



1. **Mark Seidman** – Deputy Assistant Director, Mergers IV Division, Bureau of Competition
2. **Goldie Walker** – Attorney, Mergers IV Division, Bureau of Competition
3. **Aileen Thompson, PhD** – Assistant Director, Antitrust II Division, Bureau of Economics
4. **Stephanie Wilkinson** – Attorney Advisor, Office of Policy Planning



## VIRGINIA LAW

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published. The Authority shall promptly make any such comments available to the applicants. The applicants may respond in writing to the comments within 10 days after the deadline for submitting comments. Following the close of the written comment period, the Authority shall, in conjunction with the Commissioner, schedule a public hearing on the application. The hearing shall be held no later than 45 days after receipt of the application. Notice of the hearing shall be mailed to the applicants and to all persons who have submitted written comments on the proposed cooperative agreement. The Authority, no later than 15 days prior to the scheduled date of the hearing, also shall publish notice of the hearing in a newspaper of general circulation in the LENOWISCO and Cumberland Plateau Planning Districts and on the Authority's website.

E. 1. The Authority shall recommend for approval by the Commissioner a proposed cooperative agreement if it determines that the benefits likely to result from the proposed cooperative agreement **outweigh the disadvantages likely to result from a reduction in competition** from the proposed cooperative agreement.

Authority's review of, or decision relating to, the proposed cooperative agreement; however, this prohibition on such person's participation shall not prohibit the person from providing comment on a proposed cooperative agreement to the Authority or the Commissioner. The Authority shall determine whether the proposed cooperative agreement should be recommended for approval by the Commissioner within 75 days of the date the completed application for the proposed cooperative agreement is submitted for approval. The Authority may extend the review period for a specified period of time upon 15 days' notice to the parties.

E. 1. The Authority shall recommend for approval by the Commissioner a proposed cooperative agreement if it determines that the benefits likely to result from the proposed cooperative agreement **outweigh the disadvantages likely to result from a reduction in competition** from the proposed cooperative agreement.

2. In evaluating **the potential benefits** of a proposed cooperative agreement, the Authority shall consider whether one or more of the following benefits may result from the proposed cooperative agreement:

- a. Enhancement of the quality of hospital and hospital-related care, including mental health services and treatment of substance abuse, provided to citizens served by the Authority, resulting in improved patient satisfaction;
- b. Enhancement of population health status consistent with the regional health goals established by the Authority;
- c. Preservation of hospital facilities in geographical proximity to the communities traditionally served by those facilities to ensure access to care;
- d. Gains in the cost-efficiency of services provided by the hospitals involved;
- e. Improvements in the utilization of hospital resources and equipment;



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the implementation of the cooperative agreement, including documentation of the availability of necessary funds. The description should identify which costs will be borne by each party.

21. An explanation of the reasons for the exclusion of any information set forth in this section. If the parties exclude an item because it is not applicable to the proposed cooperative agreement, an explanation of why the item is not applicable shall be provided.

22. A timetable for implementing all components of the proposed cooperative agreement and contact information for the person or persons authorized to receive notices, reports, and communications with respect to the letter authorizing cooperative agreement.

23. Records, reports, and documentation to support the information submitted pursuant to this section, including any additional supplemental information requested by the commissioner.

C. All supplemental information submitted to the commissioner shall be accompanied by a verified statement signed by the chairperson of the board of directors and chief executive officer of each party; or if one or more party is an individual, signed by the individual attesting to the accuracy and completeness of the enclosed information.

#### **12VAC5-221-80. The commissioner's review.**

A. The commissioner shall consult with the Attorney General when reviewing an application.

B. The commissioner **may consult with the Federal Trade Commission** when reviewing an application.

C. The commissioner may consult and coordinate with other affected jurisdictions when reviewing an application.

### **12VAC5-221-80. The commissioner's review.**

**A. The commissioner shall consult with the Attorney General when reviewing an application.**

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b. Enhancement of population health status consistent with the regional health goals established by the authority;

c. Preservation of hospital facilities in geographical proximity to the communities traditionally served by those facilities to ensure access to care;

d. Gains in the cost-efficiency of services provided by the hospitals involved;

e. Improvements in the utilization of hospital resources and equipment;

f. Avoidance of duplication of hospital resources;

g. Participation in the state Medicaid program; and

h. Total cost of care.

