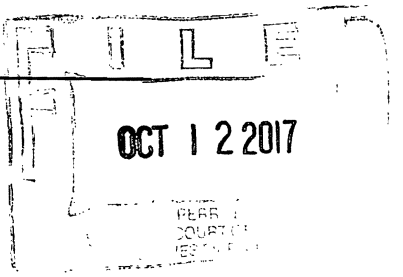
IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 17-406



STEEL OF WEST VIRGINIA, INC.,

Petitioner,

v.

Appeal from the final order of the Circuit Court of Kanawha County Case # 16-AA-100

WEST VIRGINIA HEALTH CARE AUTHORITY AND CABELL HUNTINGTON HOSPITAL, INC.,

Respondents.

BRIEF OF RESPONDENT WEST VIRGINIA HEALTH CARE AUTHORITY

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INTRODUCTION

This case is the final step in a four-year-long process designed to improve the provision of health-care services to the citizens and residents of Huntington, West Virginia. In 2013, the Sisters of the Pallottine Missionary Society decided to sell St. Mary's Hospital, the not-for-profit health-care facility they had operated since 1924. After a year-long competitive bidding process, the Sisters decided that selling St. Mary's to a neighboring not-for-profit health-care provider, Cabell Huntington Hospital, would best serve the Huntington community and would do so in accordance with the Catholic values the Sisters were duty-bound to live out. Since that time, the Cabell/St. Mary's transaction has:

- Received a certificate-of-need from the West Virginia Health Care Authority (the "Authority"), the entity statutorily trusted to decide whether a new health-care facility will benefit a given geographic region;
- Gained the express imprimatur of the Office of Judges and the Kanawha County Circuit Court, both of which affirmed without reservation the Authority's certificate-of-need grant;
- Received a certificate-of-approval from the Authority, which established that the benefits of the Cabell/St. Mary's transaction outweighed the marginal anti-competitive drawbacks; and
- Become subject to a strict Assurance of Voluntary compliance, which imposes on the transaction a host of conditions, enforceable by the West Virginia Attorney General, designed to alleviate all antitrust concerns.

At every step of this multi-faceted process, the Petitioner, Steel of West Virginia, Inc. ("Steel"), has tried to stymie this transaction, even though the consolidation will pave the way for increased efficiency, lower costs, and the introduction of specialized health-care services that Huntington residents would otherwise have to travel to receive. It has done so for one reason and one reason only—its relentless quest to preserve "competition" at the expense of every other benefit the consolidation would provide. JA 2565.

Despite the importance of this case to the citizens and residents of the Huntington area, and notwithstanding Steel's inflammatory rhetoric,[1] the legal issues are straightforward and the resolution of them obvious. *First*, when considering Cabell's certificate-of-need request, the Authority had discretion to consider, disregard, prioritize, or deemphasize competition. Its decision to not prioritize competition was consistent with the governing statutes and supported by substantial evidence. *Second*, the Authority correctly found that no superior alternatives to the Cabell/St. Mary's transaction existed before it granted the certificate of need. The Authority's determination, which declined Steel's invitation to consider bids that St. Mary's had rejected, was consistent with the governing statutes and supported by substantial evidence. *Third*, the Authority correctly found that the transaction was necessary, because patients would have difficultly accessing the care that the consolidation would facilitate if it did not take place. The Authority's determination, which found that the transaction would increase specialty health-services in Huntington, was consistent with the governing statutes and supported by substantial evidence.

For these reasons and those that follow, the Authority respectfully requests that this Court affirm the Circuit Court's order giving rise to this appeal.

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[1] Steel, for instance, raises the specter of improper collusion by suggesting that Cabell "facilitated this merger" through, among other things, "its private negotiations with the Attorney General. Pet'r's Br. 1. Steel never substantiates this outlandish suggestion—nor could it—and, indeed, the record demonstrates conclusively that the West Virginia Attorney General vigorously championed the West Virginia Antitrust Act and successfully secured two strict Assurances of Voluntary Compliance that prevent Cabell from exploiting its market power to the detriment of patients. JA 1404, 1414. If anything, Steel's overheated, empty hysterics underscore the comparative weakness in its legal presentation to this Court.

BACKGROUND & STATEMENT OF THE CASE

I. CERTIFICATES OF NEED AND CERTIFICATES OF APPROVAL

A. West Virginia's Certificate of Need Program

Back in the 1970s, it became apparent that competition did not in fact reduce costs in the health-care industry as it did in other markets. Rather, "overbuilding" of "hospital beds," "coronary care units," and similar inpatient health service facilities "without regard to the existence of similar facilities . . . already operating in" a given area were contributing to skyrocketing health-care costs. 1974 U.S.C.C.A.N. 7842, 7878 (reprinting S. Rep. No. 93-1285 (1974)) (hereinafter "*1974 Senate Report*"). This phenomena occurred because "[t]he highly technical nature of medical services" and "the growth of third party reimbursement mechanisms" blunt "the usual forces influencing the behavior of consumers with respect to personal health services." *1974 Senate Report* at 7878. In other words, certain "segments of the health care industry" do not respond to classic marketplace forces." *Id.*[2]

To "avoid the cost-inflating effects caused by [this] overbedding" problem, *Princeton Cmty. Hosp. v. State Health Planning*, 174 W. Va. 558, 561, 328 S.E.2d 164, 168 (1985), Congress enacted the National Health Planning and Resources Development Act of 1974 ("NHPRDA"), Pub. L. No. 93-641, 88 Stat. 2225 (codified at 42 U.S.C. § 300k *et seq.* (Supp. III 1972)) (repealed

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[2] In 1979, Congress reiterated that competition had a "diminished" effect on "decisions of providers respecting the supply of health services and facilities," which results in "duplication and excess supply of certain health services and facilities." Pub. L. No. 96-79, § 103(a), 93 Stat. 592, 595 (enacting 42 U.S.C. § 300k-2(b)(1) (Supp. IV 1976)). It noted that this problem was especially prevalent for "inpatient health services," e.g., hospitals. *Id.* at § 103(b), 93 Stat. 592, 595 (enacting 42 U.S.C. § 300k-2(b)(1) (Supp. IV 1976)). Congress therefore directed States receiving federal funds to continue to prioritize "quality assurance, cost effectiveness, and access" when considering requests for certificates of need for "services, for which competition does not or will not appropriately alloca[te]supply," which Congress itself found and directed includes "inpatient health services [or] other institutional health services." *Id.* (enacting 42 U.S.C. § 300k-2(b)(2) (Supp. IV 1976)).

1986). This statutory scheme was designed to "assist in preventing overinvestment in . . . health facilities," *Nat'l Gerimedical Hosp. v. Blue Cross*, 452 U.S. 378, 384 (1981), and to help prevent "unnecessary duplication of health resources." 42 U.S.C. §300*l*-2(a)(4) (Supp. III 1972). The NHPRDA directed each State, as a condition of receiving certain federal funds, to "establish a 'certificate of need' program under which all new institutional health facilities must seek state approval prior to construction" and under which the States would permit development of "only those services, facilities, and organizations found to be needed." *Nat'l Gerimedical Hosp.*, 452 U.S. at 385; *see also* 42 U.S.C. §300m-2(a)(4)(A) (Supp. III 1972).

