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SUPREME COURT OF THE STATE OF WASHINGTON

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b/h

WASHINGTON STATE HOSPITAL ASSOCIATION,

Respondent,

v.

WASHINGTON STATE DEPARTMENT OF HEALTH,

Appellant.

BRIEF OF *AMICI CURIAE* NORTHWEST HEALTH LAW
ADVOCATES, NORTHWEST JUSTICE PROJECT, PUGET SOUND
ADVOCATES FOR RETIREMENT ACTION, AND WASHINGTON
COMMUNITY ACTION NETWORK IN SUPPORT OF APPELLANT

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WAC 246-453-050.....	17

Other Authorities

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Chapin White et al., <i>Understanding Difference Between High-And-Low-Priced Hospitals: Implications for Efforts to Rein in Costs</i> , 33 HEALTH AFFAIRS 324, 328-29 (2014).	13
CN 13-08 Evaluation and Cover Letter, Peace Health’s application to lease and operate Skagit Valley Public Hospital District #2 United General Hospital (May 20, 2013), http://www.doh.wa.gov/Portals/1/Documents/2300/13-08Evaluationandcoverletter.pdf	17, 18
CN 14-13 Department of Health’s Evaluation and Cover Letter, Community Health Systems proposed acquisition of Yakima Regional Medical Center (January 9, 2014), http://www.doh.wa.gov/Portals/1/Documents/2300/2014/14-13EvalCoverLetter.pdf	17
<i>Community Health Systems Completes Acquisition of Health Management Associates</i> , MARKETWATCH, (2014), http://www.marketwatch.com/story/community-health-systems-completes-acquisition-of-health-management-associates-2014-01-27...	18
Cynthia Cox et al., <i>Medical Debt Among People With Health Insurance</i> , KAISER FAMILY FOUND. 5 (2014) http://www.clearpointcreditcounselingsolutions.org/wp-content/uploads/Kaiser-ClearPoint-Medical-Debt-among-People-with-Health-Insurance.pdf	10
David M. Cutler, et al., <i>Hospitals, Market Share, and Consolidation</i> , 310 J. AM. MED. ASS’N. 1964 (2013), http://scholar.harvard.edu/files/cutler/files/jsc130008_hospitals_market_share_and_consolidation.pdf	11

Gautam Gowrisankaran, et. al., *Mergers When Prices Are Negotiated: Evidence from the Hospital Industry*, 101 AM. ECON. REV. 172 (2015).....9

Health Insurance Coverage of the Nonelderly (0-64) with Incomes up to 138% Federal Poverty Level (FPL), THE KAISER FAMILY FOUNDATION (2011-12) <http://kff.org/other/state-indicator/nonelderly-up-to-139-fpl/?state=WA>8

James C. Robinson, *More Evidence of the Association Between Hospital Market Concentration and Higher Prices and Profits*, 1, NAT’L INST. FOR HEALTHCARE MGMT. (2011) <http://www.nihcm.org/images/stories/NIHCM-EV-Robinson-Final.pdf>10

John Birkemeyer et al., *Hospital Volume and Surgical Mortality in the United States*, 346 New Eng. J. Med. 1128, 1130 (2002), <http://www.nejm.org/doi/pdf/10.1056/NEJMsa012337>..... 14

Julie Appleby, *As They Consolidate, Hospitals Get Pricier*, KAISER HEALTH NEWS (Sept. 26, 2010), <http://www.kaiserhealthnews.org/stories/2010/ september/26/hospital-mergers-costs.aspx>.....12

Kristin Madison, *Hospital Mergers in an Era of Quality Improvement*, 7 HOUS. J. HEALTH L. & POL’Y 265, 272-80 (2007), https://www.law.uh.edu/hjhlp/Issues/Vol_72/Madison.pdf.....9

Leemore Dafny, *Estimation and Identification of Merger Effects: An Application to Hospital Mergers*, 52 J.L. & ECON. 523 (2009) <http://www.nber.org/papers/w11673.pdf>11

Martin Gaynor & Robert Town, *The Impact of Hospital Consolidation – Update*, ROBERT WOOD JOHNSON FOUND. 1 (2012), http://www.rwjf.org/content/dam/farm/reports/issue_briefs/2012/rwjf73261.....10, 11

Medical Cost Trend: Behind the Numbers 2014, PRICEWATERHOUSECOOPERS HEALTH RESEARCH INSTITUTE (2013), http://www.pwc.com/en_us/us/health-industries/behind-the-numbers/assets/medical-cost-trend-behind-the-numbers-2014.pdf..... 11

Michelle M. Doty & Alyssa L. Holmgren, *Health Care Disconnect: Gaps in Coverage and Care for Minority Adults Findings from the Commonwealth Fund Biennial Health Insurance Survey (2005)*, THE COMMONWEALTH FUND., 6 (2006), <http://www.commonwealthfund.org/publications/issue-briefs/2006/aug/health-care-disconnect--gaps-in-coverage-and-care-for-minority-adults--findings-from-the-commonwealt> 11

Molly Rosbach, *In face of Health Care Consolidation, Memorial Hospital is at a Crossroads*, YAKIMA HERALD, Sept. 7, 2014, <http://www.yakimaherald.com/home/2193203-8/in-face-of-health-care-consolidation-memorial-hospital> 14

Multicare/Tacoma General Hospital and Franciscan/St. Joseph’s Medical Center CoNs Evaluation, March 28, 2012, www.doh.wa.gov/Portals/1/Documents/2300/11-0711eval2.pdf..... 17, 18

Office of the Attorney General of the State of Massachusetts, *Examination of Health Care Cost Trends and Cost Drivers* 17 (2010), <http://www.mass.gov/ago/docs/healthcare/2013-hcctd.pdf>..... 13

Robert Town et al., *Hospital Consolidation and Racial/Income Disparities in Health Insurance Coverage*, 26 HEALTH AFFAIRS 1170, 1178 (2007), <http://content.healthaffairs.org/content/26/4/1170.full.pdf>. 19

Shannon Brownlee & Vikas Saini, *Bigger Hospitals Mean Higher Prices, Not Better Care*, Bloomberg View (Feb. 18, 2014), <http://www.bloombergvew.com/articles/2014-02-18/bigger-hospitals-mean-higher-prices-not-better-care> 9

Tamara Hayford, *The Impact of Hospital Mergers on Treatment Intensity and Health Outcomes*, at 2 (Cong. Budget Off., Working Paper 2011-5, 2011), http://www.cbo.gov/sites/default/files/cbofiles/attachments/10-06-2011-Hospital_Mergers.pdf. 14

The Impact of the Coverage Gap in States not Expanding Medicaid by Race and Ethnicity, KAISER FAMILY FOUND. 1 (December 17, 2013), <http://files.kff.org/attachment/issue-brief-the-impact-of-the-coverage-gap-in-states-not-expanding-medicaid-by-race-and-ethnicity>..... 14, 19

Thomas Bodenheimer, *High and Rising Health Care Costs Part 1: Seeking an Explanation*, 142 MED. AND PUB. ISSUES 847 (2005), <http://annals.org/article.aspx?articleid=718406>.....11

WASH. DEP'T OF HEALTH, HOSPITAL POLICIES: CHARITY CARE, <http://www.doh.wa.gov/DataandStatisticalReports/HealthcareinWashington/HospitalandPatientData/HospitalPolicies>.....16

WASHINGTON HEALTH BENEFIT EXCHANGE, *Washington Health Benefit Exchange Second Annual Enrollment Report* (2015), http://wahbexchange.org/files/9914/2740/7310/2015_Enrollment_Report_2_032615.pdf.....19

Washington State Senate Ways and Means Committee, *A Citizen's Guide to the Washington State Budget 5* (2015), <http://leg.wa.gov/Senate/Committees/WM/Documents/2015CGTB.pdf>7

William Vogt & Robert Town, *How Has Hospital Consolidation Affected the Price and Quality of Hospital Care*, ROBERT WOOD JOHNSON FOUND. (2006), http://www.rwjf.org/content/dam/farm/reports/issue_briefs/2006/rwjf12056/subassets/rwjf12056_1.....10

I. STATEMENT OF THE CASE

The Appellant's Opening Brief (Dept. Br.) accurately discusses the procedural facts at bar and is incorporated by reference. Dept. Br. 4-12.

