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VIA FEDERAL EXPRESS AND EMAIL

Ms. Courtney Avery
Administrator
Illinois Health Facilities and Services Review Board
525 West Jefferson Street, 2nd Floor
Springfield, Illinois 62761

Mr. Mike Constantino
Supervisor, Project Review Section
Illinois Health Facilities and Services Review Board
525 West Jefferson Street, 2nd Floor
Springfield, Illinois 62761

Re: Mercy Hospital & Medical Center Discontinuation, Project No. 20-039

Dear Ms. Avery and Mr. Constantino:

We are counsel to Mercy Hospital and Medical Center ("Mercy Hospital"), Mercy Health System of Chicago ("Mercy System"), and Trinity Health Corporation ("Trinity," and collectively with Mercy Hospital and Mercy System, the "Applicants"). As you know, on August 31, 2020, the Applicants filed a Certificate of Need Application (the "CON Application") with the Illinois Health Facilities & Services Review Board (the "Review Board") to discontinue (the "Project"), in its entirety, the general, acute care hospital known as Mercy Hospital & Medical Center (the "Hospital"), located at 2525 South Michigan Avenue, Chicago, Illinois 60616 (the "Campus"). The CON Application was deemed complete by the Review Board on September 4, 2020. Public hearings were held on October 28, October 29 and October 30, 2020.

On December 1, 2020, the Review Board Staff issued the State Agency Report for the Project. Pursuant to Section 6 of the Health Facilities Planning Act, 20 ILCS 3960/1 et seq., and the relevant regulations found at 77 Ill. Admin. 1100, et seq., we are submitting this Response to: (a) provide additional information to the Review Board in response to certain statements and conclusions made in the State Agency Report; and (b) note and challenge certain legal conclusions and factual errors in the State Agency Report.

The Need for Transformation and Regional Planning on the Southside of Chicago

At this stage of the CON process for the Project, it is important to remember the opening paragraphs of the CON Application for the Project. Those paragraphs provided as follows:

> The decision to discontinue Mercy Hospital was not an easy one. Indeed, it was not a single decision made at a single meeting; but rather, the culmination of a multi-year, multi-factorial process that ultimately resulted in the consensus that Mercy Hospital needed to be at the forefront of transforming the health care options available on the South Side of Chicago and needed to move forward with a new model of care.
>
> More specifically, to advance its new model of care, Mercy Hospital is developing plans for a care center that will offer diagnostics (which may include CT, MRI, X-Ray, ultrasound, mammography, echo, bone densitometry), urgent care (non-emergent on-demand medical services), and care coordination (to connect patients with specialty providers, develop care plans, and facilitate access to community services). These programs will have the potential to serve more than 50,000 patients annually. Overall, the focus will be to give access to preventive and early diagnostic services, and to help local residents avoid expensive emergency room visits and hospitalizations.
>
> There is a radical difference in life expectancy within the City of Chicago when comparing prosperous neighborhoods with some communities on the South Side. For example, people in Streeterville on Chicago's North Side live an average of **30 years** longer than those in Englewood, where the average life expectancy is only 60 years (NYU School of Medicine analysis cited in the Chicago Tribune, June 9, 2019).
>
> The prevalence of chronic health conditions is a key driver of this disparity. According to the Community Health Needs Assessment compiled by the Alliance for Health Equity, 65% of all deaths in Chicago and Suburban Cook County were attributable to chronic diseases. The communities served by Mercy Hospital disproportionately suffer from these chronic conditions and desperately need more early detection and diagnosis of illnesses and diseases, better care coordination among a multitude of

> providers to better treat chronic diseases, and more cost effective and accessible urgent care and other outpatient services. The COVID 19 pandemic has further highlighted these disparities.
>
> At the same time, the future of healthcare has changed and continues to change rapidly. Inpatient care is being replaced by outpatient care due to advancements in medicine and payor demands. Hence, the need for a new model of care that will focus on keeping people healthy, early detection of diseases, and advocating for patients by finding provider partners such as hospitals, federally qualified health centers ("FQHCs"), and specialty providers to better manage chronic diseases, is imperative. See CON Application at pages 6-7.

