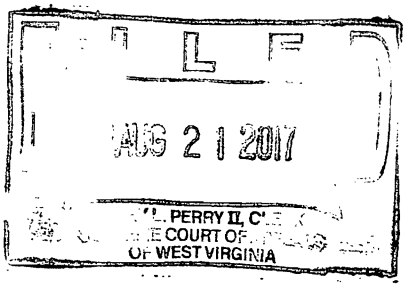
No. 17-0406

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STEEL OF WEST VIRGINIA, INC.,
Petitioner,

v.

WEST VIRGINIA HEALTH CARE AUTHORITY and CABELL HUNTINGTON HOSPITAL, INC.,
Respondent.



PETITIONER'S BRIEF

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INTRODUCTION

This case turns on the Health Care Authority's failure to comply with its statutory obligations in reviewing a Certificate of Need application. Yet, this case is also about the disproportionate ability of one party to eliminate regulatory impediments in its path, to alter the legal landscape while a case is pending. Respondent-Appellee Cabell Huntington Hospital, Inc. ("Cabell Huntington") has not been content to litigate this proceeding on its merits alone; instead it repeatedly has engaged in extrajudicial efforts to create special rules for this limited transaction.

When Cabell Huntington first set out to acquire St. Mary's Medical Center's ("St. Mary's") the underlying transaction was subject to three distinct regulatory approval and review processes:

(1) the Federal Trade Commission's merger review jurisdiction;

(2) the Attorney General of West Virginia's investigative authority under the Antitrust Act; and

(3) the Certificate of Need laws administered by the West Virginia Health Care Authority.

Today, the regulatory landscape governing this merger is much different; in fact, it is confined to this appeal. Apparently appalled at the prospect of being held to same standards as similar mergers, Cabell Huntington decided that this proposal was special, and that it warranted special rules, and that those rules should allow it to circumvent these regulatory processes and to expedite the consummation of this transaction.

Along the way, Cabell Huntington has strung together an impressive collection of extrajudicial accomplishments to facilitate this merger, including: (i) its private negotiations with the Attorney General; (ii) convincing the 2016 Legislature to exempt this merger from state and federal antitrust law; and then (iii) in an effort to negate this appeal, returning in 2017 to convince the Legislature to exempt this specific transaction from the Certificate of Need laws. *See* W.VA.CODE §16-2D-10(7) (2017 West Virginia House Bill No. 2459). Cabell Huntington then tried to get this

legislation applied retroactively to dismiss this appeal (an attempt this Court rightfully rejected).

Accordingly, this Court's review could not come at a more critical point. Having eliminated state and federal antitrust review of this merger, this Court's review presents the last (and in some respects, the first comprehensive) opportunity for the proposed transaction to be reviewed and considered in accordance with applicable law. Cabell Huntington's march to create a monopoly on the provision of health care in the Huntington area must still pass squarely before this Court, which stands as the last opportunity to review this transaction which stands to affect so many.

ASSIGNMENT OF ERRORS

The Decision by the Health Care Authority to grant Cabell Huntington a Certificate of Need should be reversed because:

1. The Circuit Court erred in concluding that the Health Care Authority had not violated West Virginia Code §§16-2D-5 through 6 by failing to consider the effect of the proposed transaction on competition;

2. The Circuit Court erred in concluding that the Health Care Authority had not violated West Virginia Code §16-2D-6(e)(1) by failing to consider alternatives in terms of cost, efficiency, and appropriateness to the proposed transaction, and failed to require any evidence regarding such alternatives; and

3. The Circuit Court erred in upholding the Health Care Authority's determination that patients would have serious problems accessing services absent the merger, in contravention of West Virginia Code §16-2D-6(e)(4).

STATEMENT OF THE CASE

A. Cabell Huntington seeks to become the sole owner of the only two general acute care hospitals in Huntington.

St. Mary's and Cabell Huntington are the only two general acute care hospitals in Huntington, West Virginia. (App.2567-2568). The competition between these two hospitals for the Huntington market is fierce and has helped to keep health care costs down in the region. (App.1333, 1338, 1347, 2525-2528.)

However, in 2014, the owner of St. Mary's, Pallottine Health Services, Inc. ("Owner"), decided to sell the hospital through a competitive bidding process whereby the Owner identified potential buyers and asked them to submit bids. (App.2567-2568). Many hospital systems—including not-for-profit, for-profit, and Catholic systems—submitted bids to purchase St. Mary's. (*Id.*).

Although there were several other willing buyers, the Owner ultimately decided to sell St. Mary's to its closest competitor in the area, Cabell Huntington. (*Id.*). This meant that both of the Huntington hospitals would be owned and operated by the same entity (Cabell Huntington), and competition for the hospital services provided by these facilities would be virtually eliminated. (*Id.*).

Although Cabell Huntington and St. Mary's are private entities in a private sale, the proposed transaction required several regulatory approvals, including a Certificate of Need. In West Virginia, the Legislature created the Health Care Authority to protect its citizens and ensure access to reasonably priced health care services. To effectuate this goal, the Legislature has required that any entity—private or public—wanting to acquire and offer health care services must obtain a Certificate of Need. Accordingly, to finalize its attempted acquisition of St. Mary's, Cabell Huntington filed its application for a Certificate of Need with the West Virginia Health Care Authority on April 30, 2015. (*Id.*).

B. Petitioner Steel of West Virginia becomes an "affected party" in the Certificate of Need proceedings.

The proposed merger concerned Petitioner Steel of West Virginia, Inc. ("Petitioner"), a self-insured employer of roughly 500 steelworkers in Huntington, because health care costs affect not only its competitiveness in the market but also its long-term viability. Wary that the proposed merger would eliminate competition in the Huntington area and increase its employees' health care costs, Petitioner sought and was granted "affected party" status in this Certificate of Need proceeding.

(App.2568).

