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

UNITED STATES OF AMERICA,

*Plaintiff,*

v.

CHARLESTON AREA MEDICAL CENTER, INC.,

*Defendant.*

Civil Action No. 2:06-0091

Filed:

**COMPETITIVE IMPACT STATEMENT**

The United States of America, pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act, ("APPA"), 15 U.S.C. § 16(b)-(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

## I. Nature and Purpose of the Proceeding

On February 6, 2006, the United States filed a civil antitrust Complaint alleging that Charleston Area Medical Center, Inc. (CAMC) had violated Section 1 of the Sherman Act, 15 U.S.C. § 1. CAMC operates the largest cardiac-surgery program in West Virginia, and the sixth largest such program in the United States, through facilities located in Charleston, West Virginia. HCA Inc. (HCA) owns and operates Raleigh General Hospital (Raleigh General), located in the city of Beckley, Raleigh County, West Virginia. Raleigh General is located about 55 miles south of CAMC's cardiac-surgery facilities.

The Complaint alleges that, in an April 17, 2002 memorandum of understanding (the CAMC-HCA MOU), CAMC persuaded HCA to agree not to develop a competing cardiac-surgery program at Raleigh General. The CAMC-HCA MOU unreasonably restrained competition to the detriment of consumers by effectively ensuring that no hospital in Raleigh County, West Virginia would compete with CAMC to provide cardiac-surgery services. With the Complaint, the United States and CAMC filed an agreed-upon proposed Final Judgment that prohibits CAMC from enforcing the anticompetitive portion of the CAMC-HCA MOU and forming new agreements that would reduce competition in cardiac-surgery services.

The United States and CAMC have agreed that the proposed Final Judgment may be entered after compliance with the APPA, provided that the United States has not withdrawn its consent. Entry of the Final Judgment would terminate the action, except that the Court would retain jurisdiction to construe, modify, or enforce the Final Judgment's provisions and to punish violations thereof.

## II. Description of Practices and Events Giving Rise to the Alleged Violations of the Antitrust Laws

### A. West Virginia's Certificate-of-Need Standards

The State of West Virginia requires that a hospital obtain a certificate of need ("CON") from the West Virginia Health Care Authority before a hospital may provide cardiac-surgery services. The West Virginia Health Care Authority was formerly known as the West Virginia Health Care Cost Review Authority (collectively, "WVHCA").

On February 22, 2002, West Virginia revised the state standards for qualifying for a cardiac-surgery CON. These new standards (the February 2002 standards) made it easier for

hospitals to qualify for a cardiac-surgery CON by lowering the minimum number of medical procedures that a hospital needed to demonstrate that it had performed or would perform.

The February 2002 standards were structured in a way such that the WVHCA would most likely approve one and only one location for a cardiac-surgery program in a "Southern West Virginia region" defined to consist of six counties: McDowell, Mercer, Monroe, Raleigh, Summers, and Wyoming Counties. At this time, no hospital from this region competed against CAMC in offering cardiac-surgery services.

Under the February 2002 standards, the only likely location of a new cardiac-surgery program in the Southern West Virginia region was at either Raleigh General, Princeton Community Hospital Association, Inc. (Princeton Community Hospital), or Bluefield Regional Medical Center, Inc. (BRMC). Princeton Community Hospital is located in Princeton, Mercer County, West Virginia, about 40 miles south of Raleigh General. BRMC is located in Bluefield, Mercer County, West Virginia, about 50 miles south of Raleigh General.

B. CAMC acted to prevent Raleigh General from developing a competing cardiac-surgery program

After the February 2002 standards were issued, CAMC recognized that the WVHCA would likely approve a new cardiac-surgery program to be located either in Raleigh County at Raleigh General or in Mercer County at BRMC or Princeton Community Hospital. CAMC wanted the new cardiac-surgery program to be located in Mercer County and not at Raleigh General because a program in Raleigh County would compete with and take revenue away from CAMC to a much greater extent than a program in Mercer County.

