



UNITED STATES OF AMERICA
Federal Trade Commission
Washington, D.C. 20580

Office of the Commissioner

July 10, 2015

VIA EMAIL

The Honorable Marilyn W. Avila
North Carolina House of Representatives
2217 Legislative Building
16 W. Jones Street
Raleigh, NC 27601-1096

Dear Representative Avila,

I write to concur with the letter submitted today from the staff of the Federal Trade Commission (“FTC” or “the Commission”) on North Carolina House Bill 200 and to clarify that, while narrowing the application of North Carolina’s Certificate of Need (“CON”) law will improve competition, I support the Commission’s longstanding position in favor of full repeal of CON laws.¹

¹ E.g., Joint Statement of the Antitrust Division of the U.S. Department of Justice and the Federal Trade Commission Before the Illinois Task Force on Health Planning Reform at 1-2 (Sept. 15, 2008) (“Together, we support the repeal of [CON] laws, as well as steps that reduce their scope.”), *available at* <https://www.ftc.gov/policy/policy-actions/advocacy-filings/2008/09/ftc-and-department-justice-written-testimony-illinois> [hereinafter 2008 FTC-DOJ Joint Statement]; Prepared Statement of the Federal Trade Commission Before Florida State Senate at 2 (April 2, 2008) (“[T]he Commission generally supports the repeal of [CON] laws as well as steps . . . to reduce significantly the scope of CON laws.”), *available at* <https://www.ftc.gov/policy/policy-actions/advocacy-filings/2008/04/ftc-prepared-statement-florida-senate-concerning>; Prepared Statement of the Federal Trade Commission Before the Alaska House of Representatives Standing Committee on Health, Education & Social Services at 1 (Feb. 15, 2008) (“The Commission believes that CON laws such as Alaska’s can be a barrier to entry to the detriment of health care competition and health care consumers, and that the legislature should consider their repeal.”), *available at* <https://www.ftc.gov/policy/policy-actions/advocacy-filings/2008/02/ftc-written-testimony-alaska-house-representatives>; FTC Staff Statement Before North Carolina State Goals and Policy Board at 1 (March 6, 1989) (“To promote competition in health care markets, the Federal Trade Commission and its staff have been active both in antitrust enforcement and in advocacy of regulatory reforms, including advocating the repeal of Certificate of Need regulation.”), *available at* <https://www.ftc.gov/policy/policy-actions/advocacy-filings/1989/03/ftc-staff-comment-north-carolina-state-goals-and>; FTC Staff Comments Concerning Repeal of Nebraska’s CON law at 1 (Feb. 22, 1989) (“While we believe the outright repeal of CON regulation proposed in LB 745 would likely best serve the interests of health care consumers, we believe that passage of either of the other CON reform bills would likely also have significant positive effects on health care markets.”), *available at* <https://www.ftc.gov/policy/policy-actions/advocacy-filings/1989/02/ftc-staff-comment-hon-bernice-labeledz-concerning>; FTC Staff Comments Concerning Repeal of Pennsylvania’s CON Law at 14 (Mar. 30, 1988) (“We believe that the continued existence of CON regulation would be contrary to the interests of health care consumers in Pennsylvania.”), *available at* <https://www.ftc.gov/policy/policy-actions/advocacy-filings/1988/03/ftc-staff-comment-hon-john-f-pressman-and-hon-donald>; FTC Staff Comments Concerning the Effectiveness of Michigan’s CON Law at 14 (Mar. 7, 1988) (“We believe that the continued existence of CON regulation would be contrary to the interests of health care consumers in Michigan.”), *available at* <https://www.ftc.gov/policy/policy-actions/advocacy-filings/1988/03/ftc-staff-comment-hon-gerald-h-law-concerning>; FTC Staff Comments Concerning Reforms to Virginia’s CON Law at 1 (Aug. 6, 1987) (“[W]e believe that CON regulation is unlikely to

Regulatory barriers to entry in health care markets deprive consumers of the benefits of competition. Competition in health care markets drives innovation, higher quality care, and lower prices. Government intervention can undermine the ability of markets to deliver those benefits to consumers. Recognizing this potential for consumer harm, the FTC has consistently explained that full repeal of CON laws is likely to best serve the interests of health care consumers. In a 2008 joint statement with the Department of Justice’s Antitrust Division (“DOJ”), the FTC and DOJ called for the full repeal of state CON laws explaining that such laws “undercut consumer choice, stifle innovation, and weaken markets’ ability to contain health care costs.”²

I also write to expound upon the state of the empirical evidence on the effect of CON laws.³ Basic economic theory, supported by a large body of empirical work, is unequivocal in its teaching that regulatory barriers to entry are, in general, harmful to competition and consumers.⁴ Decades of empirical work are consistent with this view of state imposed regulatory barriers and show they are likely to lead to higher prices, reduced consumer choice, and provide few if any consumer benefits in terms of increased quality.⁵ As such, regulatory barriers to entry should be avoided absent compelling empirical evidence demonstrating the regulation at issue will reduce the harm to competition and consumers arising from an existing market failure or promote another clearly articulated justification. 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.

The effectiveness of CON laws may be evaluated on many dimensions, including whether they facilitate cost-reduction, increased quality, and improved access to care. Unfortunately, most states, including North Carolina, do not have appropriate mechanisms to track their progress in these areas. However, available empirical research shows that with respect to cost-reduction, CON laws have generally failed to reduce costs and, in states with

benefit health care consumers in Virginia, and we support the complete elimination of CON regulation.”), available at <https://www.ftc.gov/policy/policy-actions/advocacy-filings/1987/08/ftc-staff-comment-virginia-commission-medical>; FTC Staff Comments Concerning Repeal of Hawaii’s CON Law at 1 (Mar. 13, 1987) (“[W]e strongly encourage repeal of CON legislation.”), available at <https://www.ftc.gov/policy/policy-actions/advocacy-filings/1987/03/ftc-staff-comment-governor-mary-george-concerning>.

