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

Office of Policy Planning
Bureau of Economics
Bureau of Competition

April 16, 2025

Governor Dan McKee
Office of the Governor of Rhode Island
82 Smith Street
Providence, RI 02903

Re: Proposed Reforms to Rhode Island's Certificate of Need Process

Dear Governor McKee,

The Directors of the Federal Trade Commission's ("FTC") Office of Policy Planning, Bureau of Economics, and Bureau of Competition are pleased to respond to your March 25, 2025, inquiry about the competitive implications of proposed amendments to Rhode Island's Certificate of Need process. Promoting competition in the healthcare sector—which spurs innovation, lowers prices, and improves quality and access for healthcare services—is among Chairman Andrew Ferguson's highest priorities for the FTC. We write this letter to advance these objectives.

We understand that the Rhode Island General Assembly is considering your recommended appropriations for fiscal year 2026, House Bill 5076 ("H-5076"), which includes proposed amendments to R.I. General Law § 23-15 to reform Rhode Island's Certificate of Need ("CON") process.[1] We write to highlight the FTC's prior work regarding CON laws that the General Assembly may find informative as it considers these amendments. This work reflects the FTC's and the U.S. Department of Justice Antitrust Division's ("the Agencies") consistent, bipartisan advocacy that states can improve health care competition "by repealing or curtailing their certificate of need laws."[2]

The FTC has studied the competitive effects of CON laws for several decades.[3] Indeed, as part of their competition advocacy programs, the Agencies have consistently reviewed states' CON

[1] Rhode Island House Bill 5076, Article 10, Section 1 – Certificate of Need Reform (General Assembly January Session 2025), https://webserver.rilegislature.gov/BillText/BillText25/HouseText25/H5076.pdf. This article would amend various sections of R.I. General Law § 23-15, entitled "Determination of Need for New Healthcare Equipment and New Institutional Health Services," including §§ 23-15-2, 23-15-4, 23-15-4.1, 23-15-4.2, 23-15-4.4, 23-15-5, 23-15-6, 23-15-6.1, 23-15-10, and 23-15-11.

[2] Letter from Bilal Sayyed, Dir., Office of Policy Planning, Fed. Trade Comm'n, and Daniel Haar, Acting Chief, Competition Policy & Advocacy Section, Antitrust Division, U.S. Dept. of Justice, to The Honorable Martin Daniel, Tennessee House of Representatives (Mar. 7, 2019), https://www.justice.gov/d9/pages/attachments/ 2019/03/20/363812.pdf. *See also infra* note 4.

[3] *See, e.g.,* Joint Statement of the Federal Trade Commission and the Antitrust Division of the U.S. Department of Justice Regarding Certificate-of-Need Laws and Alaska Senate Bill 62 at 2–3 (Apr. 12, 2017) [hereinafter FTC-DOJ Alaska Statement], https://www.justice.gov/archives/opa/press-release/file/957186/dl, for more information about the FTC's experience and interest regarding CON laws.

laws and encouraged them to consider the competitive impact of those laws.[4] Below we summarize the main conclusions from this prior work, and suggest that you review CON comments submitted to other states, as cited herein, for detailed information that may be relevant for Rhode Island.

These comments describe how states enacted CON laws in the 1960s and 70s in an attempt to control healthcare costs and block so-called wasteful expenditures by mitigating the incentives created by a cost-plus based reimbursement system. Although this type of reimbursement system has mostly gone away, CON laws remain in force in many states.[5] After considerable experience, it is apparent that CON laws prevent the efficient functioning of healthcare markets in several ways that may undermine their intended goals.[6] CON laws create barriers to entry and expansion, limit consumer choice, and stifle innovation. Incumbent providers may also leverage CON laws to thwart or delay entry and expansion by potential competitors and other market participants. Most of the evidence to date suggests that CON laws have not been successful in controlling costs or improving quality. For these reasons, the Agencies have consistently suggested that states repeal or retrench their CON laws.

