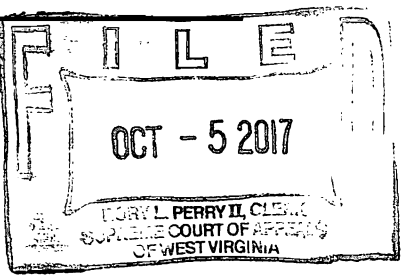
No. 17-0406

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



Steel of West Virginia, Inc.
Petitioner,

vs. No. 17-0406

West Virginia Health Care Authority
and Cabell Huntington Hospital, Inc.
Respondents.

CABELL HUNTINGTON HOSPITAL, INC.'S
RESPONSE BRIEF IN OPPOSITION TO PETITIONER'S APPEAL

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III. ASSIGNMENTS OF ERROR

Petitioner Steel of West Virginia, Inc.'s ("SWVA's") three assignments of error are as follows:

1. The Circuit Court erred in concluding that the West Virginia Health Care Authority ("Authority") had not violated W. Va. Code §§16-2D-5 through 6 (2015) by failing to consider the effect of the proposed transaction on competition;[1]

2. The Circuit Court erred in concluding that the Authority had not violated W. Va. Code §16-2D-6(e)(1) (2015) by failing to consider alternatives in terms of cost, efficiency, and appropriateness to the proposed transaction, and failing to require any evidence regarding such alternatives; and

3. The Circuit Court erred in upholding the Authority's determination that patients would have serious problems accessing services absent the merger, in contravention of W. Va. Code §16-2D-6(e)(4) (2015).

IV. STATEMENT OF THE CASE

Given the argumentative and editorial nature of the Statement of the Case presented by the Petitioner, SWVA, Respondent Cabell Huntington Hospital, Inc. ("Cabell"), believes it is appropriate that it provide a brief and factual Statement of the Case.

A. Background of the Transaction.

This is an appeal by SWVA from the Final Order of the Circuit County of Kanawha County, affirming a Decision of the Authority awarding a Certificate of Need ("CON") for the acquisition by Cabell of St. Mary's Medical Center, Inc. ("St. Mary's) from its owner, Pallottine Health Services, Inc. ("PHS"). The Authority's Decision was previously affirmed by the West

[1] Where applicable, this Brief references the 2015 version of the West Virginia Code in effect when the hearing was conducted on the application.

Virginia Office of Judges ("OOJ").

Both Cabell and St. Mary's are West Virginia nonprofit corporations. Cabell operates a 303 bed general acute care hospital in Huntington, West Virginia, while St. Mary's, which is located approximately three miles from Cabell, operates a 393 bed general acute care hospital. Both hospitals are managed by Boards of Directors selected in accordance with the requirements of the West Virginia Hospital Licensure Act, W. Va. Code §16-5B-6a (2017). As required by this Act, no fewer than 40% of the members of the Board of each nonprofit hospital must be composed of consumers representing low income persons, organized labor, elderly persons, and small businesses. W. Va. Code §16-5B-6a(c) (2017).

Since its organization in 1924, St. Mary's has been sponsored by an order of nuns known as the Pallottine Missionary Society, the owner of PHS and the sole member of St. Mary's. With the passage of time, the number of Pallottine Sisters has gradually declined and their average age has increased significantly. Due to those factors and the growing complexity of health care regulation, the Sisters in early 2014 determined that they could no longer continue to sponsor St. Mary's and the decision was made to sell the hospital. A confidential request for proposals was distributed to a selected group of potential buyers in the spring of 2014. Several proposals were received and reviewed by PHS. The Sisters determined that their mission and community objectives could best be achieved if St. Mary's were sold to Cabell. After some negotiation, an agreement providing for the replacement of PHS by Cabell as the sole member of St. Mary's was executed on November 7, 2014 (the "Definitive Agreement").

B. The Related Antitrust Investigations

As required by federal law, in November of 2014, Cabell filed a notice known as a Hart-Scott-Rodino ("HSR") Act filing advising the Federal Trade Commission ("FTC") of its pending

acquisition of St. Mary's.[2] The FTC conducted an investigation and in November of 2015 filed an administrative complaint with its administrative law judge alleging that the proposed purchase by Cabell would violate the Clayton Act.[3] (App. 001331-001355)

Following the HSR filing, the West Virginia Attorney General also conducted an investigation of the proposed transaction under the West Virginia Antitrust Law.[4] Cabell and St. Mary's provided extensive information to the Office of the Attorney General, including an efficiency study prepared by The Camden Group (discussed in further detail below), information concerning the relevant markets, as well as many letters of support from community organizations, local governmental agencies, businesses, and insurers. The FTC provided additional information obtained during the course of its investigation to the Attorney General.

Following negotiations, the Attorney General, Cabell, and St. Mary's reached an agreement known as an Assurance of Voluntary Compliance (the "AVC") pursuant to W. Va. Code §47-18-22 (2015), which was executed on July 27, 2015. (App.001404-001413) The AVC was amended and restated in its entirety on November 4, 2015. (App. 001414-001430) The AVC, in addition to containing a number of pro-competitive consumer protections, restricted the ability of the hospitals post-acquisition to increase prices or obtain greater reimbursement from third party payors, and required several prospective quality improvement measures. (App. 001419-001428) By its terms, the AVC will continue for ten years following the consummation of the Cabell-St. Mary's transaction. *Id.* Upon execution of the AVC, the Attorney General, as authorized by statute, concluded his investigation.

In its 2016 legislative session, the West Virginia Legislature enacted, and the Governor signed, Senate Bill 597 creating the West Virginia Cooperative Agreement Law (the "CAL").

[2] The Hart-Scot-Rodino Act is codified at 15 U.S.C. §18a.
[3] The Clayton Act is codified at 15 U.S.C. §§ 12–27, 29 U.S.C. §§ 52–53.
[4] The West Virginia Antitrust Law is codified at W. Va. Code §47-18-1 *et seq.*

The CAL recognized the State's compelling interest in enhanced medical education and the delivery of accessible and economically efficient health care.[5] This legislation, effective upon passage, provided that cooperative agreements entered into between the qualified hospital of an academic medical center, and another hospital located within 20 miles of the qualified hospital, will be deemed immune from state and federal antitrust laws if the Authority determines that the likely benefits of the cooperative agreement outweigh the likely anti-competitive effects. W. Va. Code §16-29B-28(d) (2016). The CAL specifically provides "[i]t is the intention of the Legislature that this chapter shall also immunize cooperative agreements approved and subject to supervision by the authority and activities conducted pursuant thereto from challenge or scrutiny under both state and federal antitrust law." W. Va. Code §16-29B-26 (2016).

With the enactment of the CAL, Cabell's status as a qualified hospital allowed it to seek and obtain a Certificate of Approval for its Definitive Agreement with PHS and St. Mary's. This Certificate of Approval was issued by the Authority on June 22, 2016, with the written concurrence of the Attorney General.[6] Immediately thereafter, the FTC yielded to the statutory immunity provided under this Certificate of Approval, and on July 6, 2016, dismissed its administrative complaint challenging the proposed transaction. (App. 000066)

C. The CON Proceeding.

An application for a CON to permit consummation of the transaction was filed with the Authority by Cabell on April 30, 2015. (App. 000127- 000351) Discovery was conducted by the parties and a hearing was ultimately scheduled for December 21 and 22, 2015. (App. 000470-000471) Prior to the hearing, SWVA requested the Authority to issue to St. Mary's a subpoena

[5] The CAL is codified at W. Va. Code §16-29B-26 and 28.

