have to approximate future cost using NCCI loss  
14 columns and all that, and it is complex. We would  
15 have to capture NCCI payroll data in order to do that  
16 from all self-insureds by their employee  
17 classification. That's another switch to them.  
18 That's not information that we have asked for  
19 administratively and it is somewhat complex and it  
20 requires a lot of change.

21           And I have got all this together and  
22 presented it to Mr. Kenny and the Commissioner like  
23 that. It's complex. And it is, and it was on very  
24 short notice. In reality, we don't have the data. I

1 do not have within my shop right now the data to  
2 accurately predict exactly what it is we should be  
3 charging them.

4           So to do that five percent, we decided  
5 that the cleaner thing and more reliable and more  
6 consistent thing should still be based on indemnity.  
7 Whether that percentage ends up being two or five or  
8 some other percentage, I think is at the discretion  
9 of this Council, and I'll let other people weigh in  
10 on that. But to us, from the administrative, the  
11 accounting, the actuarial perspective in getting  
12 payments, we have those, we can get those. They're  
13 easier to audit. They're easier to verify because  
14 they're all in the system.

15           MR. SLATER: I guess with setting this  
16 up for overall competition January 1<sup>st</sup> of 2008, I'd be  
17 interested to hear from any member that's out there,  
18 if there are any, from any of the insurance  
19 companies, private, that would be interested in  
20 entertaining that January 1<sup>st</sup> entrance date as to  
21 their feelings. I know we heard from Ms. Bense. If  
22 there are any separate companies that would like to  
23 speak, now would be a good time.

24           Okay. Hearing none, seeing none.

1 Well, I guess I'll just theorize here  
2 for a moment. It seems to me this whole thing is a  
3 bit scattered, and I don't see a great basis here of  
4 analysis or I guess proof to me thus far -- and maybe  
5 I just haven't read all the right stuff -- but to  
6 take something from 30 million down to 10 million  
7 this close to the process seems to be a bit much to  
8 me. I'm not sure 10 million is the number, but I'm  
9 also not sure it's not 15 million or 20 million.

10 So maybe there's some happy medium in  
11 all of this. It further troubles me that we have a  
12 law and we have rules that have been effectuated and  
13 in place and we have members of the self-insurance  
14 community apparently not following that. That also  
15 pains me as a member of this Council that for some  
16 reason we have things not being followed and that  
17 just doesn't quite seem right to me.

18 So for all those reasons, I am still in  
19 a bit of a lurch on that stuff and I've yet to be  
20 proven by anyone that 10 million is a good number or  
21 30 million is a good number. I mean, the fact that  
22 we have BrickStreet opposing this when they really  
23 stand to lose the most with all the other competition  
24 coming into the market here on some of this stuff. I

1 mean, they're not really opposing other competition  
2 as they come in. And this is going to kind of affect  
3 everyone here.

4 So again, Mr. Chairman, I am going to  
5 turn it back over to you with any additional  
6 questions or comments, but at this point I don't feel  
7 comfortable with this rule and, again, still open  
8 public comment period and I could be persuaded, but  
9 at this point I'm not.

10 CHAIRMAN DEAN: Mr. Pellish, do you have  
11 any comments you'd like to make?

12 MR. PELLISH: I guess I am comfortable  
13 with the change, and if I understand the procedures  
14 that have been established and what we are now asking  
15 the self-insured, the vigorous process that we put  
16 them through and the insistence that we've placed  
17 upon them to make sure that they are capable of  
18 fulfilling requirements make me comfortable that the  
19 \$30 million can be brought down. So I think I'm  
20 comfortable with the Commissioner's proposed changes.

21 CHAIRMAN DEAN: Very good. Mr.  
22 Marshall, do you have anything?

23 MR. MARSHALL: Let me put this -- in the  
24 form of your question, the surety that we require of

1 a self-insured is really based, is it not, on your  
2 financial analysis, with particular emphasis on the  
3 financial strength at the time of the applicant? In  
4 other words, the company that's investment grade is  
5 going to have a lesser surety requirement than a  
6 company of lesser financial strength. Is that  
7 correct?

8 MS. KISS: The surety requirements for  
9 the guaranty pool are only -- there is only a surety  
10 requirement if they've not passed our financial  
11 tests.

