March 21, 2007

Judith Donlan, Chair
State Health and Planning Board
NJ Department of Health and Senior Services
P.O. Box 360
Trenton, New Jersey 08625-0360

Re: Mountainside Hospital
Certificate of Need Application/CHAPA review
Transfer of Ownership to a For-profit Limited Liability Company

Dear Ms. Dolan:

We are writing to you on behalf of NJ Citizen Action, NJ-PIRG, New Jersey AARP and New Jersey Appleseed Public Interest Law Center to express our concerns regarding the proposed sale of Mountainside Hospital ("Mountainside") by Atlantic Health System ("AHS") to Merit Mountainside, LLC, a newly formed subsidiary of Merit Health Systems, LLC, a for-profit limited liability company based in Louisville, Kentucky (collectively, "Merit"). This submission is intended to supplement the Testimony of Renée Steinhagen presented at the Certificate of Need ("CN") hearing held on March 14, 2007 at Glen Ridge High School.

As you know, New Jersey has a long tradition of providing health care services in nonprofit hospitals. Because this proposed transaction would result in only the second for-profit acute care facility in the State, it is essential that the State Health Planning Board carefully consider whether this deal is in the best interests of the community served by Mountainside Hospital.[1] Diligence and caution are urged especially since it is clear that Merit's Chicago-based equity backer, Willis Stein & Partners, intends to sell the company by the year 2012. [2]

After reviewing Merit's CN Application,[3] we are concerned that, as proposed, the interests of the public in affordable and quality medical services are not adequately protected. Merit has a slim track record; it has operated for less than four years only three hospitals in two states, and has not provided in this application track record reports from those two states, Texas and Illinois.[4] Moreover, it asserts that it does not have audited financial statements,[5] and merely relies on its "established relationships with Willis Stein and with major health care financing sources" to assure the State that adequate capital will be available to finance the proposed transaction and future capital needs and expenditures.[6] The public record suggests, however, that Willis Stein's investment in Merit is limited, and is not available as a source of additional financing,[7] and no other financing sources are identified. In addition, three members of Merit's senior management team, John C. Thompson (Chief Financial Officer), Hal E. Clark (VP, Operations-Finance), and Todd A. Coke (VP, Finance and Accounting) held management positions with Vencor, Inc., which was sued by the Department of Justice for Medicare fraud resulting in a $104 million settlement in March 2001.[8] Although we cannot determine from the information distributed by Cain Brothers (relevant pages attached hereto), when these persons were affiliated with Vencor, Inc., we respectfully request that the Department further investigate whether they were implicated in the financial improprieties alleged by the federal government.

In the case of Mountainside Hospital, Merit has made commitments in the CN application to continue all medical services offered at Mountainside Hospital for at least 10 years, maintain current levels of indigent care services, and spend $20 million dollars on capital programs and physician recruitment over 10 years. These are admirable commitments, but there is nothing in the application materials that assures the public that they will become a reality. Merit's intention to operate as a hospital-management company for just another six years should be heeded and, if the application is approved, the Department of Health should demand more specific commitments with timetables and enforcement mechanisms to assure accountability to the community.

The Community Must be Assured of Continued Access
To Affordable Health Care Services

Pursuant to the Community Health Care Assets Protection Act, N.J.S.A. 26:2H-7.10 et seq., the Commissioner of Health and Senior Services may hire an independent health care monitor (paid for by the entity buying a nonprofit hospital) to monitor and report on community health care access by the entity, including levels of uncompensated care for indigent persons. N.J.S.A. 26:2H-7.11(i). We believe any approval of the sale of Mountainside Hospital ought to be conditioned on the hiring of such a monitor. Further, we recommend that the Commissioner hire an independent auditor to monitor the Hospital's billing practices and finances. The uncertainties inherent in the representations made in the application regarding operating revenues and expenses underscore this request. Revenues are based on expected increases in admissions, while expenses do not include either property or sales tax assessments.[9] Deficits are projected until 2011, and such losses are to be funded by $14-$15 million dollars expected to be part of the opening balance, the source of which remains unidentified.[10]

Merit has stated its intention to operate Mountainside Hospital as an acute care facility for 10 years, and continue "in all material respects . . . all core services offered at the Hospital."[11] However, these promises come with no guarantees since Merit specifically reserves the right to discontinue services depending on factors such as the availability of qualified physicians, changes in community needs and economic feasibility. The only check on Merit's ability to change services is its own hand-picked board. In order to assure accountability, we urge the Department to require a public process for reviewing and approving certain operational changes, even if they do not require a CN application. Such changes would include significant reductions in any core services as well as significant reductions in employment levels.[12] In particular, we urge that the Department make continuity of the health clinics and community health programs currently offered at Mountainside and detailed in the application mandatory and subject to closure only after rigorous scrutiny by the Department with notice to the public.[13] See In the Application of Sharon Corporation, Sharon Hospital, Inc., West Sharon Corporation and Essent Healthcare, Inc., Docket No. 01-486-01, Connecticut Office of Healthcare Access, Final Decision dated October 17, 2001, at p.34 (relevant pages attached hereto) and Revised Final Order, dated November 26, 2001 at p. 4 (attached hereto).

