No. 17-0406

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STEEL OF WEST VIRGINIA, INC.,
Petitioner,

v.

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

REPLY BRIEF

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COMES NOW, Steel of West Virginia, Inc. ("Petitioner"), by counsel, and hereby submits this Reply Brief in Support of its Petition for Appeal. For the reasons set forth herein, and for the reasons discussed in more detail in Petitioner's Brief, this Court should reverse the West Virginia Health Care Authority's ("Health Care Authority") Order, or, in the alternative, remand this matter back to the Health Care Authority for further consideration of the entire record.

Petitioner's interest here is simple: as a self-insured employer of roughly five hundred (500) steelworkers in Huntington, Petitioner was concerned that a merger between the only two acute care hospitals in Huntington would eliminate competition, increase its employees' health care costs, and lower the quality of the healthcare for its employees and their families. The costs to provide these healthcare benefits is one of Petitioner's most significant outlays, affecting not only its short-term profitability but also its long-term sustainability.

Accordingly, Petitioner sought to avail itself of the existing protections afforded to an "affected party" under West Virginia's Certificate of Need ("CON") laws and the Administrative Procedures Act. Armed with considerable advertising, public relations, litigation (and apparently lobbying) budgets, Cabell Huntington Hospital, Inc. ("Cabell Huntington") and St. Mary's Medical Center ("St. Mary's") have gone to great lengths to tout the purported benefits of this transaction. All Petitioner has tried to do is highlight the costs, and to do so within the process afforded by West Virginia law.

In pursuing its position through the Certificate of Need Process, Petitioner endeavored to advance its arguments, obtain rulings, and seek appellate review as expeditiously as possible, even going so far as to waive its right to an administrative hearing and seek an expedited briefing schedule before the Office of Judges. *See* (App. 3179-3182). Petitioner is no gadfly; it has no

interest in simply serving as an impediment to this proposed transaction. Rather, Petitioner sought affected party status because this case matters to the company and to its employees (not to mention other Huntington residents). It is for these reasons that Petitioner has moved quickly and intently to advance this case to where it now sits – before this Honorable Court.

Respondents feign offense at Petitioner's arguments, suggesting that Petitioner's recitation of the circumstances surrounding the merger and the Health Care Authority's rulings somehow constitutes "inflammatory rhetoric" or an attempt to tarnish the reputations of two of West Virginia's leading healthcare providers. Yet, nothing Petitioner has offered – including descriptions of Cabell Huntington's antitrust negotiations with the Attorney General or subsequent legislative enactments that altered the regulatory landscape governing this merger – suggest "improper collusion" nor impugn the motives of the parties.

It goes without saying that Cabell Huntington wants this merger to be approved; to that end, Cabell Huntington utilized available legislative and executive avenues to facilitate the merger, even going so far as to argue that recent legislation retroactively exempted the merger from Certificate of Need review. *See* Respondent Cabell Huntington's Motion to Dismiss Appeal at 2. Petitioner mentions these efforts – not to offer a value judgment - but because they contradict representations made by Cabell Huntington below and undermine some of the articulated bases for the West Virginia Health Care Authority's decision.

Aware of these contradictions, Respondents now mislead this Court, suggesting that the host of legal, legislative, and regulatory developments surrounding this merger are somehow the fault of Petitioner, and that only Petitioner has failed to appreciate and support the merits of this merger. *See* Brief of Respondent West Virginia Health Care Authority at 11 ("Having failed to convince the West Virginia Attorney General or the FTC that they should block the

consolidation, Steel opened a third front war through the certificate of need process.". In fact, when Petitioner applied for affected party status in May of 2015, the Federal Trade Commission already was in the midst of a year-long investigation which resulted in the filing of an Administrative Complaint on November 5, 2015. In that Complaint, the Federal Trade Commission alleged that the merger would create a near monopoly over general acute healthcare inpatient hospital services and outpatient surgical services in Huntington and "lead to increased healthcare costs and reduce the merging parties' incentives to maintain and improve quality of care." (See App. 1332-1333).