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[4] *See, e.g.*, FTC-DOJ Alaska Statement; FTC Press Release, *FTC Staff Testifies in Favor of Repealing Laws that Limit Competition in the Health Care Sector* (Mar. 28, 2019), https://www.ftc.gov/news-events/news/press-releases/2019/03/ftc-staff-testifies-favor-repealing-alaska-laws-limit-competition-health-care-sector (FTC staff testified before the Alaska Senate in 2018 and 2019, reaffirming the 2017 FTC-DOJ Alaska Statement). *See also* Statement of the Antitrust Division, U.S. Department of Justice Regarding the Proposed Repeal of Alaska's Certificate-of-Need Laws (May 23, 2023), https://www.justice.gov/d9/2023-08/415865.pdf; Joint Statement of the Federal Trade Commission and the Antitrust Division of the U.S. Department of Justice on Certificate-of-Need Laws and South Carolina House Bill 3250 (Jan. 11, 2016) [hereinafter FTC-DOJ South Carolina Statement], https://www.justice.gov/atr/file/812606/download; Joint Statement of the Federal Trade Commission and the Antitrust Division of the U.S. Department of Justice to the Virginia Certificate of Public Need Work Group (Oct. 26, 2015) [hereinafter FTC-DOJ Virginia Statement], https://www.justice.gov/atr/case-document/file/788171/dl; Letter from Marina Lao, Dir., Office of Policy Planning, Fed. Trade Comm'n, et al., to The Honorable Marilyn W. Avila, N.C. House of Representatives (Jul. 10, 2015) [hereinafter FTC North Carolina Letter], https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-concurring-comment-commissioner-wright-regarding-north-carolina-house-bill-200/150113ncconadv.pdf; Prepared Statement of the Federal Trade Commission Before the Florida State Senate (Apr. 2, 2008), https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-prepared-statement-florida-senate-concerning-florida-certificate-need-laws/v080009florida.pdf; Statement of the Antitrust Division, U.S. Department of Justice Before the Florida Senate Committee on Health & Human Services (Mar. 25, 2008), http://www.justice.gov/atr/comments-competition-healthcare-and-certificates-need; Prepared Statement of the Federal Trade Commission Before the Standing Committee on Health, Education, & Social Services of the Alaska House of Representatives (Feb. 15, 2008), https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-written-testimony-alaska-house-representatives-concerning-alaska-certificate-need-laws/v080007alaska.pdf; Statement of the Antitrust Division, U.S. Department of Justice, Before a Joint Session of the Health and Human Services Committee of the State Senate and the CON Special Committee of the State House of Representatives of the General Assembly of the State of Georgia (Feb. 23, 2007), http://www.justice.gov/atr/competition-healthcare-and-certificates-need.

[5] Statement of the Federal Trade Commission to the Alaska Senate Committee on Health & Social Services on Certificate of Need Laws and SB 1 at 3 (Mar. 27, 2019), https://www.ftc.gov/system/files/documents/advocacy_documents/statement-federal-trade-commission-alaska-senate-committee-health-social-services-certificate-need/v0800007_commission_testimoney_re_alaska_senate_committee_032719.pdf. *See also, e.g.*, FTC-DOJ Alaska Statement at 1, 9.

[6] *See, e.g.,* FTC-DOJ Alaska Statement at 1; FTC-DOJ South Carolina Statement at 1; FTC-DOJ Virginia Statement at 1–2; and FTC North Carolina Letter at 1.

