UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Bureau of Competition
Bureau of Economics
Office of Policy Planning

July 18, 2017

VIA ELECTRONIC MAIL

John J. Dreyzehner, M.D., MPH, FACOEM
Commissioner
Tennessee Department of Health
710 James Robertson Parkway
Nashville, TN 37243
TN.Health@tn.gov

Honorable Herbert H. Slatery III
Attorney General
State of Tennessee
500 Charlotte Avenue
Nashville, TN 37202
Herbert.Slatery@ag.tn.gov

Re: Certificate of Public Advantage Application of Mountain States Health Alliance and Wellmont Health System

Dear Dr. Dreyzehner and General Slatery:

On behalf of the staffs of the FTC's Bureau of Competition, Bureau of Economics, and Office of Policy Planning, and pursuant to the Tennessee rules implemented at Chapter 1200-38-01, we are providing the attached written public comment in response to the three consultant reports submitted by Mountain States Health Alliance and Wellmont Health System to the Tennessee Department of Health. We can provide copies of any documents referenced in these comments, upon request.

Please direct questions concerning this submission to Goldie V. Walker, Attorney, Bureau of Competition, 202-326-2919, gwalker@ftc.gov; and Stephanie A. Wilkinson, Attorney Advisor, Office of Policy Planning, 202-326-2084, swilkinson@ftc.gov.

Respectfully submitted,

Markus H. Meier, Acting Director
Bureau of Competition

Ginger Z. Jin, Director
Bureau of Economics

Tara Isa Koslov, Acting Director
Office of Policy Planning

cc: Marissa J. Levine, State Health Commissioner, Department of Health, Commonwealth of Virginia

Enclosure

Federal Trade Commission Staff's Third Submission to the Tennessee Department of Health Regarding the Certificate of Public Advantage Application of Mountain States Health Alliance and Wellmont Health System

Pursuant to Tennessee Code § 68-11-1301 *et seq*.
and the rules implemented thereunder at Chapter 1200-38-01

July 18, 2017

Bureau of Competition
Bureau of Economics
Office of Policy Planning

I. Introduction[1]

Federal Trade Commission ("FTC") staff conducted a detailed investigation into the proposed merger of Mountain States Health Alliance ("Mountain States") and Wellmont Health System ("Wellmont") (collectively "the applicants") and submitted two previous public comments.[2] Those comments discuss the potential for the proposed merger to cause significant harm to the region and raise concerns that the applicants' proposed commitments would not remedy these harms. Based on detailed analyses discussed in the comments, FTC staff concludes that the benefits of the proposed Certificate of Public Advantage ("COPA") do not exceed the likely harm to healthcare competition and consumers in Northeast Tennessee and Southwest Virginia, and definitively do not do so by clear and convincing evidence.

The Tennessee Hospital Cooperation Act directs the Tennessee Department of Health ("the Department") to review applications for a COPA between merging hospitals and to issue a COPA if the Department "determines that the applicants have demonstrated by clear and convincing evidence that the likely benefits resulting from the agreement outweigh any disadvantages attributable to a reduction in competition that may result from the agreement."[3] As we have previously testified and submitted in prior written public comments, local consumers benefit from the close competition between the applicants in the form of lower prices, higher quality, and greater access to care. If allowed to merge, the combined hospital system would have a dominant market share of inpatient services and significant market share in several outpatient and physician-specialty service lines. The loss of competition that would result from the merger is likely to have significant negative effects on hospital prices, quality of care, and the availability of services. As FTC staff explained in its initial and supplemental public comments, the applicants have failed to meet their burden of demonstrating that the purported benefits of the COPA will outweigh the likely harm from the proposed merger.[4]

The applicants recently submitted some additional information with their revised application. In particular, in April 2017, Mountain States and Wellmont submitted three reports by outside consultants to support their COPA application:

---

[1] These comments express the views of the FTC's Bureau of Competition, Bureau of Economics, and Office of Policy Planning. These comments do not necessarily represent the views of the Commission or of any individual Commissioner. The Commission has, however, voted to authorize FTC staff to submit these comments.