[6] SWVA initially appealed the Certificate of Approval awarded under the CAL to the Circuit Court of Kanawha County, but later voluntarily dismissed its appeal with prejudice on October 24, 2016.

duces tecum requiring the production of a number of documents, including the rejected bids received in response to the request for proposals (the "Bid Documents"). (App. 000473-000474) In accordance with its long standing precedent, the Authority determined that the Bid Documents were not relevant to the CON proceeding and issued a moulded subpoena which did not cover the rejected bids. (App. 000504-000505; *see* App. 003195-003196) SWVA then filed with the Supreme Court of Appeals of West Virginia a Petition for a Writ of Mandamus to compel the Authority to subpoena the Bid Documents. (App. 000509-000531) This Court promptly denied SWVA's Petition by Order entered on December 17, 2015. (App. 002107-002108) The scheduled hearing in which SWVA appeared and participated as an affected party took place on December 21 and 22, 2015. (App. 002129-002563; App. 004298-004732)

The Authority closed the record at the conclusion of the hearing on December 22, 2015. (App. 002562, 004731) Cabell and SWVA briefed their respective positions on the CON application. (App. 004733-004759; App. 004760-004809). On March 16, 2016, the Authority issued its Decision approving Cabell's CON application. (App. 003017-003062). Thereafter, on April 11, 2016, SWVA filed with the Authority a motion for reconsideration of the Decision. (App. 002754-002755). On June 29, 2016, the Authority denied SWVA's motion for reconsideration. (App. 003070-003079).

SWVA then requested review by the OOJ of the Authority's Decision. (App. 003095-003123). On October 5, 2016, the OOJ affirmed the CON, finding that the Authority had acted appropriately in approving Cabell's acquisition of the ownership interests of St. Mary's. (App. 003005-003016)

On November 2, 2016, SWVA appealed the decision of the OOJ to the Circuit Court of Kanawha County. (App. 002991-003004). The matter was briefed by the parties and on April 19,

2017, Judge James C. Stucky issued a 23 page Final Order affirming the Decisions of the Authority and the OOJ. (App. 000001-000024) It is from this Final Order that SWVA has prosecuted this appeal. The complete and detailed procedural history of this case is set forth more fully in the Circuit Court's Final Order.

W. Va. Code §16-2D-10 (2017) was amended by the Legislature during its last regular legislative session. The amendments were effective from passage. This Code section, as amended, contains a list of a number of services which may be provided in the state without a CON. Included among the exempted services is "the acquisition by a qualified hospital which is party to an approved cooperative agreement...of a hospital located within a distance of twenty highway miles of the main campus of the qualified hospital." W. Va. Code §16-2D-10(7) (2017). Because Cabell is a qualified hospital as defined by the Code and has an approved cooperative agreement with St. Mary's, which is located only three miles from Cabell, Cabell believed that this statute rendered the instant appeal by SWVA moot and, therefore, filed with this Court a Motion to Dismiss the instant appeal. By order dated June 6, 2017, this Court refused Cabell's Motion to Dismiss.

V. SUMMARY OF ARGUMENT

A. Assignment of Error No. 1.

Contrary to the assertions of SWVA, the Authority carefully considered and clearly complied with the requirements of W. Va. Code §16-2D-5 and §16-2D-6 (2015) which were in effect at the time of the Decision. The suggestion by SWVA that the Authority erred in failing to consider the effects of the transaction **on** competition demonstrates a misunderstanding of the statutory requirement. The CON law does not require the Authority to consider the effect of the proposed new services on competition, but rather the effect of competition on the supply of

services to advance the purposes of cost efficiency, quality improvements, and access to care. When applying this test, the Authority is required to make two judgments: (i) whether competition appropriately allocates supply in accordance with the State Health Plan; and (ii) if it determines that competition appropriately allocates supply in accordance with the State Health Plan, whether competition is appropriate to advance the purposes of quality assurance, cost effectiveness, and access. It is only if both questions are answered in the affirmative must the Authority give priority to actions which would strengthen the effect of competition. The Legislature vested in the Authority broad discretion to make these judgments.

The Authority considered and discussed at length the relative benefits in controlling the cost and improving the quality of health care offered by competition as opposed to the proposed combination of Cabell and St. Mary's. (App. 003045-003048) The Authority's Decision makes abundantly clear its conclusion – that competition did not appropriately allocate the supply of services in a way that would advance the purposes of costs effectiveness, quality assurance, and access. (App. 003047-003048) It stated flatly "[t]he Authority rejects SWVA's arguments about competition." (App. 003047)

This determination was supported by the clear weight of the evidence which included: (i) an efficiency study prepared by a nationally recognized consulting firm known as The Camden Group, [redacted] (ii) the testimony of the Camden Group consultant who supervised the efficiency study, Mr. Brandon Klar; Raymona Kinneberg, a health planning expert; Dr. Hoyt Burdick, Chief Medical Officer of Cabell; and Dr. Kevin Yingling, then Dean of the School of Pharmacy and a past member of the Board of Directors of both Cabell and St. Mary's; and (iii) the terms and conditions of the AVC, which imposed

significant restraints on the ability of Cabell and St. Mary's to increase prices post-transaction, and required the hospitals to implement quality enhancement measures. (App. 003525, 004355-004384, 002149-002170, 002275-002286, 002303-002322, 001414-001430)

Having determined that competition did not appropriately allocate supply to advance the statutorily-specified purposes, the Authority was directed by §16-2D-5(b) (2015) to take other "actions" to advance the purposes of cost efficiency, quality assurance, and access. This it did by approving the CON application. (App. 003053) SWVA argues, however, that the Authority erred by failing to express its determination in specific statutory language. Petitioner's Brief at 13. However, nothing in §16-2D-5 (2015) requires a specific written finding. When in the CON statute the Legislature intended to require a specific written finding, it had no difficulty in so stating as it did several times in §16-2D-6(e) and §16-2D-9(e)(1) (2015).

SWVA also argues that the AVC, which was one of the many factors considered by the Authority in analyzing the proposed benefits of the transaction, was rendered unenforceable by passage of the CAL. Petitioner's Brief at 16-17. This argument is contrary to the language and intent of the AVC and the CAL. The AVC was effective and binding on the parties upon its execution, notwithstanding the fact that certain obligations of the parties were contingent on the closing of the proposed transaction. In addition, the CAL specifically provides that "[a]n agreement entered into by a hospital party to a cooperative agreement and any state official or agency imposing restrictions on rate increases shall be enforceable in accordance with its terms ..." W. Va. Code §16-29B-28(i)(1)(A) (2016). Thus, the AVC continues to be enforceable not only by its explicit terms but by operation of law.

Finally, SWVA argues that the Authority failed to consider the effect of competition on the supply of services as required by §16-2D-6 (2015). Petitioner's Brief at 11. The Decision as a

whole makes it abundantly clear that the Authority carefully considered the effect of competition upon the supply of the health services being reviewed. (App. 003031-003060)

B. Assignment of Error No. 2.

SWVA argues that the Authority failed to consider appropriate alternatives to the proposed transaction. Petitioner's Brief at 18-25. SWVA contends that the Authority wrongfully denied its request to subpoena Bid Documents submitted by other potential buyers for the purchase of St. Mary's. *Id.* Without consideration of such bids, it contends, the Authority could not determine that the proposed purchase of St. Mary's by Cabell represented the "superior" alternative under W. Va. Code §16-2D-6(e)(1) (2015). *Id.* SWVA presented absolutely no evidence of any alternative to the proposed transaction. The Authority has consistently and correctly determined that, in the case of a hospital sale, bids which have been rejected by the seller are not relevant or practicable alternatives. (App. 003051-003053) The bids in question here were submitted more than two years prior to the Authority's Decision. There was no evidence in the record that any of the bidders are still interested in the purchase of St. Mary's or would agree to the same terms offered previously.

Further, a transaction such as the one here involved contains many important terms in addition to the purchase price. (App. 003455-003462) The Cabell – St. Mary's Definitive Agreement contains important commitments by Cabell which might or might not be acceptable to a hypothetical purchaser. *Id.* More importantly, the Legislature certainly never intended to empower the Authority to micro-manage hospital sales and substitute its judgment for that of the seller as to which terms are important. Any attempt to do so would be of questionable constitutional validity. Even if a hypothetical purchaser were willing to match many of the terms offered by Cabell, no other purchaser could provide the benefits to the community which the

proposed transaction offers due to the proximity of the two hospitals, a proximity no other hospitals share. (App. 002166, 004373)

C. Assignment of Error No. 3.

SWVA contends that in determining whether patients would experience serious problems in obtaining services of the type proposed, the Authority was required to consider "existing services and care only," and that "the evidence presented established there were no concerns about that." Petitioner's Brief at 26. SWVA asserts that since both hospitals are financially stable, no "[existing] services would be . . . endangered if the merger did not take place." Petitioner's Brief at 25.