II. IDENTITY AND INTEREST OF AMICI

Northwest Health Law Advocates, Northwest Justice Project, Puget Sound Advocates for Retirement Action, and Washington Community Action Network advocate for or have members who are low-income health care consumers and have participated in Certificate of Need advocacy. More detail on amici's interests is found in their Motion for Leave to File Brief of Amici Curiae in Support of Appellant (at 1-5).

III. INTRODUCTION

Patients and the public have a vital interest in ensuring that hospital transactions that affect cost, quality, and access to health care are transparent and take into consideration the total needs of the affected communities. The Legislature established the Certificate of Need ("CN") program recognizing that transparency and public input are critical elements of health care planning, and that regulatory oversight is needed to control health care costs and ensure access to high quality services. *See* RCW 43.370.030, 70.38.015. In Washington, statewide health planning occurs through a strategic process with the underlying public policy:

[to] promote, maintain, and assure the health of all citizens in the state, provide accessible health services, health

manpower, health facilities, and other resources while controlling increases in costs...

RCW 70.38.015(1). CN review is a critical component of and must be consistent with these statewide strategic planning activities. *See* RCW 70.38.015(1), (2); RCW 43.370.030(3)(b). If changes in hospital ownership and control are permitted to take place outside the CN review process, it severely undermines the Legislature's public policy goals of transparent health planning and regulation focused on preserving access to care, promoting care quality, and controlling costs, as well as the method it established (the CN process) for furthering those goals.

Originally, the Department of Health's (the "Department's") rules governing CN review were designed to ensure that transactions affecting the creation, control, and ownership of health facilities, as most commonly structured or characterized at that time, would be subjected to regulatory review, with public involvement. Recent changes in the nation's and our State's healthcare market threaten to make it easier for these transactions to evade CN review, prompting a fresh look at the rules and their authorizing statutes. Washington, and much of the nation, has gone through a wave of consolidating ownership and control of health care

facilities in recent years.¹ Consolidation is accompanied by a trend to structure and label these transactions as mergers, acquisitions, and affiliations, rather than cash sales or leases, making it easier for transactions to escape CN scrutiny. *See, e.g.*, AR 249-250 (highlighting three transactions in 2013 structured to evade CN review that received decisions of non-reviewability—Providence Health & Services/Swedish Medical Center; Highline Medical Center/Franciscan Health System; and Harrison Medical Center/Franciscan Health System) Ex 2; CP at 232 Ex 3.

The Department's recent amendment of the CN rules was a necessary update to ensure that the program's statutory objectives – strategic health planning focused on transparency and public accountability, cost containment, and maintaining quality, accessible care, especially for the traditionally medically underserved – are achieved through a public process. Affiliations, “corporate restructurings,” mergers, “strategic partnerships,” alignments, and other changes that involve total or partial transfers of hospital managerial or fiscal control may have the same impacts on costs and quality of patient care as more traditional sales, leases, and purchases. These effects on access to services, costs, and quality are what bring these transitions squarely within the CN review

¹ *See*, CP 287-294 (Washington State Hospital Association's (“Hospital Association”) “Hospital Chronology” documenting 14 hospital, healthcare facility, and health care network consolidations between 2009 and 2012). (Ex1).

process. At a time when health facility transactions consolidating our State's hospitals and hospital systems proliferate under a variety of new names, with potentially substantial negative effects on consumers, it is imperative that the state's system for reviewing changes in hospital and health care facilities control applies to transactions "based on the effect that these transactions have on accessibility to health services, cost containment, and quality, rather than the terminology used describing the transactions." Governor's Directive, AR 1-2 Ex 4.

IV. ARGUMENT

A. CN review with its public participation requirements must be available to the full scope of changes in hospital ownership or control covered by the Department's amended rules.

- 1. The Department's CN rule amendments are consistent with the statutory scheme governing the State's health planning process, of which CN review is a key component.*

CN review and public participation in its implementation are integral features of the State health planning process established by the Legislature. This process begins with creating a statewide health resources strategy and regulatory process. RCW 43.370.030(1); 70.38.015(1).

[The State's] strategic health planning efforts must be supported by appropriately tailored regulatory activities that can effectuate the goals and principles of the statewide health resources strategy developed pursuant to chapter 43.370 RCW.

RCW 70.38.015(1). CN review is key component of those regulatory activities, and it must be “consistent with the statewide health resources strategy and public policy goals.” RCW 70.38.015(2). The health strategy must also include:

A health care facilities and services plan that shall assess the demand for health care facilities and services to inform state health planning efforts and direct certificate of need determinations...

RCW 43.370.030(3)(b). The CN statute must be read in the context of the laws creating the health planning system, of which CN review is a critical element. By amending its CN rule, the Department fulfilled its statutory mandate to create a regulatory process “appropriately tailored” to the state’s changing health care market that “[could] effectuate the goals and principles” of the statewide health resources strategy. RCW 70.38.015(1).

2. Public participation is a central part of the statutory CN process and is needed to ensure transparency and community involvement, regardless of how a hospital transaction is labeled.

The statutes creating the CN process make it clear that the Department must have the authority to use that process to review the full

range of transactions covered by its amended rules.² The Legislature and the Department recognized the importance of transparency and public oversight and established these as central components of both the strategic health planning and CN review processes. Public input must be included in the State health strategy's development, and public hearings must be held before the strategy and its health facilities plan can be adopted. RCW 43.370.030(3), (5). In the CN process, the Department must provide public written notice at the beginning of any CN review, including expedited reviews. WAC 246-310-170(1), (2)(a)(ii).³ This notice is furnished to all "interested persons" and anyone who signs up to receive it, as well as by publishing the notice in a local newspaper. WAC 246-310-170(1). The rules also mandate a comment period during which the public may provide feedback on a CN application. WAC 246-310-150(1)(a). The Department

² The plain meaning of the undefined term "sale, purchase or lease" at issue here must be determined in part "from the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." *Ports Ass'n v. Dep't of Revenue*, 148 Wn.2d 637, 645, 62 P.3d 462 (2003). To the extent that those terms may have more than one reasonable interpretation, an agency "may interpret ambiguities within the statutory language through the rule-making process." *Edelman v. State ex rel. Pub. Disclosure Comm'n*, 152 Wn.2d 584, 598, 99 P.3d 386 (2004).

³ CN applications involving purchases and sales of hospitals and hospital systems are subject to an expedited review process. WAC 246-310-110(2)(b)(iii).

may also hold public hearings on the application, at which any “interested persons” may participate.⁴ RCW 70.38.115(9); WAC 246-310-180(2).

These opportunities for community participation in CN reviews are necessary for the program’s success for two reasons. First, by opening up the review to the public, the CN program ensures that patients and communities have transparent access to the information used to make CN decisions and a meaningful chance to express their views on whether a proposed change meets local needs. Second, the Department cannot do its job of determining a proposed transaction’s impact on a community and its most vulnerable members without affording them the ability to participate in the review. As a practical matter, the Department will not have the same breadth and recency of knowledge about the actual availability, affordability, and quality of health care delivered by local hospitals as that possessed by members of the community in which those facilities are located and patients receiving care there. At the same time, the CN review offers community members their only chance to offer evidence of the local impact of a proposed health care facility transaction, and is thus necessary to give the process local accountability.

⁴ Interested persons have the right to demand a public hearing in regular CN reviews, but not in expedited reviews. WAC 246-310-170(8); RCW 70.38.115(9). However, contrary to the Hospital Association’s assertions, the Department has discretion to hold a public hearing as part of an expedited review. *Id. Compare* Hospital Association’s Resp. Br. at 39 *with* the Department’s Reply Brief (Reply Br.) at 14.

CN review also gives regulators a chance to determine the impact of health facility consolidations on the publicly funded health care programs that make up a great part of State and local government budgets and the health care market as a whole.⁵ Many hospitals, particularly in rural and inner-city areas, are funded largely by public programs like Medicaid and Medicare.⁶ Subjecting these transactions to CN review helps to protect against the misspending of public funds.