Yet, to read the Health Care Authority's arguments, one would presume that the Federal Trade Commission fully reviewed the proposed merger and concluded that it was lawful. This is false. After the Federal Trade Commission filed the Complaint to block the merger, Cabell Huntington successfully lobbied the Legislature in 2016 to pass legislation to exempt the proposed transaction from traditional State and federal antitrust oversight, including the jurisdiction of the Federal Trade Commission. Far from blessing the proposed transaction, the Federal Trade Commission continued to raise concerns about the competitive harm, higher costs, and reduced quality that would accompany the merger.

Similarly, Respondents would have this Court believe that the Attorney General's "approval" of the merger was the culmination of a comprehensive, adversarial proceeding where Petitioner was able to articulate its concerns to the state's chief law enforcement officer. Although the Attorney General (and now the Respondents in this case) insist that he conducted a "thorough investigation and review," the reality is less clear. Indeed, in a related proceeding under the Freedom of Information Act, the Circuit Court of Kanawha County ordered the Attorney General to disclose eighty-nine public records that could illuminate precisely how

thorough his investigation truly was.

Regardless, the suggestion that Petitioner's involvement in the Certificate of Need proceeding was a "third front" is disingenuous. Indeed, given Cabell Huntington's acknowledged success in changing the rules of the game, the instant appeal is the only "front" and the only regulatory regime that Cabell Huntington has been unable to alter after the fact (despite its best efforts).

Ultimately, however, this case turns on the Health Care Authority's misapplication of the law, substantially affecting the rights of Petitioner. These legal errors, which went uncorrected by the Circuit Court, included the Health Care Authority's refusal to consider evidence of alternatives to the proposed merger, the Health Care Authority's disregard of the effect the proposed transaction would have on competition, and the Health Care Authority's conclusion that the proposed transaction was needed. Because these decisions were in error, reversal is warranted pursuant to West Virginia Code § 29A-5-4.

II. ARGUMENT

A. The Health Care Authority Failed to Consider "Alternatives" as Required by West Virginia Code § 16-2D-6(e)(1).

1. *Lifepoint* is wrong.

As a prerequisite to the issuance of the CON, West Virginia Code section 16-2D-6(e)(1) requires the Health Care Authority to make a written determination that "superior alternatives" to the proposed transaction do not exist and that "the development of alternatives is not practicable[.]" *Id.* From available public records, the Health Care Authority was aware that several other hospital systems submitted proposals to acquire St. Mary's. *See* (APP. 1337) ("In May 2014, Cabell Huntington and [redacted] other hospital systems, including not-for-profit, for-profit, and Catholic systems, submitted bids to purchase St. Mary's."). Given this fact, it

seems self-evident (and statutorily mandated) that Health Care Authority should have considered these alternative bids prior to making its written finding that superior alternatives to the proposed merger do not exist. However, the Health Care Authority flatly refused to allow any evidence relating to alternative offers for St. Mary's, instead unlawfully restricting its scope of review to the "alternatives presented." This was no discretionary misstep, but an error of law that warrants reversal.

According to the Health Care Authority's interpretation, the statute only requires it to consider the "alternatives" proposed by Cabell Huntington—specifically the status quo vs. the proposed transaction.[1] As a result, the Health Care Authority allowed Cabell Huntington, as the Certificate of Need applicant, to dictate the parameters of the Health Care Authority's review. This was in error.

In refusing to consider such evidence, the Health Care Authority relied exclusively on a series of 2006 administrative decisions referred to as the *LifePoint* cases. *See generally In re LifePoint WV Holdings, Inc., and LifePoint WV Limited Partner, LLC, and Putnam General Hospital*, (App. 3195). In *LifePoint*, the Health Care Authority formulated its own construction of section 16-2D-6(e)(1) without any basis in the statutory language:

> More importantly, the Health Care Authority's scope of review is limited to the ***alternatives presented.*** In this case, there are only two alternatives, the Health Care Authority may approve the application or it may deny it.

