Koren Wong-Ervin Remarks
Virginia's Certificate of Public Need Workgroup Meeting
August 19, 2015 1-4p.m.

I. INTRODUCTION

It's my pleasure to be here today to represent Commissioner Joshua D. Wright of the U.S. Federal Trade Commission. The views I express here today represent the views of our office and do not necessarily represent the views of the Commission or of any other Commissioner.

To begin, I would like to provide some brief background on the Federal Trade Commission.

- Our mission is to prevent business practices that are anticompetitive or deceptive or unfair to consumers; to enhance informed consumer choice and public understanding of the competitive process; and to accomplish this without unduly burdening legitimate business activity.

- Preventing and deterring anticompetitive conduct in health care markets has long been a priority of the FTC's enforcement, research, and advocacy efforts.

- The FTC has extensive experience investigating anticompetitive mergers and business practices by hospitals, pharmaceutical companies, and physicians. It also has devoted significant resources to the examination of the health care industry by sponsoring various workshops and studies, including most recently a 2014 study on competition and the regulation of advanced practice nurses.

In advocacy letters and testimony dating back to the 1980's, the FTC has consistently supported full repeal of CON laws as likely to best serve the interests of health care consumers.

Our concerns are that CON laws:

- create or increase barriers to entry and expansion to the detriment of health care competition and consumers; and

- undercut consumer choice, stifle innovation, and weaken the market's ability to contain health care costs.

- At that time, the federal government and private insurance reimbursed health care predominantly on a cost-plus basis (i.e., reimbursement for services were based on the costs of production), which provided incentives for over-investment and unnecessary expansion in exchange for greater reimbursement.

- This is a very important point. The original reason for CON laws was not that competition inherently does not work in healthcare or that market forces promote over-investment. Instead, CON laws were desired because the reimbursement mechanism, i.e., cost-plus reimbursement, incentivized over-investment. The hope was that CON laws would compensate for that skewed incentive.

- Since the 1970s, the reimbursement methodologies that may in theory have justified CON laws initially have significantly changed. The federal government, as well as private third-party payors, no longer reimburse on a cost-plus basis. Instead the reimbursement system has shifted to fee-for-service.

- In 1986, Congress repealed the National Health Planning and Resources Development Act of 1974. And health plans and other purchasers now routinely bargain with health care providers over price. Essentially, government regulations have changed in a way that eliminates the original justification for CON programs.

- Moreover, even if there is some purported market failure, why do we believe that government regulation will result in the optimal level of capital expenditures?

- Health care markets, medical technology, and consumer preferences are constantly changing. Shackling the industry with excessive regulation that only achieves higher costs and lower consumer welfare is not the solution.

- Furthermore, to the extent regulatory barriers purport to pursue non-economic goals, these goals are usually better achieved through other mechanisms that do not impose substantial costs to competition and consumers.

- Second, CON laws can be subject to various types of abuse, creating additional barriers to entry, as well as opportunities for anticompetitive behavior by private parties.
    - For example, existing competitors can exploit the CON process to thwart or delay new competition to protect their own supra-competitive revenues.
        - During the 2003 FTC-DOJ health care hearings, the Agencies heard testimony that existing firms can easily use the CON process "to forestall competitors from entering an incumbent's market."
        - Incumbent providers may use the hearing and appeals process to cause substantial delays in the development of new health care services and facilities. Such delays can lead both the incumbent providers and potential competitors to divert substantial funds from investments in such facilities and services to legal, consulting, and lobbying expenditures, which in turn have the potential to raise costs and delay or prevent the establishment of new facilities and programs.
    - Additionally, the CON process may facilitate anticompetitive agreements.
        - For instance, in 2006, the DOJ alleged that a hospital in Charleston, West Virginia used the threat of objecting during the CON process, and the potential ensuing delay and cost, to induce another hospital seeking a CON for an open heart surgery program not to apply for it at a location that would have well served Charleston consumers.
        - In another case from West Virginia, the DOJ alleged that two closely competing hospitals agreed to allocate certain health care services among themselves. The informal urging of state CON officials led the hospitals to agree that just one of the hospitals would seek approval for an open heart surgery program, while the other would seek approval to provide cancer treatment services.
        - In another case, two Vermont home health agencies entered into anticompetitive market allocation agreements. Absent Vermont's CON law, competitive entry might have disciplined such behavior. DOJ found that the anticompetitive

- On average, states with CON programs regulate 14 different services, devices, and procedures. Virginia's CON program currently regulates 19 different services, devices, and procedures, which is more than the national average, and ranks 11th most restrictive in the United States.

- CON laws are also correlated with fewer hospital beds. Throughout the United States, there are approximately 362 beds per 100,000 persons. However, in states such as Virginia that regulate acute hospital beds through their CON programs, a study by Thomas Stratmann and Jacob Russ found 131 fewer beds per 100,000 persons. In the case of Virginia, with its population of approximately 8.26 million, this could mean about 10,800 fewer hospital beds throughout the state as a result of its CON program.

- In addition, several basic health care services that are used for a variety of purposes are limited because of Virginia's CON program. Across the United States, an average of six hospitals per 500,000 persons offer MRI services. In states such as Virginia that regulate the number of hospitals with MRI machines, the number of hospitals that offer MRIs is reduced by 2.5 per 500,000 persons. This could mean 41 fewer hospitals offering MRI services throughout Virginia.

- Virginia's CON program also affects the availability of CT services. While an average of nine hospitals per 500,000 persons offer CT scans, CON regulations are associated with a 37% decrease in these services. For Virginia, that could mean approximately 58 fewer hospitals offering CT scans.

- In addition, a recent study focused on cardiac care found no evidence that CON laws are associated with higher quality care and that repealing CON laws is associated with more providers statewide and lower mean hospital volume for both coronary artery bypass graft surgery and percutaneous coronary interventions, or PCIs.

- CON laws also restrict the number of cardiac facilities and are associated with 19.2% fewer PCIs per 1000 elderly, equivalent to 322,526 fewer PCIs for 1989-2002.

- In sum, the available empirical evidence on the effects of CON laws indicate they are likely to harm consumers by reducing competition and decreasing access to and quality of care without providing any offsetting benefit such as reducing health care costs.

- As such, we support full repeal of Virginia's CON law or, at the very least, substantial narrowing as likely to best serve the interests of health care consumers.