

AFL-CIO RESPONSE TO JHBMC'S REPLY COMMENTS FROM 3/25/2019

**Regarding the Application for Certificate of Need Submitted by Johns Hopkins Bayview Medical Center
- Docket No. 18-24-2414**

On behalf of the American Federation of Labor – Congress of Industrial Organization (AFL-CIO), we are submitting the following reply to Johns Hopkins Bayview Medical Center's (JHBMC) response letter submitted on 3/25/2019. We oppose JHBMC's motion to strike the AFL-CIO's reply comments submitted on 3/8/2019 and the affidavits and exhibits submitted on its behalf on 3/27/2019. Our response to the issues JHBMC raises in its 3/25/2019 filing are laid out below. In addition, due to the fact that JHBMC has taken issue with the accuracy of our analysis of its medical debt collections practices in its Motion to Strike submission from 4/9/2019, and the willingness of former JHBMC and Johns Hopkins Hospital patients to give testimony regarding Johns Hopkins' failure to inform them about the availability of charity care (discussed below on pages 4 and 5), we are restating our request for an evidentiary hearing in which we would present oral arguments detailing the accuracy and merit of our claims, prior to the preparation of a proposed decision regarding Certificate of Need approval.

Lack of Documentation, Sworn Affidavits

Although we hold to our arguments that all of our factual assertions were appropriately documented, we have submitted sworn affidavits and a number of exhibits that provide the data and documents used in our Interested Party Comments.

Interested Party Standing

JHBMC once again disputes that the AFL-CIO is an "interested party" for the purposes of this CON review proceeding. It argues that the AFL-CIO is not "adversely affected" under the Commission's

regulations defining an “interested party.” However, JHBMC’s attack on the AFL-CIO’s status as an interested party fails for the following reasons.

JHBMC continues to incorrectly conflate “interested party” status in the CON review proceeding with “aggrieved party” status for the purpose of judicial appeal. To support this argument, JHBMC cites the fact that CON regulations governing interested party status in the CON review process and the requirements for a judicial appeal of a CON decision share the phrase “adversely affected.”

Maryland principles of statutory construction militate against JHBMC’s interpretation of COMAR 10.24.01.01(B)(2)-(3). “Absent a clear indication to the contrary, a statute, if reasonably possible, is to be read so that no word, clause, sentence or phrase is rendered surplusage, superfluous, meaningless, or nugatory....” *Walker v. Lindsey*, 65 Md. App. 402, 407, 500 A.2d 1061, 1064 (1985).

The Commission’s regulations have provided the following criteria for an “interested party” in a CON review:

“Adversely affected”, **for purposes of determining interested party status in a Certificate of Need review**, as defined in § B(19) of this regulation, means that a person: [...] (d) Can demonstrate **to the reviewer** that the person could suffer a potentially detrimental impact from the approval of a project before the Commission, **in an issue area over which the Commission has jurisdiction, such that the reviewer, in the reviewer's sole discretion, determines that the person should be qualified as an interested party to the Certificate of Need review.** COMAR 10.24.01.01(B)(2) (emphases added).

The Commission’s regulation regarding judicial review states: “**In order to take a judicial appeal**, an interested party **must be** an aggrieved party.” COMAR 10.24.01.09(F)(2).

“Aggrieved party” is defined as:

(a) An interested party who:

(i) Presented written comments on an application to the Commission, both to the reviewer and in the form of exceptions to a proposed decision that is adverse to the position of that person,

and

(ii) Would be adversely affected by the final decision of the Commission.
COMAR 10.24.01.01(B)(3)(a)(emphasis added).

Here, COMAR 10.24.01.01(B)(2) provides a definition of “adversely affected” for the express purpose of determining interested party status in a CON review. The mere fact that the phrase “adversely affected” is employed does not mean that the Commission is adopting the definition of “adversely affected” used in the judicial review context. The Commission’s regulation regarding judicial review explicitly states that “[i]n order to take judicial appeal, an interested party **must be** an aggrieved party,” indicating that an “interested party” in the CON proceeding is not by default an aggrieved party for the purpose of judicial review. Similarly, an aggrieved party is defined as an interested party that submitted comments in a CON proceeding “**and** [w]ould be adversely affected by the final decision of the Commission.” COMAR 10.24.01.01(B)(3)(a)(emphasis added). A conflation of an “interested party” for the purpose of CON review with an “aggrieved party” for the purpose of judicial review would render the bolded language above superfluous and meaningless. In fact, the two standards are distinct.^{1, 2}

In previous filings, the AFL-CIO has already described in detail how it would be detrimentally impacted in areas under the Commission’s jurisdiction, and refers the Reviewer to those documents.