So, "[a]s part of [this] comprehensive and ongoing effort to address the national problem of spiraling health care costs," the West Virginia Legislature created the certificate of need program in 1977. *Princeton Cmty. Hosp.*, 174 W. Va. at 561, 328 S.E.2d at 167. It amended its certificate-of-need program in 1981.[3] However, after Congress recognized that there may be some "health services for which the market forces of supply and demand have *not* been distorted." H. Rep. No. 96-190, at 51–52 (emphasis added). Based on this realization, Congress directed that State agencies were to "give priority," where appropriate, "to actions" that "would strengthen the effect of market forces on the supply of" health services where competition "appropriately allocate[s] supply." Pub. L. No. 96-79 at § 103(b) (enacting 42 U.S.C. §§ 300k-2)). It further directed that State agencies were to consider (1) "factors which affect the effect of competition on the supply of healthcare"—where "appropriate"—and (2) "[i]mprovements or innovations in the financing and delivery of health services which foster competition . . . and serve to promote quality assurance and cost effectiveness." *Id* at § 103(d) (enacting 42 U.S.C. §§ 300n-1(12)).

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[3] *See* 1981 W. Va. Acts 467, 487 (enacting W. Va. Code § 16-2D-5(d)–(e)); 1981 W. Va. Acts 467, 490 (enacting W. Va. Code § 16-2D-6(a)(16)–(17))

As a result, the statutory scheme governing the certificate of need at issue in this case provides, in relevant part, that the Authority should consider:

- "the factors influencing the effect of competition on the supply of the health services being reviewed," so long as the Authority determines that this criterion is "applicable," W. Va. Code § 16–2D–6(a)(16) (2015); and
- "[i]mprovements or innovations in the financing and delivery of health services which foster competition . . . and serve to promote quality assurance and cost effectiveness," so long as the Authority determines that this criterion is "applicable," W. Va. Code § 16–2D–6(a)(16) (2015).

Both of these criteria are to be considered "in accordance with section five of this article." *Id.* Section 5, in turn, provides that, if "competition appropriately allocates supply" for a particular health service, the Authority is to "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." *Id.* § 16–2D–5(d) (2015) (emphasis added). If "competition does not or will not appropriately allocate supply," then the Authority is to "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." *Id.* § 16–2D–5(e) (2015).

In addition to the foregoing considerations, West Virginia Code section 16–2D–6(e) provides that the Authority must make several findings "in writing" before granting a certificate of need. Two are relevant to this case. First, the Authority must find "[t]hat 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." *Id.* § 16–2D–6(e)(1). And second, the Authority must find "that patients will experience serious problems in obtaining care within this state of the type proposed in the absence of the proposed new service." *Id.* § 16–2D–6(e)(4). The statute provides no further elucidation of these required findings.

B. West Virginia's Certificate of Approval Program

As indicated by the foregoing analysis, the Authority has always possessed ample discretion to consider whether competition serves the purpose underlying the certificate-of-need process—*i.e.*, appropriate allocation of hospital-service supply. Historically, however, this discretion did not displace the authority of either the Federal Trade Commission to enforce federal antitrust law or the authority of the West Virginia Attorney General to enforce the State's Antitrust Act. That changed in 2016 with the passage of Senate Bill 597.

Specifically, the West Virginia Legislature created a "certificate of approval program" to accompany its certificate of need program. The program vested the Authority with power to issue a "certificate of approval" upon its conclusion that the benefits of certain enumerated hospital consolidations are likely to outweigh the disadvantages. *See* S.B. 597, 2016 Leg., Reg. Sess. (W. Va. 2016) (codified at W. Va. Code § 16-29B-28(f)(3) (2016)). If the Authority so concludes, then acquiring entity is to enter in to a "cooperative agreement" and both the Authority and the West Virginia Attorney General are to provide active and ongoing supervision to ensure compliance with the agreement. W. Va. Code §§ 16–29B–28(g)(1)(E)–(G) (2016). Providers that receive a certificate of approval, and the continuing regulatory oversight that comes with it, are specifically immunized from all other state and federal antitrust oversight and regulation. *See id.* § 16–29B–26. If the West Virginia Attorney General had previously agreed to forego antitrust enforcement against a healthcare provider based on the existence of a voluntary compliance agreement, then the terms of that agreement are still enforceable even though the underlying State and federal antitrust laws are displaced. *Id.* § 16–29B–28(i); *see also id.* § 47–18–22.

C. Interplay Between the Certificate of Need and Certificate of Approval Programs.

The foregoing demonstrates that the certificate of need and certificate of approval programs address overlapping, but distinct, regulatory regimes and serve complementary, yet distinct, goals for ensuring West Virginians the best available access to health care. The distinctions, though nuanced, are critical for understanding the proceedings at issue.

The overarching goal of the certificate of need program is to "avoid unnecessary duplication of health services" and to "contain or reduce increases in the cost of delivering health services." W. Va. Code § 16-2D-1. In some instances, and for some health care services, competition helps serves this goal. *See* H. Rep. No. 96-190, at 52 (explaining this can occur in a particular health services market if "individuals, in making decisions respecting their use of health services, are sensitive to the price of the service, and . . . any provider which developed services or facilities of that type would be at financial risk for low levels of utilization and the costs associated with excess unused capacity"). Other times, competition between health care services does little more than flood the market and drive up the cost of health services. Because the Authority is best positioned to make this determination, the West Virginia's Legislature has, with United States Congressional imprimatur, empowered the Authority to determine whether, and under what circumstances, to consider, prioritize, or disregard competition when issuing a certificate of need.

The goal of the certificate of approval program, in contrast, is to provide a series of conditions designed to alleviate federal and state antitrust concerns in the event the Authority, through issuance of a certificate of need, creates a health-services monopoly for a given area. Because creation of a health-services monopoly may substantially benefit a community but may nonetheless run afoul of traditional antitrust proscriptions, the West Virginia Legislature

empowered the Authority—again, the entity best suited to make this determination—to decide whether "the benefits likely to result . . . outweigh the disadvantages likely to result from a reduction in competition." S.B. 597, 2016 Leg., Reg. Sess. (W. Va. 2016) (codified at W. Va. Code § 16-29B-28(f)(3) (2016)). If so, then the Authority has the power, by issuing a certificate of authority, to immunize a merger from antitrust challenges.

In other words, competition plays a limited and specific role in the certificate of need program—*i.e.*, if competition appropriately allocates supply for a particular health-care service, the Authority may prioritize it. In contrast, competition is the *sole* focus in a certificate of approval proceeding; there, the only inquiry is whether enough safeguards exist to displace federal and state antitrust prohibitions.

II. THE CABELL HUNTINGTON/SAINT MARY'S MERGER AND STEEL'S QUEST TO UPEND IT.

Since 1924, the Sisters of the Pallottine Missionary Order (the "Sisters"), a Catholic not-for-profit organization, has owned and operated St. Mary's Medical Center in Huntington, West Virginia. JA 2140-42. In 2014, they decided to leave the healthcare industry and began the process of selling St. Mary's through a closed bidding process. *Id.* The Sisters ultimately awarded the bid Cabell Huntington Hospital ("Cabell"), which, historically, was St. Mary's biggest competitor in Huntington. JA 2168–70. Under the terms of the acquisition, both hospitals would remain open, but St. Mary's would be subsumed into Cabell's administrative structure. Cabell, in turn, is required to preserve St. Mary's Catholic identity by continuing to operate the hospital in accordance with the values and directives of the Catholic Church. JA 2619. The parties tentatively finalized their agreement on November 7, 2014. JA 3.