Interesting enough, some of the above paragraphs have been cited to support the notion that the Review Board should deny the CON Application. Candidly, the outpouring of support for Mercy Hospital demonstrates that Mercy Hospital has supported the poor and underserved on the Southside of Chicago, while other healthcare providers have reduced or eliminated services on the Southside of Chicago. But while Mercy Hospital has been providing care to the poor and underserved, the very disparities and inequities noted above have accelerated. The reason for that is simple. Mercy Hospital, in its current capacity, cannot solve the healthcare crisis on the Southside of Chicago on its own. The financial losses at Mercy Hospital are but a single indicator of what is broken when it comes to the healthcare delivery system on the Southside of Chicago.

The healthcare crisis on the Southside of Chicago needs to be fixed and it will only be solved if the State of Illinois, Cook County (through both County Care and the Cook County Health System), the University of Chicago Medical Center (the largest hospital on the Southside of Chicago), and the remaining healthcare providers engage in a regional healthcare planning effort and begin the process of transforming how healthcare is delivered on the Southside of Chicago. The transformation process and the regional planning process for the Southside of Chicago needs to account for the excessive number of inpatient beds, emerging technology, models of care focused on outpatient care and telehealth, the reality of crushing State of Illinois and Cook County budget deficits, payor demands, and wellness and population management.

Mercy Hospital, and three other safety nets on the Southside of Chicago, with the support of the Department of Healthcare of Family Services ("DHFS"), may have ultimately failed in their efforts to gain approval from the Illinois Legislature for their transformation plan for the Southside of Chicago, but that does not mean that the initial effort to transform the healthcare delivery system on the Southside of Chicago itself was futile. A marker for transformation has been laid and, as the Applicants stated in the CON Application, Trinity and Mercy Care Center

took the first transformation step and filed a Certificate of Need to establish the Mercy Care Center to advance a model of care which is focused on preventive and early diagnostic services and avoiding expensive emergency room visits and hospitalizations. See Project No. 20-042.

Transformation is the only feasible path forward for Mercy Hospital. And, just as importantly, it will hopefully motivate the State of Illinois, Cook County, and the other healthcare providers in the region, to begin to transform how healthcare is delivered on the Southside of Chicago so the disparities and inequities can start to abate.

Both the State of Illinois and the Federal Government have already recognized the immediate need for transformation. In 2018, the Illinois Hospital Transformation Program was signed into law. That Program set aside $150 million so providers could develop healthcare care delivery models to better meet the unmet needs of the communities served by hospitals, with a focus on shifting from inpatient services to outpatient services and models that improve the coordination, effectiveness and efficiency of care. See SB1773, House Amendment #4, as enacted into law at Public Act 100-0581 (305 ILCS 5/14-12(d-5); see also Illinois Hospital Association State Position Paper and Statement of President and CEO of Illinois Hospital Association (August 8, 2018).

And on December 2, 2020, the Centers for Medicare & Medicaid Service ("CMS") finalized its latest rules on outpatient procedures, pursuant to which another 300 procedures can be performed on an outpatient basis and at surgery centers. By 2024, CMS announced that every single inpatient procedure will be allowed to be performed on an outpatient basis or at a surgery center. See CMS-1736-FC, attached hereto as Exhibit 1. CMS has also made permanent a number of COVID period changes (such as telehealth) that will forever impact how healthcare is delivered.

So, change is coming, and the losses at the historical safety net hospitals will only accelerate if the status quo is maintained. In the case of the Southside of Chicago, the safety net hospitals (which are all operating at less than full utilization) are at particular risk because no true, regional planning has occurred to date and because the Medicaid funding model does not cover the cost of care, let alone leave any room for equipment or capital repairs or improvements.

Importantly, no hospital in Mercy Hospital's Planning Area or in its larger 10-mile market area has filed an opposition statement to the Project. Rather, they have been collaborative and working with Mercy Hospital to effectuate a safe and orderly transition of Mercy Hospital's services by the date of Mercy Hospital's closure. The reason for that is simple: they have enough capacity to treat Mercy Hospital's patients after Mercy Hospital closes.

In addition to the need for transformation, which, in some respects, was not emphasized in the State Agency Report because the hospital discontinuation process tends to focus on financial losses, life safety code issues, and short-term service line and volume losses, the Applicants also wanted to highlight some of the issues set in the State Agency Report.