Furthermore, as JHBMC points out on page 8 of its response, the “CON Modernization Task Force” states in its Final Report that the standard review process does not include any requirements for public hearings or input. Therefore, the only opportunity to provide input available to community

¹ As discussed in previous filings, it would be inappropriate for an administrative agency to usurp a judicial function: “the determination of whether a person has standing to maintain an action in court is exclusively a judicial function.” *Sugarloaf Citizens’ Ass’n, Sugarloaf Citizens’ Ass’n v. Dep’t of Env’t*, 344 Md. 271, 290 (1996).

² As a further illustration of the difference between the CON review and judicial review processes, the Commission is required to consider the “[v]iability of [a] [p]roposal,” including “the availability of... community support...” for a proposal in its evaluation of CON applications. (Overview of Maryland Certificate of Need (CON) Program: http://mhcc.maryland.gov/mhcc/pages/hcfs/hcfs_con/hcfs_con_overview.aspx.) Here, the AFL-CIO’s interested party comments are clearly probative of the availability of “community support” (or a lack thereof) for JHBMC’s CON application, consequently fall within the scope of “an area over which the Commission has jurisdiction,” and warrant the Commission’s consideration.

organizations regarding CON regulated projects is to seek interested party status. Why is JHBMC arguing so tenaciously to shut down the only avenue available to the community to express its concerns about a CON regulated project? It is our view that it would not serve the interests of the Commission, the CON program, or the citizens of Maryland to adopt a reductive and improperly restrictive interpretation of who qualifies for interested party status when no other avenue for community input is open to the public.

Charity Care Standard

Bayview states the following on pages 8 and 9 of its response: “JHBMC’s charity care policy requires that information about the availability of charity care to be provided before discharge, which is consistent with providing the notice prior to admission.” This statement is untrue. Providing charity care before discharge is not consistent with providing notice prior to admission. The hospital must be required to change its policy to comply with the State Health Plan.

Regarding JHBMC’s denial of charity care to non-citizens, the hospital states on page 10 of its response that “the AFL-CIO failed to raise this issue in its initial Comments, so this part of its Reply Comments should be stricken as outside the scope of a reply.” The Commission has no rules or standards that dictate what falls within or beyond the scope of a reply from an interested party, and it can decide for itself what information to take into account. Beyond that point, Exhibits 6 and 7 of JHBMC’s response to our Interested Party Comments, submitted on 2/25/2019, provided new information regarding the denial and discouragement of noncitizens from applying for charity care that was not previously available, and thus necessitated our response. Both of those documents, titled “Patient Handbook” and “Understanding Your Medical Bills,” had not previously been disclosed. They both list being a US citizen or legal resident as **the first qualifying factor in the consideration of charity care**. As we discussed in our reply, JHBMC’s charity policy states that non-citizens may in fact receive charity care if they reside in neighborhoods surrounding the hospital, which include the 10 zip codes

identified in the hospital's Community Health Needs Assessment (Exhibit 7 of the CON Application Docket No. 18-24-2414). Thus, those new exhibits show the JHBMC is actively communicating to its undocumented immigrant patients that they are not qualified to apply for charity care, when in fact, according to its own policies, they are eligible to receive charity care in many cases. This contradiction between JHBMC's written charity care policy and what it communicates to its patients is all the more alarming when one considers that over half of all undocumented immigrants in Maryland are uninsured, and that they make up about 34% of the total uninsured population for the state.³ By undermining its own charity care policy, JHBMC is cruelly and needlessly excluding a large number of uninsured patients from access to charity care, in violation of the State Health Plan and Maryland law.

JHBMC states on page 11 of its response that the Commission does not interpret its charity care standard to bar citizenship requirements, and supports this claim by listing a number of past Johns Hopkins CON projects approved with similar or identical charity care policies. The fact that the Commission has granted CON approval for Johns Hopkins projects in the past does not mean that it fully considered the rights of non-citizen access to charity care in those cases, or that it was alerted to the fact the Johns Hopkins Hospital and JHBMC were violating their own charity care policies by informing undocumented immigrants that they were ineligible for charity care when their policies indicated otherwise. If the Commission has not fully considered these particular issues in the past, it has every right to do so now.