#### **2. Disadvantages.**

a. The extent of any likely adverse impact of the proposed cooperative agreement on the ability of health maintenance organizations, preferred provider organizations, managed health care organizations, or other health care payers to negotiate reasonable payment and service arrangements with hospitals, physicians, allied health care professionals, or other health care providers;

b. The extent of any reduction in competition among physicians, allied health care professionals, other health care providers, or other persons furnishing goods or services to, or in competition with, hospitals that is likely to result directly or indirectly from the proposed cooperative agreement;

c. The extent of any likely adverse impact on patients in the quality, availability, and price of health care services; and



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published. The Authority shall promptly make any such comments available to the applicants. The applicants may respond in writing to the comments within 10 days after the deadline for submitting comments. Following the close of the written comment period, the Authority shall, in conjunction with the Commissioner, schedule a public hearing on the application. The hearing shall be held no later than 45 days after receipt of the application. Notice of the hearing shall be mailed to the applicants and to all persons who have submitted written comments on the proposed cooperative agreement. The Authority, no later than 15 days prior to the scheduled date of the hearing, also shall publish notice of the hearing in a newspaper of general circulation in the LENOWISCO and Cumberland Plateau Planning Districts and on the Authority's website.

D. In its review of an application submitted pursuant to subsection C, the Authority may consider the proposed cooperative agreement and any supporting documents submitted by the applicants, any written comments submitted by any person, any written response by the applicants, and any written or oral comments submitted at the public hearing. The Authority shall review a proposed

E. 1. The **Authority shall recommend for approval by the Commissioner** a proposed cooperative agreement if it determines that the benefits likely to result from the proposed cooperative agreement outweigh the disadvantages likely **to result from a reduction in competition** from the proposed cooperative agreement.

the Commissioner within 75 days of the date the completed application for the proposed cooperative agreement is submitted for approval. The Authority may extend the review period for a specified period of time upon 15 days' notice to the parties.

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- f. Avoidance of duplication of hospital resources;
- g. Participation in the state Medicaid program; and
- h. Total cost of care.

3. **The Authority's evaluation of** any disadvantages attributable to any reduction in competition likely to result from the proposed cooperative agreement shall include, but need not be limited to, the following factors:

- a. **The extent of any likely adverse impact of the proposed cooperative agreement on** the ability of health maintenance organizations, preferred provider organizations, managed health care organizations, or other **health care payors to negotiate reasonable payment and service arrangements** with hospitals, physicians, allied health care professionals, or other health care providers;

- b. The extent of any reduction in competition among physicians, allied health

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the Commissioner shall approve the proposed cooperative agreement if he finds after considering the factors in subsection E that the benefits likely to result from the proposed cooperative agreement outweigh the disadvantages likely to result from a reduction in competition from the proposed cooperative agreement. The Commissioner shall issue his decision in writing within 45 days of receipt of the Authority's recommendation. However, if the Commissioner has requested additional information from the applicants, the Commissioner shall have an additional 15 days, following receipt of the supplemental information, to approve or deny the proposed cooperative agreement. The Commissioner may reasonably condition approval of the proposed cooperative agreement upon the parties' commitments to achieving the improvements in population health, access to health care services, quality, and cost efficiencies identified by the parties in support of their application for approval of the proposed cooperative agreement. Such conditions shall be fully enforceable by the Commissioner. The Commissioner's decision to approve or deny an





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- b. The extent of **any reduction in competition among** physicians, allied health professionals, other health care providers, or other persons furnishing goods or services to, or **in competition with**, hospitals that is likely to result directly or indirectly from the proposed cooperative agreement;
- c. The extent of any likely adverse impact on patients in **the quality, availability, and price of health care services**; and
- d. **The availability of arrangements that are less restrictive to competition** and achieve the same benefits or a more favorable balance of benefits over disadvantages attributable to **any reduction in competition** likely to result from the proposed cooperative agreement.

following receipt of the supplemental information, to approve or deny the proposed cooperative agreement. The Commissioner may reasonably condition approval of the proposed cooperative agreement upon the parties' commitments to achieving the improvements in population health, access to health care services, quality, and cost efficiencies identified by the parties in support of their application for approval of the proposed cooperative agreement. Such conditions shall be fully enforceable by the Commissioner. The Commissioner's decision to approve or deny an



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23. Records, reports, and documentation to support the information submitted pursuant to this section, including any additional supplemental information requested by the commissioner.

