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By:  Darby, Lambert, Clardy H.B. No. 3301

A BILL TO BE ENTITLED

AN ACT

relating to merger agreements among certain hospitals; imposing fees.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1.  Subtitle F, Title 4, Health and Safety Code, is amended by adding Chapter 314A to read as follows:

CHAPTER 314A. MERGER AGREEMENTS AMONG CERTAIN HOSPITALS

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 314A.001.  DEFINITIONS. In this chapter:

(1)  "Attorney general" means the attorney general of Texas or any assistant attorney general acting under the direction of the attorney general of Texas.

(2)  "Commission" means the Health and Human Services Commission.

(3)  "Executive commissioner" means the executive commissioner of the Health and Human Services Commission.

(4)  "Hospital" means a nonpublic general or special hospital licensed under Chapter 241 or a private mental hospital licensed under Chapter 577.

(5)  "Merger agreement" or "merger" means an agreement among two or more hospitals for the consolidation by merger or other acquisition or transfer of assets by which ownership or control over substantially all of the stock, assets, or activities of one or more previously licensed and operating hospitals is placed under the control of another licensed hospital or hospitals or another entity that controls the hospitals.

Sec. 314A.002.  APPLICABILITY. This chapter applies only to a merger agreement among hospitals located within a county that:

(1)  contains two or more hospitals; and

(2)  has a population of:

(A)  less than 100,000 and is not adjacent to a county with a population of 250,000 or more; or

(B)  more than 100,000 and less than 150,000 and is not adjacent to a county with a population of 100,000 or more.

Sec. 314A.003.  LEGISLATIVE FINDINGS AND PURPOSES; OTHER LAW NOT AFFECTED. (a) The legislature finds that:

(1)  a merger among hospitals may benefit the public by maintaining or improving:

(A)  the quality, efficiency, and accessibility of health care services offered to the public; and

(B)  the ability of hospital administrators to operate health care facilities and take measures to improve public health; and

(2)  a merger among hospitals may provide the benefits described by Subdivision (1) despite that it may be anticompetitive within the meaning and intent of state and federal antitrust laws.

(b)  The legislature believes it is in the state's best interest to supplant state and federal antitrust laws with a process for regulatory approval and active supervision by the commission as provided by this chapter.

(c)  Nothing in this chapter affects antitrust immunity that may be provided through another provision of state law.

Sec. 314A.004.  RULEMAKING. The executive commissioner shall adopt rules for the administration and implementation of this chapter by the commission.

SUBCHAPTER B. CERTIFICATE OF PUBLIC ADVANTAGE

Sec. 314A.051.  REVIEW AND CERTIFICATION OF MERGER AGREEMENTS REQUIRED. (a) Two or more hospitals may negotiate and enter into a merger agreement, subject to approval by the commission as provided by this subchapter.

(b)  No merger agreement shall receive immunity under this chapter unless the commission issues a certificate of public advantage governing the merger agreement.

Sec. 314A.052.  APPLICATION. (a) One or more parties to a merger agreement may submit an application to the commission for a certificate of public advantage governing the merger agreement. The application must include a written copy of the merger agreement and describe the nature and scope of the merger.

(b)  If an applicant believes the documents or other information required to be submitted with an application under Subsection (a) contains proprietary information that is required to remain confidential, the applicant shall:

(1)  clearly identify the information; and

(2)  submit duplicate applications, one application that has complete information for the commission's use and one redacted application that will be made available for public release.

(c)  A copy of the application and copies of all additional related materials must be submitted to the attorney general and to the commission at the same time.

Sec. 314A.053.  APPLICATION FEE. The commission may assess a fee for filing an application under Section 314A.052 in an amount not to exceed $75,000. The amount of the fee must be sufficient to cover the reasonable costs of the commission and attorney general in reviewing and approving or denying applications under this subchapter.

Sec. 314A.054.  REVIEW OF APPLICATION BY COMMISSION; GRANT OR DENIAL OF APPLICATION. (a) The commission shall review an application for a certificate of public advantage in accordance with the standard prescribed by Section 314A.056(a).