12 MR. MARSHALL: Okay. So given that,  
13 there's no other way to take into account a situation  
14 where a company's financial condition substantially  
15 deteriorates, let's say to the point of bankruptcy,  
16 other than the surety or the guaranty fund? And  
17 we've seen in recent years an awfully rapid  
18 deterioration in companies' financial conditions.

19 So it seems to me prudent that we would  
20 have a very strong fund here. And looking to Mr.  
21 Slater's comments, I don't know whether the right  
22 number is 10 million or 30 million or somewhere in  
23 between, but at this point in time, I'm just not  
24 comfortable with it and I'd like to see some more

1 data and some more analysis that would give us --  
2 give me and perhaps the other members some comfort  
3 that we're not going to be confronted in the future  
4 with adverse affects of some large company that looks  
5 real healthy now, as Weirton Steel did at one time,  
6 deteriorating rapidly and leaving us holding the bag,  
7 basically.

8 MR. BOWEN: May I comment, sir? First  
9 of all, Mr. Slater made a comment that self-insurers  
10 are not compliant with the law. That is inaccurate.  
11 The Insurance Commission has not implemented the new  
12 provisions. That is their regulatory decision. We  
13 continue to pay everything we're asked to pay.

14 Secondly, Mr. Marshall, Weirton Steel  
15 was never financially capable of meeting its  
16 obligations. Government allowed it to self-insure.  
17 Governor Rockefeller specifically allowed it to be an  
18 employee ESOP. It was always unsecured. It was  
19 known to government for fourteen years. It was  
20 dramatically unsecured, and if anybody has heard  
21 anything today, the legislature in 2003 made it very  
22 clear that the Insurance Federation, that  
23 BrickStreet, Liberty Mutual, Travelers St. Paul and  
24 all of their insurers don't pay a dollar if there's a

1 self-insured default.

2 Now, if we have multiple defaults and we  
3 can't meet them through the surety obligations, the  
4 cash pool, then I suggest our state is in big trouble  
5 anyway, but I think you're misunderstanding the whole  
6 thing.

7 The 2005 legislation dramatically  
8 increased the taxes on insured companies and the coal  
9 industry and others to pay for the unfunded liability  
10 that's in the old fund. And arbitrarily saying 30  
11 million makes you feel better means that that's going  
12 to be twenty some million dollars more to do business  
13 in West Virginia that people are saying, "Why do we  
14 have to do it?" Please don't make a decision based  
15 on Weirton Steel because that's been addressed  
16 legislatively. You've got plenty of good public  
17 policy things to balance. And if you choose to keep  
18 the current rule, that's fine, but if you change  
19 simply because of concern of another Weirton, it  
20 can't happen.

21 The Insurance Commissioner reviews  
22 everybody annually. They're on top of it. This  
23 agency will not allow a Weirton Steel to occur again.  
24 It cannot legally happen unless something false or

1 criminally occurs. I mean, it just can't happen and  
2 it's extremely expensive.

3 MR. SLATER: Mr. Dean, would you ask Mr.  
4 Bowen if he's going to address the Council if he  
5 could come to the podium?

6 MR. BOWEN: I'm sorry.

7 CHAIRMAN DEAN: Anything else? And if  
8 you do have anything else, please come to the podium.

9 MR. BOWEN: No. I'm done. Thank you.

10 MR. MARSHALL: I would just respond to  
11 Mr. Bowen that Weirton Steel aside, we've seen some  
12 pretty large companies in the last five years go down  
13 the tubes very rapidly, and I'm thinking Enron and  
14 MCI, or whatever it was called before that. And I  
15 don't know that -- I'm not married or committed to  
16 \$30 million, but I am not sure at this point that \$10  
17 million is the right number and I think this Council  
18 needs to be very careful in its contemplation of what  
19 it's going to do with this rule.

20 MR. SIMS: I was just coming up to -- as  
21 a point of clarification, just because it's been  
22 discussed on the record, the Insurance Commission  
23 hasn't been following the law, I think that's  
24 completely inaccurate.