C. All supplemental information submitted to the commissioner shall be accompanied by a verified statement signed by the chairperson of the board of directors and chief executive officer of each party; or if one or more party is an individual, signed by the individual attesting to the accuracy and completeness of the enclosed information.

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g. Participation in the state Medicaid program; and

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#### 2. Disadvantages.

a. The extent of any likely adverse impact of the proposed cooperative agreement on the ability of health maintenance organizations, preferred provider organizations, managed health care organizations, or other health care payers to negotiate reasonable payment and service arrangements with hospitals, physicians, allied health care professionals, or other health care providers;

b. The extent of any reduction in competition among physicians, allied health care professionals, other health care providers, or other persons furnishing goods or services to, or in competition with, hospitals that is likely to result directly or indirectly from the proposed cooperative agreement;

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Title 15.2. Counties, Cities and Towns  
Chapter 53.1. Southwest Virginia Health Authority

#### § 15.2-5384.1. Review of cooperative agreements

A. The policy of the Commonwealth related to each participating locality is to encourage cooperative, collaborative, and integrative arrangements, including mergers and acquisitions among hospitals, health centers, or health providers who might otherwise be competitors. To the extent such cooperative agreements, or the planning and negotiations that precede such cooperative agreements, might be anticompetitive within the meaning and intent of state and federal antitrust laws, the intent of the Commonwealth with respect to each participating locality is to supplant competition with a regulatory program to permit cooperative agreements that are beneficial to citizens served by the Authority, and to invest in the Commissioner the authority to approve cooperative agreements recommended by the Authority and the duty of active supervision to ensure compliance with the provisions of the cooperative agreements that have been approved. Such intent is within the public policy of the Commonwealth to facilitate the provision of quality, cost-efficient medical care to rural patients.

B. A hospital may negotiate and enter into proposed cooperative agreements with other hospitals in the Commonwealth if the likely benefits resulting from the proposed cooperative agreements outweigh any disadvantages attributable to a reduction in competition that may result from the proposed cooperative agreements. **Benefits to such a cooperative agreement may include, but are not limited to, improving access to care, advancing health status, targeting regional health issues, promoting technological advancement, ensuring accountability of the cost of care, enhancing academic engagement in regional health, strengthening the workforce for health-related careers, and improving health entity collaboration and regional integration where appropriate.**

C. 1. Parties located within any participating locality may submit an application for approval of a

B. A hospital may negotiate and enter into proposed cooperative agreements with other hospitals in the Commonwealth if the likely benefits resulting from the proposed cooperative agreements outweigh any disadvantages attributable to a reduction in competition that may result from the proposed cooperative agreements. **Benefits to such a cooperative agreement may include, but are not limited to, improving access to care, advancing health status, targeting regional health issues, promoting technological advancement, ensuring accountability of the cost of care, enhancing academic engagement in regional health, strengthening the workforce for health-related careers, and improving health entity collaboration and regional integration where appropriate.**