During the underlying proceeding, Petitioner served discovery requests upon Cabell Huntington. (App.398-434.). Additionally, pursuant to W. Va. C.S.R. § 65-7-11.16, Petitioner also requested that the Health Care Authority issue a subpoena *duces tecum* to St. Mary's for several categories of documents, including the identity of the alternative bidders and documents relating to the alternative bids. (App.433-434). Petitioner plainly described the necessity of the information sought:

> Request Nos. 1, 2, and 5 seek information (i.e., alternative bids, bid evaluations, etc.) that is necessary for the Authority to determine the availability of alternatives in terms of cost, efficiency, and appropriateness, and are not efforts to seek 'judicial review' of a private bid process.

(App.442-443). Pointing to the statutory basis for these requests, Petitioner questioned how the Health Care Authority "could fulfill its statutory obligation to assess the existence of such viable alternatives without permitting even a cursory review of the requested documents." (*Id.*). Following a telephonic conference on October 28, 2015, it was announced that the Health Care Authority would issue a moulded subpoena, omitting the pertinent requests. Petitioner objected to this ruling, even going so far as to seek extraordinary relief from this Court because it feared that the ruling signaled the Health Care Authority's predetermination that it not consider any evidence related to alternatives, competing proposals, other bidders, or the effect of the acquisition on competition. (App.510-534). These fears were borne out during the hearing and embodied in the Health Care Authority's decision, where Petitioner's efforts to elicit this statutorily required information were repeatedly rebuffed. (App.3017-3061).

A prehearing conference was held on December 16, 2015, and the public hearing on this matter commenced on December 21, 2015, at the Authority's offices. (App.2110-2128). Following

a two-day hearing, the Health Care Authority then closed the record. (App.2129-2563,4298-4732).

C. The Health Care Authority grants Cabell Huntington a Certificate of Need.

Following briefing, the Health Care Authority entered an order approving Cabell Huntington's Certificate of Need Application on March 16, 2016. (App.317-360). In doing so, the Health Care Authority disregarded its statutory obligations and declared that its consideration of the merger's competitive effect is *discretionary*. (*Id.*).

In similar contravention of its legal mandates, the Health Care Authority also declared it would not consider alternative bids when determining whether the proposed merger is superior to other alternatives; instead, the only alternatives it would consider in establishing the "superior" alternative were the "alternatives presented by the applicant [Cabell Huntington]." (*Id.*). In Cabell Huntington's view, only two alternatives existed: (1) the proposed merger; or (2) maintaining the status quo. Yet, because of St. Mary's stated unwillingness to maintain the status quo, then the Health Care Authority had to approve the merger. Unfortunately, the Health Care Authority (as well as the Circuit Court) adopted this flawed reading of the law.

Finally, although the Health Care Authority did not conclude that access to the type of care *currently* being provided by the hospitals—outpatient surgical services or general acute care inpatient hospital services—would be diminished or endangered if the merger did not take place, it found patients will experience "serious problems" obtaining *new specialty services* should the proposed merger fail. (*Id.*)

On April 11, 2016, Petitioner filed a motion to reconsider the Order, which the Health Care Authority denied on June 29, 2016. (App.3070-3079.) The Office of Judges thereafter affirmed the decision on October 5, 2016. (App.3005-3015.) Petitioner sought judicial review through appeal to the Circuit Court of Kanawha County on November 2, 2016. (App.29-42.) Following briefing, the

Circuit Court affirmed the Decision of the Health Care Authority. (App.1-24.) This appeal has now ensued.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This case involves issues of fundamental public importance and issues of first impression regarding the legal standards required to issue a Certificate of Need. Accordingly, Petitioner requests oral argument under Rule of Appellate Procedure 20.

SUMMARY OF ARGUMENT

The proposed transaction between Cabell Huntington and St. Mary's would give Cabell Huntington control of at least 75.4% of the market share for general acute care inpatient hospital services, and would virtually eliminate or significantly weaken competition in the service area.

When Cabell Huntington first set out to acquire St. Mary's in 2014, the underlying transaction was subject to three distinct regulatory approval and review processes:

(1) the Federal Trade Commission's merger review jurisdiction;

(2) the Attorney General of West Virginia's investigative authority under the Antitrust Act; and

(3) the Certificate of Need laws administered by the West Virginia Health Care Authority.

As of today, however, Cabell Huntington has successfully lobbied to eliminate any state and federal antitrust review of this merger which makes this Court's review of the Certificate of Need all the more critical, as this review provides the only opportunity to ensure the propriety of a transaction which grants Cabell Huntington a monopoly over health care services and stands to affect so many.

This Court's *de novo* review of the issues of law contained in the Health Care Authority's Decision reveals that reversal is necessary. First, West Virginia law mandates that the Health Care Authority consider the effect of the proposed acquisition on competition. Despite this statutory

mandate, the Health Care Authority erroneously declared that consideration of the competitive effect of this merger is *discretionary* and that it would choose not to emphasize considerations of competition.

The only time the Health Care Authority has the discretion to disregard competition in reviewing a Certificate of Need application is after it has **first** determined the effect of competition on the supply of the health services being reviewed and then concluded that competition **does not** appropriately allocate health services. The Health Care Authority never made this statutorily required determination that competition does not appropriately allocate supply for hospital services, which warrants reversal.

Second, reversal is needed because the Health Care Authority improperly rejected consideration of whether the proposed merger was superior to the other alternative bidders for St. Mary's. The Health Care Authority based its rejection on its prior administrative decisions in the *LifePoint* cases where the Health Care Authority formulated an erroneous construction of the statute and the Health Care Authority then improperly applied the facts here to that erroneous legal conclusion.

The *LifePoint* decisions do not represent good law, and Cabell Huntington's request for a Certificate of Need should have been denied because it failed to provide evidence that the proposed merger is superior to other alternatives, as required by West Virginia Code § 16-2D-6(e)(1).