I. Proposed Amendments to Rhode Island's CON Process Under H-5076

The stated mission of Rhode Island's CON program is "[t]o prevent unnecessary duplication of medical services, facilities, and equipment; and promote access, safe and adequate treatment, and quality improvement in healthcare facilities."[7] The Governor's proposed amendments to the CON process include:

- Removing certain services and facilities—such as home health, hospice, outpatient rehabilitation, substance use disorder treatment facilities, outpatient surgical centers, and independent surgical practices—from review;
- Raising the capital expenditure threshold for review from $5–$7 million to $50 million;
- Eliminating reapproval for minor cost increases for capital projects and including additional CON exemptions for state capital projects; and
- Restricting procedural delays by potential competitors/other market participants after the Rhode Island Department of Health's approval.[8]

State officials testified that these proposed changes to Rhode Island's CON process will "align Rhode Island's [CON] policies with other states, encourage new entrants into the healthcare market, reduce regulatory burdens for cost-effective care alternatives, and expand access to underserved communities."[9]

II. Benefits of Competition and Concerns with CON Programs

Competition in health care markets benefits consumers by containing costs, reducing prices, improving quality, and encouraging innovation. Indeed, empirical evidence demonstrates that competition generally results in lower prices for, and broader access to, health care products and services. Non-price competition promotes higher quality care and encourages innovation.[10] CON laws may suppress these substantial benefits of competition by limiting the entry of new healthcare providers, as well as the availability of new or expanded healthcare facilities and services.

A. CON Laws Create Barriers to Entry and Expansion, Which May Suppress More Cost-Effective, Innovative, and Higher Quality Health Care Options

CON laws require new entrants and incumbent providers to obtain state-issued approval before constructing new facilities or offering certain healthcare services. By interfering with the market forces that normally determine the supply of facilities and services, CON laws can suppress supply, misallocate resources, and shield incumbent healthcare providers from competition by new entrants.

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[7] Rhode Island Department of Health, *Office of Health Systems Development*, https://health.ri.gov/health-systems/ridoh-programs/health-systems-development-office.

[8] *See* Presentation of the Governor's Proposed Amendments to Certificate of Need by the Rhode Island Office of Management & Budget and the Rhode Island Department of Health at the Rhode Island Senate Committee on Finance Hearing (Mar. 27, 2025), https://capitoltvri.cablecast.tv/show/11034?site=1.

[9] *Id.*

[10] *See, e.g.*, FTC-DOJ Alaska Statement at 5, 10–11, for discussion of the benefits of competition.

Specifically, prior FTC advocacies explained that CON laws can,

- Raise the cost of entry and expansion—by adding time, uncertainty, and the cost of the approval process itself—for firms that have the potential to offer new, lower cost, more convenient, or higher quality services;
- Remove, reduce, or delay the competitive pressures that typically incentivize incumbent firms to innovate, improve existing services, introduce new services, or moderate prices; and
- Prohibit entry or expansion in the event that a CON is denied.[11]

As the Rhode Island General Assembly reevaluates its CON program, we hope it will consider how CONs can harm healthcare consumers and limit access to care.

B. Incumbent Providers May Exploit the CON Process to Prevent New Competitors from Entering the Market

Incumbent providers may exacerbate the potential competitive harm by taking advantage of the CON process to protect their entrenched market position and revenues. For instance, prior FTC advocacies noted that an incumbent firm may file challenges or comments to a potential competitor's CON application to thwart or delay competition.[12] In fact, CON programs facilitated anticompetitive agreements among competitors in West Virginia and Vermont to thwart expansion and to allocate services and territories.[13] Misuse of the CON process by incumbents can also divert scarce resources away from health care innovation as potential entrants incur legal, consulting, and lobbying expenses responding to incumbents' challenges (and as incumbents incur expenses in mounting such challenges).[14]

III. Evidence on the Effects of CON Laws

Proponents of CON programs contend that CON laws contain healthcare costs by preventing "overinvestment" in capital-intensive facilities, services, and equipment.[15] They also have argued that CON laws improve the quality of healthcare services and enable states to increase access to care for their indigent residents and in medically underserved areas.[16] As described more fully in prior FTC advocacies, however, the evidence on balance suggests that CON laws have

