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SUPREME COURT OF THE STATE OF WASHINGTON

WASHINGTON STATE HOSPITAL ASSOCIATION,

Respondent,

v.

WASHINGTON STATE DEPARTMENT OF HEALTH,

Appellant.

BRIEF OF AMICUS CURIAE

**ASSOCIATION OF WASHINGTON
PUBLIC HOSPITAL DISTRICTS**

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George H. Pink and G. Mark Holmes, *What happens before and after a rural hospital closes?* at 2 (Mar. 17, 2015) [“Pink and Holmes”], *available at* <http://extension.wsu.edu/ahec/conferences/cah-rhc/cah/schedule/Documents/CAH%202015/A3%20-%20Pink%20PPT%20slides.pdf> 14, 15, 16

King County PHD No. 1, Minutes from Jan. 11, 2011 to May 23, 2011, *available at* <http://www.valleymed.org/boc-meetings/> 12

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WASHINGTON STATE AUDITOR’S OFFICE, ACCOUNTABILITY
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 (Dec. 8, 2011), *available at*
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WASHINGTON STATE DEPARTMENT OF HEALTH, RURAL
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I. INTRODUCTION

Under the “New Control Rule,” the Department of Health expands its Certificate of Need review beyond hospital sales and leases to include *any event that results in any change of control of any part of a hospital*. As explained by Respondent Washington State Hospital Association, this plainly exceeds the Legislature’s grant of authority to the Department.

The Department’s rationale for expanding its Certificate of Need jurisdiction (need for public process over access to services) is, moreover, irrelevant for so-called “change of control” transactions involving nearly half of Washington’s hospitals—specifically, the 39 hospitals already owned by the public and governed by elected public hospital district commissioners.

Each local community, represented by its elected commissioners in open public fora, is in the best position to determine how to preserve access to quality health care services, including by evaluating local market factors, resources, and community need. Redundant Certificate of Need review will only serve to burden public hospital districts, most of which serve the state’s rural areas, with costs and delays that will jeopardize the continued delivery of comprehensive health care.

The Association of Washington Public Hospital Districts requests that this Court reject the New Control Rule.

II. IDENTITY AND INTEREST OF AMICUS CURIAE

The Association of Washington Public Hospital Districts advocates for Washington's 57 public hospital districts organized under ch. 70.44 RCW, 39 of which operate hospitals. Most districts serve rural communities and some are the only inpatient provider of health care in the area they serve. They are the essential link to many health services, including primary care, specialty care, mental health, and public health.

In addition to the 39 public hospital districts that operate hospitals, their individual board commissioners support the relief sought by Respondent Washington State Hospital Association. *See* Appendix A.

III. STATEMENT OF THE CASE

The Association of Washington Public Hospital Districts relies on the Washington State Hospital Association's statement of the case.

IV. ARGUMENT

The Department of Health offers two policy justifications for expanding Certificate of Need ("CN") review beyond hospital sales and leases to include "any transaction in which the control, either directly or indirectly, of part or all of any existing hospital changes" (the "New Control Rule"): (1) the public hears about hospital affiliations only after they are finalized and publicly announced;¹ and (2) CN review is the only

¹ Appellant's Br. at 23.

mechanism available to preserve access to services when a change of control occurs.² WAC 246-310-010(54). Both arguments are misplaced with respect to transactions involving public hospital districts (“PHDs”).

PHDs are municipal corporations, created by the voters, governed by elected commissioners, and ultimately accountable to the public. Ch. 70.44 RCW. They are immersed in public processes required by PHD statutes and general open government laws, including the Open Public Meetings Act and the Public Records Act. Ch. 42.30 RCW; ch. 42.56 RCW. The Department’s concern over lack of transparency and public involvement in PHD transactions is therefore unfounded.

Elected commissioners also know their community’s health care needs better than the Department and are therefore in a better position to prioritize, deliver, and ensure continued access to services. Particularly for rural PHDs, CN review threatens to increase costs, delay service-preserving collaborations and divert local taxpayer funds away from service delivery. These considerations are likely why the Legislature consistently refrains from subjecting PHD change of control transactions to costly CN review. Washington’s PHDs request that this Court reject the New Control Rule.

² Appellant’s Br. at 22.

A. As Public Entities, Public Hospital Districts By Nature Serve Community Interests And Ensure Public Oversight Over Change Of Control Transactions.