Comprehensive Physical Rehabilitation Category of Service

At page 12 of the State Agency Report, the State Agency states that "there will be no hospitals in the A-03 Hospital Planning Area that will have comprehensive physical rehabilitation beds" and uses that statement to support its conclusion that the closure of Mercy Hospital will seemingly violate Criterion 1110.290(c)(1). But Criterion 1110.290(c)(1) specifically states that the market area (i.e., 10 miles) is the relevant consideration. See 77 Ill. Admin Code 1110.290(c)(1)("the service will no longer exist within the established radii outlined in 77 Ill. Adm. Code 1100.510(d) of the applicant facility.)

As set forth in the CON Application, there are 8 other hospitals in Mercy Hospital's market area that provide inpatient, comprehensive physician rehabilitation services. And at the time the CON Application was filed, there were 537 authorized comprehensive physical rehabilitation beds in Mercy Hospital's market area.

Moreover, the State Agency did not include the entire Service Area (HSA-06) when reviewing the comprehensive physical rehabilitation category of service, which is the relevant touchstone for the comprehensive physical rehabilitation category of service. Instead, the State Agency only looked at a subset of hospitals located HSA-06. HSA-06 is currently showing an **excess** of 166 comprehensive physical rehabilitation beds.

Additionally, Mercy Hospital's average daily census ("ADC") for its comprehensive physical rehabilitation beds has decreased from 12.4 in 2015 to 7.1 in 2019, representing a decrease in average daily census of 42.7% between 2015 and 2019. Mercy Hospital's market area can easily accommodate 7 additional comprehensive physical rehabilitation patients a day.

Comprehensive physical rehabilitation has been transitioning to specialty hospitals like the Shirley Ryan AbilityLab (f/k/a the Rehabilitation Institute of Chicago), the number one ranked rehabilitation hospital in the **world** for 30 plus years. See Project No. 19-008 (AbilityLab adding 20 additional comprehensive physical rehabilitation beds to accommodate the increasing demand for services at the AbilityLab).

Specific to Mercy Hospital's market area, on October 23, 2019, the University of Chicago Medical Center announced that it was partnering with the Shirley Ryan AbilityLab to "work together and transfer knowledge and best practices in rehabilitation services." See "Shirley Ryan AbilityLab, UChicago Medicine Partner for Physical Medicine and Rehabilitation

Services," attached hereto as Exhibit 2. See also New Rehab Hospital Part of Rush Joint Venture, Crains (September 24, 2020, attached hereto as Exhibit 3.

Thus, both legally and factually, the State Agency's conclusion that the closure of Mercy Hospital's comprehensive physical rehabilitation inpatient unit will impact the provision of healthcare in Mercy Hospital's market area is inaccurate; and should be corrected in the State Agency Report.

Intensive Care Category of Service

At page 4 of the State Agency Report, the State Agency concludes that "access to health care services will be impacted in the A-03 Hospital Planning Area with the closure of the hospital" and that "there will be a need for intensive care beds in the A-03 Planning Area and the City of Chicago and the loss of emergency care service will result in health risk to the population that Mercy Hospital serves."

At page 12 of the State Agency Report, the State Agency further states that the closure of Mercy Hospital will result in "a calculated need for 36 intensive care beds in the City of Chicago" and a "calculated need for 19 intensive care beds" in the A-03 Planning Area and uses those statements to support its conclusion that the closure of Mercy Hospital will seemingly violate Criterion 1110.290(c)(2).

But neither the City of Chicago nor the A-03 Planning Area is the relevant touchstone under Criterion 1110.290(c)(2). Although Criterion 1110.290(c)(2) does not specifically reiterate the 10 mile market area language found in Criterion 1110.290(c)(1), Criterion 1110.290(c)(2) is specifically governed by the language found in the paragraph that controls all of the Criterion set forth in Section 1110.290, which unequivocally states that "the facility's market area, for purposes of this Section, is the established radii outlined in 77 Ill. Adm. Code 1100.510(d)."

In addition to the legal point, it is important to note that intensive care services are currently available in the Planning Area for Mercy Hospital. Mercy Hospital's ICU average daily census ("ADC") in 2019 was only 14.5. Through the first ten months of 2020, Mercy Hospital's ICU ADC was 15.6. The University of Chicago Medical Center is only 6.6 miles away from Mercy Hospital and has 146 authorized ICU beds. Provident Hospital of Cook County ("Provident Hospital") is only 3.7 miles away from Mercy Hospital and has 6 authorized beds. As discussed below, both the University of Chicago Medical Center and Provident Hospital has the capacity to accommodate Mercy Hospital's volume of ICU patients if they simply staffed their authorized beds.

