FEDERAL TRADE COMMISSION
Washington, DC 20580

DEPARTMENT OF JUSTICE
Washington, DC 20530

I. The Agencies' Interest and Experience in Health Care Competition

Competition is the core organizing principle of America's economy,[3] and vigorous competition among sellers in an open marketplace gives consumers the benefits of lower prices, higher quality goods and services, greater access to goods and services, and innovation.[4] The Agencies work to promote competition through enforcement of the antitrust laws, which prohibit certain transactions and business practices that harm competition and consumers, and through competition advocacy, whereby the Agencies advance outcomes that benefit competition and consumers via comments on legislation, discussions with regulators, and court filings, among other means.

Because of the importance of health care competition to the economy and consumer welfare, this sector has long been a priority for the Agencies.[5] The Agencies have extensive experience investigating the competitive effects of mergers and business practices by hospitals, insurers, pharmaceutical companies, physicians, and other providers of health care goods and services. The Agencies also have provided guidance to the health care community on the antitrust laws, and have devoted significant resources to examining the health care industry by sponsoring various workshops and studies.

In particular, the Agencies have examined the competitive impact of CON laws for several decades. For example, staff from the FTC's Bureau of Economics conducted several studies of CON laws in the late 1980s, both before and after repeal of the federal law that had encouraged the adoption of CON laws across the United States.[6] In addition,

hearings on health care competition matters in 2003, receiving testimony about CON laws and market entry, as well as testimony on many other aspects of health care competition pertinent to CON policy, such as the effects of concentration in hospital markets.[7] In 2004, based on those hearings, independent research, and a public workshop, the Agencies released a substantial report on health care competition issues, including those related to CON laws.[8] Finally, through their competition advocacy programs, the Agencies for many years have reviewed particular CON laws and encouraged states to

II. South Carolina's CON Program and House Bill 3250

South Carolina established its CON program in 1971 "to promote cost containment, prevent unnecessary duplication of health care facilities and services, guide the establishment of health facilities and services which will best serve public needs, and ensure that high quality services are provided in health facilities in this State."[10] The program requires providers to obtain a CON from the Department of Health and Environmental Control (the "Department") before initiating a wide range of projects. Covered projects include the construction or expansion of acute care hospitals, psychiatric hospitals, alcohol and substance abuse hospitals, nursing homes, ambulatory surgery facilities, hospice facilities, radiation therapy facilities, rehabilitation facilities, residential treatment facilities for children and adolescents, intermediate care facilities for persons with intellectual disability, and narcotic treatment programs.[11] Additionally, facilities must obtain a CON before adding certain services, acquiring certain medical equipment, and making certain capital expenditures.[12] In reviewing an application for a CON, the Department considers, among other factors, the need for the project, the financial feasibility of the project, the suitability of the proposed site, the availability of physicians and other required staff, and any adverse effects on other facilities.[13]

South Carolina's CON process can be time-consuming and costly, potentially involving multiple layers of review and spanning many months or years. A party seeking a CON must publish a notification in a newspaper 20 days prior to filing its application.[14] After receiving an application,[15] the Department has 30 days to request additional information.[16] The review period commences once the application is complete and the Department has notifh

example, setting the threshold for CON coverage of capital expenditures at $5 million).[27] The Bill would repeal the CON program, effective January 1, 2018.[28]

III. Analysis of the Likely Competitive Effects of South Carolina's CON Laws

Competition in health care markets can benefit consumers by containing costs, improving quality, and encouraging innovation.[29] Indeed, price competition generally results in lower prices for, and thus, broader access to, health care products and services, while non-price competition can promote higher quality care and encourage innovation. CON laws may suppress these substantial benefits of competition by limiting the availability of new or expanded health care services. For these reasons, the Agencies histy limi

- raise the cost of entry and expansion – by adding time, uncertainty, and the cost of the approval process itself – for firms that have the potential to offer new, lower cost, more convenient, or higher quality services;

- remove, reduce, or delay the competitive pressures that typically incentivize incumbent firms to innovate, improve existing services, introduce new ones, or moderate prices;[32] and

- prohibit entry or expansion outright, in the event that a CON is denied by regulators or the courts.