1                   First of all, I'll back what Mr. Bowen  
2 said. The self-insured community, as far as I know,  
3 has been compliant with everything we've told them to  
4 pay. What the rule requires is on an annual basis  
5 for them to pay the current methodology. If, in  
6 fact, this Industrial Council does not believe this  
7 rule is proper, we will enforce the current  
8 methodologies as they are stated in the rule. I  
9 don't believe that the Insurance Commission has not  
10 followed the law, so to speak and I just wanted to  
11 get that clear on the record.

12                   Secondly, I think our decision was a  
13 policy decision. We have no clear emergency rule  
14 making provisions, but we came to the decision that --  
15 and this is my general understanding -- that the  
16 current assessment methodologies imposed an undue  
17 hardship on the self-insured community and would be  
18 contrary to the business interests of this state. As  
19 it's been noted, some of the largest employers in the  
20 community are self -- in the state are self-insured  
21 employers; thus, we believe this is the closest thing  
22 we can get to an emergency rule making whereas we  
23 believe we would change the methodology to reflect  
24 something more reasonable based on the work that our

1 self-insured department has done that would impose more  
2 reasonable assessments and more reasonable funding  
3 levels of the Guaranty Fund.

4           And again I'll reiterate, we intend to  
5 absolutely follow this rule as it reads now if we don't  
6 get this amendment, and the self-insured community will  
7 be fully assessed pursuant to the current methodology  
8 if this Council chooses not to make a change or some  
9 other type of change to the methodology as it's  
10 currently stated in the rule. And I just wanted to  
11 clear that for the record. We haven't, in my opinion,  
12 at all not followed the law.

13           MR. SLATER: Let me -- For the record, I  
14 wasn't accusing anyone of not following the law. I had  
15 asked the question pursuant to 9.1(b), that this was to  
16 go in place I guess from the initial adoption July 1<sup>st</sup>,  
17 2006 and I asked the query if this had been followed  
18 effective July 1<sup>st</sup> to the current, and all the answers  
19 were, no, it wasn't being followed. So I just used  
20 that as my --

21           MR. SIMS: And, again, I think we're on  
22 the same page. As a point of clarification, the idea  
23 of agency leadership was to try to get this rule  
24 through on expedited basis. We have to take three

1 meetings to get any rule through. We don't have an  
2 emergency provision. If we had an emergency rule  
3 making provision, we probably would have at least  
4 considered using it, but I think the idea was, if this  
5 comes through, we'll do the new methodology; if it  
6 doesn't go through, the self-insured community will  
7 deal with that with the methodology that is currently  
8 under the rule. If there's no changes, they'll have  
9 to, you know, pay up everything they had owed from the  
10 time this new methodology went into place.

11 MR. MARSHALL: Query, Ryan, while you're  
12 up there. If the existing methodology is in place for  
13 this year, would this Council have the authority for  
14 subsequent years to adjust it?

15 MR. SIMS: Well, I think there's always  
16 ability of this Council to, well, working with the  
17 Insurance Commission --

18 MR. MARSHALL: I mean, we can change it,  
19 can we not? We can let it stand as it is and amend it  
20 for subsequent years, can we not, from the standpoint  
21 of our powers?

22 MR. SIMS: One of many options.

23 MR. KENNY: Would you be referring to  
24 increasing or decreasing the size of the pool?

1 MR. MARSHALL: The proposal that's before  
2 us, which would change it from the 30 million to the 10  
3 million and the, I guess, five percent to two percent.

4 MR. SIMS: Well, a couple of changes were  
5 made, you know, moving from 30 million as the target to  
6 consider --

7 MR. MARSHALL: Right.

8 MR. SIMS: -- the pool funded fully to 10  
9 million and then the other changes the actual  
10 methodology. Currently it contemplates a percentage of  
11 the total claims liabilities. The previous methodology  
12 in effect until the recent change was five percent of  
13 the indemnity payments, and I think Ms. Kiss --

14 MR. MARSHALL: What you alluded to,  
15 Melinda, a while ago, right?

16 MS. KISS: One thing I think we need to  
17 keep in mind, that \$30 million is not a ceiling, it's a  
18 floor. And if you've got a current copy of rule, I'll  
19 defer to Mr. Sims to read that, it's \$30 million or  
20 five percent of the aggregate liabilities, whichever is  
21 greater. I can assure you that five percent of the  
22 aggregate liabilities is going to be much greater than  
23 30 million. That is -- The way it's currently written  
24 is five percent of the aggregate liabilities of all

1 self-insureds, even extremely solvent ones. There is  
2 no regard in the current provision in the rule to do  
3 any -- to look at any other financial reviews or to  
4 assess the financial viability and any potential risk  
5 from that community. It's just a flat out five  
6 percent.