In February 2002, CAMC initiated talks with HCA about a possible agreement relating to cardiac-surgery services in West Virginia. A significant reason why CAMC pursued an agreement with HCA was to ensure that HCA would not develop a cardiac-surgery program at Raleigh General. During the MOU negotiations with HCA, CAMC insisted on including language in the CAMC-HCA MOU that was designed to prevent Raleigh General from developing a cardiac-surgery program. CAMC also rejected proposed language that would have reduced the time period during which Raleigh General could not develop a cardiac-surgery program.

CAMC's and HCA's discussions resulted in the CAMC-HCA MOU, which prevented HCA from developing a cardiac-surgery program at Raleigh General by committing HCA to develop a single cardiac-surgery program in the Southern West Virginia region at either Princeton Community Hospital or BRMC for a period of three years. In exchange for HCA's agreement not to compete in Raleigh County, CAMC agreed to provide valuable support for HCA's efforts to provide cardiac-surgery services at HCA's St. Joseph's Hospital in Parkersburg, West Virginia and therapeutic cardiac-catheterization services at HCA's St. Francis Hospital in Charleston, West Virginia. CAMC did not need HCA's agreement not to compete in Raleigh County in order to agree to support HCA's programs at St. Joseph's and St. Francis.

CAMC wanted a program at BRMC rather than Raleigh General because, as one CAMC executive stated, "Raleigh General would pull more patients from Charleston Area Medical Center than a program in Bluefield." Another CAMC executive testified that the basic reason why CAMC obtained HCA's agreement not to apply for a CON at Raleigh General was because

of the threat to CAMC of losing open-heart surgery patients coming from southern West Virginia.

C. Raleigh General had been a significant potential competitor in cardiac-surgery services

Until Raleigh General signed the CAMC-HCA MOU, Raleigh General had been a significant potential competitor to CAMC in the market for cardiac-surgery services. Raleigh General had maintained a consistent and active interest in pursuing, and had taken steps to pursue, a cardiac-surgery program.

Raleigh General sought to offer cardiac-surgery services as early as July 1992, when it applied for a cardiac-surgery CON with the WVHCA. The WVHCA denied that application in July 1995 because Raleigh General was unable to show that it would perform the minimum number of procedures required by the then-existing state standards for granting cardiac-surgery CONs.

Despite the WVHCA's denial of Raleigh General's CON application, representatives from Raleigh General continued their pursuit of a cardiac-surgery program by exploring the possibility of a joint venture with Princeton Community Hospital to provide cardiac-surgery services. Raleigh General and Princeton Community Hospital engaged a consultant to determine whether Raleigh General or Princeton Community Hospital was a better location for a cardiac-surgery program. In a January 2000 report, the consultant concluded that "[b]ased upon the market, geographical location, physician support and referral patterns and clinical infrastructure and culture, Raleigh General Hospital is the recommended location for the cardiovascular

surgical program." The two hospitals were ultimately unable to finalize a strategy for jointly pursuing a cardiac-surgery CON.

In the period leading up to the February 2002 changes to the state cardiac-surgery standards, Raleigh General remained interested in pursuing a cardiac-surgery program and actively lobbied state officials to change the standards in such a way as to enable it to qualify for a cardiac-surgery CON. After the February 2002 standards were revised to make it easier to obtain a cardiac-surgery CON, Raleigh General did not apply for a cardiac-surgery CON – despite its earlier active pursuit of such a CON – but instead entered into the CAMC-HCA MOU, which precluded Raleigh General from applying for a cardiac-surgery CON for three years.