(b)  The commission shall grant or deny the application not later than the 120th day after the date of the filing of the application. The commission's decision must:

(1)  be in writing;

(2)  specify the basis for the decision; and

(3)  provide a copy of the decision to the applicants on the date of the decision.

Sec. 314A.055.  REVIEW OF APPLICATION BY ATTORNEY GENERAL. (a) The attorney general shall review an application for a certificate of public advantage and all supporting documents and information provided by the applicants. On completion of the review and subject to Subsection (b), the attorney general shall advise the commission whether the proposed merger agreement would likely benefit the public and meet the standard prescribed by Section 314A.056(a).

(b)  The attorney general shall review an application for a certificate of public advantage as soon as practicable, taking into consideration the deadline prescribed by Section 314A.054.

(c)  If the attorney general advises the commission to deny an application, the attorney general shall state the basis and reasons for the recommended denial.

Sec. 314A.056.  ISSUANCE OF CERTIFICATE OF PUBLIC ADVANTAGE. (a) The commission, after reviewing the application and consulting with the attorney general in accordance with Section 314A.055, shall issue a certificate of public advantage for a merger agreement if the commission determines under the totality of the circumstances that:

(1)  the proposed merger would likely benefit the public by maintaining or improving:

(A)  the quality, efficiency, and accessibility of health care services offered to the public; and

(B)  the ability of hospital administrators to operate health care facilities and take measures to improve public health; and

(2)  the likely benefits resulting from the proposed merger agreement described by Subdivision (1) outweigh any disadvantages attributable to a reduction in competition that may result from the proposed merger.

(b)  In making the determination under Subsection (a), the commission shall consider the effect of the merger agreement on the following nonexclusive list of factors:

(1)  the quality and price of hospital and health care services provided to citizens of this state;

(2)  the preservation of sufficient hospitals within a geographic area to ensure public access to acute care;

(3)  the cost efficiency of services, resources, and equipment provided or used by the hospitals that are a party to the merger agreement;

(4)  the ability of health care payors to negotiate payment and service arrangements with hospitals proposed to be merged under the agreement; and

(5)  the extent of any reduction in competition among physicians, allied health professionals, other health care providers, or other persons providing goods or services to, or in competition with, hospitals.

(c)  The commission may include terms or conditions of compliance in connection with a certificate of public advantage issued under this subchapter if necessary to ensure that the proposed merger likely benefits the public as specified in Subsections (a)(1) and (2).

Sec. 314A.057.  RECORDS. The commission shall maintain records of all merger agreements the commission has approved under this chapter, including any terms or conditions of issuing a certificate of public advantage that are imposed by the commission.

Sec. 314A.058.  TERMINATION OF CERTIFICATE OF PUBLIC ADVANTAGE BY HOSPITAL. A hospital resulting from a merger agreement approved under this chapter may voluntarily terminate its certificate of public advantage by giving the commission notice at least 30 days before the date of the termination.

Sec. 314A.059.  ANNUAL REVIEW OF CERTIFICATE. (a) The commission shall annually review an approved certificate of public advantage.

(b)  The attorney general may annually review an approved certificate of public advantage.

(c)  The commission may not complete its annual review of an approved certificate of public advantage under this section until:

(1)  the attorney general informs the commission whether the attorney general intends to conduct any review of the certificate of public advantage as authorized under this section; and

(2)  if the attorney general informs the commission of the attorney general's intent to conduct a review of an entity's approved certificate of public advantage, the attorney general has had the opportunity to conduct the review.

SUBCHAPTER C. SUPERVISION OF MERGED HOSPITALS UNDER APPROVED MERGER AGREEMENT

Sec. 314A.101.  SUPERVISION OF MERGED HOSPITALS. The commission shall supervise in the manner provided by this subchapter each hospital operating under a certificate of public advantage issued under this chapter to ensure that the immunized conduct of a merged entity furthers the purposes of this chapter.

Sec. 314A.102.  RATE REVIEW. (a) An increase in rates for hospital services by a hospital operating under a certificate of public advantage issued under this chapter may not take effect without prior approval of the commission as provided by this section.