[2] Federal Trade Commission Staff Submission to the Tennessee Department of Health Regarding the Certificate of Public Advantage Application of Mountain States Health Alliance and Wellmont Health System (Nov. 21, 2016) ("FTC Submission, Nov. 21, 2016"), https://www.tn.gov/assets/entities/health/attachments/COPA_FTC_Staff_Public_Comment_Submission_to_Tennessee_11-21-16.pdf; Federal Trade Commission Staff Supplemental Submission to the Tennessee Department of Health Regarding the Certificate of Public Advantage Application of Mountain States Health Alliance and Wellmont Health System (Jan. 5, 2017) ("FTC Submission, Jan. 5, 2017"), https://www.tn.gov/assets/entities/health/attachments/FTC_Staff_Supplemental_Submission_to_Tennessee_1-5-17.pdf.

[3] Tennessee Hospital Cooperation Act of 1993, Tenn. Code Ann. § 68-11-1303 (e)(1) ("Tennessee Hospital Cooperation Act").

[4] *See* FTC Submission, Nov. 21, 2016; FTC Submission, Jan. 5, 2017.

- Margaret Guerin-Calvert, Compass Lexecon ("Compass"), Independent Assessment of the Benefits and Disadvantages in the Proposed Merger of Mountain States Health Alliance and Wellmont Health System (Apr. 11, 2017) ("Compass report");

- Conduent Community Health Solutions, Healthy Communities Institute, Ballad Health Population Health Improvement Plan, Capacity and Preparedness Assessment and Recommendations ("Conduent report"); and

- Dennis Weaver, Advisory Board Consulting, Independent Assessment of Ballad Health's Likelihood of Successfully Navigating the Narrow Corridor in a Merged Integrated Delivery System, Prepared for Mountain States Health Alliance and Wellmont Health System (Apr. 7, 2017) ("Advisory Board report").

FTC staff carefully reviewed these reports, in consultation with our healthcare expert. The applicants' revised application and these supplemental reports do not change our recommendation that the Department deny the COPA. Our concerns that the proposed merger likely would increase prices and decrease the quality of healthcare services in Northeast Tennessee and Southwest Virginia, as articulated in our prior public comments, remain. Fundamentally, the applicants' supplemental reports provide no new information or analysis that changes FTC staff's conclusion that the proposed merger is likely to significantly harm consumers in Northeast Tennessee and Southwest Virginia and that the COPA's benefits do not exceed these harms by clear and convincing evidence. We respectfully submit this supplemental comment to explain certain analytical and evidentiary gaps in the applicants' consultants' reports.

II. The Compass Report Contains Insufficient Analysis to Conclude that the COPA's Benefits Outweigh the Disadvantages from the Resulting Loss of Competition

Compass "was asked to provide an independent assessment of whether the likely benefits of the proposed merger of [Wellmont] and [Mountain States] outweigh the potential disadvantages of displacing competition, as set out in statutory criteria for issuing a [COPA] . . . in Tennessee."[5] Because Compass is an economic consulting firm and Ms. Guerin-Calvert is a well-known economist, it is reasonable to have expected her assessment to include a thorough economic analysis to inform the evaluation required by the statute. It does not, however. The Compass report offers some discussion of healthcare and competition in the region, but fails to sufficiently analyze the likely harm from the merger or provide sufficient economic evidence to support its claims of the proposed merger's likely benefits.

A. The Compass Report Fails to Provide an Adequate Competitive Analysis

The Compass report offers an overview of healthcare in the region and background information about the proposed merger and it recites the applicants' proposed commitments. It

[5] Compass report at 1.

also provides a high-level discussion of the incentives and commitments that Ms. Guerin-Calvert argues may mitigate harm from the transaction. Prominently absent from the Compass report, however, is an economic analysis of the region's competitive environment, both as it exists now and as it will likely exist under the COPA. Typically, economic analysis uses several tools to assess the likely effects of a merger on prices and quality. For example, to determine likely competitive effects of a merger, economists often define a market or markets in which to assess the competitive effects of a merger, measure market concentration, and determine how much a merger would increase market concentration. They also often calculate competition metrics, such as diversion ratios, to measure the degree of substitution between the merging parties and other potential competitors, and thus the likelihood of competitive harm.