SWVA's legal analysis is simply wrong. The Code directs the Authority to consider "serious problems" in obtaining care of the type offered by the "proposed new service" - not "existing services and care." W. Va. Code §16-2D-6(e)(4) (2015). The evidence clearly established that the proposed new service, the consolidated operation of Cabell and St. Mary's with its attendant benefits, would reduce costs and enhance the quality of care in many important ways. *See, e.g.*, (App. 002156-002170, 003519-003670, 004373-004384) Depriving the population of the opportunity to obtain improved and more cost efficient medical care certainly qualifies as a serious problem.

Accepting the rationale of SWVA would mean that no purchaser could acquire St. Mary's since it is providing acute care in a satisfactory and financially stable manner. Had this rationale been applied in previous CON decisions, West Virginia residents would have been deprived of such critically important treatment modalities as MRI, Pet Scans, the Gamma Knife, and Cyber Knife.

In addition, the Authority properly determined that the combined operation of Cabell and

St. Mary's will facilitate the development of highly specialized services which currently may only be accessed by traveling to Cincinnati, Columbus, Lexington, or other destinations. Requiring the population to continue outward migration for highly specialized services likewise qualifies as a serious problem.

VI. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondent Cabell submits that oral argument under W. Va. Rule of App. Procedure 20 is warranted because this appeal involves issues of fundamental public importance to the communities served by Cabell and St. Mary's.

VII. STANDARD OF REVIEW

A. The standard of review for an administrative appeal is set forth at W.Va. Code §29A-5-4.

The standard of review for an administrative appeal taken under the CON program is set forth at W. Va. Code §29A-5-4 (2017). *See* W. Va. Code §16-2D-10 (2015); *St. Mary's Hosp. v. State Health Planning and Dev. Agency,* 178 W.Va. 792 795-796, 364 S.E.2d 805, 808-809 (1987). W. Va. Code §29A-5-4 provides in relevant part the following:

> (g) The court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision 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.

See W. Va. Code §29A-5-4(g) (2017).

B. The standard of review for an administrative appeal is a limited one.

It has been held that review by an appellate court is limited to a determination of whether the agency's decision was based on a consideration of relevant factors, and whether there has been a clear error of judgment. *Princeton Cmty. Hosp. v. State Health Planning and Dev. Agency*, 174 W.Va. 558, 564-565, 328 S.E.2d 164, 171 (1985). Further, the decision of an administrative agency charged with administrating a particular statutorily- established program is entitled to considerable deference from an appellate court. In discussing the deference to be accorded to a predecessor agency of the Authority under the CON program,[7] this Court has stated that a determination of matters within that agency's area of expertise is entitled to substantial weight. *Id.* Citing the case of *Ethyl Corporation v. EPA,* 541 F.2d 1 (D.C. Cir. 1979), *cert. denied,* 426 U.S. 941 (1976), this Court further stated:

> But that function must be performed with conscientious awareness of its limited nature. The enforced education into the intricacies of the problem before the agency is not designed to enable the court to become a superagency that can supplant the agency's expert decision-maker. To the contrary, the court must give due deference to the agency's ability to rely on its own developed expertise. The immersion in the evidence is designed *solely* to enable the court to determine whether the agency decision was rational and based on consideration of the relevant factors.

Princeton, 174 W.Va. at 564-565, 328 S.E.2d at 171.

In addition, it is clear under W. Va. Code §29A-5-4(g) that evidentiary findings made at a contested administrative hearing should not be reversed by a reviewing court unless they are clearly wrong. *Stewart v. W. Va. Bd. of Exam'rs for Registered Prof'l Nurses,* 197 W.Va. 386,

[7] The CON program was formerly administered by the State Health Planning and Development Agency ("SHPDA") until 1983. In 1983, the Authority was empowered with overseeing the CON program. *See* W. Va. Code §16-29B-11.

389, 475 S.E.2d 478, 481 (1996). The "clearly wrong" standard of review under W. Va. Code §29A-5-4(g) is a deferential one which presumes that an administrative agency's actions are to be upheld as long as they are supported by substantial evidence. *Stewart,* 197 W.Va. at 389, 475 S.E.2d at 481; *Frymier-Halloran v. Paige,* 193 W. Va. 687, 695, 458 S.E.2d 780, 788 (1995). A reviewing court is not free to substitute its own evaluation of the administrative agency's factual findings under this standard of review, regardless of whether the reviewing court would have reached a different conclusion upon the same set of facts. Rather, where there are two permissible views of the evidence, the agency's findings of fact must be upheld. *Frank's Shoe Store v. W. Va. Human Rights Comm'n,* 179 W. Va. 53, 56, 365 S.E.2d 251, 254 (1986) *citing Anderson v. City of Bessemer,* 470 U.S. 564 (1985).

With respect to legal interpretations, as opposed to factual determinations, this Court has clarified that judicial review of an agency's decision-making authority involves two (2) separate but interrelated questions, the second of which involves agency deference. A reviewing court first must ask whether the Legislature has directly spoken to the precise question at issue. *Chevron U.S.A., Inc. v. Nat'l Res. Def. Council Inc.,* 467 U.S. 837, 842-844 (1984); *Appalachian Power Co. v. State Tax Dep't of W. Va.,* 195 W. Va. 573, 578, 466 S.E.2d 424, 429 (1995); *W. Va. Health Care Cost Review Auth. v. Boone Mem'l Hosp.,* 196 W. Va. 326, 328, 472 S.E.2d 411, 413 (1996). If the intention of the Legislature is clear, that is the end of the matter, and the agency's position must be upheld if it conforms to the Legislature's expressed intent. *Chevron,* 467 U.S. at 842-844; *Appalachian,* 195 W. Va. at 582, 472 S.E.2d at 433; *Boone,* 196 W. Va. at 421-422, 472 S.E.2d at 336-337.

However, if legislative intent is not clear, a reviewing court may not simply impose its own construction of a statute or a legislative rule. *Id.* Rather, if a statute or legislative rule is

silent or ambiguous with respect to the specific issue, the question for the reviewing court is whether the agency's answer is based upon a permissible construction of the statute or legislative rule. *Id.* If it is, then the interpretation of the statute or legislative rule by the agency charged with its administration is given great deference and weight. *Id.*

VIII. ARGUMENT

As a preliminary matter, Cabell affirmatively rejects the unfortunate efforts of SWVA, throughout its Brief, to impugn the motives and tarnish the reputation of Cabell, its Board of Directors, and management. Many of SWVA's assertions are either patently inaccurate or clearly irrelevant, and no further response by Cabell is necessary.

However, Cabell makes no apology for supporting the enactment of the CAL in 2016 legislation (Senate Bill 597), which recognized the manifest importance to the state of academic medical centers in educating and training physicians, in providing care to the indigent, and in performing vital research, and which, therefore, encouraged collaborative agreements between these institutions and other health care providers.[8] Nor does Cabell apologize for its support of 2017 legislation (House Bill 2459), which eliminated the necessity for duplicative reviews by the same agency of a transaction which an applicant is able to demonstrate is likely to provide benefits to the health and well-being of West Virginia residents that outweigh any disadvantages attributable to a reduction in competition.

It should be especially noted, as SWVA is certainly aware, that Cabell did not support House Bill 68 in 2016, which eliminated the hospital rate review responsibility of the Authority. In fact, as discussed below, the CAL will result in the re-institution of hospital rate review with respect to both Cabell and St. Mary's if this transaction is approved.

[8] Similar cooperative agreement laws have also been recently enacted in Virginia (Code of Va. §15.2-5384.1) and Tennessee (Tenn. Code §68-1-1303).

A. The Authority correctly applied West Virginia Code §16-2D-5(d) and (e) (2015), and properly considered §16-2D-6(a)(16) and (a)(17) (2015) in determining that competition need not be accorded priority in its Decision.

