UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
BLUEFIELD DIVISION

UNITED STATES OF AMERICA, *Plaintiff,* v. BLUEFIELD REGIONAL MEDICAL CENTER, INC. and PRINCETON COMMUNITY HOSPITAL ASSOCIATION, INC., *Defendants.*	Civil Action No. 1:05-0234 Chief Judge David A. Farber

PLAINTIFF UNITED STATES'S RESPONSE TO PUBLIC COMMENT

Pursuant to the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) ("APPA" or "Tunney Act"), the United States hereby responds to the one public comment received regarding the proposed Final Judgment in this case. After careful consideration of the comment, the United States continues to believe that the proposed Final Judgment will provide an effective and appropriate remedy for the antitrust violation alleged in the Complaint. The United States will move the Court for entry of the proposed Final Judgment after the public comment and this Response have been published in the *Federal Register*, pursuant to 15 U.S.C. § 16(d).

On March 21, 2005, the United States filed a Complaint alleging that Bluefield Regional Medical Center, Inc. (BRMC) and Princeton Community Hospital Association, Inc. (PCH) violated Section 1 of the Sherman Act (15 U.S.C. § 1) by entering into two agreements on

January 30, 2003, in which BRMC agreed not to offer many cancer services and PCH agreed not to offer cardiac-surgery services. At the same time the Complaint was filed, the United States also filed a proposed Final Judgment and a Stipulation signed by the United States and defendants consenting to the entry of the proposed Final Judgment after compliance with the requirements of the Tunney Act. Pursuant to those requirements, the United States filed a Competitive Impact Statement ("CIS") with this Court on March 21, 2005; published the proposed Final Judgment, Stipulation, and CIS in the *Federal Register* on April 4, 2005, *see* 70 Fed. Reg. 17117 (2005); and published a summary of the terms of the proposed Final Judgment and CIS, together with directions for the submission of written comments relating to the proposed Final Judgment, in the *Washington Post* for seven days beginning on April 1, 2005 and continuing on consecutive days through April 7, 2005, and the *Charleston Gazette*, a newspaper of general circulation in the Southern District of West Virginia, beginning on April 4, 2005 and continuing on consecutive days through April 9, 2005, and on April 11, 2005. The 60-day period for public comments ended on June 5, 2005, and the United States received one comment as described below and attached hereto.

I. Background

As explained more fully in the Complaint and CIS, the defendants' cancer and open-heart agreements effectively allocated markets for cancer and cardiac-surgery services and restrained competition to the detriment of consumers in violation of Section 1 of the Sherman Act. The proposed Final Judgment will restore competition by annulling the BRMC-PCH agreements and prohibiting BRMC and PCH from taking actions that would reduce competition between the two

hospitals for patients needing cancer and cardiac-surgery services. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

II. Legal Standard Governing the Court's Public Interest Determination

Upon the publication of the public comment and this Response, the United States will have fully complied with the Tunney Act and will move the Court for entry of the proposed Final Judgment as being "in the public interest."[1] The Court, in making its public interest determination, shall consider:

> (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
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> (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.[2]

As the U.S. Court of Appeals for the District of Columbia Circuit has held, the Tunney Act permits a court to consider, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the proposed Final

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[1] 15 U.S.C. § 16(e).

[2] 15 U.S.C. § 16(e)(1).

Judgment is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the proposed Final Judgment may positively harm third parties.[3]

With respect to the adequacy of the relief secured by the proposed Final Judgment, courts have held that:

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "*within the reaches of the public interest*." More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.[4]

"[A] proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of

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[3] See United States v. Microsoft Corp., 56 F.3d 1448, 1458-62 (D.C. Cir. 1995).

[4] Bechtel Corp., 648 F.2d 660, 666 (9th Cir. 1981) (emphasis added) (citations omitted). Cf. United States v. BNS Inc., 858 F.2d 456, 464 (9th Cir. 1988) (holding that the court's "ultimate authority under the [Tunney Act] is limited to approving or disapproving the consent decree"); United States v. Gillette Co., 406 F. Supp. 713, 716 (D. Mass. 1975) (noting that, in this way, the court is constrained to "look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass"); see generally Microsoft, 56 F.3d at 1461 (discussing whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest'").

public interest.'"[5] Furthermore,

> [a]bsent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.[6]

III. Summary of Public Comments and the United States's Response

During the 60-day public comment period, the United States received one comment, from the West Virginia Health Care Authority (WVHCA), which is attached hereto. The WVHCA, among other duties, is responsible for administering West Virginia's certificate of need ("CON") program and establishing hospital rates for non-governmental payors, such as private insurers, in West Virginia.

The WVHCA does not seek to prevent entry of the proposed Final Judgment. Rather, the WVHCA states that its purpose is to "set forth the Authority's analysis of the state action doctrine and to clarify the statutory powers conferred upon the Authority by the West Virginia Legislature." (WVHCA Comment, p. 1). The state-action doctrine provides immunity from federal antitrust liability when a defendant has satisfied a two-part test by first showing that the challenged restraint is one clearly articulated and affirmatively expressed as state policy and then

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[5] United States v. AT&T Corp., 552 F. Supp. 131, 151 (D.D.C. 1982) (citations omitted) (quoting Gillette, 406 F. Supp. at 716), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1983); see also United States v. Alcan Aluminum Ltd., 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent judgment even though the court would have imposed a greater remedy).

[6] United States v. Mid-America Dairymen, Inc., 1977-1 Trade Cas. (CCH) ¶ 61,508, at ¶ 71,980 (W.D. Mo. 1977).

showing that the restraint is actively supervised by the state.[7] The WVHCA believes that the defendants' actions qualify for immunity under the state-action doctrine. (WVHCA Comment, p. 8).