² 2008 FTC-DOJ Joint Statement, *supra* note 1 at 1-2.

³ In its letter, FTC staff cites a 2014 study by Rosko & Mutter, which purports to find lower hospital cost-inefficiency in CON states than non-CON states. While there are a number of serious problems with this study (including its focus on capacity utilization without controlling for quality or access and that it rolls costs into a single cost-frontier measure), perhaps most important is its questionable relevance to North Carolina given the study’s failure to control for the significant differences among state CON laws and the fact that North Carolina CON law is the fourth most restrictive in the United States. Christopher Koopman & Thomas Stratmann, *Certificate-of-Need Laws: Implications for North Carolina* at 2-3 Figure 1 (Mercatus on Policy) (Feb. 2015), available at http://mercatus.org/sites/default/files/Koopman-Certificate-of-Need-NC-MOP_1.pdf [hereinafter Koopman & Stratmann].

⁴ See e.g., Harold Demsetz, *Two Systems of Belief About Monopoly* (1974), reprinted in EFFICIENCY, COMPETITION, AND POLICY Ch. 7 (Cambridge MA: Basil Blackwell, 1989); George Stigler, THE ORGANIZATION OF INDUSTRY (Homewood, Ill.: Richard D. Irwin, 1968); Harold Demsetz, *Why Regulate Utilities?*, 11 J.L. & ECON. 55 (1968).

⁵ See e.g., Paul Joskow & Nancy Rose, *The Effects of Economic Regulation* in HANDBOOK OF INDUSTRIAL ORGANIZATION II 1449 (R. Schmalensee & R. Willig, eds., North Holland, Amsterdam: Elsevier Science Publishers B.V., 1989).

stringent CON laws, such as North Carolina, the stringency of the program is positively and significantly related to hospital costs.⁶ In addition, CON laws are also correlated with fewer hospital beds (131 fewer beds per 100,000 persons or approximately 12,900 fewer hospital beds in North Carolina alone), as well as limitations on access to health care services such as MRIs (as many as 49 fewer hospitals offering MRI services in North Carolina) and CT scans (as many as 67 fewer hospitals offering CT scans in North Carolina).⁷ CON laws also restrict the number of cardiac facilities and are associated with 19.2% fewer percutaneous coronary interventions (PCIs) per 1000 elderly, equivalent to 322,526 fewer PCIs for 1989-2002.⁸ Lastly, 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 (CABG) surgery and PCIs.⁹ In sum, the available empirical evidence on the effects of CON laws indicate they are likely to harm North Carolina consumers by reducing competition and decreasing access to and quality of care without providing any offsetting benefit such as reducing health care costs.

In closing, I would like to emphasize that I support your efforts to narrow North Carolina's CON law, yet encourage you to consider full repeal to best serve the interests of North Carolina's health care consumers.

Sincerely,

Joshua D. Wright
Commissioner

⁶ E.g., Patrick A. Rivers, Myron D. Fottler & Jemima A. Frimpong, *The Effects of Certificate of Need Regulation on Hospital Costs*, 36 J. HEALTH CARE FIN. 1 (2010); see also *The Effect of Certificate of Need Laws on Cost, Quality, and Access* (Georgia State University, Oct. 2006) (finding that rigorous CON regulation is associated with less competitive markets and higher prices for private inpatient care); Report of Data Analyses to the Georgia Commission on the Efficacy of the CON Program at 7-8 (Nov. 2006) (“Across all markets, states ranked as having the most rigorous CON regulation (tier 2) have statistically significantly less competition than non-CON states”; “CON regulation is associated with higher private inpatient costs” and the “effect is robust with respect to model specification, measures of CON rigor, and diagnosis.”), available at http://www.issuelab.org/resource/report_of_data_analyses_to_the_georgia_commission_on_the_efficiency_of_the_con_program.

⁷ Koopman & Stratmann, *supra* note 3 at 3; Thomas Stratmann & Jacob Russ, *Do Certificate-of-Need Laws Increase Indigent Care?* (Mercatus Center at George Mason University, Working Paper No. 14-20, July 2014), available at <http://mercatus.org/sites/default/files/Stratmann-Certificate-of-Need.pdf>.

⁸ Vivian Ho, Joseph S. Ross, Brahmajee K. Nallamothu, & Harlan M. Krumholz, *Cardiac Certificate of Need Regulations and the Availability and Use of Revascularization Services*, 154 AMERICAN HEART JOURNAL 768 (Oct. 2007) (finding that each year between 1989-2002, the per capita number of hospitals performing CABG surgery and PCI was higher in states without CON (e.g., 3.7 per 100,000 elderly for CABG, 4.5 for PCI in 2002), compared with CON states (e.g., 2.5 for CABG, 3.0 for PCI in 2002)), available at <http://www.law.umich.edu/centersandprograms/lawandeconomics/workshops/Documents/Fall2010/ho.pdf>.

⁹ Vivian Ho, Meei-Hsiang Ku-Goto, and James Jollis, *Certificate of Need (CON) for Cardiac Care: Controversy over the Contributions of CON*, 44:2, Part I HSR: HEALTH SERVICES RESEARCH 483 (Apr. 2009), available at <http://www.law.umich.edu/centersandprograms/lawandeconomics/workshops/Documents/Fall2010/ho.pdf>.