1. SWVA's Brief does not apply the correct legal analysis of the competition issue.

At the time of the CON proceedings, W. Va. Code §16-2D-5 (2015) provided in pertinent part:

> (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.

The relevant part of W. Va. Code §16-2D-6 (2015) at the time of the Decision provided, "[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:

* * *

> (16) In accordance with section five of this article [§16-2D-5], the factors influencing the effect of competition on the supply of the health services being reviewed; (emphasis added)
>
> (17) Improvements or innovations in the financing and delivery of health services which foster competition, in accordance with section five [§16-2D-5] of this article, and serve to promote quality assurance and cost effectiveness;" (emphasis added)[9]

[9] Legislation repealing §16-2D-5 (2015) and rewriting §16-2D-6 (2015) was enacted by the Legislature effective June 10, 2016. The relevant provisions of §16-2D-6 (2015) setting forth minimum criteria for CON review are now contained in §16-2D-12 (2017) and no longer contain any reference to competition.

SWVA's first assignment of error is that the "Circuit Court erred in concluding that the Health Care Authority had not violated West Virginia Code §16-2D-5 (2015) through §16-2D-6 (2015) by failing to consider the effect of the proposed transaction on competition." Petitioner's Brief at 11. The mere statement of this alleged error demonstrates SWVA's misapprehension of the relevant code provisions.

Neither §16-2D-5 (2015) nor §16-2D-6 (2015) quoted above requires consideration of the proposed transaction **on** competition - rather they require the Authority to consider the factors influencing the effect of competition on the supply of the health services being reviewed to advance the purposes of cost effectiveness, quality, and access. When applying this test, the Authority is required to make two judgments: (i) whether competition appropriately allocates supply in accordance with the State Health Plan; and (ii) if it determines that competition appropriately allocates supply in accordance with the State Health Plan, whether competition is appropriate to advance the purposes of quality assurance, cost effectiveness, and access. It is only if both questions are answered in the affirmative that the Authority must give priority to actions which would strengthen the effect of competition. If, however, the effect of competition does not allocate supply in a manner that promotes these statutory purposes, then the Authority is directed by W. Va. Code §16-2D-5(e) (2015) to take other "actions" to advance cost effectiveness, quality, and access. The Legislature vested in the Authority broad discretion to make these judgments.

The beneficial effects of competition cited by SWVA relate to its alleged favorable impact on costs and contribution to improving quality. Considerable evidence on these "effects" was presented by both SWVA and Cabell. The totality of the evidence before the Authority clearly demonstrated that the goals of the State can be best achieved through the consummation

of the proposed affiliation. A summary of this evidence follows.

(a) The Cost Evidence.

SWVA offered the testimony of Elizabeth Gross, an employee of SWVA, that following Cabell's acquisition of the Cabell Huntington Surgery Center and the Cook Eye Center, the cost of certain selected procedures increased dramatically. (App. 002391-002399) Since Ms. Gross offered no evidence of the overall pricing at these facilities subsequent to their acquisition, her testimony was of little significance. Paradoxically, although SWVA has argued in its Brief before this Court that "robust competition for patients in the Huntington Area between these two hospitals has resulted in high quality, low cost health care in the area," Petitioner's Brief at 14, Ms. Gross testified at the hearing that health care costs for SWVA's employees in Huntington was substantially higher than those in other areas in which Steel Dynamics, the parent of SWVA, operates. (App. 002384-002385) If its Huntington facility does indeed incur health care costs that are already substantially higher than its operations elsewhere, then competition is not the universal panacea for cost control as alleged by SWVA.

With respect to alleged benefits of competition both with regard to price and to quality, SWVA relied largely on the testimony of Professor Robert Town, its antitrust expert. With regard to price, Professor Town testified broadly that studies show prices generally increase dramatically following a merger involving hospital competitors. (App. 002466-002476) He acknowledged, however, that if such mergers result in efficiencies, prices can actually be reduced. (App. 002495)

On cross examination, Professor Town admitted that he had not studied and was not familiar with the West Virginia health care market, that he had never visited either Cabell or St. Mary's, and that he had not done a patient flow analysis with respect to the two hospitals or a full

antitrust analysis. (App. 002480-002501) He further acknowledged that he had not determined market concentration levels using the formula normally employed for CON purposes, but had instead relied upon the determination made by the antitrust litigators of the FTC. (App. 002480, 002488) Professor Town even admitted that he was unaware that there are four hospitals in addition to Cabell and St. Mary's within the study area considered for purposes of the CON application. (App. 002488)

Cabell presented substantial evidence that the transaction under consideration would avoid duplication of equipment and services, would achieve substantial economic efficiencies, and would ameliorate the pressures to increase prices. (App. 002160-002170, 003015, 0003042, 003519-003670, 004335-004339, 004365-004384, 004488-004490) Prior to executing the Definitive Agreement to acquire St. Mary's, Cabell retained the services of The Camden Group, a nationally recognized health care consulting firm, to perform an analysis of the proposed transaction to determine the efficiencies, cost savings, and quality improvements which the combination of the two hospitals would provide. (App. 003519-003670, 004365-004384) The Camden Group conducted this analysis and prepared a detailed report ("the Camden Report") identifying the potential operational efficiencies and cost savings as well as quality improvements that could be achieved through Cabell acquiring the membership interest of St. Mary's. *Id.* This 137 page report was introduced as evidence in the CON hearing.[10] (App. 003519-003670)

[redacted]

[10] To protect certain trade secrets and other competitively sensitive business data of both Cabell and St. Mary's pending approval of the proposed transaction, portions of the Camden Report were redacted to maintain the confidentiality of this information while the two hospitals continue to compete with each other.

[redacted]

Both Mr. Klar and Raymona Kinneberg, Cabell's health planning expert, testified at the hearing that, due to the proximity of the two hospitals, the reduction in operational costs in many instances is unique to the combination of Cabell and St. Mary's. (App. 002166) As explained by Ms. Kinneberg, the identified cost reductions would not be available if another hospital system acquires St. Mary's. She testified:

> Cost and efficiencies that are going to result from this affiliation cannot be gained by any other approach. It's true, another approach might get some of the benefits. But most of the benefits, particularly the quality of care and the ability to improve the numbers served in a particular hospital, the only way that can happen is through this approach given the proximity of the hospitals.

(App. 002166)

The Camden Report clearly identified numerous achievable efficiencies and cost savings that will enhance quality at both facilities, and otherwise create synergies in service delivery that

do not currently exist. Importantly, SWVA offered no expert testimony that specifically analyzed or rebutted the conclusions of the Camden Report. Its conclusions are not contradicted in the record.

Also introduced into evidence by Cabell was the AVC entered into among Cabell, St. Mary's, and the Attorney General, a document specifically designed to ameliorate any negative impacts of a reduction in competition as well as ensure improvements in the quality of care. The Authority was persuaded that the AVC will significantly restrain price increases. The AVC contains a number or pro-competitive provisions as well as significant restrictions on the ability of Cabell and St. Mary's to increase prices inappropriately. In commenting on this document, the Authority stated in its Decision:

> A few of the limitations imposed deserving special mention include: (1) neither CHH nor SMMC may seek an increase in their hospital rates beyond the Authority's benchmark rates; (2) the combined operating margins of CHH and SMMC may not exceed an average of 4% during any three year period without resulting in a corresponding reduction during the following three year period; (3) existing contracts with third party payors subject to automatic renewal will not be terminated by either CHH or SMMC, and negotiations of new contracts will not see a reduction in the amount of the discount off charges; and (4) CHH and SMMC will develop quality goals and population health goals, including centers of excellence with quantitative benchmarks, under a proposed timeline within six months of closing.

(App. 003046-003047) There are many other pro-competitive provisions of the AVC which undoubtedly were considered by the Authority but not specifically enumerated in its Decision.

