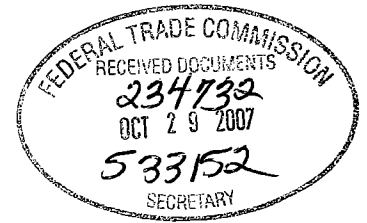


ORIGINAL



UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION

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)  
In the matter of )  
)  
)  
Evanston Northwestern Healthcare )  
Corporation, )  
a corporation, and )  
)  
ENH Medical Group, Inc., )  
a corporation. )  
\_\_\_\_\_ )

Docket No. 9315

PUBLIC

COMPLAINT COUNSEL’S COMMENTS ON ENH’S PROPOSAL

In its August 2, 2007, decision, the Commission held that the 2000 merger of Evanston Northwestern Healthcare Corporation (“ENH”) and Highland Park Hospital (“Highland Park”) violated section 7 of the Clayton Act. The Commission concluded, however, that although divestiture is the preferred remedy for an unlawful merger, this was a “highly unusual case” in which a conduct remedy was more appropriate. Slip Op. at 89. Therefore, the Commission elected to forgo the remedy of divestiture and, instead, directed ENH to submit a detailed proposal under which ENH would establish separate and independent teams, one for Evanston and one for Highland Park,<sup>1</sup> that would compete with each other in negotiating contracts with managed care organizations (“August 2 order”). The Commission directed that Complaint Counsel could then submit any objections to or comments on ENH’s proposal.<sup>2</sup> We respectfully submit the following comments.

<sup>1</sup> As in the Commission’s decision, “Evanston” refers to both Evanston Hospital and Glenbrook Hospital, “Highland Park” refers to Highland Park Hospital, and “ENH” refers to Evanston Northwestern Healthcare Corporation. See Slip Op. at 4 n.2.

<sup>2</sup> Submission of Evanston Northwestern Healthcare in Explanation and Support of its Proposed Final Order (September 17, 2007) (“ENH submission”) and Proposed Final Order (“ENH’s proposed order”).

## GENERAL COMMENTS

In determining to reject structural relief on the facts of this case, the Commission cited the integration of operations and improvements that ENH has made at Highland Park in the seven years since consummation of the merger as factors mitigating against the presumptive remedy of divestiture for an unlawful merger. In particular, the Commission expressed concern that certain improvements, particularly the cardiac surgery program that has been developed and implemented post-merger, would not survive divestiture and would take Highland Park a significant amount of time to implement on its own following divestiture. Slip Op. at 89. Based on its assessment of the likely risks and costs of divestiture in this case, the Commission concluded that a conduct remedy would be more appropriate.

Having done so, however, the Commission made clear that conduct relief is *not* a substitute for structural relief in addressing and remedying the competitive harm from an unlawful horizontal merger: “Divestiture is the preferred remedy for challenges to unlawful mergers, regardless of whether the challenge occurs before or after consummation.” *Id.* at 90-91. Indeed, the Commission made clear that its rationale for not requiring divestiture in *this* case would likely have little application to its consideration of the appropriate remedy in future challenges to unconsummated mergers, including future *hospital* mergers, and that if the agency had challenged this transaction *before* it had been consummated, none of the mitigating factors the Commission identified would have carried much weight in its analysis of remedy.<sup>3</sup> *Id.* at 90.

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<sup>3</sup> The Commission also made clear that its reasoning on remedy in this case would not necessarily apply in any future challenge to a *consummated* merger, including a consummated hospital merger. *Id.* at 90.