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[1] The mere fact that the phrase "superior alternatives" is undefined does not bestow "ambiguity" on W. Va. Code section 16-2D-6(e)(1), nor does it permit the Health Care Authority to construe this phrase in a manner that contradicts its plain meaning. Undefined terms in a statute must "be given their common, ordinary and accepted meaning." Syl. Pt. 6, *State ex rel. Cohen v. Manchin*, 175 W. Va. 525, 528, 336 S.E.2d 171, 174 (1984); *see also Apollo Civic Theatre, Inc. v. State Tax Comm'r of W. Va.*, 223 W. Va. 79, 85-86, 672 S.E.2d 215, 221-22 (2008) (rejecting State Tax Commissioner's interpretation of "health and fitness" in an exception to sales tax assessment because the interpretation was not in accord with the common and general meaning of the words). The common and ordinary meaning of "alternative" is "(of one or more things) available as another possibility or choice." Oxford Dictionary of English, The Oxford University Press (2017) https://en.oxforddictionaries.com/definition/alternative.

App. 3000 (emphasis added). This is simply wrong. By confining its review to the "alternatives presented," the *LifePoint* decision ignored the statute's plain language, which requires the Health Care Authority to find the nonexistence of "superior alternatives," not superior alternatives as presented by the Applicant. W. Va. Code § 16-2D-6(e)(1) (amended effective June 10, 2016).

Perhaps not surprisingly, the Order (and the OOJ) completely overlooked the Health Care Authority's 2015 *ARH* decision in which ARH Tug Valley Health Services, Inc. and Appalachian Regional Healthcare, Inc. (collectively "ARH"), applied for a certificate of need to acquire Williamson Memorial Hospital, which they planned to close and transfer its services to ARH's Kentucky facility. *In re Appalachian Regional Healthcare Inc. and ARH Tug Valley Health Services, Inc.*, CON File #14-2-10123-A, at 2-3, 20 (Apr. 29, 2015). In its application, ARH presented the same fallacious syllogism offered by Cabell Huntington here: (i) the only alternative to the proposed acquisition is the status quo; (ii) yet the status quo is not an acceptable alternative; and (iii) therefore, the application must be approved.

Rejecting this false choice, the Health Care Authority in ARH disregarded *LifePoint*'s modification of W.Va. Code section 16-2D-6(e)(1), looked beyond the four corners of the application, and found several available and practicable alternatives that the applicant had failed to consider. Finding "that superior alternatives do exist[,]" the Health Care Authority denied the Application. *Id.*

The attempts to distinguish the *ARH* decision are unconvincing. Admittedly, *ARH*, like any merger, involved its own circumstances and raised unique issues. However, it is the legal principle articulated by *ARH* that is controlling – a principle that simply is not affected by the factual differences here. The law requires – and the *ARH* decision recognizes – that the Health

Care Authority must consider alternatives to the proposed transaction, not merely the alternatives presented by the CON application itself.

Of course, this does not mean that the Health Care Authority must weigh the proposed merger against speculative flights of fancy like those offered facetiously by Cabell Huntington, such as "the Mayo Clinic choos[ing] to relocate . . . to Huntington and make St. Mary's its centerpiece" or "a philanthropist like Bill Gates" acquiring St. Mary's. Brief of Respondent Cabell Huntington Hospital, Inc. at 31-32. The Health Care Authority's obligations under the law are more realistic and certainly include the obligation to assess the merger relative to those alternatives that actually exist. Here, of course, public records (albeit, public records that the Attorney General and the hospitals are fighting to conceal) demonstrate that other alternatives exist that were not considered. (App. 3378) (referencing the Circuit Court of Kanawha County's Order in the related FOIA proceeding, which noted the existence of "documents relating to bids submitted to St. Mary's Medical Center by other hospital systems and other interested buyers."); *see also* (App. 1332-1355) ("In May 2014, Cabell and [redacted] other hospital systems, including not-for-profit, for-profit, and Catholic systems, submitted bids to purchase St. Mary's.").[2]

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[2] Additionally, in the cooperative agreement proceeding, the Federal Trade Commission filed a public response with the Health Care Authority, in which it identified some of the alternative buyers:

> St. Mary's had other suitors, including major hospital systems, such as LifePoint Health, Bon Secours, and CAMC, that remain interested in acquiring St. Mary's if Cabell does not. Any efficiencies that might be achieved through the cooperative agreement would likely be achieved through any of these alternative acquisitions as well.