The University of Chicago Medical Center is the largest hospital on the Southside of Chicago with 811 total beds. It is a world-class academic medical center and patients travel across the globe to receive care at the University of Chicago Medical Center. In 2018, the University of Chicago Medical Center only staffed 113 of its 146 authorized ICU beds. Its ICU ADC in 2018 was 92.8 and its peak ICU census in 2018 was 109 patients. In April of 2020, the University of Chicago Medical Center added 46 ICU beds, taking its authorized ICU bed count up to 192 beds. In June of 2020, the University of Chicago Medical Center reversed that increase in ICU beds. So, as of today, the University of Chicago Medical Center once again has 146 authorized ICU beds. By simply putting its 33 unstaffed ICU beds into use, the University of Chicago Medical Center can accommodate **all** of Mercy Hospital's ICU volume. Thus, the notion that the closure of Mercy Hospital will create a health risk when the University of Chicago Medical Center is within Mercy Hospital's Planning Area (and the larger market area) is misguided. Indeed, few people in the State of Illinois (let alone the planet) live within 6.6 miles of a world-class academic center such as the University of Chicago Medical Center.

Provident Hospital is owned and operated by Cook County and is part of the larger Cook County Health System. Cook County also owns and operates County Care, the largest Medicaid managed care provider in the City of Chicago. Over the years, Provident Hospital has reduced the number of its ICU beds and currently staffs **zero** ICU beds. Provident Hospital is authorized for 6 ICU beds and, in the past, had far more ICU beds. As Provident Hospital closed its ICU beds, the bulk of those ICU patients presumably received ICU level care at Mercy Hospital because Mercy Hospital is the closest hospital to Provident Hospital. If Provident Hospital staffed its ICU beds, Provident Hospital could also accommodate a portion of Mercy Hospital's ICU volume. Indeed, the closure of Mercy Hospital would actually allow Provident Hospital to build its ICU volumes (and other inpatient and outpatient volumes). Because Provident Hospital still has not finalized its modernization plans for its replacement hospital, basic healthcare planning would also indicate that the closure of Mercy Hospital would make Provident Hospital immediately more feasible. Since Cook County also owns the largest Medicaid managed care plan in the City of Chicago, the need for County Care to participate in the transformation process on the Southside of Chicago should also be evident.

Indeed, while other healthcare providers have reduced or eliminated services on the Southside of Chicago, Mercy Hospital has assumed the financial burden of treating patients that would have presumably been treated at those other hospitals. Provident Hospital's closure of its emergency department and ICU, is both one example. Most recently, St. Bernard Hospital was able to temporarily suspend (and has received permission from the Review Board to permanently discontinue on December 1, 2020) its OB service line because the OB service line was too expensive to operate given the volume of OB patients at St. Bernard Hospital.

At the same time Mercy Hospital was assuming these expensive service lines from the other hospitals in the Planning Area, Mercy Hospital witnessed its higher paying cases going to

the academic medical centers and other large not for profit systems. But for the presence of Trinity, Mercy Hospital would have never been able to sustain the types of losses it sustained for the past five years. Those financial burdens should have been borne by the State of Illinois and/or Cook County and an effective, regional healthcare plan would have attempted to fashion solutions that did not entail simply shifting costs to a single safety net hospital (i.e., Mercy Hospital).

Thus, both legally and factually, the State Agency's conclusion that the closure of Mercy Hospital's intensive care unit will impact the provision of healthcare in Mercy Hospital's market area is flawed and inaccurate; and should be corrected in the State Agency Report.

Emergency Department Services

At page 4 of the State Agency Report, the State Agency states that the "loss of emergency care services will result in health risk to the population that Mercy Hospital serves." That conclusion is seemingly premised on the notion that "the proposed closure will result in residents in the A-03 Planning [having to] travel five miles or more for emergency services" and the "number of comments from the community received during the 3 days of public hearings conducted by the State Board." See pages 4 and 13 of the State Agency Report.