In 1945, the Legislature authorized local communities to create PHDs to operate their own hospitals and deliver health care services. Laws of 1945, ch. 264. As special purpose municipal corporations funded by property taxes, PHDs operate within the limits of their expressly granted authority and also under Washington's broad sunshine laws. Because they are owned and governed by local citizens, PHDs necessarily tailor their services to meet their individual communities' unique needs. The Department's concern about lack of transparency and public oversight and arbitrary service termination is therefore misplaced when PHDs enter into change of control transactions.

1. Acting through elected commissioners and within the limits of local government law, the voters ultimately control all public hospital district decisions.

Local communities vote to create PHDs and to elect the commissioners that govern them. RCW 70.44.020-.040. The elected commissioners must seek reelection and, every six years, the voters may replace them. RCW 70.44.040(1). They are required to appoint and direct a superintendent to manage the PHD's facilities and programs. RCW 70.44.070. The superintendent is hired "at will" and is directly accountable to the commission. RCW 70.44.070-.090.

PHD commissioners and the superintendent are PHD fiduciaries bound by the Code of Ethics for Municipal Officers. They are prohibited from receiving any beneficial interest in PHD contracts, using their positions for private gain, or misappropriating their powers of office. *See, e.g.,* CONST. ART. XI, § 14; ch. 42.23 RCW; ch. 42.20 RCW.

As special purpose municipal entities, PHDs exercise only those powers expressly granted by statute or those necessarily or fairly implied by express powers. *See* RCW 70.44.060; *Chemical Bank v. WPPSS*, 99 Wn.2d 772, 792, 666 P.2d 329 (1983). PHDs may not own private stock or bonds, give or loan public funds, or lend their credit for private purposes, except in support of the poor or infirm. CONST. ART. VIII, §§ 5 and 7. PHD indebtedness is limited by the Washington constitution, state statute, and subject to voter approval. *See, e.g.,* CONST. ART. VIII, § 6; RCW 39.36.020. Except for contracting with hospital chaplains, PHDs may not fund or support religious establishments, including by adopting or promoting religious doctrines. CONST. ART. I, § 11.

Finally, PHDs must conduct business under Washington's broad sunshine laws. The Open Public Meetings Act ensures that PHD commissions' "actions be taken openly and that their deliberations be conducted openly." RCW 42.30.010. PHDs must publish advance notice of meeting times, locations, and agendas. RCW 42.30.070-.080. Any

person may attend. RCW 42.30.040. During meetings, commissioners conduct business by formal motion or resolution in open session, with resolutions requiring a majority vote of the entire commission for adoption. RCW 70.44.050. All formal actions and nearly every deliberation must therefore be open to the public. RCW 42.30.030.

Similarly, under the Public Records Act, all PHD records, with limited exception, are open to public inspection and copying, from formal resolutions to purchase orders for janitorial supplies. RCW 42.56.070(1). The Department's concern over "backroom deal-making"³ is simply an impossibility. The state's broad sunshine laws require transparency in PHD operations and prohibit PHDs from entering into secret transactions.

By establishing a system of locally-elected commissioners that operate under limited grants of authority and open government laws, the Legislature has established a framework for local elected officials, and not state agencies, to determine the services needed in their communities in a manner that ensures an open and public process.

2. The Legislature granted the voters, not the Department, authority to decide PHD corporate changes.

Like most municipal corporations, PHDs may change their corporate identities only after following specific statutory procedures, many of which require voter approval. A PHD may consolidate with

³ Appellant's Br. at 23.

another PHD only by following the consolidation procedures for cities and towns under ch. 35.10 RCW. RCW 70.44.190. Consolidation must be discussed at one or more public meetings and approved by the voters. RCW 35.10.410, .450. Although a change of control would occur as a result of consolidation, it is unlikely the Legislature contemplated that a voter-approved consolidation would be subject to CN review as a “sale, purchase, or lease” of an existing hospital. RCW 70.38.105(4)(b).

A PHD may also divide into two new PHDs. RCW 70.44.350. The commission must find that division is in the public interest, and its plan of division must be reviewed by the superior court and ratified by the voters. RCW 70.44.350-.380. Existing hospital facilities are divided between the new PHDs. RCW 70.44.360. Under the New Control Rule, it is unclear whether CN review would occur during plan adoption, or during court review, or after voter approval. RCW 70.44.360-.380. More likely, the Legislature did not intend CN review at all.