[11] *See, e.g.*, FTC-DOJ Alaska Statement at 5–6; FTC-DOJ South Carolina Statement at 6–7; FTC-DOJ Virginia Statement at 6–7; and FTC North Carolina Letter at 3.
[12] *See, e.g.*, FTC-DOJ Alaska Statement at 6–7; FTC-DOJ South Carolina Statement at 7–8; FTC-DOJ Virginia Statement at 7–8; and FTC North Carolina Letter at 3.
[13] See FTC-DOJ Alaska Statement at 6–7.
[14] *See, e.g.*, FTC-DOJ Alaska Statement at 6–7; FTC-DOJ South Carolina Statement at 7–8; FTC-DOJ Virginia Statement at 7–8; and FTC North Carolina Letter at 3.
[15] *See, e.g.*, FTC-DOJ Alaska Statement at 9; FTC-DOJ South Carolina Statement at 14; FTC-DOJ Virginia Statement at 11; and FTC North Carolina Letter at 1.
[16] *See, e.g.*, FTC-DOJ Alaska Statement at 12–13; FTC-DOJ South Carolina Statement at 14–16; and FTC-DOJ Virginia Statement at 14–16.

failed to produce cost savings, higher quality health care, or greater access to care for indigent or underserved populations.[17]

CON laws are instead likely to increase, rather than constrain, healthcare costs. Consistent with this, evidence suggests that repealing or narrowing CON laws can reduce the per-patient cost of healthcare.[18] Studies have also found that repealing or narrowing CON laws is generally unlikely to lower quality—instead, such action is more likely to improve the quality of certain types of care.[19]

Finally, proponents of CON laws have argued that such laws increase access to indigent care by limiting competition and allowing incumbent healthcare providers to earn greater profits, which they can then use to cross-subsidize indigent care. But the evidence shows otherwise. Some research suggests that safety net hospitals are no stronger financially in CON states than in non-CON states.[20] And an empirical study found no support for the contention that hospitals insulated from competition use their increased market power to fund more charity care.[21]

IV. Conclusion

The FTC recognizes that states must weigh a variety of policy objectives when considering healthcare legislation. But, as the FTC has consistently advocated, CON laws raise significant competitive concerns and generally do not appear to have achieved their intended benefits for healthcare consumers.

We hope that the FTC's research and findings concerning CON laws are valuable as the General Assembly assesses the proposed CON amendments in Rhode Island. Please do not hesitate to contact us if we can be of further assistance.

Sincerely,

/s/ *Clarke Edwards*	/s/ *Ted Rosenbaum*	/s/ *Daniel Guarnera*
Clarke Edwards	Ted Rosenbaum	Daniel Guarnera
Acting Director	Acting Director	Director
Office of Policy Planning	Bureau of Economics	Bureau of Competition

Cc: Senate President Dominick J. Ruggerio, House Speaker K. Joseph Shekarchi

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[17] *See, e.g.*, FTC-DOJ Alaska Statement at 9–13; FTC-DOJ South Carolina Statement at 11–17; FTC-DOJ Virginia Statement at 11–17; and FTC North Carolina Letter at 4. Because this letter summarizes the FTC's prior work regarding CON laws, it does not incorporate any empirical studies that have been published since the FTC's most recent advocacy.

[18] *See, e.g.*, FTC-DOJ Alaska Statement at 9–12; FTC-DOJ South Carolina Statement at 11–14; and FTC-DOJ Virginia Statement at 11–14.

[19] *See, e.g.*, FTC-DOJ Alaska Statement at 12–13; FTC-DOJ South Carolina Statement at 14–15; and FTC-DOJ Virginia Statement at 15.

[20] *See, e.g.*, FTC-DOJ Alaska Statement at 13–14; FTC-DOJ South Carolina Statement at 16–17; and FTC-DOJ Virginia Statement at 16–17.

[21] Christopher Garmon, *Hospital Competition and Charity Care*, 12 FORUM FOR HEALTH ECON. & POL'Y 1, 13 (2009).