A. The initial federal and state antitrust investigation.

While Cabell applied for a certificate of need from the Authority, both the West Virginia Attorney General and the FTC began investigating the acquisition for state and federal antitrust concerns. On July 31, 2015, Cabell and the Attorney General entered into an "Assurance of Voluntary Compliance" ("AVC"), a statutorily created mechanism that restrains Cabell from price hikes and requires that Cabell retain existing contracts. *See* JA 1404.[4] The AVC expressly noted that the "Attorney General of West Virginia . . . has been investigating certain acts and practices of . . . [Cabell] in connection with its proposed acquisition of St. Mary's." *Id.* "In accordance with the West Virginia Antitrust Act, W. Va. Code §[] 47–18–22 and[] federal antitrust laws, 15 U.S.C. §[§] 1 *et seq.*," [Cabell] and St. Mary's agreed to abide by certain conditions "to facilitate continued and robust competition with respect to service lines provided by the two hospitals." JA 1404, 1406. These conditions included, *inter alia*, promises (1) not to oppose the award of a certificate of need to any other healthcare provider wishing to serve the Huntington area, (2) to release any physicians/healthcare providers from agreements and obligations not to compete, (3) to refrain from increasing hospital rates beyond benchmark rates established by the West Virginia Health Care Authority, and (4) to "comply with the provisions of the Antitrust Act, W. Va. Code §[§] 47–18–1 *et seq.*, the Sherman Act, 15 U.S.C. §[§] 1 *et seq.*, and other applicable state and federal laws in their business practices." JA 1406–07, 1409.

Even after securing this AVC, the Attorney General's investigation into the Cabell/St. Mary's merger transaction. Due to these ongoing efforts, on November 4, 2015, the

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[4] Specifically, West Virginia Code section 47–18–22 provides that the Attorney General "may accept an [AVC] with respect to any method, act or practice deemed to be a violation of" the West Virginia Antitrust Act "from any person who has engaged or was about to engage in such method, act or practice." W. Va. Code § 47–18–22. An AVC must "be in writing and be filed with the circuit court in which the alleged violator resides, has his principal place of business, or is doing business." *Id.*

Attorney General secured from Cabell and St. Mary's an Amended AVC, which added substantial, material obligations to the list of conditions in the original AVC. *See* JA 1414. For instance, the Amended AVC obligated CHH and St. Mary's to "develop a Statement of Proposed Activities" designed to "achieve projected efficiencies and quality enhancements" that would need to be submitted to and approved by the Attorney General. JA 1423. The Statement of Proposed Activities, in turn, had to include a host of information that, in the Attorney General's view, would ensure compliance with the State Antitrust Act greater than that ensured by the original AVC.[5] JA 1423–24.

B. The Authority issues a certificate of need, rejecting Steel's crusade to force the Authority to prioritize competition.

While the Authority was considering Cabell's certificate-of-need application, Steel, a Huntington area-employer, intervened as an "affected party." Fearing that the transaction would reduce competition and increase healthcare prices, it also vocally opposed the transaction during review by the Attorney General and the Federal Trade Commission. These were merely the

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[5] Specifically, the Amended AVC mandated that the Statement of Proposed Activities include

(a) descriptions of proposed clinical integration;

(b) proposed Quality Goals, including Quantitative Benchmarks that may be used to assess whether those Quality Goals have been met;

(c) Population Health Goals, including Quantitative Benchmarks that may be used to assess whether those goals have been met;

(d) proposed measures by which Cabell and [St. Mary's] will prevent unwarranted price increases, achieve savings, and realize transactional efficiencies, including any anticipated participation by Cabell or [St. Mary's] in shared-risk arrangements with Third Party Payors;

(e) proposed implementation of payment methodologies that control excess utilization and costs while improving outcomes; and (f) a proposed time line for implementation of the plan contained in the Statement of Proposed Activities.

opening salvos in Steel's relentless campaign to interfere and obstruct the Cabell Huntington/St. Mary's transaction.

Having failed to convince either the West Virginia Attorney General or the FTC that they should block the consolidation, Steel opened a third front in its war through the certificate of need process. Steel's lamentations to the Authority, from start to bitter end of the process, focused entirely on competition. At the time, the West Virginia Legislature had not yet created the Authority's certificate of approval program and displaced traditional State and federal antirust oversight.

Although Steel repeatedly denied that it wanted to "turn this into a Federal Trade Commission proceeding or to second guess the procurement decisions of a private entity," JA 2148, that claim is belied by Steel's continuous insistence that the Authority "prioritize competition" and "not approve this transaction given the negative impact the merger would have on competition," JA 2583, 2586. The Authority, for its part, considered competition-related testimony and evidence, and not all of it supported Steel's position. For example, Dr. Shapiro, Dean of the Joan C. Edwards School of Medicine at Marshall University, testified that, because healthcare is a "collaborative process," market competition can sometimes discourage free communication between doctors working in different hospital systems. JA 2301–02. Similarly, Dr. Yingling, a practicing physician and the Dean of the School of Pharmacy at Marshall University, testified that sometimes "competition actually gets in the way" of sharing best practices and aligning practice protocols to "bring efficiency and improvement of quality of care." JA 2315.

To bolster its position, Steel requested that the Authority issue subpoenas *duces tecum* on the Sisters to gain access to the confidential bids that the Sisters had considered, and rejected, before agreeing to Cabell's offer. The Authority refused the request, reasoning that rejected bids

do not present evidence of "a willing buyer and seller," and thus were not true alternatives to the proposed sale. JA 2733–35. Steel unsuccessfully sought a writ of mandamus from this Court to compel the Authority to subpoena these bid documents, JA 2107, and eventually sued the West Virginia Attorney General, under the West Virginia Freedom of Information Act, to secure them.

Meanwhile, Cabell provided the Authority with extensive evidence demonstrating the benefits the acquisition. For instance, it submitted a comprehensive study prepared by the Camden Group, which detailed the cost savings and quality improvements that would result from the acquisition. JA 3020. Moreover, Cabell also demonstrated that its non-profit status would allow it to reinvest these savings into the provision of specialty care services not currently available in the area. *Id.*, JA 3053; JA 2628. Finally, Cabell agreed to preserve St. Mary's Catholic identity and continue the Sisters' practice of operating the hospital in line with the directives of the Catholic Church. JA 2619.

The Authority found Cabell's evidence persuasive and issued the requested certificate of need. JA 2741.

C. The Authority issues a certificate of approval.

While the certificate-of-need process was underway, the West Virginia Legislature created the certificate-of-approval process. S.B. 597, 2016 Leg., Reg. Sess. (W. Va. 2016). In accordance with its newly minted responsibility to determine "whether the benefits [of the merger] outweigh the costs to competition," the Authority acknowledged that the merger would reduce competition, but nonetheless concluded that the change in competition would not be substantial. *In re Cabell Huntington Hospital, Inc.,* Cooperative Agreement No. 16-2/3-001, Decision at 9 (Jul. 22, 2016).