(b)  At least 90 days before the implementation of any proposed increase in rates for inpatient or outpatient hospital services and, if applicable, at least 60 days before the execution of a reimbursement agreement with a third party payor, a hospital operating under a certificate of public advantage shall submit to the commission:

(1)  any proposed increase in rates for inpatient and outpatient hospital services;

(2)  if applicable, any increase in reimbursement rates under a reimbursement agreement with a third party payor; and

(3)  any information concerning costs, patient volume, acuity, payor mix, and other information requested by the commission.

(c)  After reviewing the proposed increase in rates submitted under Subsection (b), the commission shall approve or deny the proposed rate increase. The commission shall approve the proposed rate increase if the commission determines that:

(1)  the proposed rate increase likely benefits the public by maintaining or improving:

(A)  the quality, efficiency, and accessibility of health care services offered to the public; and

(B)  the ability of hospital administrators to operate health care facilities and take measures to improve public health; and

(2)  the proposed rate does not inappropriately exceed competitive rates for comparable services in the hospital's market area.

(d)  If the commission determines that the proposed rate inappropriately exceeds competitive rates for comparable services in the hospital's market area, and that the proposed rate is inconsistent with the standard prescribed by Section 314A.056(a), the commission shall deny or modify the proposed rate increase.

(e)  The commission shall notify the hospital in writing of the commission's decision to approve, deny, or modify the proposed rate increase not later than the 30th day before the implementation date of the proposed increase.

Sec. 314A.103.  ANNUAL REPORT. Each hospital operating under a certificate of public advantage shall submit an annual report to the commission. The report must include:

(1)  information about the extent of the benefits attributable to the issuance of the certificate of public advantage;

(2)  if applicable, information about the hospital's actions taken:

(A)  in furtherance of any commitments made by the parties to the merger; or

(B)  to comply with terms imposed by the commission as a condition for approval of the merger agreement;

(3)  a description of the activities conducted by the hospital under the merger agreement;

(4)  information relating to the price, cost, and quality of and access to health care for the population served by the hospital and the health improvements of that population; and

(5)  any other information required by the commission to ensure compliance with this chapter, including information relating to compliance with any terms or conditions for issuance of the certificate of public advantage.

Sec. 314A.104.  CORRECTIVE ACTION PLAN. (a) The commission shall require a hospital operating under a certificate of public advantage to adopt a plan to correct a deficiency in the hospital's activities if the commission determines that an activity of the hospital does not benefit the public as described by Section 314A.056(a) and no longer meets the standard prescribed by that subsection.

(b)  The corrective action plan must include each provision required by the commission and must be submitted at the commission's direction.

Sec. 314A.105.  SUPERVISION FEE. The commission may assess an annual supervision fee in an amount not to exceed $75,000 against each hospital operating under a certificate of public advantage under this chapter. The amount of the fee must be sufficient to cover the reasonable costs incurred by the commission in supervising hospitals under this subchapter and in implementing and administering this chapter.

SUBCHAPTER D. ENFORCEMENT AUTHORITY BY COMMISSION

Sec. 314A.151.  INVESTIGATION; REVOCATION OF CERTIFICATE. With respect to each hospital resulting from a merger agreement for which the commission issued a certificate of public advantage under this chapter, and to ensure that the hospital's activities continue to benefit the public under the standard prescribed by Section 314A.056(a) and the purposes of this chapter, the executive commissioner may:

(1)  investigate the hospital's activities; and

(2)  require the hospital to perform a certain action or refrain from a certain action or revoke the hospital's certificate of public advantage, if the commission determines that:

(A)  the hospital is not complying with this chapter or a term or condition of compliance with the certificate of public advantage governing the hospital's immunized activities;

(B)  the commission's approval and issuance of the certificate of public advantage was obtained as a result of material misrepresentation;

(C)  the hospital has failed to pay any fee required under this chapter; or

(D)  the benefits resulting from the approved merger no longer outweigh the disadvantages attributable to the reduction in competition resulting from the approved merger.