7                   So what you're actually saying is if we  
8 get a large -- a lot of large, really solvent, really  
9 healthy employers in here, in the self-insured  
10 community, the pool keeps going up. Is there any  
11 greater risk? No.

12                   So I think irregardless of what happens,  
13 it's going to have to be rethought and maybe fine-  
14 tuned. And I tend to agree there are always  
15 compromises to be sought, but I would not have  
16 certainly worked as much as I had or neither would any  
17 of the other staff if we thought the current rule was a  
18 workable version. As is, it's going to have to be  
19 adjusted somewhat.

20                   MR. SLATER: And I guess that would be  
21 the hope at least of this Commission member, that with  
22 the very divergent sides of this, then I would like to  
23 see all these groups kind of come together and come up  
24 with some workable compromise that serves certainly the

1 interest of everyone here. And that's kind of easy to  
2 say, but, again, I guess I'm still kind of at this  
3 point of, there's a big discrepancy there and I can't  
4 really -- and I'm just kind of a dumb accountant and I  
5 can't really quite get my arms around it very much and  
6 I'm just usually not someone that just kind of will  
7 vote to do something without understanding it. And  
8 maybe I just don't understand it, but no one has been  
9 able to get me from 30 to 10 and no one can get me from  
10 30 to 29 or 30 to 28 and I need to get there. And I  
11 don't know. I'll leave it up to the other members of  
12 the Commission to respond to that.

13 So I think all this is workable and it  
14 can be worked out. Ryan, I would ask you, I mean, can  
15 we -- do we have the mechanism to allow for additional  
16 time for discussions of compromise amongst the groups  
17 and the Insurance Commission?

18 MR. SIMS: Absolutely.

19 CHAIRMAN DEAN: Sir, do you have a  
20 comment?

21 MR. OBROKTA: Thank you. My name is T.J.  
22 Obrokta. I'm the general counsel at BrickStreet. I  
23 was not going to make any remarks today but I thought  
24 I'd just share a couple of points with the Industrial

1 Council that you may find to be of interest or you may  
2 find to be relevant as you consider these suggested  
3 changes to Rule 19.

4 I've heard some discussion today  
5 regarding security and prospective security. I just  
6 wanted to offer up one point that you may find to be of  
7 interest. As someone who lived through the drafting of  
8 Rule 19 and someone who lived through Weirton, I'll  
9 share this with you.

10 Weirton did have about \$70 million of  
11 liability on the books that ultimately got transferred  
12 to the state. They also had \$10 million of security.  
13 Their security was with a company called Frontier.  
14 Frontier went bankrupt before we could collect on that  
15 security. So I would suggest that security is not the  
16 sole solution to this problem.

17 The second thing I would suggest is that,  
18 as I understand Mr. Bowen's comments, he says that  
19 basically everything changed in 2003 and we put the  
20 Workers' Comp -- all the employers in the state that  
21 buy insurance, at that point through the state, now buy  
22 it from BrickStreet, if we put them in one bucket and  
23 we put the self-insured companies in another bucket,  
24 what he said was neither would be responsible for the

1 other's debts. That's essentially what he's saying.  
2 If that's the case, why in 2004 did that bucket of  
3 self-insureds go to the legislature and secure \$9  
4 million to help them with their debts, why in 2005 did  
5 we take the Weirton obligations and the Horizon  
6 bankrupt companies and roll it into the old fund and  
7 we're now paying those debts out of the old fund? Who  
8 pays for the old fund? Mostly all the other companies  
9 in this state, law firms, accounting firms, et cetera,  
10 who pay ten percent more on their premiums to fund the  
11 old fund.

12                   So to suggest that there's not a single  
13 payer who is going to be responsible for future self-  
14 insured obligations simply does not bear out. It's not  
15 a past practice of the self-insured community.  
16 Whenever there's a problem, they either go to the  
17 legislature or cut another agreement that will enable  
18 them to locate funds other than their own to secure  
19 their debts.

20                   So I would just ask you to consider those  
21 two points as you deliberate on this rule. Thank you.