Its conclusion was bolstered by testimony from Dr. Gautam Gowrisankaran,[6] who demonstrated that the service overlap between St. Mary's and Cabell meant that competition between the two was less pronounced. *Id.* at 70–73. The Authority also relied on the amended AVC between Cabell and the Attorney General, which, as discussed above, severely restricted Cabell's ability to exercise its new market power in a way that would harm the provision of health care in Huntington. *Id.* at 79-81; JA 1404; JA 1414. The Authority further found that individual healthcare practitioners at St. Mary's and Cabell would continue to compete with each other, irrespective of institutional affiliation. Cooperative Agreement No. 16-2/3-001, Decision at 93-95.

Unwilling to accept the finding of the entity designated by the Legislature, and indeed by Steel itself, to analyze the competition issue, Steel appealed the Authority's certificate of approval decision to the Circuit Court. Petition for Appeal at 1, *Steel of West Virginia, Inc., v. West Virginia Health Care Authority*, (Jul. 22, 2016) (Civil Action No. 16-AA-56). Its assignments of error mirrored those it raises here—*i.e.*, the Authority did not appropriately consider alternatives, including rejected bids; the Authority did not appropriately characterize the benefits that the merger would provide; and the Authority did not "properly" evaluate the merger's impact on "competition." *Id.* at 6–7. Steel then sought a motion to stay enforcement of the Authority's decision. Motion for Stay Pending Review at 1, 14-15, *Steel of West Virginia, Inc., v. West Virginia Health Care Authority* (Aug. 1, 2016) (Civil Action No. 16-AA-56). When the Court denied the motion to stay and held that it was "unlikely that [Steel would] prevail on the merits of its appeal," Steel voluntarily dismissed its appeal with prejudice. Voluntary Dismissal of Petition at 1, *Steel of West Virginia, Inc., v. West Virginia Health Care Authority* (Oct. 18, 2016) (Civil Action No. 16-

[6] Dr. Gowrisankaran is the Arizona Public Service Professor of Economics at the University of Arizona and a Senior Advisor for Cornerstone Research.

AA-56); Dismissal Order, *Steel of West Virginia, Inc., v. West Virginia Health Care Authority* (Oct. 24, 2016) (Civil Action No. 16-AA-56).

D. A few days after voluntarily dismissing its certificate-of-approval appeal, Steel appeals the Authority's certificate-of-need grant to the Circuit Court.

Merely days after voluntarily dismissing with prejudice its challenge to the competition-focused certificate-of-approval proceedings, Steel appealed the Authority's certificate-of-need grant, raising *only* competition-related objections. JA 2. Specifically, Steel continued to insist that the Authority committed reversible error by failing to prioritize competition, ignoring bids St. Mary's had rejected, and concluding that Huntington would benefit from the new, specialty health-care services the acquisition would facilitate. JA 97. It made precious little mention of its decision to voluntarily dismiss with prejudice its appeal of the competition-focused certificate-of-approval grant. *Id.*, J.A. 3-6.

The Circuit Court rejected all of Steel's arguments. First, the court found that "the rejected bids from a previously conducted bid process" that Steel insisted the Authority must examine "are false alternative, hypotheticals, which cannot be relied upon." JA 14. Next, the Circuit Court rejected Steel's competition argument, finding that the Authority (1) had ample discretion to prioritize competition or to choose to disregard it; (2) "certainly did not ignore the issue of competition"; (3) "exercised its discretion in a manner in which the issue of competition was not given priority, but was instead subordinated to other important policy concerns"; and (4) did "not believe that competition appropriately allocates the supply of" health-care services." JA 14-17. Finally, the court found that the "Authority's conclusion that patients will experience serious problems obtaining complex, specialized health care locally in the absence of the" acquisition "is a permissible interpretation of the [certificate of need] law entitled to deference[] and supported by substantial evidence." JA 17.

Steel timely appealed the Circuit Court's determination to this Court.

SUMMARY OF ARGUMENT

The Circuit Court correctly affirmed the Authority's decision not to prioritize consideration of the effect of competition on the supply of health-services. Under the governing statutory scheme, the Authority has a threshold level of discretion to forego entirely any consideration of the effect of competition on supply in a certificate-of-need proceeding. *See* W. Va. Code § 16–2D–6(a), (c). Even if the Authority exercises its discretion and considers the effect of competition on supply in a certificate-of-need proceeding, it has discretion to determine whether competition would allocate supply "appropriately" for the health service under consideration. *See id.* § 16–2D–5(d), (e). And even if the Authority determines that competition does "appropriately" allocate supply for the health service under consideration, it has the *further* discretion to determine that prioritizing consideration of the effect of competition on supply would still not be "appropriate" for the health service at issue. *See id.* § 16–2D–5(d).

In this case, the Authority decided that it would not prioritize competition. This determination was within its statutory discretion and supported by substantial evidence. For these reasons, the Court should reject Steel's competition-based challenge.

II. The Circuit Court also correctly affirmed the Authority's determination 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)(1) (2015). In so doing, the Authority limited its inquiry to "alternatives" presented to it in the record, and declined to consider, *e.g.*, bids that St. Mary's had rejected when it selected Cabell as its buyer. The Authority acted well within its discretion to so limit its inquiry, and its determination that no "superior alternative" existed is supported by substantial evidence. For these reasons, the Court should reject Steel's "alternative"-based challenge.

III. Finally, the Circuit Court correctly affirmed the Authority's determination that "patients will experience serious problems in obtaining care within this state of the type proposed" if the transaction did not take place. W. Va. Code § 16-2D-6(e)(4) (2015). In so doing, the Authority rejected Steel's argument that it must focus solely on "existing services and care" and instead relied on its conclusion that, in the absence of consolidation, "patients will experience serious problems obtaining complex, specialized health care locally" that the transaction was expected to eventually provide. The Authority's conclusion was consistent with its statutory mandate and supported by substantial evidence. For these reasons, the Court should reject Steel's "benefits"-based challenge.

STATEMENT REGARDING ORAL ARGUMENT & DECISION

The Authority requests oral argument under Rule of Appellate Procedure 20. This case raises several significant questions of great public importance and has the potential to affect substantially the health-care services provided in the Huntington area of West Virginia.

STANDARD OF REVIEW

Under the West Virginia Administrative Procedures Act, this Court may "affirm" the Authority's certificate-of-need decision, "remand [it] for further proceedings," or, if Steel's "substantial rights" are "prejudiced" by it, "reverse, vacate[,] or modify" it. W. Va. Code § 29A–5–4(g). To determine whether the Authority "prejudiced" Steel's "substantial rights," this Court considers whether the Authority's determinations were:

(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.

The Authority's factual determinations are "entitled to substantial weight," *Princeton Cmty. Hosp. v. State Health Planning*, 174 W. Va. 558, 564, 328 S.E.2d 164, 171 (1985), and may only be disturbed if "clearly wrong in view of the reliable, probative, and substantial evidence" "[a]rbitrary or capricious," or "characterized by abuse of discretion or clearly unwarranted exercise of discretion." *Frymier-Halloran v. Paige*, 193 W. Va. 687, 695, 458 S.E.2d 780, 788 (1995) (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971)).