Reply to Cabell Huntington Hospital, Inc.'s Response to Public Comments Regarding the Application for Approval of Cooperative Agreement (File No. 16-2/3-001) (May 16, 2016) https://www.ftc.gov/public statements/2016/05/letter-alexis-gilman-asst-director-mergers-iv-division-bureau-competition. Although this filing is not included in the appendix, this Court is able to take judicial notice of public records. *See State v. Heston*, 137 W.Va. 375, 375, 71 S.E.2d 481 (1952) (noting courts' ability to take judicial notice of public records); *see also* West Virginia R. Evid. 201. Moreover, this same record directly rebuts two assertions advanced by Respondents: (1) the Health Care Authority's implicit suggestion that the Federal Trade Commission blessed the merger; and (2) Cabell

Yet, without any acknowledgment that the *ARH* decision even exists, the Health Care Authority reverted back to the fallacious reasoning in *LifePoint*. The Order makes no effort to reconcile its holding with the contrary reasoning employed in the *LifePoint* cases – an omission that is entirely understandable, because its holding simply cannot be reconciled with the *ARH* decision. If the Health Care Authority had once subscribed to *LifePoint*'s improper construction of law, the *ARH* decision appeared to have rejected that decision and conformed the Health Care Authority's jurisprudence to the plain language of § 16-2D-6(e)(1).

The Health Care Authority's erroneous finding fails to give meaning to the clear language of the statute. Section 16-2D-6(e)(1) states that the Authority is not only to determine whether or not superior alternatives do exist but also to consider whether or not "the development of alternatives is . . . practicable." Regardless if any alternative bids remain on the table, information about these bidders surely is relevant (and necessary) to determine whether superior alternatives could be developed. Having failed to identify and consider the available alternatives, the Health Care Authority's decision should be reversed.

2. <u>Having denied the introduction of any available evidence of alternatives, the Health Care Authority now faults Petitioner for the lack of that very evidence.</u>

In turn, the Health Care Authority gave Cabell Huntington's witnesses wide berth to speculate about the adverse effects that any other alternative could bring to Huntington. In so doing, the Health Care Authority compounded its legal error by crediting Cabell Huntington's breathless speculation about the misfortune that Huntington, Marshall University, and the State would suffer if any another hospital system acquired St. Mary's. This void allowed Cabell Huntington to argue that only its proposed merger could achieve certain efficiencies, that only

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Huntington's contention that these other bidder "may no longer be willing buyers today[.]" Brief of Respondent Cabell Huntington Hospital, Inc. at 33.

Cabell Huntington's acquisition would maintain "local control," that only Cabell Huntington could adequately protect St. Mary's Catholic identity, and that only Cabell Huntington would maintain St. Mary's continued affiliation with Marshall University.

Before this Court, Respondents are even more audacious, arguing that Petitioner failed to offer evidence that another alternative existed. *See e.g.*, Brief of Respondent Cabell Huntington Hospital, Inc. at 9 ("There was no evidence in the record regarding alternative bidders"); Brief of Respondent West Virginia Health Care Authority at 32 (arguing that the ARH decision considered alternatives that were not presented by the applicant, but "were nonetheless included as part of the certificate of need record."). This is a particularly clever bit of legal sophistry: first, they maintain that evidence of alternative bids (the existence of which is verified by public records) is irrelevant and should be excluded from this Certificate of Need proceeding; then, when confronted with a challenge to the Health Care Authority's failure to assess the availability of "superior alternatives", they insist that, because such evidence has been excluded, the Petitioner has failed to present any evidence. Yet, Petitioner did not "fail" to offer such evidence; it was denied the opportunity to elicit and introduce such evidence. Having erred in excluding evidence of actual alternatives, then the Health Care Authority compounded it legal error by permitting Cabell Huntington to speculate about those negative effects to those same alternatives, and now wants to blame it all on Petitioner.