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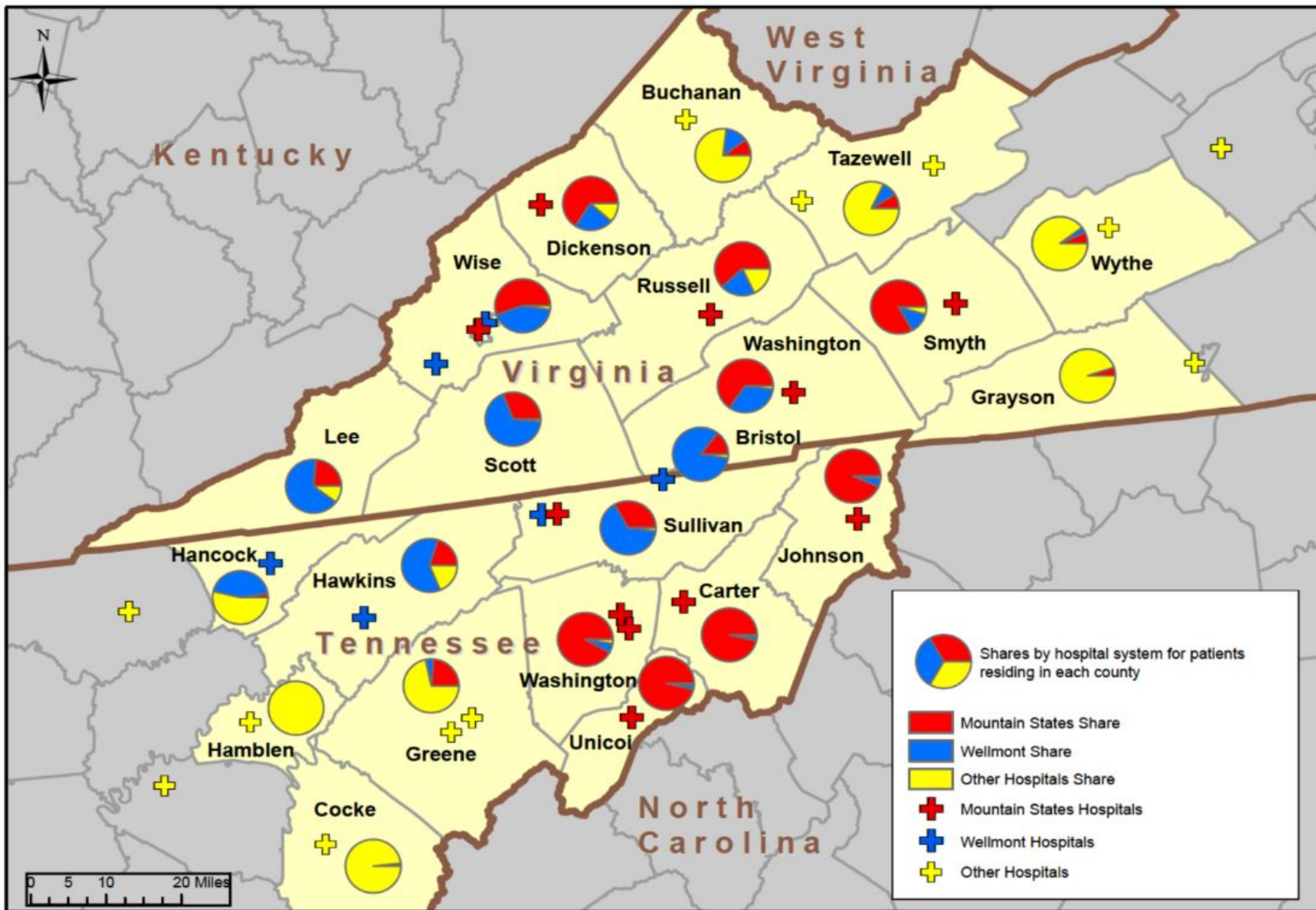
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2. In evaluating **the potential benefits** of a proposed cooperative agreement, the Authority shall consider whether one or more of the following benefits may result from the proposed cooperative agreement:

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- d. Gains in the cost-efficiency of services provided by the hospitals involved;
- e. Improvements in the utilization of hospital resources and equipment;
- f. Avoidance of duplication of hospital resources;
- g. Participation in the state Medicaid program; and
- h. Total cost of care.

## Shares of Commercial and Non-Commercial Inpatient Admissions by County by Hospital System



Source: Virginia and Tennessee State Hospital Discharge Data (2014).

Note: Shares for each county are based on commercial and non-commercial patients residing within that county and account for all hospitals located in Tennessee and Virginia, including hospitals located outside the scope of the map.

FTC Staff Submission - September 30, 2016



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- f. Avoidance of duplication of hospital resources;
- g. Participation in the state Medicaid program; and
- h. Total cost of care.