Agency legal interpretations are subject to de novo review, but with "appropriate deference to agency expertise and discretion." *Appalachian Power Co. v. State Tax Dept. of West Virginia*, 195 W. Va. 573, 582, 466 S.E.2d 424, 433 (1995). Specifically, this Court has adopted the two-pronged analysis from *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See* Syl. Pt. 2, *Appalachian Power Co.*, 195 W. Va. 573, 466 S.E.2d 424. Thus, if the agency's interpretation conforms to the "clear" intent of the Legislature, then the interpretation is upheld. *Id.* at 582, 466 S.E.2d at 433. If the intent of the Legislature is not clear, then any "permissible" interpretation by the Agency is accorded "great deference." *Id.*; *see also W. Va. Health Care Cost Review Authority v. Boone Mem'l Hosp.*, 196 W. Va. 326, 338, 472 S.E.2d 411, 423 (1996).

ARGUMENT

I. THE CIRCUIT COURT CORRECTLY AFFIRMED THE HCA'S RESOLUTION OF STEEL'S COMPETITION-RELATED OBJECTIONS.

Steel's primary argument rests on two mistaken premises. The first, a mistake of law, is that "the West Virginia Code *mandated* that the Health Care Authority" not only consider the transaction's potential antitrust ramifications, but also "give priority" to "actions that would strengthen the effect of the competition on the supply of the services." Pet'r's Br. 11–12 (emphasis added). And the second, a mistake of fact, is that the Authority failed to determine whether the competition "appropriately allocate[s] supply for hospital resources." *Id.* at 13. As discussed below, Steel is wrong.

A. Under West Virginia Code section 16–2D–5 and –6(a), the HCA *may* consider the effect the merger on competition, but it is not *required* to do so.

Steel's statutory argument is straightforward (though flawed). It construes West Virginia Code section 16–2D–6(a)(16) and (17) as requiring the Authority, in *every* certificate of need proceeding, to consider "factors influencing the effect of competition on the supply of the health services being reviewed," W. Va. Code § 16–2D–6(a)(16), and "[i]mprovements or innovations in the financing and delivery of health services which foster competition . . . and serve to promote quality assurance and cost effectiveness," *id.* § 16–2D–6(a)(17); *see* Pet'r's Br. 12–13. Because the criteria in section 16–2D–6(a)(16) must be considered "in accordance with" section 16–2D–5, Steel wrongly argues that, if "competition appropriately allocates supply consistent with the state health plan," then the Authority must "give priority . . . to actions which would strengthen the effect of competition on the supply of the services." W. Va. Code § 16–2D–5(d); *see* Pet'r's Br. 12. In Steel's view, the Authority committed reversible error by (1) failing to "make a threshold determination as to 'the effect of competition on the supply of the health services being reviewed,'"

Pet'r's Br. 13 (quoting W. Va. Code § 16–2D–6(a)(16)), and (2) failing to conclude that competition "appropriately allocates health services," *id.* (quoting W. Va. Code § 16–2D–5(d)).

The problems with Steel's argument is that both West Virginia Code provisions on which Steel relies afford the Authority with ample discretion to disregard competition when considering a certificate of need request. The operative version of West Virginia Code section 16–2D–6 established the "minimum criteria for certificate of need reviews." W. Va. Code § 16–2D–6 (2015). Subsection (a), in turn, sets out twenty-three criteria for the Authority's consideration. *See id.* § 16–2D–6(a) (2015). These criteria are not, as Steel would have it, "mandated" by "the West Virginia Code." Pet'r's Br. 11. Instead, West Virginia Code section § 16–2D–6(a) clearly directs the Authority to consider the listed criteria if—*and only if*—the Authority determines that the criteria "*are applicable.*" W. Va. Code § 16–2D–6(a) (2015) (emphasis added); *cf. Appalachian Power Co.*, 195 W. Va. at 582, 466 S.E.2d at 433. ("permissible" interpretation by Agency is accorded "great deference"). Any debate regarding the Authority's discretion to consider, or to disregard, any section 16–2D–6(a) criterion (here, numbers (16) and (17)) is expunged by section 16–2D–6(c), which provides that "[c]riteria for reviews may vary according to the purpose for which a particular review is being conducted or the types of health services being reviewed." *Id.* § 16–2D–6(c) (2015).

Steel's argument regarding section 16–2D–5's purported mandate fares no better. West Virginia Code section 16–2D–5(d) provides the Authority with discretion to determine either that "competition appropriately allocates supply" for the health service under consideration, *id.* § 16–2D–5(d) (2015), or that "competition does not or will not appropriately allocate supply" for the health service, *id.* § 16–2D–5(e) (2015). If the Authority determines that competition will not allocate supply appropriately, then it plainly need not prioritize competition. *Id.* § 16–2D–5(e)

(2015). But even if the Authority concludes that competition does appropriately allocate supply, it need only prioritize competition if it finds it "appropriate" to do so. *Id.* § 16–2D–5(d) (2015).

Stated succinctly, the Authority has three levels of discretion when considering competition (as well as the weight to assign to competition). Per West Virginia Code section 16–2D–6(a) & (c), the Authority has a threshold level of discretion to forego entirely any consideration of the effect of competition on the supply in a certificate-of-need proceeding. *See id.* § 16–2D–6(a), (c). Even if the Authority exercises its discretion and considers the effect of competition on supply in a certificate-of-need proceeding, it has discretion to determine whether competition would allocate supply "appropriately" for the health service under consideration. *See id.* § 16–2D–5(d), (e). And even if the Authority determines that competition does "appropriately" allocate supply for the health service under consideration, it has the *further* discretion to determine that prioritizing competition would still not be "appropriate" for the health service at issue. *See id.* § 16–2D–5(d).

For these reasons, Steel is wrong a matter of law to assert that the Authority was "statutorily required" to determine whether "competition . . . appropriately allocate[s] supply for hospital services." Pet'r's Br. 16. As the foregoing discussion establishes, the Authority had ample discretion at every step to decline Steel's invitation to consider competition in this certificate-of-need proceeding.

B. Although it had discretion to disregard competition, the Authority did in fact determine that "competition" would not "appropriately allocate supply for hospital resources" in Huntington.

After misconstruing the law, Steel aggravates its error by misreading the facts. Indeed, the record renders wholly meritless Steel's assertion that the Authority "never made" the "determination that competition does not appropriately allocate supply for hospital services."

Pet'r's Br. 13. On the contrary, the Authority did so repeatedly and unambiguously, even though it had discretion to decline Steel's invitation.

As part of its challenge in the underlying certificate-of-need proceedings, Steel advanced the same mistaken statutory arguments it echoes in its brief before this Court. First, it insisted that "[t]he competition between CHH and St. Mary's has driven down health care costs and incentivized both hospitals to innovate, maintain, and improve the quality of the health care they provide." JA 2565. Steel then (wrongly) contended that the Authority "***shall***" and "***must***" "consider" the competition-focused criteria listed in West Virginia Code section 16–2D–6(a). JA 2572 (emphases in original). And, then, it (wrongly) demanded that the Authority "'give priority' to advancing 'actions which would strengthen the effect of competition on the supply of health care services in West Virginia." JA 2583 (quoting W. Va. Code § 16–2D–5(d)). Finally, after championing evidence purporting to demonstrate the positive effects of pre-transaction competition between Cabell and St. Mary's, Steel (again, wrongly) asserted that "[t]he Authority cannot ignore its clear and unambiguous statutory obligation to consider the effect this proposed project would have on competition in the Huntington area." JA 2586.

