UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Office of Policy Planning
Bureau of Competition
Bureau of Economics

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Re: Virginia's Rules and Regulations Governing Cooperative Agreements, 12 VAC 5, Chapter 221

Dear Ms. Puglisi:

The staff of the Federal Trade Commission's ("FTC") Office of Policy Planning, Bureau of Competition, and Bureau of Economics[1] respectfully submits this public comment regarding Virginia's Rules and Regulations Governing Cooperative Agreements as promulgated by the Virginia Department of Health.[2] FTC staff welcomes the opportunity to consult with the Commissioner of the Virginia Department of Health ("Commissioner") during her review of any Cooperative Agreement application, to help ensure that any substantive determination as to the potential effects of a Cooperative Agreement includes a rigorous competition analysis based on well-accepted legal and economic principles.

According to the emergency rules and regulations under consideration, the Commissioner is authorized to approve an application "for the sharing, allocation, consolidation by merger or other combination of assets"[3] among two or more hospitals operating in a Participating Locality[4] in southwest Virginia "if he determines by a preponderance of the evidence that the benefits likely to result from the Cooperative Agreement outweigh the disadvantages likely to result from a reduction in competition."[5] The emergency rules also state that "[t]he Commissioner may consult with the Federal Trade Commission when reviewing an Application."[6]

Among the benefits to be considered by the Commissioner when reviewing the Cooperative Agreement applications are:

- enhancement in quality of care and population health status;
- preservation of hospital facilities to ensure access to care;
- gains in cost-efficiency of hospital services provided;

- improvements in utilization of hospital resources and equipment;
- avoidance of duplication of hospital resources;
- participation in the state Medicaid program; and
- total cost of care.[7]

Among the disadvantages to be considered by the Commissioner when reviewing the Cooperative Agreement applications are:

- adverse impact on the ability of payers to negotiate reasonable payment and service arrangements with providers;
- reduction in competition among providers;
- adverse impact on patients in the quality, availability, and price of health care services; and
- availability of alternative arrangements that are less restrictive to competition and achieve the same benefits or a more favorable balance of benefits over disadvantages.[8]

FTC staff has significant expertise in evaluating proposed hospital and other health care provider mergers, including assessing whether the potential benefits of a transaction outweigh the potential anticompetitive harms. Indeed, many of the stated benefits and disadvantages that the Commissioner must consider are among those the FTC assesses when evaluating mergers between hospitals and other health care providers. Balancing these interests often involves a comprehensive and complex analysis of various market factors, including: the merging parties' overlapping services; market shares and market concentration levels; the closeness of competition between the merging parties; barriers to entry by other providers; economic analysis based on patient discharge and pricing data; efficiencies; and other potential merger benefits, such as cost savings or quality improvements. Our analysis usually considers information, documents, and data from a wide variety of sources, including the merging parties, third-party health care providers, health plans, and employers.

The FTC has substantial experience and devotes considerable resources to gather sufficient data and conduct detailed analyses to fully understand the likely competitive effects of all mergers, including proposed hospital combinations. In our experience, mergers between close competitors in highly concentrated health care provider markets are more likely to result in significant consumer harm than a merger in a less concentrated market. Settled antitrust jurisprudence establishes, for example, that a proposed merger that would result in a monopoly or near-monopoly is likely to raise serious antitrust concerns. Against the likely anticompetitive harm, we assess the efficiencies and procompetitive benefits likely to result from a merger. The antitrust agencies credit those efficiencies that are "merger-specific" (i.e., only likely to be achieved as a result of the merger and unlikely to be achieved through another manner or relationship having less anticompetitive effects), substantiated, and non-speculative. Consideration of whether credible efficiencies can offset a merger's anticompetitive harm depends not only on the magnitude of those efficiencies, but also on the extent to which those efficiencies are likely to be passed through to consumers. Thus, the greater the

likely anticompetitive harm from a merger – as with a merger to monopoly or near-monopoly – the greater and more likely to be passed through to consumers the efficiencies need to be to pass muster under the antitrust laws. This methodology is appropriate when applying a "preponderance of the evidence" standard, as the Commissioner is required to do.

As the Commissioner likely is aware, and as we wish to emphasize, FTC staff has previously expressed concerns about Certificate of Public Advantage ("COPA") programs and other antitrust exemptions. The FTC has consistently advocated that legislation purporting to grant antitrust immunity is unnecessary to encourage procompetitive collaborations among health care providers.[9] Rather, the antitrust laws are consistent with the laudable public policy goals of improving quality, reducing costs, and improving patient access for health care services in rural communities such as southwest Virginia.[10] The FTC only seeks to prohibit under the antitrust laws those collaborations that are likely to *undermine* these goals and result in harm to consumers, including higher prices without any offsetting quality improvements.[11] Consequently, efforts to shield such conduct from antitrust enforcement are likely to harm Virginia health care consumers, no matter how rigorous or well-intentioned the regulatory scheme may be.