The Compass report includes virtually none of this critical analysis. Only one paragraph in the report describes the competitive landscape for inpatient, outpatient, and physician services in the applicants' 21-county service area.[6] That single paragraph provides limited information about market concentration and the level of competition between the two hospital systems and, hence, provides an incomplete and inadequate analysis of competition in the area. The absence of such economic analyses severely limits the Compass report's usefulness, and leaves open the question of why Compass omitted such standard economic tools to assess likely harm to consumers. Comparatively, FTC staff submitted a thorough analysis of market dynamics and competition in the region and provided an assessment of the harm and benefits from the proposed merger. This comprehensive analysis demonstrated a high likelihood of significant harm to consumers because the merger would eliminate the vigorous competition between the two systems.[7] America's Health Insurance Plans ("AHIP") performed its own empirical analysis of the market and also found that significant harm likely would result from the merger.[8] The Compass report fails to rebut the conclusions reached in these more rigorous analyses.

The Compass report references several interviews conducted with Mountain States and Wellmont executives and other stakeholders in the region, including interviews conducted for the Advisory Board report.[9] The report does not indicate how the applicants or the Advisory Board selected the interviewees or under what conditions they conducted the interviews. It is unclear from the report whether the interviews were performed in a rigorous and reliable manner, and the rules under which the interviews were conducted.

The Compass report does not add sufficient analysis or evidence to the application to show that the merger's purported efficiencies and other benefits outweigh the significant harm to competition. Economic analysis of hospital mergers typically includes information about cost reductions and quality of care improvements, also known as efficiencies, that may lessen the harm from a merger. When a hospital merger significantly reduces or eliminates competition, this typically leads to increased prices and reduced quality. Only when merging parties

---

[6] *See id.* at 19.
[7] *See* FTC Submission, Nov. 21, 2016 at 8-50.
[8] *See* Michael Doane & Luke Froeb, Competition Economics LLC, *An Economic Analysis of the Proposed Merger Between Wellmont Health System and Mountain States Health Alliance* (Jan. 2015) ("AHIP report"), https://www.tn.gov/assets/entities/health/attachments/COPA_Wellmont-Mountain_States_Merger_Report.pdf.
[9] *See*, *e.g.*, Compass report at 2, 3, 11, 13, 14, 25.

adequately demonstrate that their transaction will result in benefits achievable only through the merger that will be passed on to consumers, and those benefits outweigh the harm to consumers from lost competition, should the merger be approved.[10] That is the COPA law framework, and how the courts and antitrust agencies analyze efficiencies.

The Compass report, however, provides an inadequate analysis of the likely efficiencies from the transaction. The report simply relies upon the cost savings projected by FTI Consulting, Compass's parent company,[11] because "their findings appear to be well-documented and conservative."[12] The Compass report lists the applicants' quality commitments without conducting a comprehensive examination of each quality improvement claim or why the merger is necessary to achieve these improvements.[13]

The COPA statute requires the Department to evaluate the benefits of the transaction, such as cost saving and quality improvements, against disadvantages from the loss of competition.[14] The Compass report contains crucial gaps because it lacks a sufficient competitive analysis and does not fill the holes in the COPA application to allow the Department to adequately weigh the benefits and disadvantages of the proposed merger.