Finally, the Decision incorrectly determined that patients would have serious problems accessing services absent the merger. The Health Care Authority did not find there would be any serious problem with access to the type of care currently being provided by the hospitals if the merger did not take place. Instead, it determined that the proposed transaction could increase access to *new specialty services*.

Focusing on services that do not currently exist—and may not **ever** exist—does not comport

with the statutory mandate. As a matter of law, the appropriate inquiry for this statutory requirement should be on existing services and care, and in this regard the evidence presented established there were **no** concerns about that.

The Heath Care Authority's decision should be reversed because it was in violation of statutory provisions, in excess of the statutory authority or jurisdiction of the Authority, made upon unlawful procedures, affected by other error of law, clearly wrong in light of reliable, probative evidence on the whole record, and arbitrary and capricious.

STANDARD OF REVIEW

When reviewing the circuit court's ruling on an administrative order granting a Certificate of Need, this Court is "bound by the statutory standards contained in [the West Virginia Administrative Procedure Act] W.Va.Code § 29A-5-4." *Fairmont General Hosp., Inc. v. United Hosp. Center, Inc.*, 218 W.Va. 360, 364, 624 S.E.2d 797, 801 (2005).

Pursuant to these statutory standards in the West Virginia Administrative Procedure Act, "the court shall reverse, vacate, or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced." *St. Mary's Hosp. v. State Health Planning and Development Agency*, 178 W.Va. 792, 795, 364 S.E.2d 805, 808–09 (1987). This occurs when:

> [T]he administrative findings, inferences, conclusions, decisions or order are:
>
> (1) In violation of constitutional or statutory provisions; or
>
> (2) In excess of the statutory authority or jurisdiction of the agency; or
>
> (3) Made upon unlawful procedures; or
>
> (4) Affected by other error of law; or
>
> (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
>
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

Id. at 795–96 (citing W.VA.CODE §29A-5-4).

"Thus, the key question is whether the circuit court and the [reviewing entity] were correct, based on the foregoing standards, in ... affirming the [Administrative Agency's] determinations and granting a certificate of need." *Id.* at 796.

In making this determination, this Court on appeal reviews *de novo* any questions of law, including those that involve "[i]nterpreting a statute or an administrative rule or regulation." *Family Medical Imaging, LLC v. West Virginia Health Care Authority*, 218 W.Va. 146, 147, 624 S.E.2d 493, 494 (2005). This Court also reviews "de novo the conclusions of law and application of law to the facts." *Id.* "Findings of fact by the administrative officer are accorded deference unless the reviewing court believes the findings to be clearly wrong." *Id.*

ARGUMENT

This Court should reverse the Final Order by the Circuit Court of Kanawha County affirming the Health Care Authority's Decision to issue the Certificate of Need. Prior to granting Cabell Huntington a Certificate of Need, the Health Care Authority was required to consider the twenty-three factors set forth in West Virginia Code § 16-2D-6(a), and then make the required findings under West Virginia Code §§ 16-2D-6(e) and 16-2D-9(e)(1).[1] At issue in this appeal are the following criteria and required findings:

> (a) [I]n making its determination as to whether a certificate of need shall be issued, the state agency shall, at a minimum, consider all of the following criteria that are applicable:
>
> ...
>
> (3) The need that the population served or to be served by the services has for the services proposed to be offered or expanded, and the extent to which all residents of the area, and in particular low income persons, racial and ethnic minorities, women, handicapped persons, other medically underserved population and the elderly, are likely to have

[1] *See W. Va. Advocates for Developmentally Disabled v. Casey*, 178 W.Va. 682, 685, 364 S.E.2d 8, 11 (1987) ("Code § 16-2D-6 (1985) enumerates minimum criteria that **must** be considered by [the agency] in its determination of whether it will issue a certificate of need.") (emphasis added).

access to those services;

(4) The availability within this state of less costly or more effective alternative methods of providing the services to be offered, expanded, reduced, relocated or eliminated;

...

(16) In accordance with section five of this article,[2] the factors influencing the effect of competition on the supply of the health services being reviewed;

(17) Improvements or innovations in the financing and delivery of health services which foster competition, in accordance with section five of this article, and serve to promote quality assurance and cost effectiveness;

(e) In the case of any proposed new institutional health service, the state agency may not grant a certificate of need under its certificate of need program unless, after consideration of the appropriateness of the use of existing facilities within this state providing services similar to those being proposed, the state agency makes ... the following findings in writing:

(1) That superior alternatives to the services in terms of cost, efficiency and appropriateness do not exist within this state and the development of alternatives is not practicable;

...

(4) that patients will experience serious problems in obtaining care within this state of the type proposed in the absence of the proposed new service.

W.VA.CODE §16-2D-6(a, e) (2015).

Because the Circuit Court erroneously concluded that the Health Care Authority complied with these statutory obligations, and for the reasons discussed below, reversal is warranted.

[2] Section five was repealed in 2016, but at the time the Certificate of Need was be considered, the relevant parts of section five provided: "For health services for which competition appropriately allocates supply consistent with the state health plan, the state agency shall, in the performance of its functions under this article, give priority, where appropriate to advance the purposes of quality assurance, cost effectiveness and access, to actions which would strengthen the effect of competition on the supply of the services," and "For health services for which competition does not or will not appropriately allocate supply consistent with the state health plan, the state agency shall, in the exercise of its functions under this article, take actions, where appropriate to advance the purposes of quality assurance, cost effectiveness and access and the other purposes of this article, to allocate the supply of the services." W.VA.CODE §16-2D-5(d) and (e) (2015).

I. The Circuit Court erred in concluding that the Health Care Authority had not violated West Virginia Code §§16-2D-5 through 6 by failing to consider the effect of the proposed transaction on competition.