In response, the Authority devoted three pages of its certificate-of-need grant to Steel's competition-related arguments. First, it acknowledged that Steel "based much of its case upon the argument that the Authority is required to deny this proposal because [Steel] contends that the project is anti-competitive." JA 2727. Recognizing Steel's misconstruction of its statutory obligations, the Authority observed that the competition-related 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." JA 2728 (emphasis in original).

Even though it (correctly) observed that it had no obligation to consider Steel's competition-related arguments, the Authority did so anyway. Specifically, the Authority observed that Steel "submits that the proposed project will be anti-competitive and result in increased prices to consumers." JA 2729. The Authority then recited back Steel's evidentiary proffer. *Id.* And, in response to both, the Authority, in no uncertain terms, "reject[ed] [Steel's] arguments about competition." *Id.* In other words, the Authority did in fact consider "the factors influencing the effect of competition on the supply of the health services being reviewed." W. Va. Code § 16–2D–6(a)(16). Contrary to Steel's wishes, however, the Authority determined that these factors did not warrant denying the certificate of need. *See also St. Mary's Hosp. v. State Health Planning and Development Agency*, 178 W.Va. 792, 796, 364 S.E.2d 805, 809 (1987) ("rulings" need only be "sufficiently clear to assure a reviewing court that all those findings have been considered and dealt with, not overlooked or concealed").

The Authority not only exercised its discretion to consider competition, as part of its West Virginia Code section 16–2D–6(a) inquiry. It also determined that, for purposes of this merger, "competition does not or will not appropriately allocate supply consistent with the state health plan." W. Va. Code § 16–2D–5(e). Specifically, the Authority first observed that, "[h]istorically, in hospital acquisitions, the Authority has not given priority to factors impacting the effect on competition." JA 2728. For that reason, "the Authority has [routinely] looked to" West Virginia Code section *16–2D–5(e)* for the appropriate considerations in hospital merger certificate-of-need proceedings, instead of West Virginia Code section 16–2D–5(d), only the latter of which allows the Authority to prioritize competition. *See* JA 2728 ("[T]he 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).*"(emphasis added)). And "[i]n

this hospital acquisition," the Authority exercised its discretion to act in accordance with its historical practice and apply West Virginia section 16–2D–5(e) rather than –5(d). *Id.*

This represents the Authority's conclusion that "competition does not or will not appropriately allocate supply consistent with the state health plan." W. Va. 16–2D–5(e). As the Authority explained, this conclusion is consistent with "the public policy of this state to avoid unnecessarily duplication of services and to contain or reduce increases in the cost of delivering health services." JA 2729–30. In other words, the Authority exercised its statutorily authorized discretion to not "give priority" to "strengthen[ing] the effect of competition on the supply of the services," *id.* § 16–2D–5(d), and thus applied West Virginia Code section 16–2D–5(e) because "competition does not or will not appropriately allocate supply consistent with the state health plan." *Id.* § 16–2D–5(e).

Any confusion regarding the Authority's decision to apply West Virginia Code section 16–2D–5(e) instead of –5(d) fades away when considering the Authority's order on Steel's motion for reconsideration. The Authority made plain that it "did not 'ignore' the issue of competition," as Steel suggested it had (and continues to insist in its opening brief). JA 2907; *see also* Pet'r's Br. 13. Rather, the Authority devoted "three pages discussing the issue of competition in great detail" but "elected not to grant the enhancement of competition priority under the [certificate of need] law." JA 2907. "[E]lecting not to grant the enhancement of competition priority under the [certificate of need] law" necessarily meant that the Authority applied West Virginia Code section 16–2D–5(e), instead of West Virginia Code section 16–2D–5(d). *See id.* ("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." (emphasis added)).

In other words:

> The Authority [found] that its determination was within the proper exercise of discretion, since former W. Va. Code § 16–2D–5(d) and (e) clearly state that the Authority has the discretion to conclude that competition either appropriately allocates supply consistent with the State Health Plan, or that it does not. The Authority is not required to grant priority to competition in all cases[] and may in fact discount the competition factor in whole or in part before considering the criteria set forth in former W. Va. Code § 16–2D(a)(16) or (a)(17)
>
> The conclusion in this Decision was consistent with the Authority's prior precedents and historical position on factors impacting the effect of competition in hospital acquisitions. *The Authority has not made competition a priority item in its prior review of hospital mergers and acquisitions under former W. Va. Code § 16–2D–5(d). . . . The Authority's review of the CHH/SMMC transaction was consistent with these earlier cases.*"

JA 2907–08 (emphases added).

Based on the foregoing, three observations are undeniable. First, the Authority correctly understood the discretion it wielded to consider competition, disregard it, or deemphasize it. Second, the Authority exercised its discretion to consider the competition-related factors in West Virginia Code section 16–2D–6(a)(16) and (17), and concluded that competition concerns did not warrant denying the requested certificate of need. And third, the Authority exercised its discretion under West Virginia Code section 16–2D–5(d) and (e) to determine whether competition would appropriately allocate supply for purposes of this merger, decided that it would not do so, and, accordingly, declined to prioritize competition. For these reasons, Steel's argument that the Authority "never made [a] statutorily required determination" is flatly incorrect.[7]

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[7] The Circuit Court drew the same conclusion. *See* JA 16 ("[Steel] claims that the Authority ignored the issue of competition, and in particular, ignored [Steel's] allegations about the potential anti-competitive effects of the proposed transaction. The Court does not find this argument as being substantiated when viewed in light of the entire record below."); *see also id.* at 17 ("The Authority's Decision makes it

C. The Authority's determination that "competition" would not "appropriately allocate supply for hospital resources" in Huntington is supported by substantial evidence.

Finally, Steel caps its competition-related argument by trotting out an evidentiary recitation that, in its view, establishes that "the proposed transaction would have an anti-competitive effect on the supply of health services." Pet'r's Br. 14. Steel is wrong. Had Steel acknowledged the appropriate standard of review (and it never once does) it would have to conclude that even its one-sided, skewed presentation does not—and cannot—justify upsetting the considered decision of the Authority that competition would not appropriately allocate supply for hospital resources in Huntington.