Sec. 314A.152.  JUDICIAL REVIEW OF COMMISSION ACTION. (a) A person aggrieved by a decision of the commission in granting, denying, or refusing to act on an application for a certificate of public advantage submitted under Subchapter B or revoking a certificate of public advantage issued under this chapter may appeal the final order by filing a petition for judicial review in a district court of Travis County.

(b)  The filing of a petition for judicial review of a decision by the commission to revoke a certificate of public advantage stays enforcement of the commission's decision.

(c)  Not later than the 45th day after the date a person files a petition for judicial review under this section, the commission shall submit to the district court the original copy or a certified copy of the entirety of the commission's record regarding the decision under review. By stipulation of all parties, the record may be shortened. The district court may require or permit later corrections or additions to the record. The district court may extend the period prescribed by this subsection for submitting the commission's record to the court.

(d)  The district court shall conduct the review sitting without a jury.

(e)  The district court may reverse a decision by the commission regarding revocation of a certificate of public advantage if the court finds that the decision is:

(1)  in violation of a constitutional or statutory provision;

(2)  in excess of the commission's statutory authority;

(3)  made through unlawful procedure;

(4)  arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or

(5)  unsupported by substantial and material evidence in light of the record as a whole.

(f)  Under Subsection (e)(5), in determining the substantiality of the evidence, the district court:

(1)  shall consider other evidence that detracts from the substantiality; and

(2)  may not substitute its judgment for the judgment of the commission on the weight of the evidence as to a question of fact.

(g)  The district court shall issue a written decision setting forth the court's findings of fact and conclusions of law. The commission shall add the court's decision to the commission's record.

SUBCHAPTER E. ATTORNEY GENERAL INVESTIGATION AND ENFORCEMENT AUTHORITY

Sec. 314A.201.  CIVIL INVESTIGATIVE DEMAND. (a) The attorney general, at any time after an application is filed under Section 314A.052 and before the commission makes a determination on the application, or in connection with the commission's annual review of a certificate of public advantage under Section 314A.059, may require by civil investigative demand the attendance and testimony of witnesses and the production of documents in Travis County or the county in which the applicants are located for the purpose of investigating whether the merger agreement satisfies or, after issuance of the certificate of public advantage, continues to satisfy the standard prescribed by Section 314A.056(a).

(b)  All nonpublic documents produced for and testimony given to the attorney general under Subsection (a) are subject to the prohibitions on disclosure and use under Section 15.10(i), Business & Commerce Code.

(c)  The attorney general may seek an order from the district court compelling compliance with a civil investigative demand issued under this section.

Sec. 314A.202.  ACTION TO REVOKE CERTIFICATE OF PUBLIC ADVANTAGE FOLLOWING CHANGED CIRCUMSTANCES. (a) If, following an annual review of a certificate of public advantage, the attorney general determines that as a result of changed circumstances the benefits resulting from a certified merger agreement as described by Section 314A.056(a) no longer outweigh any disadvantages attributable to a reduction in competition resulting from the merger agreement, the attorney general may bring an action in a district court in Travis County seeking to revoke the certificate of public advantage in accordance with the procedures prescribed by this section.

(b)  Except as provided by Subsection (c), in an action brought under this section, the attorney general has the burden of establishing by clear and convincing evidence that as a result of changed circumstances the benefits resulting from the certified merger agreement and the unavoidable costs of revoking the certificate of public advantage are outweighed by disadvantages attributable to a reduction in competition resulting from the merger agreement.

(c)  In any action brought under this section, if the attorney general first establishes by clear and convincing evidence that the commission's certification was obtained as a result of material misrepresentation to the commission or the attorney general or as the result of coercion, threats, or intimidation directed toward any party to the merger agreement, then the parties to the merger agreement bear the burden of establishing by clear and convincing evidence that despite changed circumstances the benefits resulting from the certified merger agreement and the unavoidable costs of revoking the certificate of public advantage are not outweighed by disadvantages attributable to a reduction in competition resulting from the merger agreement.

SECTION 2.  This Act takes effect September 1, 2019.