It is also important to note that although universal rate review for West Virginia hospitals was eliminated by the passage of Senate Bill 68 in 2016, hospital rate review was not abolished in its entirety and, in fact, remains an important factor that will govern the actions of Cabell and St. Mary's indefinitely with their CAL approval under the provisions of Senate Bill 597. Specifically, Senate Bill 597 includes the following requirements:

> (B) At least ninety days prior to the implementation of any increase in rates for inpatient and outpatient hospital services and at least sixty days prior to the execution of any reimbursement agreement with a third party payor, a hospital party to a cooperative agreement involving the combination of two or more hospitals through merger, consolidation or acquisition which has been approved by the authority shall submit any proposed increase in rates for inpatient and outpatient hospital services and any such reimbursement agreement to the Office of the West Virginia Attorney General together with such information concerning costs, patient volume, acuity, payor mix and other data as the Attorney General may request."

W. Va. Code §16-29B-28(i)(1)(B) (2016). The Attorney General is given the authority by this code provision to approve, reject, or modify any price increase request, and to reject any third party reimbursement agreement which includes pricing terms at anti-competitive levels. W. Va. Code §16-29B-28(i)(1)(B) (2016). These rate review powers are not time-limited, and will govern both hospital rate increases and reimbursement agreements with health insurance plans.

Despite SWVA's assertions to the contrary, nothing has materially changed in terms of rate review for hospitals involved in an approved cooperative agreement except that such rate review will now be under the primary jurisdiction of the Attorney General rather than the Authority. Ironically, when the transaction is completed, as a result of Senate Bill 597, Cabell and St. Mary's will be the only remaining hospitals in West Virginia subject to rate review.

In summary, there was substantial evidence presented by Cabell that the consolidation of the hospitals, rather than their continued competition, will most favorably impact the supply of services from a cost standpoint. This alone supports the Authority's determination not to grant priority to actions which would strengthen the effect of competition on the supply of services pursuant to W. Va. Code §16-2D-5(e) (2015).

(b) <u>The Quality Evidence.</u>

With respect to the effect of competition on the supply of services from a quality of care

standpoint, SWVA's expert witness, Professor Town, testified "there is no doubt that the impact of merges (sic) on quality of care is - you know there is no clear pattern, if any. There seems to be no pattern or no effect." (App. 002498) He amplified this testimony, however, by saying "I think on average I'd say more studies find that competition leads to better quality but it's certainly not unanimous." (App. 002498) Importantly, Professor Town recognized "that broadly higher volumes lead to higher quality." (App. 002495) While he questioned whether shifting volume from one hospital to another would necessarily affect quality, he acknowledged "there is certainly a robust literature that finds that higher volumes lead to higher quality." (App. 002495-002496) Except for the meandering testimony of Professor Town, SWVA offered no evidence of the impact of competition on quality.

The rather ambiguous testimony of Professor Town stands in stark contrast to the clear and explicit testimony of witnesses offered by Cabell with respect to the quality improvements which the combination of Cabell and St. Mary's will provide. Dr. Kevin Yingling, who was then the Dean of the Marshall University School of Pharmacy and had served on the boards of both Cabell and St. Mary's, and as chief of the medical and dental staffs of both hospitals, testified at length as to the quality improvements the combination of Cabell and St. Mary's will provide. During the hearing, when SWVA asked whether he was concerned about the quality of health care provided by the two hospitals if the hospitals are no longer competing against each other, he replied, "I'm not only concerned, I am convinced that the quality and the - the quality will go up and the costs will actually go down." (App. 002312) When SWVA asked Dr. Yingling to explain his answer, he stated, "I think both hospitals have made it clear that the practice culture of their hospital is first and foremost about quality. I think that's from the leadership, from the board to the CEO, to the senior management, to the staff, to the patients who receive that benefit." (App.

002313)

Dr. Yingling explained the many quality improvements the proposed transaction will offer, including the opportunity to adopt at both hospitals uniform protocols for the treatment of specific diseases or conditions. Dr. Yingling also noted other significant benefits, such as the elimination of unnecessary duplication of equipment and services, the ability to implement an integrated and interactive medical records system, and the ability of the hospitals to provide more specialized care locally for patients who are presently required to travel to other areas for necessary treatment. (App. 002312-002319)

Similarly, Dr. Hoyt Burdick, Vice President and Chief Medical Officer of Cabell, testified extensively on the quality improvements which will be attained with the combination of Cabell and St. Mary's. During the hearing, he was asked "do you have an opinion as to whether this transaction would improve or decrease the level of quality available at Cabell Huntington Hospital?" (App. 002283) He replied, "I'm absolutely convinced that these two great hospitals working together in this wonderful community can achieve things together that neither could, no matter who they — who else they might partner with. This — it is a merger-specific and it is real." *Id.*

Dr. Burdick further testified that "the specific opportunities presented by this merger and the ability to have a common health information system, common population health data, working with Cabell County Health Department and this new entity, I can't imagine any other arrangement that would have this kind of potential." (App. 002285-002286) In addition, Dr. Burdick explained "that critical mass for tertiary subspecial level work is much more achievable in a system that has a larger population rather than two medium-sized hospitals trying to build tertiary services or recruit tertiary or quaternary national experts to work in a smaller system."

(App. 002289)

The Authority heard and reviewed the evidence presented by both SWVA and Cabell. It had the opportunity to assess the credibility of witnesses and to decide the weight to be given to each. After considering the totality of the evidence, including the testimony of Elizabeth Gross, SWVA's expert, Professor Robert Town, Dr. Kevin Yingling, Dr. Hoyt Burdick, Brandon Klar, and Raymona Kinneberg, as well as the Camden Report and the AVC, the Authority flatly rejected SWVA's argument on competition. The Authority instead determined that the combination of Cabell and St. Mary's would "result in significant cost savings and operational efficiencies, improvements in quality of care, better coordination of care, and has the potential to increase access to highly specialized acute care services." (App. 003053)

(c) The Access Evidence.

Access to health care is inextricably connected to the cost of care and the quality of care. Health care which is not affordable is not accessible. Access to inferior care is not acceptable. The previous sections of this Brief have demonstrated that the substantial evidence before the Authority clearly established the proposed transaction will restrain the costs and improve the quality of health care. Thus, without the addition of new services, access to care will be advanced by the affiliation of Cabell and St. Mary's. SWVA presented no specific evidence as to how competition will impact the supply of services from an access standpoint.

Cabell presented evidence that more complex, specialized health care services will be developed as a result of the consolidation of Cabell and St. Mary's. Patients currently must travel out of the Huntington area to obtain many highly specialized services. *See, e.g.* (App. 002318, 002169) Dr. Yingling, Dr. Burdick, Ms. Kinneberg, and St. Mary's CEO, Mike Sellards, all testified that a consolidated hospital system will allow such specialized services to be

developed in Huntington, thereby improving patient access. (App. 002318, 002283-002286, 002169, 002243-002244) In short, Cabell's acquisition of St. Mary's will restrain costs, enhance quality, and allow the combined hospitals to offer more specialized hospital services to the community than either institution can individually offer, thus increasing local access to necessary care.

(d) The Authority's Decision on competition was proper and based upon substantial evidence.

The Authority spoke clearly and succinctly on the issue of competition. It made the judgment that, in the case of hospital acquisitions, competition is not appropriate to allocate supply in a manner that will advance cost effectiveness, quality assurance, and access. After noting the arguments advanced by SWVA and the testimony of Professor Town, it stated flatly:

> The Authority rejects SWVA's arguments about competition.

(App. 003047) Importantly, the Authority emphasized that there was "broad factual support for the conclusion that the CHHI proposal is the superior alternative in terms of cost, efficiency, and appropriateness, and is the only practicable compliance with W. Va. Code § 16-2D-6(e)(1)." (emphasis added) (App. 003053) Further, at page 21 of its Decision, the Authority stated:

> [b]ased upon the evidence, the Authority finds that although there are no specific standards in the State Health Plan for the acquisition of an existing facility, the project is nevertheless consistent with the overall goals and objectives of the State Health Plan to promote cost effectiveness, quality, and access to needed services. In addition, this project will promote the development of a community-oriented, integrated health care network consistent with the policy recommendation set forth in Chapter 4 and 5 of the 2000-2002 State Health Plan. (emphasis added)

(App. 003037)

Similarly, at page 26, the Authority specifically found "the proposed project will reduce duplication, increase efficiency, quality, and coordination of care and allow for greater

recruitment of professionals, promoting more effective management of population health, enhancing existing programs of health science education, all while maintaining and potentially expanding access to essential acute care services to West Virginia residents. This is a core principle and purpose of the Certificate of Need law (W. Va. Code § 16-2D-1)." (App. 003042)

One of SWVA's arguments for overturning that the findings of the Authority is predicated on the following sentence from the Authority's Decision:

> 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.