Public participation is an explicit objective of the CN process and is no less important where a change in control occurs through transactions called a “merger,” “strategic alignment,” “affiliation,” or other nonspecific label, rather than being called a sale, purchase or lease. When health facility transactions are renamed in a way that does not substantially change how the transactions impact the public, they remain fully within the statutory authority of the Department to regulate through the CN process. RCW 70.38.135(3)(c) (the Department has authority to adopt CN

⁵ Washington State Senate Ways and Means Committee, *A Citizen's Guide to the Washington State Budget 5* (2015) (35% of Washington's budget is comprised of health and human services, including health care costs), <http://leg.wa.gov/Senate/Committees/WM/Documents/2015CGTB.pdf>.

⁶ American Hospital Association, *The Opportunities and Challenges for Rural Hospitals in an Era of Health Reform 5*, Trendwatch (2011), <http://www.aha.org/research/reports/tw/11apr-tw-rural.pdf> (finding that sixty percent of rural hospitals' funding comes from public programs); *Health Insurance Coverage of the Nonelderly (0-64) with Incomes up to 138% Federal Poverty Level (FPL)*, THE KAISER FAMILY FOUNDATION (2011-12), <http://kff.org/other/state-indicator/nonelderly-up-to-139-fpl/?state=WA> (stating that 41% of Washington's population is covered by Medicaid, and 5% is covered by other public insurance.) This number has likely increased with Medicaid expansion, thus increasing overall state spending).

program rules); RCW 70.38.015(4)(b) (CN process applies to undefined “sales, purchases, and leases”). The Department has a duty to ensure that the CN program affords patients and communities continued influence in the review process. The amended regulation properly aligns with the statutory scope and purpose of the CN rules, allowing the Department to continue this important function.

B. CN review of mergers, affiliations, and other transfers of control that affect costs, care quality, and access to health care services is necessary and appropriate to fulfilling the aims of the CN statute.

It is critical that these newly-popular and differently-styled transactions be subject to CN review because, however named, hospital consolidation can increase the costs of health care, result in patients receiving poorer quality care, and negatively impact access to care for vulnerable populations⁷ – three key factors considered in the CN process. RCW 70.38.015(1), (5); WAC 246-310-240 (cost containment); WAC 246-310-210(1), (2) (effect of changed services on vulnerable populations;

⁷See, e.g., Gautam Gowrisankaran, et. al., *Mergers When Prices Are Negotiated: Evidence from the Hospital Industry*, 101 AM. ECON. REV. 172, 174 (2015) (finding that hospital charges would increase 3.1 percent in case study merger) (copy available on file with State Law Library); Kristin Madison, *Hospital Mergers in an Era of Quality Improvement*, 7 HOUS. J. HEALTH L. & POL’Y 265, 272-80 (2007), https://www.law.uh.edu/hjhlp/Issues/Vol_72/Madison.pdf (providing a comprehensive review of studies on hospital mergers and quality, finding that evidence that mergers improve quality is limited); Shannon Brownlee & Vikas Saini, *Bigger Hospitals Mean Higher Prices, Not Better Care*, Bloomberg View (Feb. 18, 2014), <http://www.bloombergview.com/articles/2014-02-18/bigger-hospitals-mean-higher-prices-not-better-care>.

adequate access to services for discrete populations and medically underserved groups). This is consonant with the goals this court has recognized as the aims of the CN process—to “provide accessible health services and assure the health of all citizens...while controlling costs.” *King Cnty. Pub. Hosp. Dist. No. 2 v. Wash. State Dep’t of Health*, 178 Wn.2d 363, 366, 309 P.3d 416 (2013).

1. *The CN process is a safeguard against increases in costs of care associated with hospital consolidation.*

Controlling increases in costs and “emphasizing cost control of health services” as part of a statewide strategy to improve overall health access and outcomes are central purposes of the CN program. RCW 70.38.015(1), (5); WAC 246-310-240(2), (3). Hospital consolidation can cause the local health care market to shrink, resulting in increased prices due to a reduced incentive to keep prices down.⁸ Increased costs for care are particularly harmful for low-income and elderly persons and other

⁸ See, e.g., William Vogt & Robert Town, *How Has Hospital Consolidation Affected the Price and Quality of Hospital Care*, ROBERT WOOD JOHNSON FOUND. (2006) (*hereinafter Hospital Consolidation*), http://www.rwjf.org/content/dam/farm/reports/issue_briefs/2006/rwjf12056/subassets/rwjf12056_1; Martin Gaynor & Robert Town, *The Impact of Hospital Consolidation – Update*, ROBERT WOOD JOHNSON FOUND. 1, 2 (2012) (*hereinafter Impact*), http://www.rwjf.org/content/dam/farm/reports/issue_briefs/2012/rwjf73261 (noting that increased pricing at Chicago area hospitals post-merger “established that post-acquisition, hospitals are willing to use their increased market power to raise prices.”); James C. Robinson, *More Evidence of the Association Between Hospital Market Concentration and Higher Prices and Profits*, 1, NAT’L INST. FOR HEALTHCARE MGMT. (2011), <http://www.nihcm.org/images/stories/NIHCM-EV-Robinson-Final.pdf>. (“Results clearly showed that hospitals in concentrated markets, where there is less competition, are able to extract significantly higher payments from private insurers” for six procedures studied.)

vulnerable populations. These communities already struggle to pay bills and may be burdened with medical debt.⁹ Although mergers, affiliations, and other similar transactions are often touted as a means of lowering costs or increasing care quality, the evidence generally supports the opposite conclusion – that they do not guarantee better patient pricing or quality of care. Studies throughout the United States show that hospital consolidation often has a direct negative effect on the price of health care at post-consolidation facilities.¹⁰ In Massachusetts, California, and Florida, where hospital mergers and affiliations have increased since 2006, studies show that “[i]ncreases in hospital market concentration lead to increases in the price of hospital care.”¹¹ These increased prices are

⁹ Cynthia Cox et al., *Medical Debt Among People With Health Insurance*, KAISER FAMILY FOUND. 5 (2014), <http://www.clearpointcreditcounselingsolutions.org/wp-content/uploads/Kaiser-ClearPoint-Medical-Debt-among-People-with-Health-Insurance.pdf>. (“Difficulties with medical bills are more pronounced among the poor and near poor – approximately 4 in 10 nonelderly adults with incomes below 200% of the federal poverty level reported problems affording medical bills.”); *see also* Michelle M. Doty & Alyssa L. Holmgren, *Health Care Disconnect: Gaps in Coverage and Care for Minority Adults Findings from the Commonwealth Fund Biennial Health Insurance Survey (2005)*, THE COMMONWEALTH FUND., 6 (2006) <http://www.commonwealthfund.org/publications/issue-briefs/2006/aug/health-care-disconnect--gaps-in-coverage-and-care-for-minority-adults--findings-from-the-commonwealth> (“African Americans have the highest rates of problems with medical bills and medical debt.”).

¹⁰ *Impact*, *supra* n. 7, at 2. (“The magnitude of price increases when hospitals merge in concentrated markets is typically quite large, most exceeding 20 percent.”).

¹¹ *Id.*; *see also* Thomas Bodenheimer, *High and Rising Health Care Costs Part 1: Seeking an Explanation*, 142 MED. AND PUB. ISSUES 847, 852 (2005), <http://annals.org/data/Journals/AIM/20089/0000605-200505170-00010.pdf>. (“As hospitals consolidated and competition waned, hospitals gained market power and prices of hospital care shot back up.”); Leemore Dafny, *Estimation and Identification of Merger Effects: An Application to Hospital Mergers*, 52 J.L. & ECON. 523, 544 (2009)

generally passed along to patients, either directly or indirectly, through higher costs to patients' health care coverage.¹² Given the evidence that these transactions can have a negative impact on health care costs, it is particularly incumbent—and a direct legislative mandate—on the Department to subject them to the CN process.