JHBMC argues on pages 13 and 14 of its response that our analysis of its medical debt collections practices provides no evidence that it failed to properly carry out its charity care policy. We believe the data we presented provides ample circumstantial evidence that the hospital may be failing to inform its

³ Sources: Migration Policy Institute for uninsured undocumented immigrant population <https://www.migrationpolicy.org/data/unauthorized-immigrant-population/state/MD> and Kaiser Family Foundation for total uninsured in Maryland: <https://www.kff.org/other/state-indicator/total-population/?dataView=1¤tTimeframe=0&selectedRows=%7B%22states%22:%7B%22maryland%22:%7B%7D%7D%7D&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D>

indebted former patients about the availability of charity care and discouraging them from applying. In fact, we have now received personal testimony that this is in fact the case. The personal statements of multiple individuals sued for medical debt by JHBMC and Johns Hopkins Hospital, which shares its charity policy document with JHBMC (exhibit 7 of the CON Application Docket No. 18-24-2414), show that the hospitals failed to inform their indebted patients about the availability of charity care, as our medical debt study indicated. The details listed below, along with our analysis of JHBMC's predatory medical debt collections practices, provide compelling evidence of the hospital's failure to carry out its charity care policy.

- **Lakesha Spence:** In 2015, Lakesha Spence was admitted to Bayview for medical treatment. She had insurance at the time through her job as a security guard. She never received any information about financial assistance or charity care. JHBMC filed a lawsuit against Lakesha in 2016 seeking \$4,821 in alleged medical debt. She told them that she could not afford to pay her medical debt while supporting both her mother, who lives with her, and her son. She owed at least \$1,800 to Johns Hopkins Hospital for the birth of her son in 2016. In discussions with Hopkins representatives, Lakesha has insisted that she cannot pay her medical debts and still support herself and her family. Rather than being told about the availability of financial assistance, the hospital representatives insisted they would keep calling back to "check if her situation has changed." Lakesha states that she cannot pay down her alleged medical debt to JHBMC and still afford to pay for food, rent, and other essential expenses. In March of this year, JHBMC sought and received a court order for a Writ of Garnishment of Property. Her

bank account was zeroed out in April.⁴

- **Eric Simmons:** In 2013 Eric Simmons went to Johns Hopkins Hospital for an ankle injury that ultimately caused him to lose his job at a bakery. Eric later got a more difficult job at Amazon. In 2014, Eric was sued for \$524 for his hospital visit and had his Amazon wages garnished by Johns Hopkins Hospital to pay for his alleged medical debt. He was never told about the availability of financial assistance. “[Hopkins] withheld information from me, information that could have helped me and my family...Years later, we’re still playing catch-up.”⁵
- **Mary Scott:** In 2016 Mary Scott went to the Johns Hopkins Hospital ER for acute bronchitis, lacking insurance, but employed on modified compensation as a medical records clerk. She was not told about any financial assistance, free or reduced care, or charity care. Hopkins sued her in July 2017 for the ER visit and obtained a judgment against her two months later. Mary then began dealing with someone called “Ms. Smith” from “JH Law.” She agreed to pay \$100 per month and did so for about five months with the help of her adult children. The debt was so great, however, that Mary declared bankruptcy in November 2018. This has all affected Mary’s anxiety and well-being tremendously. “They should really emphasize that charity care is available. Every patient should be informed. The way they go after people is aggressive, especially for

⁴ From personal statement of Lakesha Spence on 2/17/2019 and 4/11/2019; Case No. 010100117842016, Baltimore City District Court; Case No. 010100282962016, Baltimore City District Court

⁵ From personal statement of Eric Simmons on 2/16/2019; and Case No. 010100132652014, Baltimore City District Court.

those of us that are living paycheck to paycheck. Hopkins should find some compassion for its patients because their current practices can cause financial devastation.”⁶

Adverse Impact

JHBMC claims on page 14 of its response that our assertion is incorrect that if its requested rate increase is allowed, its profits will increase by 510% by FY 2025. Yet, as it admits, this is exactly how much the hospital projects its income will increase. JHBMC takes issue with our inclusion of non-operating income in our calculations of its income. The hospital argues that it is inappropriate to consider such income when considering its profits, because it is subject to “economic factors outside of the JHBM’s control.” This argument is not persuasive. First, non-operating income is income, with a material effect on the financial performance of the hospital. The purpose of a hospital holding investments and interest rate swaps is to support the functions and financial health of the hospital. If a hospital’s investments produce income, it is the hospital’s income and should not be cordoned off and treated as income from an outside entity. Similarly, when an indigent patient of JHBMC applies for charity care, the hospital looks not just at the individual’s “operating income,” such as wages or business income, but at total household income and assets.⁷ Likewise, it is appropriate to look at JHBMC’s total income when considering the appropriateness of its requested rate hike. Second, there are many factors beyond the control of the hospital that will impact both its operating and non-operating income. Just because these factors exist doesn’t mean it cannot make meaningful projections about the income it expects to earn. If JHBMC feels its projected non-operating income is overly optimistic, it should have provided more conservative estimates.