(App. 003046) While the wording of this sentence may be ambiguous, it is clear that its purpose was to distinguish those factors which the Authority was directed to <u>consider</u> from those with respect to which it was directed to make specific written findings. More importantly, as explained above, the Authority clearly and unquestionably complied with the mandate of the CON law and considered the effect of competition on the supply of services being reviewed. Any ambiguity in the above quoted sentence from the Decision is, therefore, clearly immaterial.

SWVA also argues the Authority did not make an express written finding in statutory language allegedly required by W. Va. Code §16-2D-5 (2015). There is, however, no such requirement in the Code. When the Legislature intends to require a written finding, it has no difficulty in so stating. *See, e.g.,* §16-2D-6(e) (2015) and §16-2D-9(e)(1) (2015).[11] The

[11] W. Va. Code §16-2D-6(e) (2015) states "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 providing services similar to those being proposed, the state agency makes, in addition to findings required in section nine [§ 16-2D-9] of this article, *each of the following findings in writing*: (1) That superior alternatives to the services in terms of cost, efficiency and appropriateness do not exist and the development of alternatives is not practicable; (2) that existing facilities providing services similar to those proposed are being used in an appropriate and efficient manner; (3) that in the case of new construction, alternatives to new construction, such as modernization or sharing arrangements, have been considered and have been implemented to the maximum extent

Authority's Decision makes it abundantly clear that, in the case of hospital acquisitions, competition does not appropriately allocate the supply of services in accordance with the State Health Plan. The Authority stated:

> 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. 003047-003048) The Authority specifically cited W. Va. Code §16-2D-5(e) (2015) as the basis for the Authority's exercise of discretion in not granting priority to competition, and referenced some of its historical precedents involving the same issue.[12]

The meaning and purport of the above quoted language is clear - the Authority determined that competition does not appropriately allocate supply in accordance with the goals and objectives of the CON law. This determination was within the scope of its discretion, was well articulated, was consistent with its prior precedents, and accordingly, is entitled to substantial deference by this Court under the principles enunciated in *Princeton Cmty. Hosp. v.*

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practicable; (4) that patients will experience serious problems in obtaining care of the type proposed in the absence of the proposed new service." (emphasis added). W. Va. Code § 16-2D-9(e)(1) (2015) states "For each proposed new institutional health service it approves, the state agency shall in addition to the written findings required in subsection (e), section six [§ 16-2D-6] of this article, *make a written finding*, which shall take into account the current accessibility of the facility as a whole, on the extent to which the new institutional health service will meet the criteria in subdivisions (3), (11) and (22), subsection (a), section six of this article, regarding the needs of medically underserved population..." (emphasis added)

[12] *See, In re: Genesis Affiliated Health Services, Inc.,* CON File #98-2-6384-A Decision (June 22, 1998) (approving the affiliation of Cabell, St. Mary's, and Pleasant Valley Hospital into a single, integrated health care delivery system); *In re: W. Va. United Health System, Inc., Camden-Clark Health Servs., Inc., and Camden-Clark Memorial Hosp. Corp.,* CON File #10-5-9266-A, Decision (Jan. 14, 2011) (approving the creation of a single hospital system in Parkersburg through the affiliation of the city's two existing hospitals).

State Health Planning and Dev. Agency, supra; Appalachian Power Co. v. State Tax Dep't of W. Va., supra; W. Va. Health Care Cost Review Auth. v. Boone Mem'l Hosp., supra.

2. The AVC is enforceable and a substantial means of consumer protection.

SWVA claims that the AVC, one of the many factors upon which the Authority relied in considering the effect of competition upon the supply of services, is unenforceable because the CAL deprived the Attorney General of his ability to deliver the promised consideration. SWVA also asserts that the AVC did not become effective when executed, but only upon closing of the transaction so that before its terms could become binding, the Attorney General's ability to sign it had been stripped away. These arguments are flawed in many respects.

In the first place, the AVC was clearly binding on the parties upon its execution. The first page of the AVC states that it is effective "from and after the date" on which it was entered, November 4, 2015. (App. 001414-001430) The section of the AVC to which SWVA refers (Section 25) merely defines the timing of certain obligations under the AVC. The fact that promised obligations are contingent upon the occurrence of subsequent events renders them no less enforceable. Secondly, as recognized by Judge Stucky, upon execution of the AVC, the Attorney General concluded his investigation and agreed to forego any enforcement action so that his enforcement forbearance at the time was clear consideration to support the AVC which was immediately effective by its own terms.

The Legislature wanted to leave no doubt as to the continued enforceability of an AVC under the CAL. It provided:

> (1)(A) 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) (2016). The obvious intent of the Legislature in enacting its newly articulated state policy in the CAL was to give officials like the Attorney General the flexibility needed to best implement policy. If the Attorney General believes an AVC is an appropriate way to deal with the issues, then the Legislature's plain language cited above ensures that such an approach is enforceable. Hence, the AVC was not only supported by adequate consideration, it is enforceable by operation of law.[13]

Further the antitrust exemption under the CAL cannot be obtained without the involvement of the Attorney General. Any application under the CAL must be filed with him, and the Authority must consult with the Attorney General about the proposed agreement. Most importantly, the written approval of the Authority **and** the written concurrence of the Attorney General are both required for approval of any antitrust exemption. W. Va. Code §16-29B-28(f)(3) (2016). Should the Attorney General elect to withhold his written concurrence to approval of a cooperative agreement, there is no antitrust exemption and the full panoply of powers under W. Va. Code §47-18-1 *et seq.* remain available for enforcement. Rather than being stripped of his power as alleged by SWVA, the Attorney General is simply given an alternative enforcement tool for his antitrust toolbox.

SWVA's Brief also ignores the substantial ongoing, active State supervision of an approved cooperative agreement under the CAL, as detailed in W. Va. Code §16-29B-28(g) (2016). This ongoing supervision includes annual reporting requirements, annual disclosure of quality of care metrics, as well as possible corrective action plans and financial rebates to payers and insurers. W. Va. Code §16-29B-28(g)(1)(A), (B), (C), and (D) (2016). And, as previously

[13] It should also be noted that Cabell's and St. Mary's compliance with the AVC was made a specific condition of the Decision granting cooperative agreement approval.

discussed, the Attorney General was given the authority by the CAL to approve, reject, or modify any price increase request, and to reject any third party reimbursement agreement which includes pricing terms at anti-competitive levels. W. Va. Code §16-29B-28(i)(1)(B) (2016). These rate review powers granted to the Attorney General are not time-limited. The powers are real, and exist in addition to the conduct limitations imposed by the AVC. They are vested in one of the state's constitutional offices.

SWVA's attempt to minimize these rate review powers is superficial at best. The extensive consumer protections afforded by the AVC and the CAL are unprecedented in West Virginia. The rate caps and other restrictions contained in the AVC demonstrate a significant commitment from the hospitals to ensure that any potential anti-competitive effects of the consolidation will be avoided. Both the AVC and the CAL ensure that West Virginia consumers will not experience arbitrary and unjustified price increases as a result of the proposed transaction.