Nevertheless, we recognize that the Virginia Department of Health must promulgate rules to implement Virginia's new COPA legislation. FTC staff is willing to provide any expertise and information that we are authorized to share in connection with the Commissioner's review of Cooperative Agreement applications. Likewise, to the extent that the Commissioner is able to share, FTC staff investigations may benefit from receiving information and materials submitted as part of any Cooperative Agreement application.[12] Respectfully, we urge the Virginia Department of Health to incorporate these concepts of permissible sharing of information and expertise between the Commissioner and the FTC in the promulgated rules.

Respectfully submitted,

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Office of Policy Planning

Stephen Weissman, Deputy Director
Bureau of Competition

Francine Lafontaine, Director
Bureau of Economics

[1] These comments express the views of the FTC's Office of Policy Planning, Bureau of Competition, and Bureau of Economics. These comments do not necessarily represent the views of the Commission or of any

individual Commissioner. The Commission has, however, voted to authorize staff to submit these comments. The Commission also authorized staff to provide oral comments at today's quarterly meeting of the Virginia Board of Health. *See* http://www.vdh.state.va.us/administration/meetings/documents/pdf/Agenda%20September%202015.pdf.

[2] *See* Va. Dep't of Health Regs, 12 VAC 5, Chapter 221, VIRGINIA'S RULES AND REGULATIONS GOVERNING COOPERATIVE AGREEMENTS at 218-30, *available at* http://www.vdh.state.va.us/administration/meetings/documents/pdf/Agenda%20September%202015.pdf. The Virginia Department of Health is required to promulgate rules implementing the Code of Va., Chapter 741, § 15.2-5384.1, enacted pursuant to Virginia HB 2316 (Apr. 15, 2015), *available at* https://leg1.state.va.us/cgi-bin/legp504.exe?151+ful+CHAP0741.

[3] Va. Dep't of Health Regs, 12 VAC 5, at Chapter 221-20 ("'Cooperative Agreement' means an agreement among two or more hospitals for the sharing, allocation, consolidation by merger or other combination of assets, or referral of patients, personnel, allocation, consolidation by merger or other combination of assets, or referral of patients, personnel, instructional programs, support services, and facilities or medical, diagnostic, or laboratory facilities or procedures or other services traditionally offered by hospitals.").

[4] *See* Va. Dep't of Health Regs, 12 VAC 5, at Chapter 221-20 ("'Participating Locality' means any county or city in the LENOWISCO or Cumberland Plateau Planning District Commissions and the Counties of Smyth and Washington and the City of Bristol with respect to which an authority may be organized and in which it is contemplated that the Authority will function.").

[5] Va. Dep't of Health Regs, 12 VAC 5, Chapter 221-80-H.

[6] Va. Dep't of Health Regs, 12 VAC 5, Chapter 221-80-B.

[7] *See* Va. Dep't of Health Regs, 12 VAC 5, Chapter 221-80-G.1.(a)-(h).

[8] *See* Va. Dep't of Health Regs, 12 VAC 5, Chapter 221-80-G.2.(a)-(d).

[9] *See, e.g.*, FTC Staff Comment to Sen. Michael H. Ranzenhofer and Assemblyman Thomas Abinanti, N.Y. State Legislature, Concerning S.B. 2647 and A. 2888, Intended to Exempt Certain Public Health Entities from the Antitrust Laws (June 2015), https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-new-york-state-senator-ranzenhofer-new-york-state-assemblyman-abinanti-concerning/150605nypublichealthletter.pdf; FTC Staff Comment to Sen. Chip Shields, Or. State Legislature, Concerning S.B. 231-A, Intended to Exempt Certain Collaborations Among Competing Health Care Providers and Payers Participating in a Primary Care Transformation Initiative (May 2015), https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-regarding-oregon-senate-bill-231a-which-includes-language-intended-provide-federal/150519oregonstaffletter.pdf; FTC Staff Comment to New York State Department of Health, Concerning Certificate of Public Advantage Applications, Intended to Exempt Performing Provider Systems from the Antitrust Laws (Apr. 2015), https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-center-health-care-policy-resource-development-office-primary-care-health-systems/150422newyorkhealth.pdf; FTC Staff Comment to Sen. Catherine Osten and Rep. Peter Tercyak, Conn. Gen. Assembly, Concerning H.B. 6431, Intended to Exempt Health Care Collaboratives from the Antitrust Laws (June 2013), https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-connecticut-general-assembly-labor-and-employees-committee-regarding-connecticut/130605conncoopcomment.pdf.

[10] *See* Code of Va., Chapter 741, § 15.2-5368 (describing the unique health care challenges facing southwest Virginia communities as the basis for establishing the Southwest Virginia Health Authority and the Cooperative Agreement regulatory scheme).

[11] *See* Deborah L. Feinstein, Dir., Bureau of Competition, Remarks at the Fifth National Accountable Care

Organization Summit in Washington, DC: Antitrust Enforcement in Health Care: Proscription, not Prescription (June 19, 2014), https://www.ftc.gov/system/files/documents/public_statements/409481/140619_aco_speech.pdf (noting that the federal antitrust agencies have challenged very few of the thousands of health care provider mergers, joint ventures, and other types of collaborations that have occurred in recent years, and have "brought those challenges only after rigorous analysis of market conditions showed that the acquisition was likely to substantially lessen competition.").

[12] *See* Va. Dep't of Health Regs, 12 VAC 5, Chapter 221-70.