2. *CN review can determine if a proposed transaction will have negative impact on the quality of patient care.*

Another key consideration in the CN review process is the impact a proposed transaction may have on quality of care at resultant facilities. RCW 70.38.015(5); WAC 246-310-240(3). When hospitals consolidate through a merger, affiliation, or a similar transaction, the resulting impact on quality of care can be detrimental to patients in the affected community. A patient is concerned about her access to quality care and how much it costs, not how a hospital labels a change in its ownership and

<http://www.nber.org/papers/w11673.pdf>; *Medical Cost Trend: Behind the Numbers 2014*, PRICEWATERHOUSECOOPERS HEALTH RESEARCH INSTITUTE 5, 13 (2013), http://www.pwc.com/en_us/us/health-industries/behind-the-numbers/assets/medical-cost-trend-behind-the-numbers-2014.pdf (“Health industry consolidation has increased more than 50% since 2009... Higher prices are sure to follow in some markets. [H]ospital mergers can lead to price increases of up to 20%.”) (citing *Impact supra* n.7); David M. Cutler, et al., *Hospitals, Market Share, and Consolidation*, 310 J. AM. MED. ASS’N. 1964, 1967-68 (2013), http://scholar.harvard.edu/files/cutler/files/jsc130008_hospitals_market_share_and_consolidation.pdf (“A recent summary cites 8 studies that show price increases in the range of 10% to 40% due to mergers.”) (citing *Health Care Industry Consolidation: Hearing before the H. Ways and Means Subcomm. on Health, 112th Cong.* (statement of Martin Gaynor, Professor Carnegie Mellon University) (2011), http://waysandmeans.house.gov/uploadedfiles/gaynor_testimony_9-9-11_final.pdf.

¹² Julie Appleby, *As They Consolidate, Hospitals Get Pricier*, KAISER HEALTH NEWS (Sept. 26, 2010), <http://www.kaiserhealthnews.org/stories/2010/september/26/hospital-mergers-costs.aspx>.

control. The Department has an interest in subjecting these transactions to review to protect patients and fulfill its statutory mandate to strategically plan health care system changes.

One might hypothesize that post-consolidation increases in a hospital's costs relate to post-consolidation improvements in the quality of its care. A recent study of health care costs conducted by the Massachusetts Attorney General's Office concluded that "results indicate that there is no correlation between price and quality, and certainly not the positive correlation between price and quality we would expect to see in a rational, value-based health care market."¹³ The evidence does not support the conclusion that hospital consolidation, accomplished through hospital mergers, affiliations, and other similar transactions improves quality of care. In fact, the opposite is true—consolidation more frequently has a negative effect on quality of care¹⁴ for understandable reasons.

[R]educing competition may decrease the incentive to improve quality to attract patients [and] disruption caused by unifying two

¹³ Office of the Attorney General of the State of Massachusetts, *Examination of Health Care Cost Trends and Cost Drivers* 17 (2010), <http://www.mass.gov/ago/docs/healthcare/2010-hcctd-full.pdf> (hereinafter "*Examination*"); see also Chapin White et al., *Understanding Difference Between High-And-Low-Priced Hospitals: Implications for Efforts to Rein in Costs*, 33 HEALTH AFFAIRS 324, 328-29 (2014) (study found that high-priced hospitals' service quality, often in concentrated markets, is mixed when measured by outcome-based quality measures). (available on file with State Law Library)

¹⁴ *Hospital Consolidation*, *supra* n. 8, at 11 (Review of effect of hospital mergers on quality finding that "[a]lthough the results...are mixed, a narrow balance of the evidence and the evidence from the best studies indicates that hospital consolidation more likely decreases quality than increases it.") .

independent facilities may negatively affect quality, particularly in the immediate aftermath of the merger.¹⁵

Indeed, increases in negative health effects, including mortality rates, have been reported for certain treatments in post-merger hospitals.¹⁶

We acknowledge that hospital consolidations may not have a uniformly negative impact on patient care. For example, if two nearby hospitals merge and consolidate the provision of a particular health care service at only one, the providers at that facility could become more skilled at the procedure.¹⁷ But, overall access to care could suffer if the affiliating facilities are more distantly separated, eliminating access to the procedure in one area and forcing patients to incur extra expenses to travel to receive the procedure. This concern resonates in Yakima,¹⁸ where Yakima Valley Memorial Hospital is exploring options, including a

¹⁵ Tamara Hayford, *The Impact of Hospital Mergers on Treatment Intensity and Health Outcomes*, at 2 (Cong. Budget Off., Working Paper 2011-5, 2011), http://www.cbo.gov/sites/default/files/cbofiles/attachments/10-06-2011-Hospital_Mergers.pdf.

¹⁶ John Birkemeyer et al., *Hospital Volume and Surgical Mortality in the United States*, 346 NEW ENG. J. MED. 1128, 1130 (2002), <http://www.nejm.org/doi/pdf/10.1056/NEJMsa012337>. (*hereinafter* “Surgical Mortality”) (“find[ing] that hospital mergers are associated with increased treatment intensity and higher inpatient mortality rates among heart disease patients.”) (emphasis added).

¹⁷ Some studies have shown that, for select complex surgical procedures, an increase in patient volume is correlated with better post-surgery results. See e.g., *Id.*, at 1130.

¹⁸ Molly Rosbach, *In face of Health Care Consolidation, Memorial Hospital is at a Crossroads*, YAKIMA HERALD, Sept. 7, 2014, <http://www.yakimaherald.com/home/2193203-8/in-face-of-health-care-consolidation-memorial-hospital>. (“If you can’t get over there [to Seattle], if you’re afraid to go over there...it’s an incredible economic burden.” (*quoting* Dr. Al Brady, identified as an oncologist who practiced for nine years in the area).

strategic partnership with a Seattle-based hospital.¹⁹ CN review provides the opportunity for consumers and community members to raise such concerns. These concerns can then be addressed through the CN process rather than forcing unplanned changes in care access on local patients.

This is the CN statute's intended result. It may not be possible to determine without inquiry whether a specific health facility transaction will have a harmful (or positive) effect on patient care. That some such transactions will pass muster is not a valid basis to excuse them from review. Rather, the CN statute and its implementing rules establish access to and quality of care as key considerations. RCW 70.38.015(5); WAC 246-310-240(3). Because significant evidence demonstrates that patient care sometimes suffers due to hospital consolidations, it is critical these transactions fall within the statutorily-created review process and should not be allowed to evade review.

3. Review of consolidations' impact on low-income and other vulnerable populations is a key component of CN review.

Changes in control of a hospital, regardless of what the transactions are called, can affect policies and planning efforts that ensure access and result in outcomes that disproportionately affect lower-income and racial minority patients. For this reason, another significant factor

¹⁹ *Id.*

considered during CN review is the effect of a proposed hospital transaction on vulnerable populations' access to care. WAC 246-310-210(1)(a), (2). In certain circumstances, the CN process requires the Department to review a proposed transaction's likely effects on "low-income persons, racial and ethnic minorities, women, handicapped persons, and other underserved groups and the elderly to obtain needed health care." WAC 246-310-210(1)(a). The CN review process also considers whether the proposed project "makes a contribution toward meeting the health-related needs of members of medically underserved groups which have traditionally experienced difficulties in obtaining equal access to health services." WAC 246-310-210(2).

A key area of concern to low-income individuals is a hospital's charity care policy. Every Washington State hospital must have a charity care policy to provide free and discounted care to low-income persons; the policy must be submitted for the Department's approval and, when approved, is posted on the Department's website. RCW 70.170.010; 70.170.060; WAC 246-453.²⁰ Hospitals have substantial discretion in establishing the eligibility criteria and scope of assistance for patients above the federal poverty level. RCW 70.170.060(5); WAC 246-453-040,

²⁰ See also, WASH. DEP'T OF HEALTH, HOSPITAL POLICIES: CHARITY CARE, <http://www.doh.wa.gov/DataandStatisticalReports/HealthcareinWashington/HospitalandPatientData/HospitalPolicies>.

050. For this reason, there is an understandable concern that a change in a hospital's control may result in changes to the availability of charity care. Past CN reviews included a consideration of a hospital's level of charity care.²¹ This allows the Department to ensure that, when a change in ownership or control occurs, the hospital maintains its level of charity care and participates in public programs to prevent or mitigate negative impacts of the transaction.