We urge

process “to forestall competitors from entering an incumbent’s market.” [34] This use of the CON process by competitors can cause more than delay;[35] it can divert

C. CON Laws Can Impede Effective Antitrust Remedies

As the FTC's recent experience in

consumers."[46] That is, because CON laws can limit the supply of competitors, and not just the supply of health care facilities and services, they can foster or preserve provider market power. Thus, South Carolina should consider whether its CON laws could prevent divestiture as an effective tool to remedy anticompetitive mergers in appropriate cases.

D. Interim Provisions in H.B. 3250 Discriminate Against New Entrants

This statement focuses on the impact of CON laws generally because House Bill 3250 would repeal South Carolina's entire CON program, effective January 2018. ea(ld)-10(Tj EMC 8.2whtl0ao)Tj ( )Tj (Tc 0.00)0Tw -TJ 0 530

health care reimbursement system.[49]

Second, those regulatory costs also can work as a barrier to entry, tending to discourage some would-be providers from entering certain health care markets, and tending to discourage some incumbent providers from expanding or innovating in ways that would make business sense, but for the costs imposed by the CON system. Further, even for providers willing to incur those regulatory costs, CON requirements stand as a hard barrier to entry in the event that a CON application is denied. Hence, CON laws can diminish the supply of health care facilities and services, denying consumers options for treatment and raising the prices charged for health care.

Empirical evidence on competition in health care markets generally has demonstrated that consumers benefit from lower prices when provider markets are more competitive.[53] Agency scrutiny of hospital mergers has been particularly useful in understanding concentrated provider markets, and retrospective studies of the effects of provider consolidation by Agency staff and independent scholars suggest that "increases in hospital market concentration lead to increases in the price of hospital care."[54] Furthermore, both the FTC and the Division have engaged in significant enforcement efforts to prevent

suggests that consumers benefit from competition.[55] The Agencies strongly believe that competition can work in health care markets.[56]

The best empirical evidence suggests that greater competition incentivizes providers to become more efficient.[57]

restrict investments that would benefit consumers and lower costs in the long run. Because CON laws raise the cost of investment for all firms, they make it less likely that beneficial investment will occur. The CON application process directly adds to the cost of investment for both incumbents and potential entrants. In addition, CON laws shield incumbents from competitive incentives to invest.

B. Quality of Care Arguments Should Not Preclude CON Reform

Proponents also have argued that CON laws improve the quality of health

CON programs on quality. [64] The volume/outcome relationship is just one mechanism by which quality of health care can be affected by CON laws, so this literature only provides a partial picture of the impact of CON. A more complete picture is obtained by studies that directly analyze the impact of changes in CON laws on health outcomes. The weight of this research has found that repealing or

C. More Targeted Policies May Be More Effective at Ensuring Access to Care and Would Not Inflict Anticompetitive Costs

Another argument advanced by proponents of CON programs is that the programs enable states to increase access to care for their indigent residents and

Dissenting Statement of Commissioner Julie Brill on the Joint Statement of the Federal Trade Commission and the Antitrust Division of the U.S. Department of Justice on Certificate-of-Need Laws and South Carolina House Bill 3250

January 8, 2016

The Federal Trade Commission (the "FTC") and the Antitrust Division (the "Division") of the U.S. Department of Justice (together, the "Agencies") submitted a joint statement today regarding South Carolina House Bill 3250 (the "Bill"). The Bill, which is currently under consideration by the South Carolina Senate, would narrow the application of and ultimately repeal South Carolina's CON laws. [1] The Agencies' statement advocates for the repeal of South Carolina's CON laws. I write separately to explain my position on this issue.

Before serving as a Commissioner at the FTC, I spent over 20 years as a state antitrust and consumer protection regulator, including as Assistant Attorney General for Consumer Protection and Antitrust in Vermont and Senior Deputy Attorney General and Chief of Consumer Protection and Antitrust in North Carolina. Through these years of experience, I have gained a deep understanding of the multifaceted concerns states face with respect to the provision of health care services, particularly in rural and underserved areas.