A. As a matter of law, the Health Care Authority is mandated to consider the competitive effect of the proposed transaction and its failure to do so requires reversal.

West Virginia law recognizes that competition among health care providers can impact the supply of health services in this state. At the time the Certificate of Need was being considered in this case, the West Virginia Code mandated that the Health Care Authority consider:

- "factors influencing the effect of competition on the supply of the health services being reviewed," and
- "improvements or innovations in the financing and delivery of health services which foster competition ... and serve to promote quality assurance and cost effectiveness."

W.VA.CODE §16-2D-6(a)(16, 17) (2015). These criteria are to be considered "in accordance with section five of this article." *Id.* At the time of the Certificate of Need proceedings, section five provided:

> (d) For health services for which competition appropriately allocates supply consistent with the state health plan, the state agency shall, in the performance of its functions under this article, give priority, where appropriate to advance the purposes of quality assurance, cost effectiveness and access, to actions which would strengthen the effect of competition on the supply of the services.
>
> (e) For health services for which competition does not or will not appropriately allocate supply consistent with the state health plan, the state agency shall, in the exercise of its functions under this article, take actions, where appropriate to advance the purposes of quality assurance, cost effectiveness and access and the other purposes of this article, to allocate the supply of the services.

W.VA.CODE §16-2D-5 (2015).

These statutes explain that evaluating competition for purposes of a Certificate of Need involves multiple steps. First, as a threshold matter, the Health Care Authority must evaluate "the effect of competition on the supply of the health services being reviewed"—here the services being reviewed are the services provided by Cabell Huntington and St. Mary's. W.VA.CODE §16-2D-

6(a)(16) (2015).

Second, after evaluating "the effect of competition on the supply of the health services being reviewed," section five then requires the Health Care Authority to determine whether this effect on competition either "appropriately allocates supply consistent with the state health plan" or "does not or will not appropriately allocate supply consistent with the state health plan." W.VA.CODE §16-2D-5(d, e) (2015).

Third, if the Health Care Authority determines that the competition *does* appropriately allocate the supply of health services, then it must "give priority, where appropriate to advance the purposes of quality assurance, cost effectiveness and access, to actions which would strengthen the effect of competition on the supply of the services." W.VA.CODE §16-2D-5(d) (2015).

Conversely, if the Health Care Authority determines that the competition does *not* appropriately allocate the supply of health services, then it must simply "take actions, where appropriate to advance the purposes of quality assurance, cost effectiveness and access and the other purposes of this article, to allocate the supply of the services." W.VA.CODE §16-2D-5(e) (2015).

Despite this statutory mandate, the Health Care Authority erroneously declared that consideration of the competitive effect of this merger is *discretionary* and that it would choose not to emphasize considerations of competition:

> These criteria are listed in a Code section with many other factors that the Authority may consider, as opposed to the required findings it must make in every case. Historically, in hospital acquisitions, the Authority has not given priority to factors impacting the effect on competition. Instead, the Authority has looked to other factors such as cooperation and collaboration to advance the purpose of quality assurance, cost effectiveness, and access pursuant to W. Va. Code § 16-2D-5(e).

(App.3046.)

Although appearing to acknowledge the largely uncontroverted evidence about the anti-competitive effect of the merger, the Health Care Authority nonetheless declared:

> The Authority rejects [Petitioner's] arguments about competition. The Authority has discretion to consider the weight competition should be given and historically has not given it priority in hospital acquisition cases. It is not inclined to do so in this hospital acquisition either for the reason that it is the public policy of this state to avoid unnecessary duplication of services and to contain or reduce increases in the cost of delivering health services. W. Va. Code § 16-2D-1(a). In the present case, this policy is best served by the proposed acquisition.

(App.3047-3048.)

As a matter of law, this does not comport with the statute. As noted, the Health Care Authority **must** make a threshold determination as to "the effect of competition on the supply of the health services being reviewed." W.VA.CODE §16-2D-6(a)(16) (2015). It is only if the Health Care Authority determines that the effect on competition "does not or will not appropriately allocate supply consistent with the state health plan" that the Health Care Authority can take its attempted action "pursuant to §16-2D-5(e)."

Stated differently, the Health Care Authority has the discretion to disregard competition in reviewing a Certificate of Need application **only** after it has first determined the effect of competition on the supply of the health services being reviewed and then concluded that competition **does not** appropriately allocate health services. *Id.*

In the instant case, this never happened. The question is not, as the Circuit Court suggested, whether there are special rules for "hospital acquisitions," but whether competition appropriately allocates supply for **hospital services**. The Health Care Authority never made this statutorily required determination that competition does not appropriately allocate supply for hospital services.

Having failed to make a specific finding that competition does not appropriately allocate supply consistent with the state health plan, the Health Care Authority's decision to disregard competition was in violation of statutory provisions, in excess of its statutory authority and/or jurisdiction, made upon unlawful procedures, and affected by other error of law.

B. Applying the correct legal analysis, the proposed transaction would have an anti-competitive effect on the supply of health services and the Certificate of Need should not have been granted.

The Health Care Authority's erroneous legal conclusion that consideration of competition was discretionary flies in the face of the evidence presented establishing the proposed transaction would have an anti-competitive effect on the supply of health services. In particular, St. Mary's and Cabell Huntington are the only two general acute care hospitals in Huntington, West Virginia, and Huntington residents primarily seek their medical care from these two hospitals. (App.1333, 1338, 2525-2528.) The robust competition for patients in the Huntington area between these two hospitals has resulted in high quality, low cost health care in the area. (App.1333, 1347, 2244, 2525-2528.)