3. ***The Attorney General retains residual antitrust authority over the transaction.***

SWVA further contends that the abolition of the State antitrust law's applicability to this merger "would forever preclude the Attorney General from reopening his investigation." Petitioner's Brief at 16-17. Again, SWVA's contention is contradicted by a careful reading of the law. West Virginia's antitrust laws were not repealed by the CAL. Rather, it is possible under W. Va. Code §16-29B-28(g)(1)(F) (2016) for the cooperative agreement approval to be revoked, thereby eliminating antitrust immunity. Clearly, the Attorney General could re-open his antitrust investigation if the immunity granted by the cooperative agreement approval is revoked. In addition, the AVC "may at any time be reopened by the attorney general for further proceedings in the public interest." W. Va. Code §47-18-22 (2015). There is, therefore, no basis for SWVA's

claim that the Attorney General is forever precluded from reopening his investigation.

B. The Authority and the Circuit Court properly determined under W. Va. Code §16-2D-6(e)(1) (2015) that the proposed transaction constitutes the superior alternative in terms of cost, efficiency, and appropriateness, and the development of alternatives is not practicable.

W. Va. Code §16-2D-6(e)(1) (2015) requires the Authority to find in writing "[t]hat superior alternatives to the services in terms of cost, efficiency and appropriateness do not exist and that development of alternatives is not practicable." The Authority made these findings in writing in its Decision. Contrary to SWVA's demeaning allegations, there is nothing in the record to support the allegation that the Authority's conclusion on what constitutes the superior alternative was predetermined. Petitioner's Brief at 4. Rather, the Authority's findings were reached only after a thorough review of the record, as made evident in its Decision.

1. The Authority's Decision not to request or consider the Bid Documents was proper and consistent with the Authority's prior precedents.

The CON statute does not define the term "superior alternatives," outline the process by which the Authority must make this finding, or define the precise scope of evidence upon which the Authority must rely. The Authority must necessarily interpret and apply the statute in accordance with the overall purpose of the CON law, the State Health Plan, and its own accumulated health care experience. The Authority is in the best position to decide what information it needs to make its required findings, and doing so requires the exercise of substantial discretion.

By the logic expressed in SWVA's Brief, W. Va. Code §16-2D-6(e)(1) (2015) requires the Authority to consider the universe of all conceivably possible alternatives, real or hypothetical, and imposes upon the applicant the impossible burden of establishing their non-existence or inferiority. Clearly, this is not the construction of the above section intended by the Legislature. It is theoretically possible that a philanthropist like Bill Gates could decide to purchase St. Mary's and

donate hundreds of millions of dollars to area health care. It is also theoretically possible that the Mayo Clinic could choose to relocate its medical center from Rochester, Minnesota, to Huntington and make St. Mary's its centerpiece. It obviously was not the intention of the Legislature to foreclose the award of a CON to an applicant because such remote and speculative "possibilities" are not evaluated by an acquiring applicant or by the Authority.

It is likewise clear that by requiring the Authority to consider "superior alternatives," the Legislature never intended to empower the Authority to micro-manage hospital sales and substitute its judgment for that of the selling hospital as to acceptable terms. Indeed, any attempt by the Authority to do so would be of questionable constitutionality. The CON law does not require the selling hospital to justify its selected bid; in fact, the selling hospital is not even a party to the CON Application. For this reason, in a series of decisions known as the *LifePoint* Decisions, the Authority determined that bid documents are not relevant to CON proceedings, and that rejected bids are not practicable "alternatives" under the CON program.[14] In all four of the *LifePoint* Decisions, the affected persons challenging the hospital acquisition sought and were denied access to bid documents through the discovery process because they were found by the Authority not to be relevant to the underlying CON process.

As explained by the Authority, under the CON law, the acquiring party (and not the seller) must prepare the application seeking CON approval of the acquisition. In a bid process for the sale of any hospital, the acquiring party submits a bid, but does not conduct the bid process, which is the selling hospital's task. The selling hospital maintains the bids as

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

confidential so as to enable it to negotiate the best possible terms. The acquiring party only has knowledge of the terms of its own bid and does not know the terms or even existence of any other bids. To require a CON applicant, who also happens to be the acquiring party, to access and publicly disclose information from the other bids rejected by the seller would effectively destroy the entire purpose of a confidential bidding process, and ruin the seller's future negotiating power in the event that the transaction did not gain CON approval.

A hospital acquisition must have a willing buyer and seller. *See In re: Signature Hospital*, CON File #06-5-8401-A, Decision (Mar. 14, 2007); *In re: CAMC Teays Valley Hosp., Inc.*, CON File #06-3-8371-A, Decision (Nov. 2, 2006) Here, Cabell was awarded the bid by St. Mary's and therefore is the willing buyer. The other entities that submitted bids more than three years ago may no longer be willing buyers today, or may not be amenable to the same terms that they previously offered, and no evidence was submitted in this regard. The old bids submitted prior to St. Mary's choosing Cabell were rejected, and are no longer viable. They do not represent practicable alternatives within the meaning of W. Va. Code §16-2D-6(e)(1) (2015).

The Authority's prior *LifePoint* precedents are correct, and this Court's denial of SWVA's Petition for Writ of Mandamus to force the Authority to issue a subpoena *duces tecum* to St. Mary's to produce Bid Documents was entirely proper. The Bid Documents are neither necessary nor relevant to the Authority's analysis of alternatives under W. Va. Code §16-2D-6(e)(1) (2015).

In its Brief, SWVA claims that the Authority's Decision made no effort to reconcile its holding in *In re: Appalachian Regional Healthcare, Inc. and ARH Tug Valley Health Services, Inc.*, CON File #14-2-10123-A, Decision (Apr. 29, 2015) (the "ARH Decision") with the *LifePoint* Decisions. Petitioner's Brief at 19-22. However, reconciliation is not necessary as the

facts and circumstances in the ARH Decision are readily distinguishable from the proposed transaction and the *LifePoint* decisions. The ARH Decision involved the proposed acquisition **and closure** of Williamson Memorial Hospital ("WMH"), a West Virginia hospital, by Williamson ARH, a Kentucky hospital, and the consolidation of hospital services outside of West Virginia at ARH's facility in Kentucky. *See* ARH Decision at 2. There was no bid process or bid documents related to the acquisition **and closure** of WMH. *Id.* at 2-10, 22-23. The Authority determined that the proposed transaction was not needed, was not financially feasible, and was not a superior alternative. *Id.* at 19, 35. Importantly, evidence of each of the superior alternatives recognized by the Authority was presented by an affected party. *Id.* at 3, 20-26.

*2. **SWVA presented no evidence of a superior alternative.***

On at least five occasions in its Brief, SWVA makes the inaccurate and highly misleading statement that the Authority determined it could only consider "alternatives presented by the applicant." Petitioner's Brief at 5, 19-22. Three times this phrase appears in quotation marks. *Id.* SWVA's Statement of the Case states explicitly that the Health Care Authority "declared" that "the only alternatives it would consider in establishing the "superior" alternative were the "alternatives presented by the applicant [Cabell Huntington]." Petitioner's Brief at 5. In fact, the Authority's Decision in the case before the Court never uses this phrase, or any approximation thereof. In the *LifePoint* Decisions decided in 2006, the Authority noted that it could only "consider alternatives presented", or in other words, the only evidence it could consider was the evidence before it. *See supra* note 13.

In this case, SWVA presented absolutely no evidence of any alternative which would provide benefits to the community, Cabell, or St. Mary's equal to or superior to the benefits of the proposed Cabell-St. Mary's transaction. While SWVA may contend that it was prevented

from doing so by the Authority's refusal to subpoena the Bid Documents, this is shear speculation. Whatever their content, there is no reason to believe any would be acceptable to PHS. These rejected bids can no longer be considered as either viable or practicable under W. Va. Code §16-2D-6(e)(1) (2015).