Simply put, mere disagreement with an agency factual finding is never a basis for overturning that finding on appeal. Rather, agency findings may only be disturbed if they evidence a "clear error of judgment" or indicate that the agency failed to consider "relevant factors." *Frymier-Halloran v. Paige*, 193 W. Va. 687, 695, 458 S.E.2d 780, 788 (1995). Where an agency finding is supported by "such relevant evidence that a reasonable mind might accept as adequate to support [the] conclusion," the finding is "conclusive." *In re Queen*, 196 W. Va. 442, 446, 473 S.E.2d 483, 487 (1996). Such "conclusive" findings are said to be supported by "substantial evidence." *Id.*

Here, the relevant evidence tending to show that competition between Cabell and St. Mary's would not appropriately allocate the supply of health services was considerable, and far exceeded the minimum necessary for a "reasonable mind" to conclude the same. Such evidence included a 131-page report prepared by The Camden Group that described a wide variety of

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abundantly clear that, in the case of hospital acquisitions, it does not believe that competition appropriately allocates the supply of services in accordance with the State Health Plan.").

healthcare improvements the transaction would accomplish, all of which "would otherwise be unattainable" if Cabell and St. Mary's remained "independent healthcare entities." JA 3524. It also included competition-related testimony from healthcare professionals. For instance, Raymona Kinneberg, former Deputy Secretary of Health and Human Services, testified that consolidated hospitals have better access to capital than separate hospitals in competition with one another, and therefore can supply more comprehensive health services at a lower cost. JA 2163-65. She also noted that the consolidated hospital would still encounter competition from other hospitals in the service area but would nonetheless have greater efficiency and effectiveness. JA 2166-67. Similarly, Dr. Kevin Yingling testified that market competition can "get in the way" of "unified . . . protocols" of care, thereby diminishing care, and that the current competition between Cabell and St. Mary's was creating such inefficiencies. JA 2312-15.Finally, Dr. Joseph Shapiro testified that because healthcare is a "collaborative process," market competition can sometimes discourage free communication between doctors working in different hospital systems. Hearing, JA 2301–02.

The Authority afforded Steel ample opportunity to present its counterevidence on the benefits of competition, and it did so enthusiastically. Steel's expert testified that competition between hospitals generally leads to lower prices, although he admitted he had not studied the proposed consolidation or the West Virginia healthcare market in detail. JA 2480-2501. To the extent this evidence was persuasive, the AVC secured by the West Virginia Attorney General provided substantial evidence that the merger would not disrupt those benefits. The AVC specifically gives the Attorney General the authority to limit both prices and overall operating margins at both hospitals. JA 1420-21. Indeed, the amended AVC imposes, *inter alia*, the following conditions on Cabell: proposed Quality Goals and Population Health Goals, along with Quantitative Benchmarks that may be used to assess whether those Quality Goals have been met;

measures by which Cabell will prevent unwarranted price increases, achieve savings, and realize transactional efficiencies; and implementation of payment methodologies that control excess costs.

The Authority considered the strength of the AVC as part of its determination on competition.[8] JA 2728-29. Taken alongside Cabell's evidence, it concluded that competition would not appropriately allocate the supply of hospital services in Huntington. And because the Authority reached a reasonable conclusion based on the substantial evidence presented to it, its finding is conclusive.

II. THE AUTHORITY APPROPRIATELY CONSIDERED ALTERNATIVES

When the Authority granted the certificate of need, it determined, consistent with its statutory obligation, 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)(1) (2015); *see also* JA 2730. In so doing, the Authority first considered Cabell's representations that, *inter alia*, the transaction would reduce duplication of services, JA 2730, enhance efficiency, *id.* at 2730–31, and maintain St. Mary's Catholic identity and culture, *id.* at 2731. It then considered Steel's argument that Cabell "failed to establish the non-existence of superior alternatives; that it had "failed to demonstrate that the development of alternatives is not practicable"; and that the benefits heralded by Cabell could be achieved by a cooperative venture short of a merger. *Id.* at 2732. The Authority also considered Steel's objection to the Authority's refusal to issue a subpoena for documents relating to bids from other hospitals that Saint Mary's had rejected, *Id.* at 2732, and Steel's argument about the "plausib[ility] that an interested buyer could come from another state." *Id.* at 2733.

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[8] As the Circuit Court pointed out, Steel's concern that the AVC is no longer enforceable following the enactment of Senate Bill 597 is misguided, given the express language preserving existing AVCs included in the Bill. *See* JA 20; W. Va. Code § 16-29B-28(i)(1)(A) (2016).

"After considering all of the evidence," the Authority agreed with Cabell that "superior alternatives do not exist." *Id.* at 2733. In so doing, it found that "the consideration of other potential purchasers of [St. Mary's] is not relevant to the issue of superior alternatives," because the Authority "has historically not considered rejected bids as 'alternatives' under the [certificate-of-need] program." JA 2733. Finding that "a hospital acquisition must have a willing buyer and seller," *id.* at 2734, the Authority concluded that "rejected bids from a previously conducted bid process are false alternatives that cannot be relied upon," *id.* at 2735. For all these reasons, the Authority concluded that the merger "is the superior alternative in terms of cost, efficiency, and appropriateness, and is the only practicable compliance with" West Virginia Code section § 16–2D–6(e)(1).

Before this Court, Steel suggests the Authority committed reversible error by declining to "consider[] the merits of alternative bids" or "cooperative agreements short of a merger." Pet'r's Br. 18. Steel is wrong. The Authority's treatment of irrelevant, rejected bids, and a hypothetical joint venture that St. Mary's never desired was well within its statutory authority.

A. The Authority appropriately interpreted the word "alternative."

The West Virginia Legislature did not elucidate what it meant when it ordered the Authority to consider whether "superior alternatives" exist before granting a certificate of need. In other words, the Legislature has not "directly spoken to the precise question at issue." Syl. Pt. 3, *Appalachian Power Co.*, 195 W. Va. at 578, 466 S.E.2d at 429. Thus, this Court must consider whether the Authority's construction of the term "alternatives" "is based on a permissible construction of the statute." *Id.* at Syl. Pt. 4, 195 W. Va. at 578, 466 S.E.2d at 429. In so doing, the Authority's interpretation is entitled to "substantial deference." *Id.*

The Authority's construction of the statutory term "alternatives" was abundantly reasonable. As an initial matter, the term "alternatives" is reasonably construed to constitute a

narrow, closed universe. Indeed, "[c]ommon sense . . . teaches us that the 'detailed statement of alternatives' cannot be found wanting simply because the agency failed to include *every* . . . conceivable by the mind of man." *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 551 (1978). Rather, the Authority was well within its authority to limit its consideration of "alternatives" to "the information then available to it." *Id.* at 552–53, 98 S. Ct. at 1216; *see also Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52, 103 S. Ct. 2856, 2871 (1983) ("The agency must explain the evidence *which is available.*") (emphasis added). In other words, if a potential alternative was not presented to the Authority, the Authority was under no obligation to go looking for one.

The Authority also acted reasonably when it determined that bids St. Mary's rejected were not relevant to its "superior alternative" analysis. It is axiomatic that hospital acquisitions require a seller and a buyer willing to comply with the seller's sale terms. *See in re Signature Hospital, LLC*, CON File # 06-5-9401-A, Decision (Mar. 14, 2007). For this reason, the Authority has (quite reasonably) refrained from considering bids rejected by a seller as a potential "alternative," for purposes of West Virginia Code section 16-2D-6(e)(1) (2015). This is because rejected bids either (1) lack a willing seller (or they would not have been rejected) or (2) lack a buyer willing to abide by the terms of the seller's initial bid. *See, e.g., 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 # 05-5-8116-A, Decision (Mar. 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 (Mar. 17, 2006); *In re LifePoint WV Holdings, Inc. and LifePoint WV Ltd. Partner, LLC, and Putnam General Hosp.*, CON File 3 05-3-8118-A, Decision (Mar. 17, 2006). In either event, they

are, as the Circuit Court aptly described them, "false alternatives, hypotheticals, which cannot be relied upon." JA 2734-35.