Merit Must Make Specific Assurances That It Will Continue to Serve the Indigent

In the CN application, Merit commits to providing access to free and indigent care at the same levels offered by Mountainside Hospital prior to the sale. However, the application only provides the percentage of charity care for outpatient and inpatient services for the year 2005, although it gives a history of actual dollars expended back to 2001. We strongly recommend that levels of prior charity care be considered a floor and not a ceiling, and Merit has to commit to providing indigent care based on need, not just on a percentage for one year that may or may not be a function of government policy for that one year.

Accordingly, Merit's commitment regarding indigent care should be based upon the needs of the persons residing in the Hospital's service area. Merit should be required to provide to the Department an accounting of the number of outpatient visits (emergency and other) as well as the number of inpatient days provided on a free or reduced cost basis to patients for the 3 years prior to the conversion, and then be held accountable for providing at least that level of care in the future (unless it can demonstrate that community need for such care has been substantially reduced). If Merit fails to maintain that level of service to indigents, the Department should retain authority to issue a penalty in an amount no less than the value of the services required, but not provided.

Merit Must Commit to a Specific Investment Plan

Merit has agreed to make available $20 million over the next ten years for capital improvements and investments, including a physician recruitment program.[14] To assure accountability to the community, the Department should require that Merit submit for review and approval a specific improvement and investment plan, with enforceable deadlines, for the entire $20 million. If Merit does not meet is commitments, the Department should retain the right to place an equivalent amount into the Mountainside

Hospital Foundation (that should be controlled and operated independently from either AHS or Merit) for health programs and services that will benefit the community.

To Ensure Accountability, CHS Must Include Consumer Representatives on its Governing Board

The CN application contains very little information about the governance of the new hospital. It states only that Merit will appoint a Board of Trustees comprised of 9-15 members. The Board must include the CEO, at least three physicians on the medical staff and local community members. [15] The Board of the Mountainside Foundation is not discussed since it is not expected to receive any proceeds from this transaction as is typically the case when a nonprofit hospital converts to for-profit status (unless purchased out of bankruptcy).

We believe that it is vital that there be substantial consumer representation guaranteed on the new governing Board of the Hospital, even though the Board is in essence an advisory Board regarding budget, operations and medical policy. In particular, representatives of local vulnerable populations (including representatives of low-income populations, immigrants, the disabled, the chronically ill and minorities) should be included. Furthermore, the creation of a permanent Community Advisory Committee, made up of such individuals from the service area would help to ensure ongoing consultation with consumers on issues such as free care, interpreter services, cultural competence and transportation. Such advisory committee should also be authorized to speak publicly about operational matters that will have a direct impact on service to the community.

We appreciate this opportunity to present these comments and recommendations to the Department. Given that this would be only the second for-profit acute care hospital in the State, and the first in the northern part of the State, the Department has a unique opportunity—and obligation – to protect the public. We urge the Department to carefully scrutinize this proposal and take all actions within its authority to make the above commitments real and not just representations nominally made to facilitate approval of the transfer. Specifically, we request that the Commissioner consider the appointment of a health care monitor pursuant to its authority under CHAPA to ensure that the quality, affordability and accessibility of health care is not diminished after conversion, and that each of Merit's commitments is made a condition of approval subject to change only after public notice, hearings and the Commissioner's approval.

Respectfully submitted,

Renée Steinhagen
Ex. Director
New Jersey Appleseed PILC

END NOTES

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[1] Under the Community Health Care Assets Protection Act ("CHAPA"), the Commissioner of Health and Senior Services must determine that "the proposed transaction is not likely to result in the deterioration of the quality, availability or accessibility of health care services in the affected communities." N.J.S.A. 26:2H-7.11(b).

[2] See Ed Green, "Merit's Plan to Buy, Improve Urban Hospitals is `On Track'," BUSINESS FIRST OF LOUISVILLE, May 5, 2006.

[3] It should be noted that we were not given access to review any of the schedules of Exhibits to the Asset Purchase Agreement.

[4] See CN Application at page 20.

[5] See CN Application at page 15.

[6] See CN Application at page 20.

[7] See Ed Green, "Merit's Plan to Buy, Improve Urban Hospitals is `On Track'," BUSINESS FIRST OF LOUISVILLE, May 5, 2006; Jennifer Gordon, "Hospital Management Company to Buy Dallas-Area Facility," BUSINESS FIRST OF LOUISVILLE, November 12, 2004.

[8] Information regarding Vencor, Inc. and the allegations of fraud lodged by the federal government can be found at www.uow.edu.au/arts/sts/bmartin/dissent/documents/health/vencor_fraud.html.

[9] [9] See CN Application at pages 11-12.

[10] See CN Application, Completeness Review Responses at pages 8-9.

[11] See Asset Purchase Agreement, §10.17

[12] As noted in our testimony at the CH hearing, Merit states that it will double the number of employees it currently employs when acquiring Mountainside. Although we do not know the regulatory environment in either Illinois or Texas nor the exact break down of the type of beds Merit is operating in its three other facilities, we question whether Merit really intends to keep the same number of employees to operate 251 beds at Mountainside as it has to operate over 500 beds at its three other facilities – 90 beds in its Lancaster facility, plus 190 beds at its Dallas campus (licensed to operate 294) and 225 beds at its Lincoln Park facility in Chicago (licensed to operate 390). See Potential Sponsor-Owner Company Overview, prepared and distributed by Cain Brothers, at pp. 3-4 (attached hereto)

[13] See CN Application, Completeness Review Responses at pages 1-3 and 5-6.

[14] See Asset Purchase Agreement, §10.18.

[15] See Asset Purchase Agreement, §10.15.