3. Elected commissioners are best suited to prioritize health care needs in their communities and hold the legal authority to do so.

Under the management framework established by the Legislature (and ratified by the voters upon each PHD’s incorporation), commissioners and superintendents ensure each PHD fulfills its statutory purpose to provide appropriate hospital and health care services to district

residents and other individuals who need those services. RCW 70.44.003, .007, .060.⁴ Each PHD must therefore take a community-focused, holistic approach to service delivery, evaluating existing service availability, including from other community providers.

The Rural Strategic Plan Steering Committee, a diverse statewide coalition dedicated to improving the health of rural communities,⁵ confirms that local PHD governance ensures that communities direct health care decision-making. The Committee's "Strategic Plan" notes:

Hospital Districts are governed by boards elected by the citizens served by the hospital district. De facto, this form of governance assures a community-centric focus for the hospital district.⁶

The Department's concern that CN review provides the only mechanism for the public to oversee service continuation⁷ is therefore unfounded. The public already performs this function through its elected commissioners.

The Legislature does not, moreover, require PHDs to provide any particular health care services.⁸ Instead, the Legislature defers to

⁴ See AGO 2013 No. 3 at p.3.

⁵ The Committee was funded through a Medicare Rural Hospital Flexibility Grant Program administered by the Department of Health. The Committee was comprised of Department and local health officials, hospital and provider executives, community members, and academics. See RURAL STRATEGIC PLAN STEERING COMMITTEE, RURAL HEALTH CARE: A STRATEGIC PLAN FOR WASHINGTON STATE i-iii (2d ed. 2012) ["RURAL STRATEGIC PLAN"], available at <http://www.wsha.org/0316.cfm>.

⁶ RURAL STRATEGIC PLAN at 32.

⁷ Appellant's Br. at 22-23.

⁸ See generally AGO 2013 No. 3 at p.3 (noting PHDs "may" provide any number of health care services, some of which the Department might wish to regulate, but citing no

individual communities, hospitals, and providers to determine appropriate services based on the individual community's needs and circumstances. The Department may not use CN review to end run the Legislature and dictate services without legal authority to do so.⁹

4. PHDs enter into affiliation transactions to maintain services, not to terminate care.

The Department broadly asserts that Washington hospitals are “evading the public process and benefit of certificate of need review” by calling their transactions affiliations or strategic partnerships rather than sales, purchases or leases, and cities concern that these transactions may result in service terminations.¹⁰ These assertions are completely false with respect to PHD affiliations. PHDs enter into joint agreements to *maintain and expand* health services for their residents.

Stabilizing and expanding services at Valley General Hospital (“VGH”)¹¹ is a prime example of why PHDs enter into affiliation transactions. For several years, VGH experienced operating losses and

requirement that PHDs provide any specific service). Indeed, service delivery among PHDs ranges from public health and wellness programs to advanced primary and tertiary care hospitals. Compare VERDANT HEALTH COMMISSION (community wellness center, community health and wellness programs, at <http://verdanthealth.org/about-us/our-work/>), with SKAGIT REGIONAL HEALTH (hospital, advanced oncology, network of community and specialty care clinics, at <http://www.skagitvalleyhospital.org/About-Us/Facilities>).

⁹ See, e.g., Appellant's Br. at 22 (expressing a desire to require hospitals to provide pediatric care without citing a law that requires any hospital or facility to do so).

¹⁰ Decl. Of Janis R. Sigman In Support Of Mot. For Stay ¶ 6; see also Appellant's Mot. For Accelerated Review at 2-3.

¹¹ VGH is owned by Snohomish County Public Hospital District No. 1.

service terminations. In a 2013 audit, the State Auditor found that VGH was at risk of missing financial obligations or failing to provide services at current levels.¹² In fact, VGH had already closed its inpatient psychiatric and obstetrics services. As a solution, VGH sought a potential buyer or lessee of the hospital, which it found in Capella HealthCare.

Capella proposed to lease the hospital for 40 years with a capital commitment of approximately \$30 million.¹³ The parties underwent CN review for the lease, which the Department approved,¹⁴ but Capella ultimately withdrew from the deal. Unable to find a new buyer or lessee, VGH approached King County PHD No. 2 (EvergreenHealth) to explore an affiliation. VGH did not intend to evade CN review (which it had already received) with an affiliation, but was facing the practical reality that no third party wanted to invest significant capital required by a lease.