Steel questions whether Cabell could have bought a different hospital besides St. Mary's, but this is no more than "a hypothetical transaction that hasn't even been defined." Pet'r's Br. 24; JA 2176. Steel suggested "cooperative ventures short of a merger," JA 2732, in similarly vague terms. JA 2177–8. These proposals are even less relevant than the bids St. Mary's rejected, because the Sisters never had an interest in any cooperative venture. Their goal, from the outset, was to sell St. Mary's hospital and to disengage entirely from the health-services industry in Huntington. If the Authority had the power to stall the sale that St. Mary's desired based on a finding that a cooperative venture might be "superior," that necessarily implies that the Authority had the power to *force* the Sisters to continue participating in a market that they desire to exit. Because this proposition is absurd, Cabell's decision not to investigate "[c]ooperative ventures short of a merger" as a potential "alternative" provides no grounds for upsetting the Authority's certificate-of-need grant.

For these reasons, the Authority's construction of the "alternatives" was reasonable and entitled to this Court's deference. It should be affirmed.

B. The Authority's refusal to issue a subpoena for irrelevant information was not erroneous.

Steel suggests that, had the Authority issued its requested subpoena to St. Mary's, it would have been able to present evidence of superior alternatives. Steel is mistaken. The subpoena it requested sought documents relating to bids that St. Mary's received from other interested buyers, but ultimately rejected. As noted above, these rejected bids were not relevant for purposes of determining whether "superior alternatives" existed. For this reason, the Authority had no authority to issue the requested subpoena because the information sought by Steel was not relevant.

See Syl. Pt. 1, *State ex rel. Hoover v. Berger*, 199 W. Va. 12, 14, 483 S.E.2d 12, 14 (1996) (agency must demonstrate that "information sought" via subpoena "is relevant to the authorized purpose").

Moreover, there is good reason for the Court to bar parties like Steel from "conduct[ing] fishing expeditions" for documents related to rejected bids. *W. Va. Advocates for the Developmentally Disabled v. Casey*, 178 W. Va. 682, 685, 364 S.E.2d 8, 11 (1987). The other entities bidding to purchase St. Mary's did so with the express understanding that St. Mary's would keep confidential the financial, trade-secret, and proprietary information they submitted to support their pitch. Prudence, then, dictates that the Authority should hesitate before ordering St. Mary's to turn over information best left confidential. This practice would, as aptly described by the Circuit Court, "effectively destroy the entire purpose of a secretive bidding process, and ruin the seller's future negotiating power in the event that the transaction did not gain" certificate-of-need approval. JA 14.

C. Steel's objection to the *LifePoint* cases is a red herring.

Steel devotes approximately one-half of its superior-alternatives argument to attacking the Authority's reliance on four *LifePoint* administrative decisions. Pet'r's Br. 18–21. In Steel's view, the Authority impermissibly relied on *LifePoint* cases to limit its consideration to "superior alternatives as presented *by the applicant*." *Id.* at 19 (emphasis added). True, the Authority was not statutorily limited to considering only "the alternatives presented *by the applicant*." But Steel's argument fails regardless because the Authority did not limit its consideration in this way.

Steel's argument rests on a misreading not only of the *LifePoint* decisions but also the Authority's certificate-of-need decision. Regarding the former, Steel is wrong to suggest that the Authority, in the *LifePoint* cases, limited its consideration to alternatives presented *by the applicant*." JA 699, 734, 768, 802 (emphasis added). Instead, the *LifePoint* decisions represent the Authority's decision to examine only "the alternatives presented" *at all*, by *any* interested party.

Attorney General will place significant economic limitations upon the operations of the hospitals post-transaction, thereby benefiting local consumers." *Id.* In other words, the Authority's superior-alternative finding was supported by substantial evidence, and is, therefore, "conclusive."

III. THE AUTHORITY CORRECTLY DECIDED THAT THE TRANSACTION WOULD BENEFIT PATIENTS IN HUNTINGTON.

Finally, under West Virginia Code section 16–2D–6(e)(4), the Authority had to determine that "that patients will experience serious problems in obtaining care within this state of the type proposed" if the transaction did not take place. W. Va. Code § 16-2D-6(e)(4) (2015). Cabell "submit[ed]" that the merger would (1) "allow the hospitals to run more appropriately and efficiently," and (2) "patients may experience problems accessing care in the absence of the" consolidation because the merger would allow for "more specialized services" than either hospital could provide independently. JA 2736-37. The Authority agreed, concluding that the consolidation "will allow the hospitals to be operated more appropriately and efficiently consistent with the intent and purpose of W. Va. Code § 16–2D–6(e)(2)," and, "[t]herefore . . . , patients will experience serious problems obtaining complex, specialized health care locally in the absence of the proposed new service." JA 2737-38.

Steel objects to this conclusion. It finds fault in the Authority's failure to "conclude . . . that access to the type of care currently being provided by the hospitals—outpatient surgical services or general acute care impatient hospital services—would be diminished or endangered if the merger did not take place." Pet'r's Br. 25. In support, Steel cites witness testimony "rejecting any suggestion that St. Mary's or Cabell Huntington would close down without the merger because of financial concerns." *Id.* In Steel's view, the Authority's "focus on new services . . . is improper," and "[t]he appropriate inquiry . . . should be on existing services and care only. *Id.* at 26.

The Court should reject this argument as wholly divorced from the statutory text and profoundly flawed as a matter of public policy. By its plain terms, West Virginia Code section 16–2D–6(e)(4) does not ossify a given community's health-care services unless and until the community's services are at risk of failure or the community's health is in peril. Instead, this provision is meant to ensure that a certificate-of-need grant *adds* value to a community's health-care access, rather than forbidding certificate-of-need grants unless the community's health-care service is deteriorating.

Here, the Authority considered whether Huntington residents would have difficulty accessing health care without the "proposed new service," (*i.e.*, the consolidated hospital system). In so doing, it weighed Cabell's argument that the merger "will allow the hospitals to run more appropriately and efficiently due to increased coordination" and, in the absence of the merger, "patients may experience problems accessing care . . . because the project better positions [the two hospitals] to offer more specialized services to the community that neither hospital individually is able to currently provide." JA 2737. It also weighed Steel's arguments, including its argument that neither "facility would close down without the merger." JA 2738. The Authority's conclusion that the merger would "allow the hospitals to be operated more appropriately and efficiently" and that "patients will experience serious problems obtaining complex, specialized health care locally in the absence" of the merger faithfully applied West Virginia Code section 16–2D–6(e)(4) and was supported by substantial evidence. For this reason, the Court should affirm it.

CONCLUSION

For the foregoing reasons, the Court should affirm the Circuit Court's order in its entirety.

Respectfully Submitted,

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 17-406

STEEL OF WEST VIRGINIA, INC.,

Petitioner,

v.

WEST VIRGINIA HEALTH CARE AUTHORITY AND CABELL HUNTINGTON HOSPITAL, INC.,

Respondents.

CERTIFICATE OF SERVICE

I, Edward M. Wenger, counsel for the Respondent West Virginia Health Care Authority, do hereby certify that I caused a true copy of the foregoing *RESPONSE BRIEF* to be served on all parties and the Court by depositing the same in the U.S. Mail, postage-prepaid, first-class, to each on this 12th day of October, 2017.

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