B. The Compass Report Lacks Sufficient Evidence to Support Its Claims

The Compass report lacks evidentiary support for its claims, is contradicted by the evidence in several respects, and ultimately fails to supplement the COPA application sufficiently to meet the required evidentiary burden. For example, the Compass report states "[o]f all available alternatives, [the new health system's] incentives best align with those of payors . . .,"[15] but the report provides no evidence of payor support for the transaction. Instead, public evidence demonstrates the exact opposite: payors are concerned about the transaction's likely harm.[16]

Additionally, the Compass report states that the new health system will "have greater incentives to make necessary investments to sustain [its] operations than either [system] would

---

[10] The FTC staff submission on November 21, 2016 and the AHIP report both predicted significant price increases from the merger. *See* FTC Submission, Nov. 21, 2016 at 3, 9, 12-13, 57-59; AHIP report at 2, 17-18, Table 14. In order to mitigate this harm, the benefits of the transaction would need to be substantial, likely beyond what the applicants have claimed, even taking their proposed commitments into account. FTC Submission, Nov. 21, 2016 at 70.

[11] *See About Us*, Compass Lexecon, http://www.compasslexecon.com/about-us/.

[12] Compass report at 12.

[13] *Id.* at 10-11.

[14] Tennessee Hospital Cooperation Act § 68-11-1303(e).

[15] Compass report at 10.

[16] *See, e.g.*, Comments from America's Health Insurance Plans to the Tennessee Department of Health-COPA Index Advisory Group (Apr. 19, 2016), https://www.tn.gov/assets/entities/health/attachments/AHIP_COPA_Comments_041819.pdf; Declaration of Colin Drozdowski, Vice President for National Provider Solutions, Anthem, Inc. (FTC Submission, Nov. 21, 2016 at Attachment A); Comments from Virginia Association of Health Plans to Southwest Virginia Health Authority (May 25, 2016), https://swvahealthauthority.files.wordpress.com/2016/09/8-vahp-comments-to-swva-health-authority-members-5-25-16.pdf.

have independently or through an out-of-area merger."[17] The report does not discuss the specific alternative offers made to Wellmont, rather it relies only on this statement without comparison to concrete alternatives. The Compass report fails to assess the benefits that Wellmont could achieve through any less competitively harmful alternative. Indeed, the statute requires the applicants to evaluate the "availability of arrangements that are less restrictive to competition and achieve the same benefits or a more favorable balance of benefits over disadvantages attributable to any reduction in competition likely to result from the agreement."[18] As noted in FTC staff's previous comments, the COPA application failed to address this factor in any meaningful way, thus it does not satisfy the statute. Similarly, the Compass report does not provide additional information about these alternatives to the merger to understand how the purported benefits of the COPA compare to the benefits that other transactions could provide to the region.

It is inadequate for the applicants to state there are no active alternatives at this time. If that were the standard—that applicants could simply reject alternative bids not raising competitive concerns and then file an application stating that there are no active or current alternatives to the COPA transaction—that would vitiate the very purpose of this statutory provision. The only way the COPA statute makes sense is to require the applicants to demonstrate that before executing an agreement to merge, the applicants had no alternatives available that raised fewer competitive concerns or had a better balance of benefits to disadvantages. Mountain States and Wellmont have wholly failed to make that showing.

C. The Compass Report Overlooks that Mountain States and Wellmont Already Are Fully Integrated Systems

The Compass report argues that the new health system will become a "single, fully integrated delivery system" that will be "accountable, both clinically and fiscally, for health outcomes and the health of the region's population"[19] and discusses the purported benefits that will result from this integration.[20] The suggestion is that only through the merger can the applicants become integrated health systems, which, only then, will unleash tremendous benefits. But the broad statements in the Compass report overlook the applicants' own statements that Mountain States and Wellmont each already are fully integrated delivery systems.[21] Thus, the region currently realizes many of the benefits that the Compass report discusses. Further, although some additional benefits may result from combining the two systems, by failing to analyze the benefits created by merging the two systems compared to what each system can achieve independently or through alternative arrangements, the report overstates the benefits

[17] Compass report at 10.
[18] Tennessee Hospital Cooperation Act § 68-11-1303 (e)(3)(D).
[19] Compass report at 8.
[20] *Id*. at 10-11.
[21] Mountain States Health Alliance & Wellmont Health System, Application for a Certificate of Public Advantage for State of Tennessee (Feb. 16, 2016) ("COPA Application") at 11, http://tn.gov/assets/entities/health/attachments/COPA_application.pdf ("Throughout its multi-state service area, Mountain States functions as an integrated delivery system."); *id.* at 12 ("Wellmont owns and operates an integrated health care delivery system providing inpatient, outpatient and other health care services at multiple locations in Northeast Tennessee and Southwest Virginia.").