Testifying as to the benefits and need for this competition in the market place, Petitioner's expert, Professor Robert Town, identified two stages of competition that affect the price and quality of health care. In the first stage, hospitals compete for inclusion in third-party payer networks so that the hospitals can access the third-party payer's enrollees. (App. 2459-2462.) If a comparable substitute to the hospital seeking inclusion exists, the third-party payer can threaten to exclude the hospital in order to obtain a higher discount on the hospitals prices and, as a result, lower prices for its enrollees. (*Id.*)

In the second stage of competition, hospitals compete with each other on non-price terms such as patient experience, hospital quality, location, etc., because patient's out-of-pocket costs do not vary across in-network hospitals. (*Id.*) The CEO of St. Mary's explained that competition between the two hospitals creates "incentives for investing dollars into their operations to provide and improve quality to expand services for patients." (App.1347, 2244.)

The evidence established that the proposed transaction between Cabell Huntington and St. Mary's would virtually *eliminate* competition in four of the seven service area counties that Cabell Huntington identifies as its "primary market area," and would significantly affect competition in the

other three county service area. (App.2266, 4713-4720.) If the Certificate of Need is granted, the combined facility would control at least 75.4% of the market share for general acute care inpatient hospital services in those four counties and, as a result, the combined facility could leverage its increased bargaining power to drive up prices in negotiations with third-party payers. (App.1339-1340.)

The increase in costs if this happens will be substantial; studies of hospital mergers show that prices often increase dramatically. (App.1344-1345,4638.) In addition, without a comparable substitute hospital, the combined facility would have no incentive to increase its quality of care. (App.1348-1349.) In fact, following Cabell Huntington's previous acquisition of Cabell Huntington Surgery Center, the "cost of claims changed tremendously on the order of 100, 200, and 300 percent." (App.2391-2392.) Similarly, following Cabell Huntington's acquisition of Cook Eye Center, costs for services increased up to 250% to 300% after Cabell Huntington took over. (App.2396-2397.)

The Attorney General for the State of West Virginia recognized the negative effect that the merger would have on competition and initiated an antitrust investigation that resulted in Cabell Huntington entering into an Assurance of Voluntary Compliance with the Attorney General for the State of West Virginia. (App.1404-1412.)

This Assurance is no substitute for real competition, however, as the Health Care Authority's rate review jurisdiction contemplated therein relies on benchmark rates that are only a "ceiling on negotiated rates" and do not "preclude a significant increase in those negotiated rates." (App.1334,2359.) Moreover, the purported rate caps are temporally limited; after those restrictions expire, the combined facility can use its overwhelming market share to drive up rates. (App.2399-2400.)

More importantly, the Assurance is no longer enforceable. The Assurance of Voluntary Compliance is a statutory creation, expressly included as a settlement mechanism under the West

Virginia Antitrust Act. *See* W.VA.CODE § 47-18-22. Yet, following the hearing before the Health Care Authority, Cabell Huntington successfully lobbied the Legislature to exempt this transaction from state (and federal) antitrust review. The new legislation permits a "qualified hospital" to enter into a "cooperative agreement" with another provider; once such a "cooperative agreement" is approved by the Health Care Authority, the agreement and the parties are exempt from state antitrust laws enforced by the Attorney General, even though the agreement or underlying transaction "might be anti-competitive within the meaning and intent of state and federal antitrust laws[.]" W.VA.CODE §16-29B-28(a)(2), (c) (2016).

In doing so, the Legislature has rendered the Assurance unenforceable. By its own terms, the Assurance of Voluntary Compliance becomes effective upon closing; thus, before its terms could become binding, the Attorney General's ability to sign it had been stripped away. (App.1404-1412). Although the new law facially purports to salvage the Assurance,[3] the Attorney General now can only bring an action for a breach of contract.[4] But the power of the Assurance to prevent anti-competitive actions was based on the possibility of an **antitrust enforcement action** that would subject Cabell Huntington to injunctive relief, enhanced damages, civil penalties, as well as costs and attorneys' fees. *See* W.VA.CODE §§47-18-8; 47-18-9; 47-18-18.

Now, any recovery sought by the Attorney General in a contract action could not include any

[3] "An agreement entered into by a hospital party to a cooperative agreement and any state official or state agency imposing certain restrictions on rate increases shall be enforceable in accordance with its terms and may be considered by the authority in determining whether to approve or deny the application. Nothing in this chapter shall undermine the validity of any such agreement between a hospital party and the Attorney General entered before the effective date of this legislation." W.VA.CODE §16-29B-28(i)(1)(A).

[4] This assumes the Assurance constitutes a valid contract, but there is a serious question as to consideration. Contracts negotiated with the Attorney General are valid only because the Attorney General gives up an enforcement action to enjoin the antitrust violations or to recover damages, penalties and fees for those violations. But after the enactment of the new law, the Attorney General here no longer had anything to give away because the Legislature has taken that enforcement power away.

of these remedies. More troubling, the Attorney General is now forever precluded from reopening his original antitrust investigation into the admitted anti-competitive effect of the Cabell Huntington proposed transaction. In addition, successful lobbying led to the Legislature stripping the Health Care Authority's power to review hospital rates. *See* W.VA.CODE §16-2D-10 (2016). This abolition of rate regulation eliminates an important layer of consumer protection and will "cause a direct impact on health care premiums. Health insurance premiums will go up." (App.109).[5]

In summary, the Assurance and promise of rate review authority are insufficient to blunt the anti-competitive harm that will accompany this merger. Nonetheless—other than bald, conclusory statements and reference to the Assurance—Cabell Huntington offered no counter evidence as to the effect on competition, in fact repeatedly conceding it had never even looked at the effect of the merger on competition. (App.2246, 2270).

All of which simply underscores the Health Care Authority's blatant legal error in concluding that it had the discretion to ignore these anticompetitive effects in reviewing the Certificate of Need Application. For these reasons, reversal is needed. *See Family Medical Imaging, LLC*, 624 S.E.2d at 494 (this Court on appeal reviews *de novo* any questions of law, including those that involve "[i]nterpreting a statute or an administrative rule or regulation" and "the conclusions of law and application of law to the facts.").