B. The Health Care Authority violated West Virginia Code § 16-2D-5 by failing to consider the impact of the proposed transaction on competition.

Next, the Health Care Authority's failure to consider the impact of the proposed merger on competition, as required by W. Va. Code § 16-2D-6 (2015), warrants reversal. As Cabell Huntington points out, the Health Care Authority has the discretion to disregard competition in reviewing a CON application only when it determines that competition ***does not*** appropriately

allocate health services:

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

W. Va. Code § 16-2D-5(d)-(e). In this case, however, the Health Care Authority never made this statutorily required finding, but instead refused to consider competition "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." (App. 3012); *see also* Decision on Reconsid., at 7 (App. 2897) ("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)").

Unable to point to this requisite finding, Respondents collectively dedicate nearly seventeen pages of their briefs to explain how the result below "represents" the Health Care Authority's conclusion that competition does not appropriately allocate the supply for hospital services. *See generally* Brief of Respondent West Virginia Health Care Authority at 20–24 and Brief of Respondent Cabell Huntington Hospital, Inc. at 14–25. As creative as this lengthy explanation may be, the Health Care Authority simply has not (in this case or any other) made the requisite finding that competition does not appropriately allocate supply for hospital services.

Having failed to make a specific finding that competition does not appropriately allocate supply consistent with the state health plan, the Health Care Authority's decision to disregard competition was in violation of statutory provisions, in excess of its statutory Health Care

Authority and/or jurisdiction, made upon unlawful procedures, and affected by other error of law.

Moreover, the notion that competition should be disregarded is unsettling, given the evidence presented demonstrating the positive impact competition has on price and quality of healthcare. Petitioner elicited extensive evidence during the hearing demonstrating the efforts of Cabell Huntington and St. Mary's to aggressively compete for patients in the Huntington area, resulting in high quality, low cost healthcare in the area. *See* (App. 2109-2563). Even Michael Sellards, CEO of St. Mary's, recognized the positive impact of this competition, conceding that it creates "incentives for investing dollars into their operations to provide and improve quality to expand services for patients." (App. 1347). Combining the two hospitals would, unsurprisingly, significantly affect competition in the seven-county service area, and would virtually eliminate these competitive incentives in four of the counties in the service area – Cabell, Wayne, and Lincoln, West Virginia and Lawrence County, Ohio.

Moreover, the Order's disregard for the anti-competitive effects of this merger has been exacerbated by post-hearing events that undermine the Health Care Authority's conclusion that consumers will be protected from arbitrary price increases. During the CON proceedings, Cabell Huntington insisted that Petitioner's concerns about the anticompetitive effects of this merger were unwarranted in light of two layers of protection: (i) the Health Care Authority's rate review powers and (ii) the Assurance of Voluntary Compliance that Cabell Huntington and St. Mary's negotiated with the Attorney General of West Virginia. However, after the hearing and the close of evidence, Cabell Huntington sought to dismantle both of these "protections." Accordingly, the Health Care Authority's refusal to consider competition, especially in light of the above-described post-hearing events, was in violation of statutory provisions, in excess of the statutory

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

VI. CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Carte P. Goodwin, hereby certify that I served a copy of the foregoing Petitioner's **Reply Brief** on this 1st day of November, 2017, by United States mail, postage prepaid, to the following:

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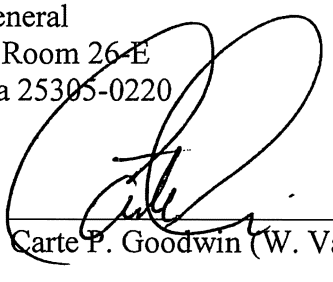

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