(*e.g.*, quality and cost efficiencies). The comparison must be made between the benefits that the region would gain from the two fully integrated healthcare systems remaining separate and continuing to compete and improve their quality and cost effectiveness, versus the potential for benefits if they combine. Compass looks at only the potential benefits from the combination, and ignores what the fully integrated systems are doing in these areas and likely would do in the future.

The Compass report emphasizes the financial challenges facing some individual hospitals,[22] and claims that, without the proposed merger, smaller rural hospitals may be downsized or face "fundamental changes" to their operations.[23] First, it is important to note that the applicants' commitments do not alter this risk of downsizing or operational changes—they merely ensure the hospitals will stay open as some type of healthcare facility for five years, and, as the applicants admit, could entail fundamental changes to the services offered. Moreover, the report fails to consider the role of those hospitals in each system's larger network. In particular, the report does not analyze whether the health systems derive benefits from having affiliated rural hospitals. These benefits could include increased referrals from outlying communities that contribute to the profitability of the overall system. Indeed, the applicants have not claimed that either system is in financial distress. An individual hospital could appear unprofitable because of how each applicant allocates costs to each of their system hospitals for accounting purposes. A hospital may appear unprofitable on a standalone basis, but may still be profitable to the system as a whole and, therefore, likely to remain operational even without the COPA. The Compass report does not engage in this analysis.

In sum, the Compass report does not add new evidence or new analysis to fill in the evidentiary and analytical gaps in the COPA application. As a result, its analysis does not change FTC staff's view of the market or conclusion that the merger will likely harm competition and consumers. The Compass report does not change the fact that the applicants still fail to demonstrate by clear and convincing evidence that the benefits of the COPA will outweigh the harm from the merger to near-monopoly.

III. The Advisory Board and Conduent Reports Do Not Change FTC Staff's Previous Analysis and Conclusions

The applicants also submitted two reports—the Advisory Board report and the Conduent report—discussing the merged hospital system's readiness to transition toward population health management and risk-based contracting.[24] Although the reports describe the framework by which these goals could be met, they change nothing about the applicants' plans or commitments to achieve these goals. The applicants have indicated that the proposed commitments to invest in

[22] Compass report at 5.
[23] *Id*.
[24] The Advisory Board report is intended to assess the "likelihood that the merged integrated delivery system, known as Ballad Health, will be able to achieve its stated goals . . . of successfully transitioning toward population health management and risk-based contracting." Advisory Board report at 4. The Conduent report "is intended to serve as an assessment of the capacity of the new health system, Ballad Health, to develop and implement an effective population health strategy – and to improve the community health of this region." Conduent report at 5.

community health are contingent on achieving their cost-savings targets.[25] As we explained in our initial public comment, if the applicants do not achieve these cost savings, it is unclear whether or how they could fulfill these commitments.[26] The applicants have not answered these questions. The Advisory Board and Conduent reports do not do so either. These reports do not describe any new mechanisms (beyond those already mentioned in the COPA application) to ensure the investments will be made or to guarantee the success of the applicants' proposed commitments and initiatives.