[5] Although some limited rate review was given to the Attorney General by another bill passed during the 2016 Regular Session (Senate Bill No. 597), these rate review provisions stand in stark contrast to the prior robust rate review system, which relies on numerous factors and data, including the collection of financial and utilization data from hospitals, to set benchmark rates based on a comparison of costs incurred by peer hospitals. *See* W.VA.CODE §16-29B-19 thru -21 (repealed effective June 5, 2016); W.VA. C.S.R. §65-05.

II. Cabell Huntington should not have been granted a Certificate of Need because the Decision failed to consider appropriate alternatives.

A. The Health Care Authority improperly rejected review of whether the proposed merger was superior to other alternatives.

West Virginia law provides that a Certificate of Need may not be granted "unless, after consideration of the appropriateness of the use of existing facilities within this state providing services similar to those being proposed, the state agency makes ... the following findings in writing ... That superior alternatives to the services in terms of cost, efficiency and appropriateness do not exist within this state and the development of alternatives is not practicable." W.VA.CODE §16-2D-6(e) (2015).

Consistent with that statutory directive, Petitioner sought discovery as to alternative bidders for St. Mary's. (App.398-434.) The Health Care Authority flatly refused to allow such discovery and Petitioner made clear its objection to that refusal, fearing that the discovery ruling signaled the Health Care Authority's predetermination that it would not consider any evidence relating to alternatives, competing proposals, or other bidders at the Certificate of Need hearings. (App.442-443, 510-534).[6]

These fears were eventually realized, when Petitioner's attempts to elicit this statutorily required information during the Certificate of Need hearing were rejected, and ultimately the Health Care Authority declared it would not consider the merits of alternative bids when determining whether the proposed merger is superior to other alternatives.

[6] Petitioner even filed a petition for writ with this Court seeking extraordinary relief on this issue, which was ultimately denied. (App.510-534.) This denial, however, did not address the merits of Petitioner's underlying legal argument—not unsurprising given that a primary reason to decline such a petition is based on the availability of an adequate remedy at law in another forum (namely this instant appeal). *See Knotts v. Moore*, 177 W.Va. 9, 11, 350 S.E.2d 9, 11 (1986) ("The point that bears emphasizing is that a denial of the application for an original writ in this Court is not to be construed as having some res judicata effect simply because there has been no adjudication of the underlying merits of the case in this Court.").

1. The *LifePoint* cases were wrongly decided.

The Health Care Authority based this refusal on its 2006 administrative decisions in the *LifePoint* cases[7] where the Health Care Authority formulated its own (erroneous) construction of section16-2D-6(e)(1) that failed to comport with the statutory language at issue. *See e.g., In re LifePoint WV Holdings, Inc., and LifePoint WV Limited Partner, LLC, and Putnam General Hospital*, CON File #05-3-8118-A (Mar. 17, 2006).

In these cases, LifePoint WV Holdings, Inc., sought to acquire Putnam General Hospital (along with three other West Virginia hospitals), from HCA, Inc., which was selling the facilities pursuant to a competitive bidding process. An affected party in the Certificate of Need proceedings sought information relating to the bid process utilized by the seller. *See id.* at 2-3, 23. The affected party argued that such information was necessary for the Health Care Authority to determine whether "superior alternatives" existed in accordance with the provisions of West Virginia Code § 16-2D-6(e)(1). *See id.* at 23. Rejecting this request, the Health Care Authority declared that its "scope of review is limited to the **alternatives presented.** In this case, there are only two alternatives, the Health Care Authority may approve the application or it may deny it." *Id.*

This is simply wrong. By confining its review to the "alternatives presented," the *LifePoint* decision did not just ignore, but actually perverted the statute's plain language, which requires the Authority to find the nonexistence of "superior alternatives," not superior alternatives ***as presented*** by the Applicant. An agency may not use the guise of "interpretation" to modify, revise, amend or rewrite the law. *Consumer Advocate Div. of Public Serv. Comm'n v. Public Service Comm'n of West*

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[7] *In re: LifePoint WV Holdings, Inc. and LifePoint WV Ltd. Partner, LLC, and Putnam General Hosp.*, CON File #05-3-8118-A, Decision (March 17, 2006); *In re: LifePoint WV Holdings, Inc. and LifePoint WV Ltd. Partner, LLC, and St. Francis Hosp.*, CON File # 05-3-8115-A, Decision (March 17, 2006); *In re: LifePoint WV Holdings, Inc. and LifePoint WV Ltd. Partner, LLC, and St. Joseph's Hosp.*, CON 05-5-8116-A, Decision (March 17, 2006); *In re: LifePoint WV Holdings, Inc. and LifePoint WV Ltd. Partner, LLC, and Raleigh General Hosp.*, CON File # 05-1-8117-A, Decision (March 17, 2006).

Virginia, 182 W.Va. 152, 386 S.E.2d 650 (1989). This is what happened in the *LifePoint* cases.

Rather than interpreting the law it is charged with administering, the Health Care Authority in *LifePoint* effectively—and improperly—amended §16-2D-6(e)(1) to add language that the legislature itself never added. *See State ex rel. O.H. v. West Virginia Board of Medicine*, 238 W.Va. 139, 792 S.E.2d 638, 643 (2016) (agency may not "read into a statute that which it does not say. Just as courts are not to eliminate through judicial interpretation words that were purposely included, we are obliged not to add to statutes something the Legislature purposely omitted.").

As set out above, however, the statute at issue obligates the Authority to find the nonexistence of "superior alternatives," W.VA.CODE §16-2D-6(e)(1), not "superior alternatives **as presented by the Applicant**." By using the plural of "alternative" in §16-2D-6(e)(1), the Legislature directed that the Health Care Authority consider multiple alternatives to the Applicant's proposal, not just a single alternative to the proposal–i.e. the status quo.