22                   CHAIRMAN DEAN: Any further comments?

23                   MR. PELLISH: Yeah, I'd like to make a  
24 comment and respond to something that Rick said and I

1 think that other people have said as well. I don't  
2 want us to get trapped into the focusing on the \$30  
3 million as being a valid number. I'm not sure it is  
4 or ever was. So going from 30 to 10 sounds like a  
5 monumental change. The real question is what is  
6 necessary to go into a fund so that we are  
7 comfortable. Maybe the 10 million is not enough.  
8 Maybe it needs to be 12 or 15. I don't know. I  
9 think that's a valid question, but I don't think we  
10 should focus on the 30 because I'm not sure how real  
11 that is.

12                   And the other comment I would make,  
13 again, is that we spend a lot of time, in the sense  
14 of an awful lot of work when we review anyone who is  
15 applying to be self-insured and the tests that we're  
16 applying to these folks are extremely rigorous, and I  
17 think are tremendous studies in terms what the  
18 abilities of the company are to self-insure  
19 themselves. So I think we're taking some excellent  
20 preventative measures to never allowing a Weirton to  
21 happen again. And I forget who pointed it out  
22 before, but Weirton was never fully funded, and I'm  
23 only hazarding a guess here because I wasn't around  
24 before, but I'm not sure that we ever put the kind of

1 test to Weirton that we're putting toward self-  
2 insureds as they attempt to become or continue to be  
3 self-insured under the present system.

4 CHAIRMAN DEAN: Thank you. We'll move  
5 on to a general public comment if anybody in the  
6 audience would like to comment on anything.

7 MR. WHITE: Steve White, Director of the  
8 Affiliated Construction Trades Foundation. The  
9 purpose I came was just to try to get an issue on  
10 your agenda for a future meeting, so I talked about  
11 it before, it's compliance. I would feel more  
12 comfortable and I think it's an obligation for you  
13 folks as the Industrial Council to be getting regular  
14 reports on compliance. And my understanding was the  
15 Insurance Commission was to put together a dedicated  
16 compliance unit. I think we had one report during  
17 the times we've met. I really am unclear on how many  
18 people are in the unit and how many investigations  
19 they are undertaking, how many companies have gone  
20 into default or how many folks have been fined, what  
21 the range of fines or default is, how many of those  
22 things have been done.

23 These are all things that I think are  
24 very important to closely monitor, not the self-

1 insurance this time, but the regular community, to  
2 make sure that that part of our debt doesn't grow,  
3 the uninsured fund doesn't grow and those other  
4 things.

5                   Now, I think there's a lot of things  
6 being done, so I'm not here to say I don't think it's  
7 being done. I'm just not clear on what's being done.  
8 I've had a lot of communication with folks in the  
9 Insurance Commission and I feel that they're very  
10 willing to communicate and talk, but I also see that  
11 there's a lot that I feel that needs to be done to  
12 better explain what's in place, what's being done and  
13 what kind of trends, in particular, we're facing.  
14 Are we seeing more people, you know, default? Are we  
15 seeing more people coming in to the state and just  
16 not getting any insurance at all? Do we have people  
17 out there doing the job, policing what needs to be  
18 done?

19                   I feel like that would take -- that's a  
20 good area of oversight and I've come here just as a  
21 suggestion in the hope that perhaps you folks would  
22 ask for that type of report at least for a while so  
23 we can feel comfortable that the mechanisms are in  
24 place.

1 Thank you.

2 CHAIRMAN DEAN: Any comments, Mr.  
3 Marshall?

4 MR. MARSHALL: No.

5 CHAIRMAN DEAN: Anybody else from the  
6 general public have any comments today?

7 MR. PELLISH: Before we move on for any  
8 other comments, I think Mr. White's suggestion is an  
9 excellent one and that's something that we should  
10 focus on.

11 MR. SLATER: Walt, is that a motion to  
12 receive a report from the Insurance Commission?

13 MR. PELLISH: If we need a motion, I  
14 will make it, yes.

15 MR. SLATER: I'll second the motion.

16 CHAIRMAN DEAN: Made and seconded to  
17 have a report from the Insurance Commission. Any  
18 questions on the motion? All in favor, aye.