A. The Advisory Board and Conduent Reports Overlook the Benefits from Competition Between Mountain States and Wellmont

Both the Advisory Board and the Conduent reports emphasize that the merger will allow the new health system to leverage complementary capabilities and programs between Mountain States and Wellmont.[27] We do not doubt that each system has certain strengths that benefit the region or that the new health system could realize some benefits from financial and operational integration.[28] But these reports fail to note the extensive overlap—and consequently head-to-head competition—that exists between the two hospital systems. In other words, while there may be some complementary capabilities and programs, the applicants' competitive capabilities and programs, and the patient benefits they provide, far outweigh them.

As explained in FTC staff's initial public comment, when competition determines the range of choices available to consumers, patients ultimately benefit from improved quality, lower prices, and more effective utilization of resources.[29] Moreover, although the Conduent report states that the "health systems have had little incentive to work together and have lacked the resources to collaborate on a regional approach . . .,"[30] the applicants have worked collaboratively before and during the COPA process to achieve community health goals. These collaborations include bringing a Susan G. Komen affiliate to the region, implementing an antibiotic stewardship program, and starting a partnership with East Tennessee State University to develop a community health improvement assessment.[31] In doing so, they have already shared some of their strengths and capabilities—without merging—and the applicants have not specified what collaborations, if any, they have been unable to undertake because of antitrust concerns. Indeed, antitrust law recognizes the value of procompetitive collaboration that benefits consumers, and would not necessarily prevent the applicants from collaborating and sharing

---

[25] Response by Applicants to Federal Trade Commission Staff Submission on September 30, 2016 and Supporting Memorandum to the Southwest Virginia Health Authority and Virginia Department of Health Regarding Cooperative Agreement Application (Oct. 14, 2016) at 33 ("The monetary commitments are possible solely based on savings to be realized from merger efficiencies. . . ."), https://swvahealthauthority files.wordpress.com/2016/09/response-to-ftc-comments-submitted-to-swvha.pdf.

[26] *See* FTC Submission, Nov. 21, 2016 at 29-30.

[27] *See, e.g.*, Advisory Board report at 21; Conduent report at 17-19.

[28] It is, however, by no means clear that each system will completely transmit all of its strengths or that it will not also import any of its weaknesses to the combined system.

[29] *See* FTC Submission, Nov. 21, 2016 at 9.

[30] Conduent report at 14.

[31] COPA Application at 13-14. Although the East Tennessee State University community health improvement assessment was done as part of the COPA process, there does not seem to be any reason why this could not have been done outside of the COPA process.

these costs with each other (or with other partners) absent a merger. Additionally, certain healthcare reform efforts, such as population health initiatives, may incentivize independent healthcare providers to engage in a greater degree of collaboration in the future.

B. The Advisory Board and Conduent Reports Ignore the Applicants' Current Programs and Likely Overstate the Merger's Population Health Benefits

Together, the Advisory Board and Conduent reports tout the applicants' independent successes as proof that the merged entity will have the ability to engage successfully in risk-based contracting and population health initiatives.[32] But these successes actually illustrate why the applicants can engage in these programs and activities without merging with each other. The reports fail to identify how much, if any, of the purported benefits can be achieved only through the proposed merger rather than alternatives "that are less restrictive to competition and achieve the same benefits or a more favorable balance of benefits over disadvantages."[33]

The Advisory Board report argues that increased scale will improve the new health system's ability to engage in risk-based contracting.[34] But the report also notes that both organizations already have experience in value-based arrangements and contracting.[35] In fact, according to the report, Mountain States has had early successes with risk-based contracts containing both upside and downside risk,[36] and Wellmont has experience with pay-for-performance and bundled-payment arrangements.[37] Although the merger will allow the combined entity to spread risk over a larger group of covered lives, the report does not address the incremental benefit the new health system will gain relative to Mountain States' and Wellmont's current level of successes or what improvements to scale the applicants each could achieve from another transaction. Without this analysis, the Advisory Board report does not demonstrate the transaction will lead to benefits obtainable only through this merger, and it likely overstates the benefits from the merger. Taken to its logical conclusion, the scale benefits the applicants argue for would encourage all hospital systems in Tennessee to merge to monopoly—an outcome clearly harmful to competition and Tennessee healthcare.