VGH now operates under a joint operating board with representatives from both PHD commissions.¹⁵ Under the alliance agreement, EvergreenHealth helped to reestablish portions of Valley

¹² WASHINGTON STATE AUDITOR'S OFFICE, ACCOUNTABILITY AUDIT REPORT: PUBLIC HOSPITAL DISTRICT NO. 1 OF SNOHOMISH COUNTY (VALLEY GENERAL HOSPITAL) 1, 5 (Jan. 8, 2013), available at <http://portal.sao.wa.gov/ReportSearch/Home/ViewReportFile?arn=1009414&isFinding=false&sp=false>.

¹³ See Sharon Salyer, *Public can weigh in on Tennessee firm's proposed lease of Monroe hospital*, EVERETT DAILY HERALD (Jan. 25, 2012), available at <http://www.heraldnet.com/article/20120125/NEWS01/701259860>.

¹⁴ See WASHINGTON STATE DEPARTMENT OF HEALTH, CN12-07 (Dec. 8, 2011), available at <http://www.doh.wa.gov/portals/1/Documents/2300/12-07eval.pdf>.

¹⁵ See EVERGREENHEALTH MONROE, ALLIANCE GOVERNANCE BOARD, available at http://evergreenhealthmonroe.com/about_us/alliance_governance_board.asp.

General's obstetrics services (prenatal and chemical dependency care for pregnant women), and the PHDs are evaluating options to restart deliveries at the hospital.¹⁶ EvergreenHealth also supported additional physician resources and new services, including pulmonary rehabilitation and the anti-coagulation clinic.¹⁷

CN review over the alliance agreement did not occur,¹⁸ but the PHDs' standard processes allowed the public to consider the alliance in dozens of open public meetings in Monroe and Kirkland.¹⁹ Contrary to the Department's warnings about secret transactions and the public first hearing about deals only after they are finalized,²⁰ these communities knew about affiliation and had many opportunities to comment.

5. CN review is unnecessary for PHD interlocal operating agreements among public entities.

PHDs are also authorized to operate services cooperatively with other governmental entities under the Interlocal Cooperation Act ("ICA").

¹⁶ See Sharon Salyer, *Valley General's name to change in final step to partnership*, EVERETT DAILY HERALD (Dec. 12, 2014), available at <http://www.heraldnet.com/article/20141212/NEWS01/141219700>.

¹⁷ *Id.*; see also Sharon Salyer, *Despite auditor's suggestion, Monroe hospital says no cuts in services*, EVERETT DAILY HERALD (Apr. 6, 2015), available at <http://www.heraldnet.com/article/20150406/NEWS01/150409457>.

¹⁸ Appellant's Mot. For Accel. Rev. at 5; Sigman Decl. ISO Mot. For Accel. Rev. ¶ 2.

¹⁹ Snohomish County PHD No. 1 discussed the alliance in at least 20 public meetings prior to authorizing the final agreement. See Minutes from May 30, 2012 to Nov. 14, 2014, available at http://www.valleygeneral.com/about_us/meeting_minutes.asp. Similarly, King County PHD No. 2 discussed the alliance in at least 15 public meetings prior to authorizing the agreement. See Minutes from Oct. 2, 2012 to Nov. 18, 2014, available at https://www.evergreenhealth.com/about_evergreen/governance_leadership/.

²⁰ Appellant's Br. at 23.

Under the ICA, PHDs may participate in cooperative governance over joint activities. Consequently, the public maintains its traditional oversight role in PHD health care planning decisions.

For example, the University of Washington and King County PHD No. 1 entered into an interlocal agreement where both entities formed a joint board to govern the District's health care system as part of UW Medicine. *Pub. Hosp. Dist. No. 1 of King Cnty. v. Univ. of Wash.*, 182 Wn. App. 34, 36, 327 P.3d 1281 (2014). The Washington Court of Appeals upheld the transaction as within the PHD's contracting authority under the PHD statutes and the ICA. *Id.* at 39-42. The Department did not require CN review of the transaction and its rationale for the New Control Rule (more public involvement over transactions) fails to explain why CN review should have occurred. The District's commissioners already oversaw the transaction in open sessions.²¹

B. Rural Hospitals Face Enormous Challenges And Accessing Resources Through Affiliations Is Essential.

Providing care in rural communities requires flexibility and efficiency, including through collaborative arrangements.²² The Rural Strategic Plan Steering Committee recognizes that:

²¹ King County PHD No. 1 discussed the agreement in at least 12 public meetings prior to authorizing the agreement. See Minutes from Jan. 11, 2011 to May 23, 2011, available at <http://www.valleymed.org/boc-meetings/>.