This interpretation—that the statute only requires it to consider the "alternatives" proposed by the applicant—vests the ability to unilaterally dictate the parameters of the Certificate of Need review **with the applicant itself** instead of the reviewing entity. This defeats the purpose of the Certificate of Need proceedings, which were created to deal with "spiraling health care costs" and affirmatively mandate that **the Health Care Authority** must use these proceedings to "protect the health and well-being of the citizens of this State by guarding against unreasonable loss of economic resources as well as to ensure the continuation of appropriate access to cost-effective, high-quality health care services." W.VA.CODE §16-29B-1; *St. Mary's Hosp.*, 364 S.E.2d at 808.

Abdicating this independent review and instead allowing the applicant to establish the parameters of the Certificate of Need review flies in the face of this statutory responsibility. The Health Care Authority's interpretation finds no basis in the statute's plain language, and instead impermissibly limits the statutory mandate. "The judiciary is the final authority on issues of statutory

construction, and we are obliged to reject administrative constructions that are contrary to the clear language of a statute." *Kessel v. Monongalia Cty. Gen. Hosp. Co.*, 220 W. Va. 602, 619, 648 S.E.2d 366, 383 (2007).

In the face of a clear and unambiguous statute, the Authority's prior construction must be rejected.

2. The reasoning and rational of *In re Appalachian Regional Healthcare* effectuates the legislative intent and should be followed here.

Nine years after the *LifePoint* administrative decisions were handed down, the administrative decision in *In re Appalachian Regional Healthcare Inc. and ARH Tug Valley Health Services, Inc.*, CON File #14-2-10123-A (Apr. 29, 2015), appeared to reverse the course set in the *LifePoint* cases.

In that subsequent decision, ARH Tug Valley Health Services, Inc. and Appalachian Regional Healthcare, Inc. (collectively "the applicants"), applied for a certificate of need to acquire Williamson Memorial Hospital, which they planned to close and transfer those services to ARH's Kentucky facility. The applicants offered the same flawed construct espoused by Cabell Huntington, arguing that the only alternative to the proposed acquisition is the status quo, but because the status quo was not an acceptable alternative, the application must be approved.

The Health Care Authority disagreed, and it looked beyond what had been presented by the applicants and noted several available and practicable alternatives that the applicants had failed to consider or advance, including:

- Merging the Kentucky hospital into Williamson Memorial;
- Merging the Kentucky hospital with non-party Pikeville Medical Center; and
- Maintaining both hospitals as separate facilities and sharing services between them to reduce expenses and increase efficiencies.

Id. at 25. Finding "that superior alternatives *do* exist," the Health Care Authority rejected the

Certificate of Need Application. *Id.*

This decision comports with the statutory language and stands conceptually and legally at odds with the declaration in *LifePoint* that the only thing to be considered are the "superior alternatives as presented by the Applicant." Moreover, the mere fact that the "alternatives" considered in *In re Appalachian Regional Healthcare Inc.* did not involve competing bids to purchase (as contrasted to the instant case) is of no moment. The reasoning of *In re Appalachian Regional Healthcare Inc.* is not dependent upon the existence of purchase bids but rather reflects—consistent with the statutory mandate—the legal principle that §16-2D-6(e)(1) requires the Health Care Authority to look beyond the four-corners of the application, to look beyond the status quo, and to make a determination regarding the availability of all alternatives.[8]

Accordingly, the Health Care Authority's reliance on the *LifePoint* decisions warrants reversal because it misconstrues the legal requirements of §16-2D-6(e)(1), and the Health Care Authority then improperly applied the facts here (more specifically, the lack of facts) to that erroneous legal conclusion. *See Family Medical Imaging, LLC*, 624 S.E.2d at 494 (this Court on appeal reviews *de novo* any questions of law, including those that involve "[i]nterpreting a statute or an administrative rule or regulation" and "the conclusions of law and application of law to the facts.").

B. The legal error by the Health Care Authority left Cabell Huntington able to avoid its statutory mandates.

Into the vacuum created by the Health Care Authority's refusal to consider the availability of alternatives, Cabell Huntington was permitted to litigate this case in the realm of the hypothetical,

[8] The notion that the Health Care Authority's review of alternative bids would destroy a secret bidding process or undermine the parties' negotiating power is unfounded. Petitioner expressly offered to execute a protective order to protect any confidential information produced in response to specific requests for alternative bidder information, similar to the one negotiated by the parties that protects other "proprietary and competitively sensitive information." (App.446-447).

repeatedly putting on speculative testimony about the misfortune that Huntington, Marshall University, and the State allegedly would suffer if another hospital system acquired St. Mary's, such as:

- the alleged threat of St. Mary's being "guided by an unknown company with uncertain long term intentions";
- the claim that the proposed merger will ensure "there won't be any out of state control";
- A hypothetical alternative purchaser of St. Mary's would not support graduate medical education with Marshall University;
- A hypothetical for-profit purchaser of St. Mary's also would not support graduate medical education.

(App.2143, 2168, 2295, 2325.)

In addition to being unmoored to economic reality, this testimony only underscores the Health Care Authority's failure to require Cabell Huntington to produce any evidence about the availability of alternatives. Indeed, many of these same witnesses eventually conceded there is no evidence to support this speculation and that most alternative bidders would see the value of continuing St. Mary's affiliation with Marshall University. (App. 2300-2301, 2323.)

Moreover, the Health Care Authority's misguided reliance on *LifePoint* effectively permitted Cabell Huntington to (unabashedly) avoid even *considering* the availability of alternatives to the merger. Cabell Huntington's witnesses admitted their opinions were reached without any contemplation of (or comparison to) other alternatives:

> Q. Did you consider other potential purchasers for St. Mary's in your analysis?
>
> A. I am representing Cabell Huntington Hospital. That is the only Applicant in this case. That's my client, and the only thing that I considered.