⁶ From personal statement of Mary Scott on 2/17/2019; and Case No. 080400129162017, Baltimore County District Court.

⁷ Johns Hopkins Medicine – Financial Assistance Policies: https://www.hopkinsmedicine.org/patient_care/billing-insurance/assistance-services/assistance_policies.html

JHBMC also points out on page 15 of its response that in FY2016 it reported a \$14 million loss in non-operating income in CON Table H. This particular figure was reported in its response to the Commission's second completeness request, dated 7/3/2018, labeled Exhibit CQ39.1. The data was resubmitted due to JHBMC's previous use of inaccurate outpatient volumes projections in another exhibit (Table G). The revised financial information for table H, however, contain a number of changes with no apparent connection to outpatient volumes. Specifically, in FY 2016 JHBMC's revised Table H reported a loss of \$14 million in non-operating income, while in the original Table H it only reported a loss of \$5 million. No explanation or acknowledgement is provided for this discrepancy. Other reports also contradict this estimate. In its unaudited income statement reports submitted to the Health Services Cost Review Commission, JHBMC reported non-operating income of \$2.7 million, while in its annual financial statement, JHHS reported Bayview lost about \$5.3 million in non-operating income.⁸

JHBMC acknowledges on page 16 of its response that if the rate increase is not allowed and nothing else changes (e.g. no additional system or charitable funding for the project) that it would still receive millions in profits, including \$4.7 million for FY 2025 alone. JHBMC calls this level of income "dangerously low." If JHBMC were a for-profit hospital focused on maximizing its profits to ensure its investors receive a high return on investment, we could see how this level of income could be perceived as dangerous, but of course this is not the case. JHBMC would hardly be in any financial difficulty if, as it projects, it would be making a profit 5.7 times greater than what it earned in FY 2018.⁹ After all, as a

⁸ Hospital Monthly Unaudited Income Statements Reports, https://hscrc.state.md.us/Pages/hsp_Data2.aspx; and The Johns Hopkins Health System Corporation and Affiliates Combined Financial Statements and Supplementary Information June 30, 2016 and 2015, https://hscrc.maryland.gov/Documents/Hospitals/ReportsFinancial/Audited/FY-2016/JHHS_AFS_FY16.pdf

⁹ Interested Party Comments filed by AFL-CIO, February 2019, pg. 17.

http://mhcc.maryland.gov/mhcc/pages/hcfs/hcfs_con/documents/filed_2018/Bayview/con_bayview_2414_ip_comments_Feb%202019.pdf

nonprofit hospital, the mission of Bayview is not to hoard cash, but to provide high quality hospital care to the community and free care to the indigent (for which it is largely reimbursed).

It is also important to note that according to JHBMC's unaudited income statement reports submitted to HSCRC, its average annual income between 2012 and 2018 was \$6.8 million. With its requested rate increase, JHBMC is hoping to increase its annual income to \$38.4 million by FY 2025. It is hard to fathom how JHBMC could justify the need to extract additional revenue from its rate payers so that it could increase its profits to nearly \$40 million annually. This is especially hard to understand when one considers that the hospital system that owns it earned well over a quarter of a billion dollars in profit last year, and over \$1.3 billion over the last 6 years.¹⁰

Conclusion

Based on the issues raised above and in our previously filed comments, the AFL-CIO respectfully requests that the Commission delay approval of the requested CON until JHBMC has fully addressed and remedied these concerns. Failure to require JHBMC to do so will cause adverse impacts upon this organization and its employees and the working people our affiliated unions represent in the service area. Furthermore, in light of disputes over the accuracy of our analysis of JHBMC's medical debt collections practices and the personal statements from former JHBMC and JHH patients outlined above, we are restating our request for an evidentiary hearing that would allow us to present oral arguments prior to the preparation of a proposed decision.

Respectfully submitted,

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¹⁰ Interested Party Comments filed by AFL-CIO, February 2019, pg. 18 – 19.
http://mhcc.maryland.gov/mhcc/pages/hcfs/hcfs_con/documents/filed_2018/Bayview/con_bayview_2414_ip_comments_Feb%202019.pdf