A charity care policy review is particularly important when the Department considers proposed affiliations between hospitals with different missions (e.g., where only one is a non-profit, or where one has a religious orientation towards serving low-income individuals). In such cases, a hospital may be reoriented to costly revenue-generating services and away from charitable ones, narrowing access to care.

In CN proceedings, the Department can and has required hospitals to maintain charity care levels as a condition of approval. In granting a CN to PeaceHealth's application to lease and operate Skagit Valley Public

²¹ See, e.g., PeaceHealth's Evaluation and Cover Letter for its application to lease and operate Skagit Valley Public Hospital District #2 United General Hospital, available at <http://www.doh.wa.gov/Portals/1/Documents/2300/13-08Evaluationandcoverletter.pdf> (hereinafter "*PeaceHealth CN*"); Multicare/Tacoma General Hospital and Franciscan/St. Joseph's Medical Center CoN Evaluations, available at www.doh.wa.gov/Portals/1/Documents/2300/11-0711eval2.pdf (hereinafter "*Multicare CN*"); Community Health Systems' Evaluation and Cover Letter for its proposed acquisition of Yakima Regional Medical Center, available at <http://www.doh.wa.gov/Portals/1/Documents/2300/2014/14-13EvalCoverLetter.pdf> (hereinafter "*CHS CN*").

Hospital, the Department conditioned approval on the post-lease hospital making “reasonable efforts to maintain charity care,” in an amount “not...below the regional average amount of charity care,” and required the hospital to maintain records demonstrating compliance.²² In evaluating a CN application from Community Health Systems (CHS) to acquire Yakima Regional Medical and Cardiac Center (YRMCC) and Toppenish Community Hospital from Health Management Associates, the Department conditioned its approval on CHS’s submission of a charity care policy, using reasonable efforts to provide for charity care as proposed in the policy, providing charity care in an amount comparable to or exceeding the levels provided throughout the region, documenting its compliance with its policy, and notifying the Department of the final outcome of a lawsuit regarding charity care provided at YRMCC.²³

Harms linked to hospital consolidation may fall most heavily on racial and ethnic minorities and low-income individuals in other ways too. Persons of color are less likely to have health insurance coverage than whites, and low-income individuals are less likely to have coverage than

²² See PeaceHealth CN, Multicare CN, *supra* note 20.

²³ See, CHS CN, *supra* note 22; see also, *Community Health Systems Completes Acquisition of Health Management Associates*, MARKETWATCH (2014), <http://www.marketwatch.com/story/community-health-systems-completes-acquisition-of-health-management-associates-2014-01-27>.

middle and high income persons.²⁴ Hospital consolidation has exacerbated already higher uninsurance rates for nonwhites, as compared with whites, and for low-income populations, compared with higher income persons.²⁵

The CN program was specifically designed to review how major changes in health care systems affect vulnerable and historically underserved populations. To permit these transactions to continue without review could imperil access to care for the State's most at-risk citizens. As Washington continues to increase access to coverage through the successful implementation of the Affordable Care Act,²⁶ the State should be diligent in ensuring that hospitals remain in communities where there is a need for services and that consolidation does not negatively impact access, either for the newly insured or those who remain uninsured.

²⁴ See, e.g., *The Impact of the Coverage Gap in States not Expanding Medicaid by Race and Ethnicity*, KAISER FAMILY FOUND. 1 (December 17, 2013), <http://files.kff.org/attachment/issue-brief-the-impact-of-the-coverage-gap-in-states-not-expanding-medicaid-by-race-and-ethnicity> ("Today, there are significant racial and ethnic disparities in health coverage among adults. Overall, among adults, people of color are more likely to be uninsured than Whites (27% vs. 15%), with Hispanics at the highest risk of lacking coverage (33%)"); See also Robert Town et al., *Hospital Consolidation and Racial/Income Disparities in Health Insurance Coverage*, 26 HEALTH AFFAIRS 1170, 1178 (2007) (hereinafter "*Racial/Income Disparities*") (income-based disparities in coverage), <http://content.healthaffairs.org/content/26/4/1170.full.pdf>.

²⁵ See, e.g., *Racial/Income Disparities* at 1177. (Analysis found that, during the period from 1990-2003, the rate of uninsurance for whites in the United States decreased by 1.4%, but that it would have decreased by 1.7% in the absence of hospital consolidation. By contrast, the rate of uninsurance for nonwhites increased by 2% during that time, of which 0.9% was attributable to effects of hospital consolidation. *Id.*

²⁶ *Washington Health Benefit Exchange Second Annual Enrollment Report* (2015), http://wahbexchange.org/files/9914/2740/7310/2015_Enrollment_Report_2_032615.pdf (reporting that as of March 2015 there were 158,302 enrollees in Qualified Health Plans and 533,628 Medicaid enrollees).

V. CONCLUSION

Hospital transactions that effect a change in facility ownership and control in a manner similar to a traditional cash sale purchase, or lease must be subject to public scrutiny to assess whether they will increase patient costs, diminish the quality of care, or negatively impact vulnerable community members. The amended regulation gives the Department and the public the opportunity to provide oversight necessary to ensure that these transactions do not jeopardize access to health care, consistent with the aims of and authority conferred by the Legislature.

Respectfully submitted this April 30, 2015

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I certify the following under penalty of perjury and in accordance with the laws of the State of Washington:

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- b) I filed a copy of this brief with the Washington Supreme Court by emailing the foregoing to supreme@courts.wa.gov.
- c) On April 29, 2015, I placed into the U.S. Mail a copy of the following sources cited in the foregoing brief addressed to the Washington State Law Library and emailed a copy of those sources to above-listed counsel at the listed email addresses:
1. Gautam Gowrisankaran, *et. al.*, *Mergers When Prices Are Negotiated: Evidence from the Hospital Industry*, 101 AM. ECON. REV. 172, 174 (2015);
 2. Chapin White et al., *Understanding Difference Between High-And-Low-Priced Hospitals: Implications for Efforts to Rein in Costs*, 33 HEALTH AFFAIRS 324, 328-29 (2014).

DATED: April 30, 2015, at Seattle, Washington.

/s/ Sarah M. Kwiatkowski
Sarah M. Kwiatkowski (WSBA #42996)

Exhibit 1



Washington Hospital Closures, Openings, Mergers, and Acquisitions

This list does not include Critical Access Hospital conversions, unit changes, or all name changes

Year	Hospital	City	Type of Change	Notes
2Q12	Valley General Hospital <i>EvergreenHealth, December</i>	Monroe	affiliation	
	PeaceHealth Peace Island Medical Center <i>PeaceHealth, November</i>	Friday Harbor	opened	
	Harrison Medical Center <i>Franciscan Health System</i>	Bremerton	pending affiliation	
	Auburn Regional Medical Center <i>Multicare Health System</i>	Auburn	acquisition	
	PMH Medical Center <i>Kadlec Regional Medical Center, April</i>	Prosser	affiliation	
	EvergreenHealth <i>Virginia Mason Medical Center, February</i>	Kirkland	strategic partnership	
	Swedish Health Services <i>Providence Health & Services, February</i>	Seattle	affiliation	
2011	Deaconess Medical Center <i>Integrated system under the Rockwood Health System</i>	Spokane	system integration	
	Valley Hospital Medical Center <i>Renamed Deaconess Hospital and Valley Hospital</i>	Spokane		
	Olympic Medical Center <i>Swedish Health Services, October</i>	Port Angeles	affiliation	
	Central Washington Hospital <i>Wenatchee Valley Medical Center, pending September</i>	Wenatchee	pending affiliation	
	United General Hospital <i>PeaceHealth, pending July</i>	Odessa/Woolley	pending affiliation	
	Valley Medical Center <i>University of Washington Medicine Health System, July</i>	Renton	affiliation	