As an initial matter, the Court need not rule on whether the state-action doctrine provides federal antitrust immunity to the challenged agreements. The Court's role under the Tunney Act is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint. The Tunney Act does not authorize the Court to construct a "hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459. Indeed, the WVHCA does not argue that the proposed Final Judgment is not "within the reaches of public interest" or that the remedy secured does not fit the violations alleged. Nor does the WVHCA assert that any public or private interest would be harmed by the entry of the judgment, or that the judgment inadequately or improperly preserves the role of competition in the relevant markets within the regulatory framework established by the Commonwealth of West Virginia.[8] In short, the WVHCA has provided no argument against entry of the proposed Final Judgment

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[7] California Retail Liquor Dealers Ass'n v. Midcal Aluminum, 445 U.S. 97, 105 (1980).

[8] The question of state-action immunity may not properly be before the Court. State-action immunity is essentially an affirmative defense with the party claiming state-action immunity bearing the burden of proof in establishing the defense. Ticor Title, 504 U.S. at 625; Town of Hallie v. City of Eau Claire, 471 U.S. 34, 37-39 (1985); Yeager's Fuel v. Pennsylvania Power & Light, 22 F.3d 1260, 1267 (3d Cir. 1994); Nugget Hydroelectric, L.P. v. Pacific Gas & Elec. Co., 981 F.2d 429, 434 (9th Cir. 1992). In the present matter, the defendants have chosen not to assert a state-action defense but instead to stipulate that the Court may enter the proposed Final Judgement.

and does not object to its entry. Consequently, the WVHCA's comment does not support disapproving the proposed Final Judgment.

Even if the Court were to consider the applicability of the state-action doctrine, the WVHCA's comment does not demonstrate that the doctrine should apply in this case. With regard to the first part of the state-action test, the comment discusses the WVHCA's powers over West Virginia's CON program. (WVHCA Comment, pp. 8-10). But the comment does not discuss whether those powers allow the WVHCA to authorize market-allocation agreements between private parties such as the ones challenged in the Complaint. In fact, the WVHCA's CON powers do not allow it to authorize such agreements.[9] Rather, the West Virginia legislature empowered the WVHCA to administer West Virginia's CON program only according to legislatively established procedures, consisting principally of granting or denying CONs to firms wishing to compete.[10] Because the West Virginia legislature did not empower the WVHCA to authorize private market-allocation agreements, the defendants' cancer and open-heart agreements do not qualify for state-action immunity.

With regard to the second part of the state-action test, the comment states that the WVHCA "clearly has on-going supervision of West Virginia acute care hospitals" through West Virginia's CON program and regulation of hospital rates for non-governmental payors. (WVHCA Comment, p. 10). However, the active-supervision requirement of the state-action

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[9] See W. Va. Code § 16-2D-1 et seq., W. Va. Code St. R. § 65-7-1 et seq., W. Va. Code § 16-29B-1 et seq.

[10] W. Va. Code § 16-2D-1 et seq., W. Va. Code St. R. § 65-7-1 et seq., W. Va. Code § 16-29B-1 et seq. See also CIS, pp. 8-10.

doctrine requires that the State actively supervise and exercise ultimate control over the challenged anticompetitive conduct.[11] So the relevant question for determining whether state-action immunity exists is not whether the WVHCA actively supervises some aspects of hospital regulation in West Virginia, but whether the WVHCA is empowered to supervise and has actively supervised the defendants' agreements.

The WVHCA does not have such powers and has not actively supervised the defendants' agreements. The West Virginia legislature has not empowered the WVHCA to require parties to private agreements to maintain, alter, or abandon their agreements. Thus, the WVHCA has no power to exercise active supervision or control over private agreements such as the cancer and open-heart agreements. Moreover, the WVHCA has not purported to actively supervise the cancer and open-heart agreements, as it did not (1) develop a factual record concerning the initial or ongoing nature and effect of the agreements, (2) issue a written decision approving the agreements, or (3) assess whether the agreements further criteria established by the West Virginia legislature.[12]

The WVHCA's rate-regulation responsibilities do not satisfy the active-supervision requirement because the challenged anticompetitive conduct in this matter is not the prices charged by the hospitals to non-governmental payors, but rather the terms of the cancer and open-heart agreements. The WVHCA's price regulation activities do not directly address market-allocation issues or the potential anticompetitive effects of such allocations as rate regulation

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[11] Midcal, 445 U.S. at 105, Patrick v. Burget, 486 U.S. 94, 100-101 (1988).

[12] See FTC v. Ticor Title Ins. Co., 504 U.S. 621, 637-639 (1992).

may fail to ensure that the hospitals charge rates equal to those rates that would have prevailed in a competitive market and fails to address decreases in quality of service, innovation, and consumer choice that result from an agreement not to compete.

The WVHCA comment also does not address the fact that the defendants' agreements allocated markets for cancer and cardiac surgery in three Virginia counties. As the WVHCA is not vested with any power concerning matters in the Commonwealth of Virginia, the powers and actions of the WVHCA cannot create state-action immunity for an agreement not to compete in Virginia.

IV. Conclusion

After careful consideration of the WVHCA comment, the United States still concludes that entry of the proposed Final Judgment will provide an effective and appropriate remedy for the antitrust violation alleged in the Complaint and is, therefore, in the public interest. Pursuant to Section 16(d) of the Tunney Act, the United States is submitting the public comments and its Response to the *Federal Register* for publication. After the comments and its Response are

published in the *Federal Register*, the United States will move this Court to enter the proposed Final Judgment.

Dated: June 30, 2005

Respectfully submitted,

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