(App.2174.)

> Q. So Cabell Huntington did not look at any of those other hospitals for

acquisition; right?

A. We did not.

(App.2267-2268.)

Nor did Cabell Huntington investigate whether it could take other steps to achieve the purported goals of the merger short of acquiring St. Mary's. Specifically, it did not investigate ways in which it could standardize practice protocols with St. Mary's absent a merger:

> Q. Did you investigate whether or not an affiliation between Cabell Huntington and St. Mary's as opposed to an outright merger could result in coordination of care between those two facilities to improve the quality of care in the Huntington area?
>
> A. I don't believe what you're suggesting is possible.

(App.2177-2178.)

Likewise, it did not examine building upon its existing quality improvement efforts. (App.2268.) It did not consider how it could have increased quality by merging or affiliating with **other** institutions that would not include the anti-competitive effects of the proposed merger here. (App.2268, 2513-2520.)

Finally, Cabell Huntington offered no evidence regarding the effect of the merger on the costs paid by patients; it conceded no consideration was given to the impact the merger would have on consumer prices:

> Q. Did you do any type of analysis of what this merger --- what kind of effect it would have on the prices for healthcare in the Huntington area?
>
> A. To my knowledge, we did not.

(App.2245.)

> Q. And was there any analysis of the impact on prices for healthcare services in the service area that's identified in the application?
>
> A. None that I saw.

(App.2270.)

These failures were facilitated (and sanctioned) by the Authority's steadfast refusal to follow

the law. For all the above reasons, the conclusion that Cabell Huntington had met the requirements of West Virginia Code §16-2D-6(e)(1) must be reversed. Cabell Huntington failed to provide evidence that the proposed merger is superior to other alternatives, as required by West Virginia Code § 16-2D-6(e)(1), and its request for a Certificate of Need should have been denied.

III. The Decision incorrectly determined that patients would have serious problems accessing services absent the merger.

To grant a Certificate of Need, the West Virginia Code requires that "after consideration of the appropriateness of the use of existing facilities within this state providing services similar to those being proposed, the state agency makes ... the following findings in writing ... that patients will experience serious problems in obtaining care within this state of the type proposed in the absence of the proposed new service." W.VA.CODE §16-2D-6(e)(4) (2015).

When granting Cabell Huntington's Certificate of Need request, the Health Care Authority found "patients will experience serious problems obtaining complex, specialized health care locally in the absence of the proposed new service." (App.3056.)

Critically, the Health Care Authority did not conclude (nor was there evidence to support such a conclusion) that access to the type of care currently being provided by the hospitals—outpatient surgical services or general acute care inpatient hospital services—would be diminished or endangered if the merger did not take place. In addition, witnesses testified regarding the continuing strength of the two hospitals, rejecting any suggestion that St. Mary's or Cabell Huntington would close down without the merger because of financial concerns:

> Q. This sale is not occasioned by any financial difficulty or anything of that nature?
>
> A. No. The financial issues relative to St. Mary's is not relevant to the reason for the sale.

(App.2239.)

Q. Is Cabell Huntington Hospital a financially stable organization?

A. It sure is.

(App.2261.)

Moreover, these witnesses testified that several willing buyers existed for St. Mary's such that if this Certificate of Need was denied, St. Mary's "will sell regardless of this outcome here," (App.2262), and another hospital could buy St. Mary's in order to continue providing services and maintain competition (with the attendant benefits to patients from that competition):

Q. And without getting into the bid process, they could also be acquired by another entity, isn't that correct, that might be local?

A. Yes, that would be a possibility.

(App.2255, 2558-2559.)

Faced with this evidence, the Health Care Authority did not find there would be any serious problem with access to the type of care currently being provided by the hospitals—outpatient surgical services or general acute care inpatient hospital services—if the merger did not take place. Instead, it determined that the proposed transaction could increase access to *new specialty services*.

The Health Care Authority's exclusive focus on new services that do not even currently exist—and are not guaranteed to **ever** exist—is improper. The appropriate inquiry for this statutory requirement should be on existing services and care only, and in this regard the evidence presented established there were **no** concerns about that.

Even if looking at hypothetical new services was appropriate, there was no evidence presented supporting this conclusion that patients would have serious problems accessing these new specialty services without the merger. The existing competition described above suggests the contrary.

In summary, the evidence does not support a finding that patients would "experience serious problems in obtaining care within this state" without the merger. W.VA. CODE §16-2D-6(e)(4) (2015). The Heath Care Authority's determination should be reversed because it was in violation of

statutory provisions, in excess of the statutory authority or jurisdiction of the Authority, made upon unlawful procedures, affected by other error of law, clearly wrong in light of reliable, probative evidence on the whole record, and arbitrary and capricious.

CONCLUSION

For these reasons, Petitioner respectfully requests this Court to reverse the Authority's Order, or, in the alternative, remand this matter back to the Authority for further consideration of the entire record in accordance with W.VA. C.S.R. §65-7-2.14.c.

Respectfully submitted,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STEEL OF WEST VIRGINIA, INC.,
Petitioner,

v. **No. 17-0406**

WEST VIRGINIA HEALTH CARE AUTHORITY and CABELL HUNTINGTON HOSPITAL, INC.,
Respondent.

CERTIFICATE OF SERVICE

I, Carte P. Goodwin, hereby certify that I served a copy of the foregoing **Petitioner's Brief** on this 21st day of August, 2017, by United States mail, postage prepaid, to the following:

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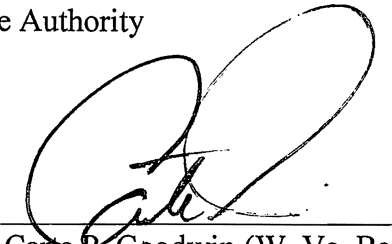

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