Statement of the Federal Trade Commission
to the Alaska Senate Committee on Health & Social Services
on Certificate of Need Laws and SB 1
March 27, 2019

Chairman Wilson, and Members of the Committee, my name is Daniel Gilman, an Attorney Advisor in the Federal Trade Commission's Office of Policy Planning. With me today is David Schmidt, Assistant Director of the FTC's Bureau of Economics. Thank you for this opportunity to present the views of the FTC on Certificate of Need laws, often called "CON laws" for short.

Our prepared remarks review recent statements on the effects of CON laws issued jointly by the two federal competition authorities, the FTC and the Antitrust Division of the U.S. Department of Justice

market more easily. Entry and expansion – and often even just the credible threat of entry or expansion – typically restrains health care prices, improves the quality of care, incentivizes innovation, and improves access to care.

Entry restrictions, on the other hand, tend to raise costs and prices. They also limit opportunities for providers to compete not just on price, but also on non-price aspects – like quality and convenience – that may be particularly important to patients. Impeding new entry into health care markets can be especially harmful in rural or other underserved areas. CON laws may delay or block the development of facilities and services where they are needed most and, potentially, reinforce market power that incumbent providers may enjoy in already-concentrated areas.

II. Incumbent Providers May Exacerbate the Competitive Harm From These Entry Barriers by Taking Advantage of the CON Process – and not Merely its Outcome – to Protect Their Revenues.[7]

The strategic use of the CON process by competitors can cause more than delay.[8] It can divert scarce resources away from health care innovation and delivery, as potential entrants incur legal, consulting, and lobbying expenses responding to competitor challenges, and as incumbents incur expenses in mounting such challenges.[9] Moreover, as the FTC's recent experience in *FTC v. Phoebe Putney* shows,[10] CON laws can entrench anticompetitive mergers by limiting the ability of antitrust enforcers to implement effective structural remedies to consummated transactions.

III. The Evidence Does Not Show that CON Laws Have Achieved Their Goals

States originally adopted CON programs over 40 years ago as a way to control health care costs and mitigate the incentives created by a cost-plus based health care reimbursement system.[11] Although this type of reimbursement system has mostly gone away, CON laws remain in force in a number of states, and CON proponents continue to raise cost control as a justification. Proponents also argue that CON laws improve health care quality while increasing access. The evidence suggests otherwise:

- Empirical evidence on competition in health care markets generally has demonstrated that more competition leads to lower prices.[12] FTC scrutiny of

[6] *See* A DOSE OF COMPETITION, *supra* note 4, at ch. 8 at 4 (discussing examples of how CON programs limited access to new cancer treatments and shielded incumbents from competition from innovative newcomers).

[7] A DOSE OF COMPETITION, *supra* note 4, Exec. Summ. at 22; *see also* Tracy Yee et al., Health Care Certificate-of-Need Laws: Policy or Politics? 2, 4 (Research Br. No. 4, Nat'l Institute for Health Care Reform May 2011) [hereinafter, Policy or Politics?] (interviewees stated that CON programs "tend to be influenced heavily by political relationships, such as a provider's clout, organizational size, or overall wealth and resources, rather than policy objectives," that, in Georgia, "large hospitals, which often have ample financial resources and political clout, have kept smaller hospitals out of a market by tying them up in CON litigation for years," that the CON process "often takes several years before a final decision," and that providers "use the process to protect existing market share – either geographic or by service line – and block competitors"). This can cause more than delay. Policy or Politics?, at 5 ("CONs for new technology may take upward of 18 months, delaying facilities from offering the most-advanced equipment to patients and staff."). It can divert scarce resources away from health care delivery and innovation, as potential entrants incur legal, consulting, and lobbying expenses responding to competitor challenges.

[8] *See, e.g.*, Policy or Politics?, *supra* note 7, at 5 ("CONs for new technology may take upward of 18 months, delaying facilities from offering the most-advanced equipment to patients and staff.").

[9]

higher prices.")); *see also, e.g.*, Joseph Farrell et al.,

https://www.ftc.gov/reports/retrospective-analysis-clinical-quality-effects-acquisition-highland-park-hospital-evanston.

[19] Cutler, *supra* note 18, at 63 (finding that, following repeal of Pennsylvania's CON program, incumbent hospitals "were not put in a precarious position by the elimination of CON"); THE LEWIN GROUP, AN EVALUATION OF ILLINOIS' CERTIFICATE OF NEED PROGRAM: PREPARED FOR THE STATE OF ILLINOIS COMMISSION ON GOVERNMENT FORECASTING AND ACCOUNTABILITY ii, 27-28 (2007), http://cgfa.ilga.gov/Upload/LewinGroupEvalCertOfNeed.pdf ("Through our research and analysis we could find no evidence that safety-net hospitals are financially stronger in CON states than other states.").

[20] Christopher Garmon, *Hospital Competition and Charity Care*, 12 FORUM FOR HEALTH ECON. & POL'Y 1, 13 (2009).