3. The Authority's evaluation of **any disadvantages attributable to any reduction in competition**

3. The Authority's evaluation of **any disadvantages attributable to any reduction in competition** likely to result from the proposed cooperative agreement shall include, but need not be limited to, the following factors:

d. **The availability of arrangements that are less restrictive to competition and achieve the same benefits** or a more favorable balance of benefits over disadvantages attributable to **any reduction in competition** likely to result from the proposed cooperative agreement.

**benefits** or a more favorable balance of benefits over disadvantages attributable to **any reduction in competition** likely to result from the proposed cooperative agreement.

F. 1. If the Authority deems that the proposed cooperative agreement should be recommended for approval, it shall provide such recommendation to the Commissioner.

2. Upon receipt of the Authority's recommendation, the Commissioner may request from the applicants such supplemental information as the Commissioner deems necessary to the assessment of whether to approve the proposed cooperative agreement. The Commissioner shall consult with the Attorney General regarding his assessment of whether to approve the proposed cooperative agreement. On the basis of his review of the record developed by the Authority, including the Authority's recommendation, as well as any additional information received from the applicants as well as any other data, information, or advice available to the Commissioner, the Commissioner shall approve the proposed cooperative agreement if he finds after considering the factors in subsection E that the benefits likely to result from the proposed cooperative agreement outweigh the disadvantages likely to result from a reduction in competition from the proposed cooperative agreement. The Commissioner shall issue his decision in writing within 45 days of receipt of the Authority's recommendation. However, if the Commissioner has requested additional information from the applicants, the Commissioner shall have an additional 15 days, following receipt of the supplemental information, to approve or deny the proposed cooperative agreement. The Commissioner may reasonably condition approval of the proposed cooperative agreement upon the parties' commitments to achieving the improvements in population health, access to health care services, quality, and cost efficiencies identified by the parties in support of their application for approval of the proposed cooperative agreement. Such conditions shall be fully enforceable by the Commissioner. The Commissioner's decision to approve or deny an application shall constitute a case decision pursuant to the Virginia Administrative Process Act



# APPLICATION FOR A LETTER AUTHORIZING COOPERATIVE AGREEMENT

Application for a Letter Authorizing Cooperative Agreement  
Commonwealth of Virginia

rural area with extremely low Medicare payment rates, high volumes of Medicaid and uninsured populations, and significant health care challenges.

After a thorough evaluation, Wellmont's Board of Directors and leadership team ultimately determined that Wellmont's future would be best served through a strategic alignment with another health care system. In April 2014, Wellmont began a strategic options process to further consider alternatives to fulfill its long-term health care mission through potential alignment options. Wellmont issued requests for proposals from organizations interested in strategic alignment and received substantial interest and a number of proposals from a variety of sophisticated health systems, including Mountain States. Based on inquiries, Wellmont issued twenty-two requests for proposals and **received nine proposals from other health systems**. After more than a year of merger discussions, internal analysis within each system, thoughtful conversations in the community and unanimous votes by both boards to examine this option, Wellmont entered into a term sheet with Mountain States in April, 2015 to exclusively explore the creation of a new, integrated and locally governed health system (the "New Health System").

mission through potential alignment options. Wellmont issued requests for proposals from organizations interested in strategic alignment and received substantial interest and a number of proposals from a variety of sophisticated health systems, including Mountain States. Based on inquiries, Wellmont issued twenty-two requests for proposals and **received nine proposals from other health systems**. After more than a year of merger discussions, internal analysis within each system, thoughtful conversations in the community and unanimous votes by both boards to examine this option, Wellmont entered into a term sheet with Mountain States in April, 2015 to exclusively explore the creation of a new, integrated and locally governed health system (the "New Health System").



# COMMITMENTS CHART

October 12, 2016

Metric: Easily verified.

32. **Commitment:** The New Health System will adhere to Exhibit 12.1 setting forth relevant

## A. Revision of Commitments – Recommendations by the Authority to the Commissioner

These commitments have been negotiated and drafted with the intent of them remaining in place for ten (10) years. **Nevertheless, there may be changes in circumstances that arise which affect the feasibility or the meaningfulness of the commitments and which are not possible to foresee presently.** For example,<sup>5</sup> a major structural change to the federal payment system

Timing: Immediate upon closing of the merger.