I agree it is appropriate that the FTC, as an antitrust agency, explain to South Carolina policymakers the considerable benefits that come from competitive markets, and how regulations may adversely affect competition. The FTC's mission statement outlines the important role that we play "[t]o prevent business practices that are anticompetitive" and "to enhance … public understanding of the competitive process." [2]

non-CON states for this proposition.[5] Like many other studies cited by the Agencies, it has meaningful limitations. Importantly, the Lewin Group study expresses caution about its results, noting that it may have been conducted too soon after repeal of the CON laws it studied to observe the long-run impact, and possible detrimental effect, on safety-net hospitals. The Lewin Group also did not analyze the effect of repealing CON within a state—it merely conducted cross-state comparisons. As a result, the Lewin Group study may not reliably predict the effect of CON repeal on safety-net hospitals in South Carolina in particular. Finally, the Lewin Group specifically did not recommend repeal of CON laws in Illinois, which commissioned the group's work; instead, the Lewin Group called on Illinois policy makers to study the issue further.[6] I've attached an Appendix to my Statement to outline my critique of some the other studies discussed by the Agencies in their statement.

In addition, there are other reports which are not cited by the Agencies that urge caution in considering the repeal of CON laws. For example, last year, a health care consulting firm known as Ascendient issued a report in conjunction with North Carolina's review of its CON laws, concluding that until other means of cost control, such as new payment methods, are widespread and universally adopted, and the care for the uninsured addressed, the reduction or elimination of North Carolina's CON program would be premature. While not a rigorous4 Tw -6.64 -1.43 Td [(p)4(h)6(i)5(l)5(wl)5(wl)5(wl)5

1,000 uninsured people than markets with similar incom es in states without CON laws.[8] This evidence that uninsured patients are admitted to hospitals more frequently in CON law states, controlling for ability to pay, suggests that CON laws allow the uninsured greater access to inpatient care.

I do not contend that the Ascendient and Georgia studies

time continue to achieve some of the other policy goals that the CON laws are designed to achieve.

Thank you for consideration of my views.

Appendix

A critique of certain studies cited by the Agencies

1. Vivian Ho & Meei -Hsiang Ku -

The Agencies cite this study by Garmon as evidence showing that dominant providers do not use their market power to cross-subsidize charity care. While Garmon's study finds a lack of evidence that changes in hospital market concentration affect the provision of charity care among private hospitals, public hospitals were excluded from the data analyzed in the study. Thus, the study does not address the relationship between competition and the viability of public hospitals' important role as safety-net providers.

5. Daniel Sherman, FED. TRADE COMM'N, THE EFFECT OF STATE CERTIFICATE-OF-NEED LAWS ON HOSPITAL COSTS: AN ECONOMIC POLICY ANALYSIS (1988);

6. Monica Noether, FED. TRADE COMM'N, COMPETITION AMONG HOSPITALS (1987);

7. Keith B. Anderson & David I. Kass, FED. TRADE COMM'N, CERTIFICATE OF NEED REGULATION OF ENTRY INTO HOME HEALTH CARE: A MULTI-PRODUCT COST FUNCTION ANALYSIS (1986).

The Agencies cite these three FTC economic studies from the 1980s in discussing the FTC's expertise in examining the competitive impact of CON laws. The Agencies rightly do not place any evidentiary weight on these studies, which are quite outdated now, especially given how much health care markets and the regulatory landscape have changed in the last 30-40 years. Each of the studies evaluated the effects of CON regulation on various aspects of hospital costs, pricing, and expenses, and find no evidence that CON programs led to the savings they were designed to promote. However, the data analyzed in these studies is actually older than the studies themselves: Sherman (1988) looked at 1984 hospital survey data, Anderson and Kass (1986) looked at 1981 Medicare cost reports, and Noether (1987) looked at 1977-78 Medicare and American Hospital Association survey data. Thus, the conclusions drawn in these studies are not very relevant insofar as predicting what will happen in South Carolina in 2016 and future years if it repeals its CON laws.

Not only are these studies extremely outdated, there are other reasons to question whether their conclusions are at all predictive of the effect of changing CON regulations in South Carolina. For example, because they examine data collected roughly within the decade following the establishment of CON laws in the 1970s, the differences in cost between CON and non-CON states that these studies observe might be due to reverse causality. That is, when they observe higher costs in CON states than in non-CON states, this might not be due to a cost-increasing effect of CON laws, but

instead due to states that historically had higher costs being more likely to implement CON laws in the 1970's as a cost control measure. In addition, like some of the more recent studies already cited, none of these studies examine the effect of enacting, repealing or changing CON laws within the same state, or for that matter, any other changes in cost occurring over time due to policy changes. Also, the Anderson and Kass (1986) study, which studied costs for home healthcare providers in CON vs. non-CON states, actually found mixed results: compared to states without CON laws, Anderson and Kass find evidence of higher costs