19 MR. SLATER: Aye.

20 MR. MARSHALL: Aye.

21 MR. PELLISH: Aye.

22 CHAIRMAN DEAN: All opposed? The ayes  
23 have it. So we will get reports, I'm sure.

24 We'll move on to the next meeting, which

1 will be Thursday, January the 11<sup>th</sup>, '07 at 3:00 p.m.  
2 at the Charleston Civic Center.

3 Is there a motion to move into Executive  
4 Session?

5 MR. SLATER: So moved.

6 MR. MARSHALL: Seconded.

7 CHAIRMAN DEAN: Motion made and seconded  
8 to move into Executive Session. Any questions on the  
9 motion? All in favor, aye?

10 MR. MARSHALL: Aye.

11 MR. SLATER: Aye.

12 MR. PELLISH: Aye.

13 CHAIRMAN DEAN: The ayes have it.

14 (WHEREUPON, the regular meeting was  
15 adjourned and the Executive Session  
16 commenced.)

17

18

19 CHAIRMAN DEAN: Okay. We're back in  
20 regular session.

21 The first resolution for Ball Aerosol  
22 Specialty Containers for self-insured status, is  
23 there a motion on the application?

24 MR. MARSHALL: So moved.

1 MR. SLATER: Seconded.

2 MR. PELLISH: Seconded.

3 CHAIRMAN DEAN: Motion made and seconded  
4 to approve the application. Any questions on the  
5 motion? All in favor, aye.

6 MR. SLATER: Aye.

7 MR. MARSHALL: Aye.

8 MR. PELLISH: Aye.

9 CHAIRMAN DEAN: All opposed? The ayes  
10 have it.

11 The second resolution would be for  
12 Gannett River State Publishing Corporation for self-  
13 insurance status. Is there motion?

14 MR. SLATER: So moved.

15 MR. MARSHALL: Seconded.

16 CHAIRMAN DEAN: Motion made and seconded  
17 to approve the resolution. Any questions on the  
18 resolution? All in favor, aye?

19 MR. MARSHALL: Aye.

20 MR. SLATER: Aye.

21 MR. PELLISH: Aye.

22 CHAIRMAN DEAN: All opposed? The ayes  
23 have.

24 The third resolution is for Snowshoe

1 Mountain Industry for self-insurance status. Is  
2 there a motion?

3 MR. SLATER: I so move.

4 MR. PELLISH: Second.

5 CHAIRMAN: Motion made and seconded to  
6 approve the application. Any questions on the  
7 motion? All in favor, aye.

8 MR. MARSHALL: Aye.

9 MR. SLATER: Aye.

10 MR. PELLISH: Aye.

11 CHAIRMAN DEAN: All opposed? The ayes  
12 have it.

13 If nothing else, is there a motion for  
14 adjournment?

15 MR. MARSHALL: So moved.

16 MR. SLATER: Seconded.

17 CHAIRMAN DEAN: Motion made and seconded  
18 to adjourn. Any questions on the motion? All in  
19 favor, aye.

20 MR. MARSHALL: Aye.

21 MR. SLATER: Aye.

22 MR. PELLISH: Aye.

23 CHAIRMAN DEAN: All opposed? The ayes  
24 have it.

1                   Mr. Pellish, do you have anything else  
2 for us?

3                   MR. PELLISH: Just my apologies for not  
4 being able to get out there today, but I had to get a  
5 second injection in my back and it got scheduled for  
6 today. There wasn't much I could do about it. So my  
7 apologies to you.

8                                   \* \* \* \* \*

9                                   *(Concluded at 4:52 p.m.)*

10                                   \* \* \* \* \*

## REPORTER' S CERTIFICATE

STATE OF WEST VIRGINIA,  
COUNTY OF KANAWHA, to wit:

I, Evalyn Garrett Bibbee, Notary Public in and for the State of West Virginia, duly commissioned and qualified, do hereby certify that the foregoing **MEETING OF THE WORKERS' COMPENSATION INDUSTRIAL COUNCIL** was duly taken by and before me, at the time and place specified in the caption thereof, and is an accurate verbatim record of said meeting.

Given under my hand this 2<sup>nd</sup> day of  
January, 2007.

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Evalyn Garrett Bibbee, CCR  
Notary Public

My commission expires June 8, 2008.