Amount: No cost.

Metric: Creation of a Joint Task Force.

### A. Revision of Commitments – Recommendations by the Authority to the Commissioner

These commitments have been negotiated and drafted with the intent of them remaining in place for ten (10) years. **Nevertheless, there may be changes in circumstances that arise which affect the feasibility or the meaningfulness of the commitments and which are not possible to foresee presently.** For example,<sup>5</sup> a major structural change to the federal payment system could, depending on how it is implemented, materially change both the needs of the region and the New Health System's ability to meet those needs. Other events which may have a material effect include, but are not limited to, substantial and material reductions in federal reimbursement, repeal of Certificate of Public Need, labor shortages causing significant and material increases in labor expense, significant reductions in inpatient hospital use rates which cause a material decrease in revenue (and which may be demonstrated to reduce the total cost of care), or an act of God. It is the interest of the Commonwealth that the region's hospitals maintain their financial viability, that they are of sound credit worthiness and that they are capable of reinvesting capital. Accordingly, if the New Health System produces clear and

<sup>5</sup> These are examples only and are not intended to be exclusive basis for amending the agreement, but simply as an illustration of a possible change in circumstances that may have a material impact.

# RESPONSE BY APPLICANTS TO FEDERAL TRADE COMMISSION STAFF SUBMISSION

## E. Summary Of Commitments

To assure the Authority and the Commissioner of the overriding benefits of the proposed merger, the New Health System has made substantial commitments to the region that include the investment of hundreds of millions of dollars over the next ten years. The monetary and other commitments go well beyond any commitments made in the approved cooperative agreement/certificate of public advantage that were granted in our neighboring states of North Carolina (Mission Health COPA) and recently West Virginia (Cabell Huntington cooperative agreement).<sup>45</sup> **The monetary commitments are possible solely based on savings to be realized from merger efficiencies, and cannot be made without the merger.** The commitments are evidence of the Parties' belief in the New Health System's ability to reduce cost growth, improve the quality of health care services and access to care, including the patient experience of care, and enhance overall community health in the region. The commitments are made to demonstrate clearly that the benefits of the Cooperative Agreement are not only likely to, but will, outweigh any disadvantages likely to result from a reduction in competition from the

agreement).<sup>45</sup> **The monetary commitments are possible solely based on savings to be realized from merger efficiencies, and cannot be made without the merger.** The

into the following areas, which align with the Cooperative Agreement's list of potential benefits and disadvantages likely to result from a cooperative agreement:

- Improving Community Health
- Enhancing Health Care Services
- Expanding Access and Choice
- Improving Health Care Value: Managing Quality, Cost and Service
- Investment in Health Education/Research and Commitment to Workforce

The current commitments in each of these categories are outlined in Exhibit 4 "Commitments Outlined in the Application" attached hereto. The Application provides additional details on the commitments as well as the Parties' initial proposed benchmarks and metrics (or the process by which these will be identified) to measure the New Health System's progress toward achieving the commitments.<sup>46</sup>

Now that the Application has been deemed complete and the Authority is reviewing the Application, the Parties have been engaged in productive dialogue with the Authority about the commitments. Based on its extensive knowledge of the health care needs of the region, the Authority has provided valuable input on some specific areas of focus for a set of broader commitments and ways in which achievement of these commitments can best be demonstrated and measured by the Authority and the Commissioner on an ongoing basis after the Cooperative

<sup>45</sup> Some states like Tennessee and North Carolina have called these agreements with the state Certificates of Public Advantage (COPAs) while other states like Virginia and West Virginia have called them cooperative agreements. They function in the same way.

<sup>46</sup> See especially Section 15 of the Application.



1. **Mark Seidman** – Deputy Assistant Director, Mergers IV Division, Bureau of Competition
2. **Goldie Walker** – Attorney, Mergers IV Division, Bureau of Competition
3. **Aileen Thompson, PhD** – Assistant Director, Antitrust II Division, Bureau of Economics
4. **Stephanie Wilkinson** – Attorney Advisor, Office of Policy Planning