	Swedish Medical Center/Issaquah Outpatient services and specialty clinics opened, July	Issaquah	opened
	Southwest Washington Medical Center PeaceHealth	Vancouver	affiliation
2010	Stevens Healthcare Swedish Medical Services, September - No longer governed by board of Public Hospital District No. 2 of Snohomish County renamed Swedish Medical Center/Edmonds	Edmonds	affiliation
	Enumclaw Regional Hospital Facility replaced by new construction, now St. Elizabeth Hospital	Enumclaw	replaced, renamed
	Shriners Hospital for Children - Spokane Moved from no-fee status to potential fee for service	Spokane	re-classified
2009	Swedish Medical Center/Issaquah Free-standing emergency hospital; financial reports submitted to DOH - as part of license 001 (Swedish Medical Center/First Hill, Ballard)	Issaquah	opened
	Northwest Hospital and Medical Center University of Washington Medicine Health System. Renamed UW Medicine/Northwest Hospital and Medical Center	Seattle	affiliation
	St. Anthony Hospital New hospital, Franciscan Health System, March 2009	Gig Harbor	opened
2008	Deaconess Medical Center Acquired by Community Health Systems from Empire Health System, changed from nonprofit to for-profit status	Spokane	acquisition
	Valley Hospital and Medical Center Acquired by Community Health Systems from Empire Health System	Spokane Valley	acquisition
	Group Health Eetside Hospital May 1, 2008	Redmond	closed
	Dear Park Hospital Closed by Providence Health and Services, March 2008	Dear Park	closed
2007	Enumclaw Community Hospital Acquired by Franciscan Health System May 2007, renamed	Enumclaw	acquisition

Hospital Chronology

2006	Puget Sound Behavioral Health <i>Closed as an inpatient psychiatric hospital, January 2006</i>	Tacoma	closed
	Good Samaritan Community Healthcare <i>Acquired by Multicare Health System</i>	Puyallup	acquisition
2005	Legacy Hospital Salmon Creek <i>New hospital, Legacy Health, August 2005</i>	Vancouver	opened
	Capital Medical Center <i>Acquired by Cepella Healthcare, November 2005</i>	Olympia	acquisition
2004	Affiliated Health Services <i>Separated to original two hospitals January 2004; Skagit Valley Hospital (207), United General Hospital (206)</i>	Mt. Vernon / Sedro-Woolley	disaffiliated
	Snoqualmie Valley Hospital	Snoqualmie	re-opened
2003	Providence Yakima Medical Center <i>Acquired by Hospital Management Associates, Inc. (HMA)</i>	Yakima	acquisition
	Providence Toppenish Hospital <i>Acquired by Hospital Management Associates, Inc. (HMA)</i>	Toppenish	acquisition
	Snoqualmie Valley Hospital <i>Temporary license suspension, November 2003</i>	Snoqualmie	closed
2001	Snoqualmie Valley Hospital <i>January 2001</i>	Snoqualmie	re-opened
	Wenatchee Valley Hospital <i>New hospital, August 2001, owner, Wenatchee Valley Clinic, purchased beds from Cascadia Valley Medical Center (158)</i>	Wenatchee	opened
	Seattle Cancer Care Alliance <i>New hospital, January 2001, a joint venture of Children's Regional Hospital and Medical Center, University of Washington Medical Center, and Fred Hutchinson Cancer Research Center</i>	Seattle	opened
	Puget Sound Behavioral Health <i>Re-classified as a psychiatric hospital, license number 182</i>	Tacoma	re-classified
2000	Venar Hospital <i>Acquired by Kindred Healthcare, renamed</i>	Seattle	acquisition

	Providence Seattle Medical Center <i>Acquired by Swedish Health Services, renamed</i>	Seattle	acquisition
	Puget Sound Hospital <i>License suspended, acquired by Pierce County, the same license number, and renamed Puget Sound Behavioral Health</i>	Tacoma	closed acquisition
1998	Allenmore Community Hospital <i>Formed Tacoma General Allenmore Hospital (178), license number 148 terminated Tacoma General Hospital</i>	Tacoma	merged
1997	THC Seattle Hospital <i>Acquired by Vencor, Inc., renamed Vencor Hospital Seattle</i>	Seattle	acquisition
	Snoqualmie Valley Hospital <i>June 1997</i>	Snoqualmie	closed
	CPC Fairfax Hospital <i>Acquired by Behavioral Healthcare Corporation, renamed BHC Fairfax Hospital</i>	Kirkland	acquisition
	West Seattle Psychiatric Hospital <i>New hospital, August 1997</i>	Seattle	opened
1996	Fairfax Hospital <i>Acquired by Community Psychiatric Centers, renamed CPC Fairfax Hospital</i>	Kirkland	acquisition
	Capital Medical Center <i>Acquired by Columbia/HCA April 1996, renamed Columbia Capital Medical Center</i>	Olympia	acquisition
1995	Providence Hospital (Everett) <i>Formed Providence General Everett Medical Center (084), license number 027 terminated General Hospital Medical Center (Everett)</i>	Everett	merger
	Seattle 5th Avenue Hospital <i>Acquired from BRIM Healthcare Corporation by YHC, Inc., renamed THC Seattle Hospital</i>	Seattle	acquisition
	Deer Park Health Center and Hospital <i>Acquired by Providence Services</i>	Deer Park	acquisition
1994	Northwest Regional Hospital for Respiratory Care. <i>New hospital, January 1994</i>	Seattle	opened

	Snoqualmie Valley Hospital September 1994	Snoqualmie	re-opened
	St. Luke's Rehabilitation Institute. Operated as separate entity from Deaconess Medical Center (037)	Spokane	opened
1993	St. Luke's Memorial Hospital St. Luke's facility became Deaconess Rehabilitation Institute	Spokane	merger
	Deaconess Medical Center Activity reported under Deaconess 037R license, January 1993	Spokane	
	Mountainview Hospital Converted to counseling center which closed June 1994	Tacoma	closed
1992	Snoqualmie Valley Hospital May 1992	Snoqualmie	closed
	Ballard Community Hospital Facilities renamed Swedish Medical Center/Ballard, and Swedish Medical Center/Seattle	Ballard	merger
	Swedish Medical Center License number 036 terminated, all activity reported under license number 007	Seattle	
	Community Hospital - Yakima October 1992, converted to ambulatory surgery center	Yakima	closed
1990	St. Cabrini Hospital November 1990	Seattle	closed
	West Seattle Community Hospital June 1990	Seattle	closed
	Lakewood Hospital Acquired by Franciscan Health System, renamed	Lakewood	acquisition
	Cascade Oaks Hospital Acquired by St. Peter Hospital (160), license number 218 terminated	Olympia	merger
1989	St. Luke's General Hospital Merged with St. Joseph Hospital (145), license number 188	Spokane	merger
	St. Joseph Hospital (Bellingham) Terminated	Bellingham	
	Humana Tacoma Hospital Acquired by MultiCare Health System, renamed Altamare Community Hospital	Tacoma	acquisition

Hospital Chronology

	Medical Dental Building Hospital <i>Converted to outpatient facility, August 1989.</i>	Seattle	closed
	Riverton General Hospital <i>Acquired by Highline Community Hospital (126), license number 185</i>	Burien	merger
	Highline Community Hospital <i>Terminated</i>	Burien	
1986	Centralia General Hospital <i>Formed Providence Hospital - Centralia (191), license number 184</i>	Centralia	merger
	St. Helen Hospital <i>Terminated</i>	Chesham	
	Mount Linton Hospital (Metaline Falls) <i>January 1988</i>	Metaline Falls	closed
	St. Joseph Hospital (Aberdeen) <i>Purchased by Greys Harbor Community Hospital (063)</i>	Aberdeen	acquisition
	Medical Dental Building Hospital <i>Filed bankruptcy January 1988, re-opened under new ownership, October 1988</i>	Seattle	re-opened
	St. Joseph Southwest Washington (Vancouver). <i>Formed Southwest Washington Medical Center (171), license Number 170 (annulled) Vancouver Memorial Hospital</i>	Vancouver	merger
	Cascade Oaks Hospital	Olympia	opened
1987	St. Francis Community Hospital <i>New hospital, May 1987</i>	Federal Way	opened
	Pacific Medical Center <i>Converted to outpatient facility, July 1987</i>	Seattle	closed
	Monticello Medical Center <i>Formed St. John's Medical Center (Longview), license number 151 terminated</i>	Longview	merger
	St. John's Hospital	Longview	
	Shorewood Osteopathic Hospital	Burien	closed
1986	Northgate General Hospital <i>Purchased by Northwest Hospital, facility converted to outpatient care, license number 106 terminated</i>	Seattle	merger
	Northwest Hospital	Seattle	
		Spokane	closed