Again, for the reasons stated above, pursuant to 77 Ill. Admin Code 1110.290, the applicable review area is Mercy Hospital's market area, which is a 10 mile radius around Mercy Hospital. There is no "5-mile emergency department rule" in the Illinois Health Facilities Planning Act or the Review Board's regulations. Nor is there a regulation that references the number of comments received at a Public Hearing as being solely determinative of impact.

Moreover, Provident Hospital is less than 4 miles away from Mercy Hospital. Provident Hospital recently downgrade its emergency department to standby status. So, there is a hospital with an emergency department within 5 miles of Mercy Hospital, but Provident Hospital elected to downgrade the level of its emergency department services. Provident Hospital can simply return to its original status and begin treating emergency department patients again. It also bears noting that 20% of the patients that present at Mercy Hospital's emergency department are enrolled in the County Care plan, so the need for Cook County to restore emergency department services at Provident Hospital is more than theoretical.

The State Agency also cited the average number of emergency department visits to Mercy Hospital over the past five years. Point in fact, the number of emergency department visits at Mercy Hospital has decreased from 67,432 in 2015 to 48,889 in 2019, representing a decrease in visits of 27.5 % between 2015 and 2019. The numbers for 2020 show an even further decrease. Through October 31, 2020, the Mercy Hospital Emergency Department has treated 32,163 patients, for an annualized rate of 38,596 visits. If, in fact, that trend continues,

Mercy Hospital will have experienced a decrease in emergency department visits of 42.8% since 2015. That said, the Applicants are not asserting that 38,596 emergency department visits each year is insignificant. Rather, the Applicants are challenging the notion that the State Agency can cite unwritten rules and Public Hearing testimony as the sole basis for concluding that the market area will experience an increased health risk to the market area residents. Indeed, a large majority of the citizens of the State of Illinois do not live within 5 miles of an emergency department; nor do they have access to a county owned hospital within 3.7 miles of their residence or a world class academic medical center within 6.6 miles of their residence.

Thus, both legally and factually, the State Agency's conclusion that the closure of Mercy Hospital's Emergency Department will impact the provision of healthcare in Mercy Hospital's market area is flawed and inaccurate; and should be corrected in the State Agency Report.

Ongoing Financial Losses

During the Public Hearing, and in various opposition statements, concerned parties have asserted that Mercy Hospital is viable (and that closure and transformation is not necessary) because Mercy Hospital posted a $4.1 million profit in fiscal year 2020. However, that figure is a function of timing and one-time payments from the State of Illinois and the Federal Government. If the 2020 net profit is normalized, Mercy Hospital posted losses of $38.9 million in fiscal year 2020. The following chart sets forth the one-time payments:

Excess of Revenues Over Expenses (prior to normalization)	$4.1 million
Less:	
Federal CARES Act Payments Attributable to FY 2020	$14.7 million
State of Illinois enhanced, MCO directed hospital assessments (COVID specific)	$1.9 million
One time, supplemental payments from State of Illinois to cover operating losses during efforts to effectuate 4 hospital merger, transition plan	$26.4 million
Total of one-time payments	$43.0 million
Excess of Revenues Over Expenses (after normalization)	($38.9) million

Some of the opposition statements also assert that Mercy Hospital was once profitable and that Mercy Hospital somehow mismanaged its way to hundreds of millions of dollars in losses over the past five years. That is simply false.

First, as set forth in the CON Application, the census at Mercy Hospital has materially declined over the past five years and Mercy Hospital has taken on a number of underinsured patients and expensive service lines from Provident Hospital and the other safety net hospitals in the Planning Area; while at the same time seeing its better paying cases shift to the academic medical centers and larger not-for-profits. Even a cursory review of Mercy Hospital's audited financial statements shows the impact of those events. The Applicants also engaged in a robust, multi-year sale process, led by a nationally recognized healthcare investment banking firm, and found no buyers. Those buyers also concluded that Mercy Hospital's losses were real and that they could not develop a financially stable path forward for Mercy Hospital.