²² See RURAL STRATEGIC PLAN at iii, 4.

Health care culture is shifting away from individualism to consolidation and collaboration. Partnering on some level is critical for the survival of many health care providers.²³

This is particularly true for Washington's rural hospitals.

Of the 39 hospitals operated by PHDs in Washington, 32 are critical access hospitals ("CAHs").²⁴ Congress created the CAH designation to improve rural health care access and to reduce rural hospital closures.²⁵ CAHs are small hospitals, generally located in rural areas, with fewer than 25 beds.²⁶ The smallest CAHs serve fewer than 2,500 residents and are typically unable to support specialty services like obstetrics, surgery, or anesthesia.²⁷

CAHs are often the only hospitals in their areas,²⁸ operating in challenging environments and under tenuous financial conditions.²⁹ Rural

²³ *Id.* at 28.

²⁴ See WASHINGTON STATE DEPARTMENT OF HEALTH, RURAL HEALTH: DESIGNATED CRITICAL ACCESS HOSPITALS, available at <http://www.doh.wa.gov/ForPublicHealthandHealthcareProviders/RuralHealth/HealthcareFacilityResources/CriticalAccessHospitals/DesignatedCriticalAccessHospitals>.

²⁵ See WASHINGTON STATE DEPARTMENT OF HEALTH, RURAL HEALTH: CRITICAL ACCESS HOSPITALS, available at <http://www.doh.wa.gov/ForPublicHealthandHealthcareProviders/RuralHealth/HealthcareFacilityResources/CriticalAccessHospitals>.

²⁶ *Id.*

²⁷ See RURAL STRATEGIC PLAN at 12; see also Rachel Alexander, *Pomeroy hospital to close if levy fails*, UNION-BULLETIN (Oct. 11, 2014) (describing how a \$730,000 special levy was needed to keep the hospital), available at <http://union-bulletin.com/news/2014/oct/11/pomeroy-hospital-close-if-levy-fails/>.

²⁸ CAHs are generally located more than a 35-mile drive from the next nearest hospital unless the hospital has been designated by the state as a necessary provider of health care services in the area. 42 C.F.R. § 485.610(c).

²⁹ See AMERICAN HOSPITAL ASSOCIATION, TRENDWATCH: THE OPPORTUNITIES AND CHALLENGES FOR RURAL HOSPITALS IN AN ERA OF HEALTH REFORM 6 (2011) ["CHALLENGES FOR RURAL HOSPITALS"], available at <http://www.aha.org/research/reports/tw/11apr-tw-rural.pdf>.

Americans are more likely to suffer from chronic illness than their urban counterparts and rely on insurance through public programs,³⁰ making care for these patients more complex and costly.³¹ CAHs also face challenges accessing capital to replace aging facilities, acquire modern equipment, and improve operational efficiencies.³² Rural communities also suffer from shortages of health professionals, which makes staffing challenging and costly.³³

These challenges have increased many CAHs' financial distress, leading to over 40 closures nationwide since 2010.³⁴ A recent survey by the American Hospital Association revealed that approximately 38% of CAHs nationally had negative operating revenue and approximately 30% had negative margins.³⁵ CAHs in Washington State are similarly situated. Approximately 30% of Washington CAHs had negative cash flow margins in 2013 and approximately half had two years of negative operating margins.³⁶

³⁰ *Id.* at 5; *See also* RURAL STRATEGIC PLAN at 4, 19.

³¹ *Id.* at 2.

³² CHALLENGES FOR RURAL HOSPITALS at 7.

³³ *Id.* at 10-11.

³⁴ *See* George H. Pink and G. Mark Holmes, *What happens before and after a rural hospital closes?* at 2 (Mar. 17, 2015) ["Pink and Holmes"], *available at* <http://extension.wsu.edu/ahec/conferences/cah-rhc/cah/schedule/Documents/CAH%202015/A3%20-%20Pink%20PPT%20slides.pdf>.