	Spokane Doctors Surgical Hospital <i>July 1985</i>		
1985	Central Memorial Hospital (Toppenish) <i>Acquired by Providence Health System, renamed Providence Central Memorial Hospital (198), license number D87 terminated</i>	Toppenish	acquisition
	Valley Memorial Hospital <i>Formed Sunnyside Community Hospital (198), license numbers 082 and 135 terminated</i> Sunnyside General Hospital	Sunnyside	merger
	Black Hills Community Hospital (Olympia), January 1985 (renamed Capital Medical Center, April 1991)	Olympia	opened
	Eye and Ear Hospital (Wenatchee) <i>Converted to short-stay facility briefly, then closed December 1986</i>	Wenatchee	closed
1984	Doctors Hospital (Tacoma) <i>Acquired by MultiCare Health System, converted to outpatient facility, license number 149 terminated</i>	Tacoma	acquisition
	McKay Memorial Hospital <i>Converted to nursing home</i>	Soap Lake	closed
1988	St. Joseph Hospital (Aberdeen) <i>Acquired by Providence Health System</i>	Aberdeen	acquisition
	St. Helen Hospital <i>Acquired by Providence Health System</i>	Chenails	acquisition
	Woodstock Hospital		closed
1980	Doctors Hospital (Seattle) <i>Merged with Swedish Hospital Medical Center (001)</i> Seattle General Hospital	Seattle Seattle	merger
	Deer Park Health Center and Hospital <i>New hospital</i>	Deer Park	opened
1979	Tri-County Hospital	Deer Park	closed
1977	Group Health Eastside Hospital <i>New hospital</i>	Redmond	opened
	Vancouver Hospital <i>Formed Southwest Washington Hospitals (170), license number 002 terminated</i> St. Joseph Community Hospital (Vancouver)	Vancouver	merger

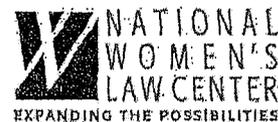
Hospital Chronology

	Edgell Tuberculosis Hospital	Spokane	closed
1975	Nelms Memorial Hospital	Shoquahmie	closed
	Roslyn-Cle Elum Hospital Converted to outpatient facility	Cle Elum	closed
1975	Rosewood Hospital Merged with Central Washington Hospital (1988)	Wenatchee	merger
	St. John Hospital (Port Townsend) Acquired by Jefferson County PHD No. 2 from Sisters of Providence (renamed Jefferson General Hospital in 1985)	Port Townsend	acquisition
1973	Douglas County Memorial Hospital Converted to nursing home	Brewster	closed
	Ferland Hospital	Seattle	closed
	Booth Memorial Hospital	Spokane	closed

Date: Washington State Department of Health CHARS History document, Washington State Hospital Association files, hospital websites.
Sources:



Exhibit 2



November 26, 2013

VIA U.S. MAIL AND ELECTRONIC MAIL

Janis Sigman, Program Manager
Washington State Department of Health
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**Re. Department of Health Proposed Rules to Certificate of Need Regulations and
Hospital Licensing Regulations, Implementing Governor's Directive 13-12**

Dear Ms. Sigman:

The National Women's Law Center and MergerWatch are pleased to submit the following comments in response to the above-referenced proposed changes in WAC 246-310-0101 Certificate of Need Definitions and WAC 246-320-141 Patient Rights and Organizational Ethics.

MergerWatch and the National Women's Law Center are non-profit organizations that are committed to protecting and expanding access to comprehensive women's health services. Since 1972, the National Women's Law Center has worked to protect and advance the progress of women and their families in core aspects of their lives, with an emphasis on the needs of low-income women. MergerWatch assists community-based consumers and health practitioners in protecting patients' rights and their access to comprehensive reproductive health services at secular hospitals when those facilities propose business partnerships with religiously-sponsored hospitals that restrict care based on doctrine. We have provided assistance in more than 115 cases across the country, including several in the state of Washington involving Catholic health systems.

I. Proposed Change to WAC 246-310-010 Certificate of Need Definitions

The proposed rule change would expand the number and type of hospital transactions required to seek state approval by broadening the definition of "sale, purchase, or lease." This important rule change would address the growing problem of hospitals in Washington State entering into agreements and partnerships that, because of their structure, do not require state review, yet result in the discontinuation of important reproductive and end-of-life health care. In the past four years alone, four secular regional medical centers have completed affiliation agreements with three different Catholic health systems in the State of Washington without any state oversight. Currently two publicly-owned facilities are considering similar partnerships with a Catholic health system. All of these partnerships have or will limit community access to reproductive health services and end-of-life care. In fact, the percentage of

acute-care hospital beds under Catholic control has dramatically grown in the state from 28% in 2010 to 35% in 2013. That percentage could reach 44% if all pending proposals are completed.

Typically, when secular hospitals partner with Catholic hospitals, they are asked to ban services that run contrary to *The Ethical and Religious Directives for Catholic Health Care Services* (the *Directives*).¹ These *Directives* prohibit provision of a range of commonly-used reproductive health services, including contraception, sterilization, abortion, many infertility treatments, and even emergency care when a woman's health or life is threatened by a pregnancy. The *Directives* also forbid certain treatment options at the end of life.² As a result, patients are denied access to needed care, as well as counseling, referrals and information regarding treatments of which they may not be aware.

In several recent mergers in the state of Washington, Catholic and secular hospitals have structured their agreements to avoid the Certificate of Need process, while also imposing some or all of the *Directives* on the newly formed health system. For example, the partnership between Swedish Medical Center and Providence Health & Services is an affiliation in name only. Despite Swedish retaining ownership of its assets and public promises that the system would "remain a nonreligious organization,"³ Providence now has control of the governing board of the two systems⁴ and has successfully demanded that Swedish discontinue or restructure financial billing of reproductive health services that the Catholic system finds objectionable.⁵ Swedish is now labeled as a division of Providence⁶ and the two systems have recently submitted a joint proposal for a potential hospital partnership in Yakima, WA, under one name.⁷ These troubling developments demonstrate a clear-cut shift in control from Swedish to Providence that has escaped state oversight and public discourse.

Other Catholic health systems in the state have since taken a cue from the Swedish/Providence transaction. This year, two more stand-alone regional medical centers, Highline Medical Center and Harrison Medical Center, have formed affiliation agreements with Franciscan Health System, a sub-network of a large national system, Catholic Health Initiatives. These partnerships, too, appear to have been structured to avoid state review and, thus, public scrutiny of the potential risks to health care access, especially for reproductive health services and end-of-life care.⁸ Highline Medical Center serves

¹ United States Conference of Catholic Bishops, *Ethical and Religious Directives for Catholic Health Care Services* (June 2009), available at <http://www.usccb.org/issues-and-action/human-life-and-dignity/health-care/upload/Ethical-Religious-Directives-Catholic-Health-Care-Services-fifth-edition-2009.pdf>.

² *Id.* at 31. *Directive 59* allows health care providers to ignore patients' advance directives, including specific requests to end nutrition and hydration.

³ Carol Ostrom, "Swedish alliance with Providence is now complete," *Seattle Times*, Feb. 1, 2012.

⁴ Peter Neurath, "Swedish-Providence affiliation complete," *Puget Sound Business Journal*, February 1, 2012.

⁵ "Will Swedish limit choices for women and dying under Providence deal?," *Crosscut*, Oct. 12, 2011.

⁶ Carol Ostrom, "Swedish alliance with Providence is now complete," *Seattle Times*, Feb. 1, 2012.

⁷ "Yakima's Memorial Hospital considers adding partner," *Yakima Herald*, October 23, 2013.

⁸ See ACLU-WA's letter regarding Request for Department of Health to Decline to Issue Determination of Non-Reviewability Regarding Proposed Affiliation of Franciscan Health System and Harrison Medical Center, July 16, 2013.

vulnerable populations in the Burien-West Seattle area. Harrison Medical Center serves the geographically isolated Kitsap Peninsula.