With respect to population health management, the Advisory Board report states that the "merged entity's scale is critical to pursue population health management in a financially sustainable manner."[38] The Conduent report notes several successful population health programs that each hospital system has already developed, including programs designed to combat obesity, physical inactivity, tobacco use, and substance abuse.[39] However, the Conduent report fails to provide any specifics about these population health initiatives, including the number of current participants or people reached by the programs, whether the programs are at capacity, or how much business the programs drive to each hospital system. Thus, the Conduent report does not

---

[32] *See, e.g.*, Advisory Board report at 13; Conduent report at 17-19.
[33] Tennessee Hospital Cooperation Act § 68-11-1303(e)(3)(D).
[34] Advisory Board report at 13.
[35] *Id.*
[36] *Id*.
[37] *Id*.
[38] *Id.* at 6.
[39] Conduent report at 18-19.

demonstrate whether the merger actually will improve or expand these existing population health programs. To the extent any of these population health initiatives already exist, they cannot be counted fully as merger-specific benefits. Only improvements over what the applicants could achieve independently or through an alternative transaction should be counted as benefits attributable to the merger.

C. The Advisory Board and Conduent Reports Do Not Adequately Substantiate Their Claims

The Advisory Board and Conduent reports do not offer sufficient additional evidence to substantiate their claims that the new health system actually will engage in population health initiatives or risk-based contracting. For example, beyond providing an amount of money the applicants could spend, the reports do not identify specific plans to implement any of these initiatives. Moreover, the reports lack evidence demonstrating that the new health system will successfully achieve its population health or risk-based contracting goals. These reports neither evaluate the effectiveness of current programs nor offer evidence that the programs the applicants plan to implement with the merger will improve population health in the region relative to the currently offered programs. Further, the reports provide no evidence to demonstrate that the merger is necessary to implement these programs.

Like the Compass report, the Advisory Board and Conduent reports fail to provide sufficient evidence or analysis to advance the applicants' claims that the purported benefits of the merger will outweigh its likely harm to residents of Northeast Tennessee and Southwest Virginia.

D. Applicants Have Not Provided Any Additional Commitments or Offered Improvements to Their Existing Commitments

FTC staff's prior public comments also identified numerous flaws, gaps, and shortcomings with the applicants' proposed commitments. The proposed commitments fail to remedy the competitive harm to consumers from the merger. At least publicly, the applicants have not offered additional or improved commitments—as such, those flaws, gaps, and shortcomings remain. While we encourage the Department to carefully consider any additional commitments that the companies may propose as part of the COPA application, FTC staff remains concerned that behavioral remedies generally are far inferior to structural remedies because they are difficult and costly to construct, implement, monitor, and enforce. The requirement to agree to commitments also may be eliminated by legislative or other changes. Moreover, once the applicants merge, it will be difficult, if not impossible, to unwind the merger as a practical matter, notwithstanding any plan the applicants propose or any right the Department has to do so. As such, the applicants may have tremendous leverage to resist enforcement of commitment terms if they fall out of compliance.

IV. Conclusion

FTC staff's previous public comment submissions to the Department contain substantial information and evidence demonstrating that the proposed merger will eliminate competition and likely lead to higher prices, lower quality, and reduced availability of healthcare services in Northeast Tennessee and Southwest Virginia. The FTC staff's submissions have provided detailed evidence to rebut the applicants' claims that the purported benefits of the COPA would be significant enough to outweigh its very likely harm to competition and consumers. The applicants' consultants' reports fail to provide sufficient additional information or analysis to demonstrate by clear and convincing evidence that the purported benefits of the proposed merger would outweigh the serious competitive harm that would likely result from creating a near-monopoly. We are not aware of other evidence or analysis that does so. Therefore, FTC staff remains deeply concerned that this proposed merger will cause significant and irreversible harm to competition and consumers in the region, and we continue to urge the Department to reject Mountain States and Wellmont's COPA application.