³⁵ *See* AMERICAN HOSPITAL ASSOCIATION, IN CRITICAL CONDITION: THE FRAGILE STATE OF CRITICAL ACCESS HOSPITALS (2011), *available at* <http://www.aha.org/research/policy/infographics/criticalaccess-hospitals.shtml>.

³⁶ *See* Pink and Holmes at 18.

Facing declining revenues and increasing complexities and costs in delivering care to rural residents, CAHs and other rural hospitals in recent years have been forced to discontinue services and reduce staffing, and some have been at risk of closure.³⁷ Financial constraints may prevent CAHs from providing services directly, and they are more commonly turning to affiliations or collaborative arrangements with partners to address their communities' needs.³⁸ In particular, affiliations with larger tertiary providers, such as the Valley General and EvergreenHealth affiliation, can help small and rural hospitals address these issues.

As another example of a collaborative arrangement, at least two rural PHDs formed the North Olympic Peninsula collaboration³⁹ in a strategic affiliation with Swedish Health System to increase access to care on the Olympic Peninsula. Driven by economic pressures and gaps in services, the affiliation provided Olympic Medical Center and Jefferson Healthcare with coordinated access to tertiary services, a needed electronic medical records system, support for health professional recruitment, and

³⁷ See Alexander, *Pomeroy hospital to close if levy fails*, *supra* note 127; Sharon Salyer, *Hospital in Monroe to seek voter OK of tax increase*, EVERETT DAILY HERALD (Apr. 8, 2013), available at <http://www.heraldnet.com/article/20130408/NEWS01/704089937>.

³⁸ RURAL STRATEGIC PLAN at iii, 28-29.

³⁹ The PHDs include Clallam County Public Hospital District No. 2 operating Olympic Medical Center and Jefferson County Public Hospital District No.2 operating Jefferson Healthcare. Clallam Public Hospital District No. 1 operating Forks Community Hospital may also have participated in the collaboration. See RURAL STRATEGIC PLAN at 31.

other vital resources.⁴⁰ The affiliation allowed the PHDs to remain independently-controlled by their elected commissioners, but also offered access to a large regional health system and its significant resources.⁴¹

Expanding CN review to cover these types of strategic alliances will increase rural hospitals' costs with little benefit. The CN application fee alone is over \$40,000, not to mention the additional cost of preparing and participating in the review process.⁴² These costs, in particular for Washington's rural hospitals in which almost half operate with negative margins,⁴³ are material. Given existing PHD open government processes, CN review is not an efficient use of scarce rural PHD resources.

Beyond the issue of cost, CN review of PHD affiliations will not aid the Department's policy goal of transparency and public input. Like the commissions in the Valley General Hospital and King Co. PHD No. 1 affiliations, PHDs would review and approve an affiliation transaction in open and public meetings. CN review would simply add a redundant layer of public process. Such costly review might also deter some rural PHDs from engaging in these efforts at all, undermining the Department's second policy goal of maintaining access to services.

⁴⁰ See RURAL STRATEGIC PLAN at 31.

⁴¹ *Id.*

⁴² WAC 246-310-990(1)(b); see also Resp't's Br. at 5-7 (noting CN review costs ranging from \$100,000 to over \$500,000).

⁴³ See Pink and Holmes at 11.

C. When Amending Public Hospital District Authority, The Legislature Has Consistently Refrained From Expanding Certificate of Need Review To Usurp Commissioner Duties.

Over the last several decades, the Legislature has granted PHDs additional authority to enter into cost-saving partnerships, sometimes requiring additional processes when PHDs enter into specific transactions, and sometimes not. The Legislature has not, however, expanded CN review to supplement, let alone displace, PHD commission decision-making over any of these transactions.

- 1. In 1992, the Legislature authorized rural PHDs to partner with other entities to deliver health care services, *without expanding CN review.***

Recognizing the financial difficulties facing rural PHDs, the Legislature in 1992 found:

[I]t is not cost-effective, practical, or desirable to provide quality health and hospital care services in rural areas on a competitive basis because of limited patient volume and geographic isolation.

Laws of 1992, ch. 161, § 1. In response, lawmakers authorized rural PHDs to enter into cooperative agreements with public and private entities to deliver and pay for health care services. Laws of 1992, ch. 161, § 3(3); RCW 70.44.450(3). Rural PHDs were authorized to allocate health care services among the facilities owned by each participating PHD. Laws of 1992, ch. 161, § 3(1); RCW 70.44.450(1).