Both transactions were issued a Determination of Non-Reviewability by the Department of Health, developments that were especially unfortunate considering the level of control Franciscan now has over these traditionally secular medical centers. The overseeing boards of both hospitals are now dominated by Franciscan representatives and both hospitals have imposed religious doctrine on services and policies to satisfy their Catholic parent organization.⁹ ¹⁰ Medical staff at Highline facilities are now required to follow the *Directives* as stipulated in the affiliation agreement with Franciscan.¹¹ Harrison, now labeled "A Part of Franciscan Health System" on its website, has agreed to a ban on abortion services and aid-in-dying as a condition of affiliating with the Catholic system. Most recently, Harrison filed a request to transfer to Franciscan a Certificate of Need application for hospital expansion plans at Harrison Silverdale.¹²

The Department's proposed definition of "sale, purchase, or lease," that includes "any transaction in which control, either directly or indirectly . . . changes to a different person including, but not limited to by contract, affiliation, corporate membership restructuring, or any other transaction" goes a long way towards capturing transactions such as those described above and requiring them to seek Certificate of Need approval. However, we believe the definition could be strengthened to help ensure that hospitals are unable to structure agreements to avoid the Certificate of Need when they impose religious restrictions.

Recommendation: *We suggest that the proposed definition be modified to clarify that "sale, purchase, or lease," includes any transaction in which one partner gains the ability to determine what services are available or what ethical policies will apply in the combined entity or any part thereof. To that end we suggest the following changes to the proposed definition (additional language in bold and capitalized):*

"Sale, purchase, or lease" means any transaction in which the control, **INCLUDING THE ABILITY TO DETERMINE WHAT SERVICES ARE AVAILABLE AND WHAT ETHICAL POLICIES WILL APPLY**, either directly or indirectly, of part or all of any existing hospital changes, to a different person including, but not limited to, by contract, affiliation, corporate membership restructuring, or any other transaction.

Further, we believe the Department of Health has a responsibility to assess how the potential loss of services at a hospital because of a proposed partnership with another entity may affect community access to comprehensive health services. When a negative impact is identified, the Department should

⁹ Highline Medical Center, Franciscan Health System Agreement sec. 13.5.

¹⁰ Leslie Kelly, "Harrison CEO Tries to Calm Nerves About Upcoming Affiliation," Central Kitsap Reporter, June 20, 2013.

¹¹ Highline "acknowledges that it cannot engage in actions that conflict with the ERDs." (Highline Medical Center/Franciscan Health System Agreement sec. 13.5) On file at MergerWatch.

¹² CON transfer request letter on file with the ACLU-WA.

Exhibit 3

1 5. A copy of WSHA's Opening Brief was sent to me by the Department's attorneys. I
2 noted that WSHA said that the Department did not conduct certificate of need
3 reviews for mergers. I compared the 13 mergers on WSHA's document between
4 1979 and 1989 (the last year WSHA's document lists a merger) with the
5 Department's information on these transactions. Six of the 13 had been reviewed
6 through the certificate of need process. Those six mergers are:
7
8 1989 St. Luke's General Hospital/St. Joseph Hospital CN #981
9 1989 Riverton General Hospital/Highline Community Hospital CN #994
10 1988 Centalla General Hospital/St. Helen Hospital (Providence) CN #922
11 1988 St. Joseph Southwest Hospital/Vancouver Memorial Hospital CN #932
12 1987 Monticello Medical Center/St. John's Hospital CN #891
13 1980 Doctors Hospital/Seattle General Hospital (merged with Swedish) CN #316-
14 252 & # 351-295 (two CNs)
15
16 //
17 //
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22 //
23 //
24 //
25 //
26

Exhibit 4

JAY INSLEE
Governor



STATE OF WASHINGTON
OFFICE OF THE GOVERNOR
P.O. Box 40002 • Olympia, Washington 98504-0002 • (360) 902-4111 • www.governor.wa.gov

DIRECTIVE OF THE GOVERNOR 13-12

June 28, 2013

To: Washington State Department of Health
From: Jay Inslee, Governor
Subject: Modernizing the Certificate of Need Process and Ensuring Greater Consumer Transparency with Regard to Health Care Facility Actions and Policies

A large, stylized handwritten signature in black ink, appearing to read "Jay Inslee".

Health care facilities have a leading role in the delivery of health care across Washington State. As recognized in RCW 70.38.015, the Certificate of Need program is an important component in the health resources strategy to promote, maintain, and ensure the health of all citizens in the state by providing accessible health services, health facilities, and other resources.

Washington is poised to fully implement health reform. The state has made important changes in the structure of those state agencies involved in providing health care service, including the Health Care Authority. We have also seen changes in the private health care delivery marketplace, including the structuring of new relationships among health care facilities, provider systems, and insurers.

However, the Certificate of Need process, as set forth in chapter 70.38 RCW and chapter 246-310 WAC, has not kept current with the changes in the health care delivery system in preparation for the implementation of health reform in Washington.

Therefore, I am directing Washington State Department of Health (Department) to commence rulemaking in an expeditious and efficient manner, consistent with the processes in chapter 34.05 RCW. The Department shall consider how the structure of affiliations, corporate restructuring, mergers, and other arrangements among health care facilities results in outcomes similar to the traditional methods of sales, purchasing, and leasing of hospitals, particularly when control of part or all of an existing hospital changes from one party to another.

The Certificate of Need process should be applied based on the effect that these transactions have on the accessibility of health services, cost containment, and quality, rather than on the terminology used in describing the transactions or the representations made in the preliminary documents.

Directive of the Governor 13-12
June 28, 2013
Page 2

The Department's rulemaking process shall also consider ways to improve transparency for consumer information and ease of use, specifically the Department shall ensure hospitals supply non-discrimination, end of life care and reproductive health care policies; and the Department shall ensure that consumers have access to the policies on its webpage. The Department's rulemaking process shall also consider the factors in RCW 43.06.155, the principles and policies in the implementation of health reform, including the guarantee of choice for patients.

No later than July 3, 2013, the Department will initiate rule-making by filing a CR 101 with the Code Reviser's Office, commencing the rulemaking process. By October 31, 2013, the Department will provide a report to the Governor of the status of the rulemaking process.

OFFICE RECEPTIONIST, CLERK

To: Sarah Kwiatkowski
Subject: RE: Case No. 90486-3 WSHA v. DOH-Northwest Health Law Advocates' Brief of Amici Curiae

Received 4-30-15

From: Sarah Kwiatkowski [mailto:sarah@nohla.org]

Sent: Thursday, April 30, 2015 10:45 AM

To: OFFICE RECEPTIONIST, CLERK

Cc: Ross, Douglas; Fisher, Brad; rebeccafrancis@dwt.com; deniseratti@dwt.com; Shickich, Barbara; Roper, Joyce (ATG); Watson, Laura (ATG); kristinj@atg.wa.gov; rebeccam3@atg.wa.gov; ahdolyef@atg.wa.gov; sgoolyef@atg.wa.gov; Nancy Talner; Leah Rutman; miller@carneylaw.com; mmadden@bblaw.com; dvalladao@bblaw.com; mollyt@summitlaw.com; Carson Flora; Iglitzin@workerlaw.com; wade@carneylaw.com; cunningham@carneylaw.com; bergb@foster.com; nomul@foster.com; marcl@foster.com; Daniel Gross

Subject: Case No. 90486-3 WSHA v. DOH-Northwest Health Law Advocates' Brief of Amici Curiae

Dear Clerk,

Attached for filing in the matter of *Washington State Hospital Association v. Washington State Department of Health* (Case No. 90486-3) please find a Brief of *Amici Curiae* by Northwest Health Law Advocates on behalf of Appellant, Department of Health.

The Brief is filed by:

Sarah M. Kwiatkowski, WSBA #42994
(206) 325-6464, sarah@nohla.org

cc: Counsel of Record for the Parties (per service agreement)
Counsel of Record for Amici (per service agreement)

Respectfully,

Sarah M. Kwiatkowski
Staff Attorney
Northwest Health Law Advocates
206.325.6464 | sarah@nohla.org