IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

UNITED STATES OF AMERICA, Plaintiff, vs. HEALTH CHOICE OF NORTHWEST MISSOURI, INC., HEARTLAND HEALTH SYSTEM, INC., AND ST. JOSEPH PHYSICIANS, INC., Defendants.	)	Case No. 95-6171-CV-SJ-6

UNITED STATES' OPPOSITION TO PROPOSED ADDITIONS TO HEARING AGENDA

The United States opposes the Coalition's proposed additions to the agenda of the public interest hearing the Court has scheduled for this matter.

I.
Background

The Court on July 30, 1996 entered a written Order directing that a non-evidentiary hearing be held in this case on Friday, September 20, 1996. That Order was the result of a conference the Court had with counsel on July 26, 1996 to consider procedural matters relating to the scheduling of a public interest hearing concerning the government's recent motion for entry of the Proposed Final Judgment in this civil antitrust case.

The Court in its July 22, 1996 letter scheduling the July 26 procedural conference with counsel listed two issues that should

be addressed at the public interest hearing:

1. Whether the Coalition's counter-proposal is significantly more desirable, as a matter of public interest under the antitrust laws, than the settlement proposal; and

2. Given the hazards and burdens of litigation, whether the proposed settlement is at least minimally consistent with the public interest. (July 22, 1996 Order at 1-2).

The Court at the July 26 hearing enumerated three other topics counsel were to address at the September 20 non-evidentiary hearing:

3. Whether the ancillary services provision falls within the range or reasonableness that the parties might agree upon in order to save trial and does not involve a corrupt failure of the Government to discharge its duty (Tr. 24 & 44);

4. Whether the referral provision must be deleted from the Proposed Final Judgment either because ancillary services is not the target of the Complaint or the provision is not otherwise in the public interest (Tr. 25-6); and

5. Whether the ancillary services provision falls within the range or reasonableness that the parties might agree upon in order to save trial and does not involve a corrupt failure of the Government to

discharge its duty (Tr. 24 & 44).

The Court at the July 26 hearing also instructed that the Coalition by August 2 provide a list of any additional points that should be addressed at the September 20 hearing. (Tr. 45). The Coalition has recently suggested seven additional issues.

II.

Discussion

The United States continues to believe that the September 20 non-evidentiary hearing ought only address whether the ancillary services provision of the Proposed Final Judgment sufficiently protect the development of competitive managed care in Buchanan County so that the Proposed Final Judgment is "within the reaches of the public interest" under the Tunney Act. E.g., United States v. Microsoft Corp., 56 F.3d, 1448, 1459-61 (D.C.Cir. 1995). In any event, however, the Coalition's proposed issues are either already subsumed within or more appropriately stated by the five issues the Court has already enumerated, or will unduly and unnecessarily prolong and complicate the September 30, 1996 non-evidentiary public interest hearing, or have already been answered on the record.

Given the Tunney Act, the sole issues appropriate for consideration at a public interest hearing in this case are whether the Government was not entitled to seek ancillary services relief given the violation alleged in the complaint (i.e., the Government got too much relief) or whether, again given violation alleged in the complaint, the ancillary services

referral and physician practices acquisitions provisions fall within the range of reasonableness that the parties might agree upon in order to save trial and does not involve a corrupt failure of the Government to discharge its duty (i.e., the Government got too little relief). The focus of the "public interest" inquiry under the Tunney Act is whether the Proposed Final Judgment would serve the public interest in free and unfettered competition. E.g., United States v. American Cyanamid Co., 719 F.2d 558, 565 (2nd Cir. 1983), cert. denied, 465 U.S. 1101 (1984). Furthermore, under the Tunney Act it is unnecessary for the District Court to "engage in an unrestricted evaluation of what relief would best serve the public." United States v. BNS, Inc., 858 F.2d 456, 462 (9th Cir. 1988), quoting United States v. Bechtel Corp., 648 F.2d 660, 666 (9th Cir.), cert. denied, 454 U.S. 1083 (1981). Rather, the Court is required to determine only if the settlement is "within the reaches of the public interest", and not that a particular decree is the one that will best serve society. Bechtel, supra; see also, United States v. Microsoft Corp., 56 F.3d, 1448, 1459-61 (D.C.Cir. 1995)(decree adequate if within reaches of public interest); United States v. Associated Milk Producers, Inc., 534 F.2d 113, 117-18 (8th Cir. 1976), cert. denied, 429 U.S. 940 (1976). "[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 public interest.'(citations omitted)." United States v. AT&T Co.,

552 F. Supp. 131, 150 (D.D.C.), aff'd sub nom. Maryland v. United States, 460 U.S. 1001 (1982).

Here, the inclusion of the seven additional issues proposed by the Coalition would impede, not advance, the making of these crucial Tunney Act public interest inquiries. For example, "whether the proposed referral policy prevents patients from making informed choices ... and thus is not in the public's best interest" (Coalition Issue 1) is already subsumed in the Court's issues of whether the Coalition's counter-proposal is significantly more desirable than the settlement proposal and whether it is within the range or reasonableness that the parties might agree upon in order to save trial and does not involve a corrupt failure of the Government to discharge its duty.

Likewise, it is immaterial for ascertaining the effectiveness of the ancillary services and physician practices acquisitions provisions of the Proposed Final Judgment in protecting the development of competitive managed care in Buchanan County "whether the referral policy would allow Heartland to effectively monopolize ancillary services in Heartland's geographic service region, or use its monopoly power as the only hospital in Buchanan County to create an unfair competitive advantage." (Coalition Issue 2). Rather, those are difficult and complex factual issues that go to a very different antitrust case than the one at bar, a case that the Government has decided not to bring but which the Coalition is free to pursue. E.g., Microsoft, supra.

Likewise, “the practical effect of Heartland’s existing referral policy - informed patient choice versus steering” (Coalition Issue 6), is already subsumed within the Court’s issues of whether the settlement proposal is significantly less desirable than the Coalition’s counter-proposal and outside the range of reasonableness that the parties might agree upon in order to save trial. The same is true of “whether an alternative policy should be substituted or whether the proposed referral policy should be stricken from the settlement. (Coalition Issue 4). The question of “Whether the referral policy is essential to this settlement (or even relevant to the managed care issues)...” (Coalition Issue 3), is subsumed within the Court’s issue of whether the provision should be deleted.

Finally, Counsel has already stated on the record the extent and nature of defendants’ affiliation with ancillary service providers. (Coalition Issue 5) (Tr. at)(none)). Likewise, the Response To Public Comments already fully and comprehensively answers “Whether the Compliance Assurance provisions ...are effective” (Coalition Issue 7) and renders unnecessary further discussion on this point at the September 20 hearing.

Consequently, the Court should limit the issues at the September 20 non-evidentiary hearing at a maximum to the five set forth in its July 22 Order and July 25 procedural conference remarks.

Dated: August 14, 1996

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Edward D. Eliasberg, Jr., hereby certify that copies of the United States' Opposition To Proposed Additions To Hearing Agenda in U.S. v. Health Choice of Northwest Missouri, Inc., et.al., was served on the 14th day of August 1996 by first class mail on the following:

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