Significantly, the same legislation authorized rural PHDs to form nonprofit partnerships with other PHDs under the ICA to administer the cooperative. Laws of 1992, ch. 161, § 4(3)(b); RCW 39.34.030(3)(b). The Legislature did not, however, find it necessary to extend CN review over these new cooperative agreements in health care delivery.

2. In 1997, the Legislature authorized PHDs to form joint operations with other entities, *without expanding CN review.*

Under RCW 70.44.240, PHDs may contract or “join” with other PHDs or public or private entities to provide health facilities and services. In 1997, the Legislature amended the joint activities statute to allow PHDs to establish and participate in nonprofit corporations, partnerships, limited liability companies, or any other legal entities to administer those joint activities. Laws of 1997, ch. 332, § 16. Again, the Legislature did not find it necessary to extend CN review over the newly-authorized joint hospital operation and management activities that did not involve the legal transfer of hospital facilities. Rather, existing processes in the PHD statute, outlined above, were sufficient.

3. In 1997, the Legislature imposed additional public processes over for-profit acquisitions of PHD hospitals, *without expanding CN review.*

At the same time the Legislature authorized PHDs to participate in nonprofit health care entities, it also expanded public review to for-profit

acquisitions of PHD facilities. Laws of 1997, ch. 332, § 18. The for-profit acquisition statute requires PHD commissioners to determine whether the PHD should retain a right-of-first-refusal to repurchase assets acquired by a for-profit entity. RCW 70.44.315(2). The statute also requires PHD commissioners to obtain an independent professional written opinion that the acquisition will not affect the continued existence of accessible, affordable health care in the community served by the PHD. RCW 70.44.315(3). Finally, the PHD must publish the independent opinion, hold a public hearing after the opinion is made available, and refrain from voting on the acquisition until at least 30 days after the hearing. RCW 70.44.315(3)(c), (d).⁴⁴

Under Laws of 1997, ch. 332, the Legislature therefore addressed concerns about for-profit acquisitions and determined that those transactions require additional public scrutiny. But even so, the Legislature did not extend CN review over for-profit acquisitions by change of control transactions. It would be contrary to the Legislature's targeted review process in the for-profit acquisition statute to now shoehorn all PHD hospital change of control transactions (for-profit and nonprofit alike) into the CN administrative review boot.

⁴⁴ See, e.g., *supra* note 13.

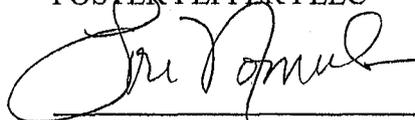
V. CONCLUSION

PHDs and the community-minded commissioners that govern them⁴⁵ support public awareness and involvement in change of control transactions. Existing mechanisms under Washington law, however, already accomplish this goal. PHDs are governed by publicly-elected commissioners, they conduct business openly under Washington's broad sunshine laws, and they hold public hearings on many transactions under the PHD statutes. By their very nature, PHDs embody public involvement and public decision making over community health care choices.

Simply put, CN review over so-called "change of control" transactions will merely duplicate (at great cost) already existing PHD forums for public involvement. It is no wonder that the Legislature, at every opportunity, refrained from extending CN review over PHD change of control transactions. Washington's PHDs accordingly request this Court reject the New Control Rule.

RESPECTFULLY SUBMITTED this 10th day of April, 2015.

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⁴⁵ See Appendix A.