A transaction such as the one before the Court involves many important terms in addition to just the purchase price. In the Definitive Agreement among PHS, Cabell, and St. Mary's, Cabell committed, among other things, to very significant capital expenditures at St. Mary's; to operate St. Mary's as a faith-based institution in accordance with the religious and ethical directives of the Catholic Church; to establish specific Centers of Excellence at St. Mary's; to adopt uniform protocols at both hospitals; to establish a uniform and integrated medical records system; to maintain the St. Mary's infirmary; to provide continued representation of the Sisters on the Board of Directors of St. Mary's; and to continue the affiliation of St. Mary's with the Marshall University School of Medicine. (App. 002241, 002166-002167, 003455-003457, 003460-003461) Cabell has a well-established record of providing critically needed support for the School of Medicine, and the proposed transaction was determined to enhance existing programs of health science education. (App. 002158, 002285, 002332, 003460)

Even if one assumes that other bidders remain interested in acquiring St. Mary's and would renew their previous offers, such hypothetical buyers might or might not agree to the commitments of this type, and might or might not provide much needed support for medical education. Moreover, PHS rejected the other bids and there is no indication that such hypothetical buyers would now be acceptable to St. Mary's. It is certain, however, that since many of the significant benefits are made possible by the proximity of Cabell to St. Mary's (a proximity which no other hospital shares), these benefits cannot be duplicated by another

purchaser. Thus, only Cabell and St. Mary's can achieve the millions of dollars of savings identified in the Camden Report and made possible by the elimination of duplicative equipment and services. Only Cabell and St. Mary's can implement an integrated and interactive medical records system and develop uniform protocols at both hospitals for the treatment of disease. No other potential purchaser would be bound by the pro-competitive provisions of the AVC or subject to the restraints on price increases which the AVC imposes. Nor would any other purchaser be required to obtain approval of the Attorney General for price increases and reimbursement agreements with third party payors under the CAL. Even more fundamentally, it is the seller and not the Authority which is uniquely qualified and entitled to determine the commitments that are important to it.

While SWVA criticizes Cabell for not investigating alternatives short of acquiring St. Mary's, such as entering into some other type of "affiliation" short of a full merger, the truth of the matter is that PHS is not seeking such half-measures; rather, PHS seeks the outright sale of St. Mary's. These other alternatives touted by SWVA are simply not "practicable" within the meaning of W. Va. Code §16-2D-6(e)(1) (2015).

SWVA also advanced patently frivolous arguments that the Authority should have considered whether the purchase by Cabell of a hospital other than St. Mary's represented a superior alternative and should have required Cabell to demonstrate that the benefits made possible by the proposed acquisition could not be achieved by quality improvement efforts instituted by Cabell independently. As previously explained, many significant benefits of Cabell's acquisition of St. Mary's, including certain cost savings and improvements to quality, are dependent on the proximity of the two hospitals. They cannot be achieved by another buyer's purchase of St. Mary's, Cabell's purchase of a hospital other than St. Mary's, or Cabell acting

alone.

Ultimately, it is for the Authority to exercise its discretion and collective expertise in health care to determine whether the applicant has met its burden of proof on the alternatives issue. SWVA brought forth no specific alternative plan for St. Mary's, nor did it offer any report or other analysis (such as the Camden Report) demonstrating the opportunity for greater savings or other community benefits. In fact, SWVA offered absolutely no evidence in the record to support a finding that any alternative arrangement could provide the same benefits or greater benefits than Cabell's acquisition of St. Mary's. Cabell, by contrast, presented a strong body of evidence (including the Camden Report) demonstrating the substantial advantages to be derived from the proposed transaction.

In short, Cabell met its burden of proof that the proposed transaction represents the superior alternative pursuant to W. Va. Code §16-2D-6(e)(1) (2015). SWVA's argument that the Authority failed to consider alternatives is belied by even a casual reading of the Decision. The Authority's Decision spent six pages discussing the issue of superior alternatives, and the evidence presented on this issue. (App. 003048-003053) The cumulative evidence in this matter conclusively supports the Authority's determination that the Cabell project represents the superior alternative in terms of cost, efficiency, and appropriateness in full compliance with W. Va. Code §16-2D-6(e)(1) (2015), and that other alternatives are not practicable.

C. The Authority and the Circuit Court properly determined under W. Va. Code §16-2D-6(e)(4) (2015) that patients will experience serious problems in obtaining care of the type proposed in the absence of the proposed transaction.

SWVA argues that the Authority incorrectly determined that patients will experience serious problems in obtaining care of the type proposed in the absence of the project, and thus acted in violation of W. Va. Code §16-2D-6(e)(4) (2015). SWVA asserts that "[t]he 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." Petitioner's Brief at 26. SWVA posits that both hospitals are financially stable, and that no existing services "would be diminished or endangered if the merger did not take place." Petitioner's Brief at 25. It advances the nonsensical position that unless existing services would be eliminated or endangered in the absence of a sale or merger, no financially stable hospital can be sold.

If SWVA's premise were correct, the Authority could never approve a new service or sanction new equipment to deliver previously unavailable treatment. Medicine is a constantly evolving field. Numerous treatment modalities available today were not envisioned a short time ago. Had the Authority adhered to the standard proposed by SWVA in its prior CON decisions, the State would be without such critical treatment and analytical tools as MRI, PET scans, Gamma Knife, and Cyber Knife. Clearly it is not the intention of the CON law to forever limit West Virginia residents to the most rudimentary levels of care. In fact, W. Va. Code §16-2D-5(d) requires the Authority to take actions which "advance the purposes of quality assurance, cost effectiveness and access." (emphasis added)

Fundamentally, the legal test enunciated in SWVA's Brief under W. Va. Code §16-2D-6(e)(4) (2015) is wrong. SWVA ignores the plain language of W. Va. Code §16-2D-6(e)(4) (2015), which directs the Authority to instead consider serious problems in relation to the "proposed new service," and not to "existing services and care." It is a well-established principle of construction that the Court should look first to the plain language of the statute, and its terms should be applied as written. *Collett v. Eastern Royalty, LLC*, 232 W.Va. 126, 751 S.E.2d 12 (2013); *University Commons Home Owners Ass'n, Inc. v. University Commons Morgantown, LLC*, 230 W.Va. 589, 741 S.E.2d 613 (2013). The "proposed new service" in this instance is the

consolidated hospital system and the benefits it is projected to bring.

Throughout its Decision the Authority emphasized the cost savings, quality improvements, and improved access to care which the project will make possible. These include improved patient outcomes through consolidation of services to assure an adequate volume of patients for certain specialty services, the adoption of uniform treatment protocols at both Cabell and St. Mary's, the implementation of a uniform medical records system accessible to physicians at both hospitals in real time, and the savings of many millions of dollars which can be devoted to improved care. (App. 003031-003060) Can it be seriously argued by SWVA that the inability of the local population served by the two hospitals to receive this enhanced care is not a serious problem?

The Authority was particularly impressed by the evidence that more complex, specialized health care services will be developed as a result of the consolidation of Cabell and St. Mary's. (App. 003056) As explained by Ms. Kinneberg, patients currently bear the burden of having to travel out of the Huntington area to obtain highly specialized services. (App. 002169)

Cabell's acquisition of the membership interest of St. Mary's will allow the combined hospitals to offer more specialized hospital services to the community that neither institution can individually offer. This, in turn, will permit more patients to receive care locally, thereby alleviating the time and expense of travelling to Lexington, Columbus, Cincinnati, or other destinations for highly specialized services. The Authority properly concluded that patients will experience serious problems in obtaining care of the type proposed in the absence of the proposed transaction in accordance with W. Va. Code §16-2D-6(e)(4).

IX. CONCLUSION

The arguments of SWVA were fully and carefully considered and rejected in the well-

reasoned Decision of the Kanawha Circuit Judge Stucky, just as they had previously been rejected by the Authority and the OOJ. The Decision of the Authority to grant a CON to Cabell was supported by substantial evidence, and was rendered in accordance with law. Accordingly, the Circuit Court's Final Order affirming the Authority's Decision to should likewise be affirmed by this Court.

Respectfully submitted,

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No. 17-0406

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Steel of West Virginia, Inc.
Petitioner,

vs. No. 17-0406

West Virginia Health Care Authority
and Cabell Huntington Hospital, Inc.
Respondents.

X. CERTIFICATE OF SERVICE

I, James W. Thomas, do hereby certify that a true and exact copy of the foregoing Respondent **CABELL HUNTINGTON HOSPITAL, INC.'S RESPONSE BRIEF IN OPPOSITION TO PETITIONER'S APPEAL** was caused to be served upon the following via hand delivery, this 5th day of October, 2017:

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