Second, every safety net hospital in the State of Illinois (and in Cook County in particular) has been absolutely devastated by: (a) the 793 day long budget crisis in the State of Illinois from July 1, 2015 to August 31, 2017; (b) the decision by Governor Rauner to place nearly 90% of the Medicaid population into managed care plans on January 1, 2018, with **none** of the protections that the other Medicaid managed care plan states have in place to protect hospital providers from payment delays and denials; and (c) the constant payment delays with County Care, the largest Medicaid managed care plan in Cook County. These last two points in particular have resulted in payment denial rates across certain payors approaching 40% and delays stretching into months. In this environment, every single safety net hospital in Chicago has suffered and two hospitals have already closed (i.e., Westlake Hospital and MetroSouth Hospital. See e.g., Saint Anthony Hospital vs. Illinois Department of Healthcare and Family Services, 20-CV-02561 (N.D. Ill., April 27, 2020)(Chicago safety net hospital files suit against DHFS citing tens of millions dollars of delayed and denied Medicaid managed care payments and seeking a receiver to manage the Medicaid managed care program because of the lack of compliance by the Medicaid managed care payors), attached hereto as Exhibit 4; Deloitte Audit of County Health System Finances Requested After Scathing IG Report, Crains (July 25, 2019), attached hereto as Exhibit 5.

So, the notion that Mercy Hospital was an outlier in terms of performance is simply wrong. Mercy Hospital only survived for the past five years because they were supported by Trinity Health.

Update on a Safe and Coordinated Transition

As the Applicants stated in the CON Application, the Applicants are absolutely committed to effectuating a safe and coordinated transition of operations. Indeed, to date, no hospital in Illinois preparing to close has ever: (a) spent over 3 years searching for options to

avoid closure: (b) committed to lose $3 million a year on an outpatient center to assist in the transformation of healthcare; (c) committed to spend tens of millions of dollars on severance payments, retention payments, and placement efforts; and (d) worked diligently to find a medical home for all of its patients and employment for its providers, colleagues, and residents.

To date, the following hospitals and health systems in Mercy Hospital's Planning Area and in its larger 10-mile market area have been working with Mercy Hospital to effectuate a safe and orderly transition of Mercy Hospital's services by the date of Mercy Hospital's closure: (a) on December 1, 2020, St. Bernard Hospital transitioned Mercy Hospital's outpatient behavioral health service line; (b) the University of Chicago Medical Center has been working with Mercy Hospital on a timely transition of Mercy Hospital's critical intervention, outpatient behavioral health service line; (c) Rush University Health System has been working with Mercy Hospital on coordinating care for cardiology cases; (d) Loyola Medicine, the University of Chicago Medical Center, and Rush University Health System are prepared to provide easy entry for Mercy Hospital's patients to receive oncology services through expedited scheduling and the use of navigators to assist with care coordination at multiple locations for Mercy Hospital patients; (e) Alivio Medical Center, one of the largest obstetrics providers at Mercy Hospital, already transitioned its expectant mothers to Mt. Sinai Hospital on November 1, 2020; and (f) Rush University Health System and the University of Chicago Medical Center are prepared to treat any high risk, expectant mothers in Mercy's service area.

Loyola Medicine has already interviewed physicians and nurses to fill positions at their hospitals: Loyola University Medical Center, Gottlieb Memorial Hospital and MacNeal Hospital). Loyola Medicine also plans to hire approximately 50 physicians from Mercy Hospital. Mercy Hospital has already placed nearly all of its resident and should have every resident placed by the time of Mercy Hospital's closure.

Mercy has also scheduled the first of several job fairs in January for clinical staff, including nurses, CNAs, laboratory staff, radiology staff and cardiovascular staff. The following hospitals and healthcare providers will participate in the job fairs to interview employees for positions at their respective institutions: Loyola University Medical Center, MacNeal Hospital, Gottlieb Memorial Hospital, University of Chicago Medical Center, Rush University Health System, St. Bernard Hospital, Thorek Memorial Hospital, and ACCESS Community Health Network. These partner organizations will allow Mercy Hospital colleagues to begin a new role at their institutions after Mercy Hospital closes. The arrangements will allow Mercy Hospital to continue to provide critical care to patients in the community during this transition period.

For all of these reasons, the Applicants believe that the negative findings and conclusions set forth in the State Agency Report should be changed to reflect conformance with all applicable Criteria.

The Applicants reserve their right to supplement this Response.

Please feel free to contact me if you have any questions.

Sincerely,

Edward J. Green

EJG:sxc