Appendix A
Public Hospital District Hospitals and Commission Chairs

	City	Chair	Hospital Name	Public Hospital District Designation
1.	Aberdeen	Maryann Welch	Grays Harbor Community Hospital	Grays Harbor Public Hospital District #2
2.	Anacortes	Chip Bogosian, MD	Island Hospital	Skagit County Public Hospital District #2
3.	Arlington	Tim Cavanagh, DVM	Cascade Valley Hospital and Clinics	Snohomish County Public Hospital District #3
4.	Brewster	Vicki Orford	Three Rivers Hospital	Okanogan-Douglas Counties Public Hospital District #1
5.	Coupeville	Anne Tarrant	Whidbey General Hospital	Whidbey Island Public Hospital District
6.	Davenport	Jerry Krause	Lincoln Hospital	Lincoln County Public Hospital District #3
7.	Dayton	Ted Patterson	Columbia County Health System	Columbia County Public Hospital District #1
8.	Ellensburg	Jack Baker	Kittitas Valley Healthcare	Kittitas County Public Hospital District #1
9.	Elma	Andrew Hooper	Summit Pacific Medical Center	Grays Harbor County Public Hospital District #1
10.	Ephrata	Keith Kniter	Columbia Basin Hospital	Grant County Public Hospital District #3
11.	Forks	Daisy Anderson	Forks Community Hospital	Clallam County Public Hospital District #1
12.	Goldendale	M. Connie Pond	Klickitat Valley Health Center	Klickitat County Public Hospital District #1
13.	Grand Coulee	Jerry Kennedy	Coulee Medical Center	Douglas, Grant, Lincoln, Okanogan Counties Public Hospital District #6
14.	Ilwaco	Nancy Gorshe	Ocean Beach Hospital and Medical Clinics	Pacific County Public Healthcare Services District #3
15.	Kennewick	P. Donna Vance	Trios Health	Kennewick Public Hospital District #1
16.	Kirkland	Al DeYoung	EvergreenHealth	King County Public Hospital District #2

Appendix A
Public Hospital District Hospitals and Commission Chairs

	City	Chair	Hospital Name	Public Hospital District Designation
17.	Lake Chelan	Tom Warren	Lake Chelan Community Hospital	Chelan County Public Hospital District #2
18.	Leavenworth	Mary Helen Mayhew	Cascade Medical Center	Chelan County Public Hospital District #1
19.	Monroe	Tony Balk	EvergreenHealth Monroe	Snohomish County Public Hospital District #1
20.	Morton	Sheri Hendricks	Morton General Hospital	Lewis County Hospital District #1
21.	Moses Lake	Dale Paris	Samaritan Healthcare	Grant County Public Hospital District #1
22.	Newport	Lois Robertson	Newport Hospital and Health Services	Pend Oreille County Public Hospital District #1
23.	Odessa	H.P. Carstensen	Odessa Memorial Healthcare Center	Lincoln County Public Hospital District #1
24.	Omak	Gary Oestreich	Mid-Valley Hospital	Okanogan County Public Hospital District #3
25.	Othello	Shirley McCullough	Othello Community Hospital	Adams County Public Hospital District #3
26.	Pomeroy	Jeness Evanson	Garfield County Hospital District	Garfield County Public Hospital District
27.	Port Angeles	Tom Oblak	Olympic Medical Center	Clallam County Public Hospital District #2
28.	Port Townsend	Jill Buhler	Jefferson Healthcare	Jefferson County Public Hospital District #2
29.	Prosser	Stephen Kenny, PhD	PMH Medical Center	Prosser Public Hospital District
30.	Pullman	Tricia Grantham	Pullman Regional Hospital	Whitman county Public Hospital District #1
31.	Quincy	Randy Zolman	Quincy Valley Medical Center	Grant County Public Hospital District #2
32.	Renton	Carolyn Parnell	Valley Medical Center	King County Public Hospital District #1

**Appendix A
Public Hospital District Hospitals and Commission Chairs**

	City	Chair	Hospital Name	Public Hospital District Designation
33.	Republic	Nancy Betschart	Ferry County Memorial Hospital	Ferry County Public Hospital District #1
34.	Ritzville	Jerry Snyder	East Adams Rural Hospital	Adams County Public Hospital District #2
35.	Shelton	Nancy Trucksess	Mason General Hospital and Family Clinics	Mason County Public Hospital District #1
36.	Snoqualmie	Joan Young, RN	Snoqualmie Valley Hospital	King County Public Hospital District #4
37.	South Bend	Scott McDougall	Willapa Harbor Hospital	Pacific County Public Hospital District #2
38.	Tonasket	Helen Casey	North Valley Hospital	Okanogan County Public Hospital District #4
39.	White Salmon	Jonathan Blake	Skyline Hospital	Klickitat County Public Hospital District #2

CERTIFICATE OF SERVICE

I hereby certify that on April 10, 2015, I caused a true and correct copy of the foregoing document to be served via email:

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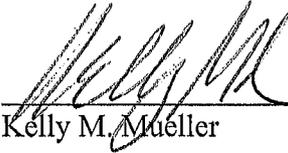
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Washington State Hospital Association v. Washington State Department of Health
90486-3

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on behalf of the Association of Washington Public Hospital Districts

Kindly file the attached and send me an email indicating it has been received. Thank you.

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