## III. Explanation of the Proposed Final Judgment

The proposed Final Judgment would enjoin CAMC from enforcing the portion of the CAMC-HCA MOU that prevents HCA from developing a cardiac-surgery program in Raleigh County. Unless CAMC gives prior notice to and receives the prior written approval of the United States, CAMC also would be enjoined from entering into, continuing, maintaining, or enforcing any agreement with a health-care facility that (1) allocates any cardiac-surgery service, market, territory, or customer; (2) prohibits or restricts such health-care facility from applying for a certificate of need to offer, maintain, or expand cardiac-surgery services; or (3) otherwise prohibits or restricts such health-care facility from providing cardiac surgery. The effect of the proposed Final Judgment would be to restore competition between CAMC and Raleigh General that the CAMC-HCA MOU eliminated, and to prevent CAMC from engaging in similar anticompetitive conduct in the future.

## IV. Remedies Available to Potential Private Litigants

Section 4 of the Clayton Act, 15 U.S.C. §15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of such actions. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the Final Judgment has no *prima facie* effect in any subsequent lawsuits that may be brought against the Defendant.

## V. Procedures Available for Modifications of the Proposed Final Judgment

The United States and the Defendant have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty days of the date of publication of this Competitive Impact Statement in the Federal Register. All comments received during this period will be considered by the Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to the Court's entry of judgment. The comments and the response of the United States will be filed with the Court and published in the Federal Register.

Written comments should be submitted to:

Mark J. Botti
Chief, Litigation I Section
Antitrust Division
United States Department of Justice
1401 H Street, N.W., Suite 4000
Washington, D.C. 20530

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

## VI. Alternatives to the Proposed Final Judgment

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against defendant CAMC. The United States is satisfied, however, that the Final Judgment, with its prohibition on anticompetitive conduct, will more quickly achieve the primary objectives of a trial on the merits – reestablishing competition between CAMC and HCA.

## VII. Standard of Review Under the APPA for the Proposed Final Judgment

The APPA requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty-day comment period, after which the Court shall determine whether entry of the proposed Final Judgment "is in the public interest." 15 U.S.C. § 16(e)(1). In making that determination, the Court shall consider:

> (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of 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

(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.

15 U.S.C. § 16(e)(1)(A) and (B). As the United States Court of Appeals for the District of Columbia Circuit has held, the APPA 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 decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See United States v. Microsoft Corp.*, 56 F.3d 1448, 1458-62 (D.C. Cir. 1995).

"Nothing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. § 16(e)(2). Thus, in conducting this inquiry, "[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973) (statement of Senator Tunney).[1] Rather:

> [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

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[1] *See United States v. Gillette Co.*, 406 F. Supp. 713, 716 (D. Mass. 1975) (recognizing it was not the court's duty to settle; rather, the court must only answer "whether the settlement achieved [was] within the reaches of the public interest"). A "public interest" determination can be made properly on the basis of the Competitive Impact Statement and Response to Comments filed by the Department of Justice pursuant to the APPA. Although the APPA authorizes the use of additional procedures, 15 U.S.C. § 16(f), those procedures are discretionary. A court need not invoke any of them unless it believes that the comments have raised significant issues and that further proceedings would aid the court in resolving those issues. *See* H.R. Rep. No. 93-1463, 93rd Cong., 2d Sess. 8-9 (1974), *reprinted* in 1974 U.S.C.C.A.N. 6535, 6538.

> responses to comments in order to determine whether those explanations are reasonable under the circumstances.

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

Accordingly, with respect to the adequacy of the relief secured by the decree, a court may not "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) (citing *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft*, 56 F.3d at 1460-62. 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.

*Bechtel*, 648 F.2d at 666 (emphasis added) (citations omitted).[2]

The proposed Final Judgment, therefore, should not be reviewed under a standard of whether it is certain to eliminate every anticompetitive effect of a particular practice or whether it mandates certainty of free competition in the future. Court approval of a final judgment requires a standard more flexible and less strict than the standard required for a finding of liability. "[A] proposed decree must be approved even if it falls short of the remedy the court would impose on

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[2] *Cf. BNS*, 858 F.2d at 464 (holding that the court's "ultimate authority under the [APPA] is limited to approving or disapproving the consent decree"); *Gillette*, 406 F. Supp. at 716 (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'").

its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'" *United States v. AT&T*, 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 decree even though the court would have imposed a greater remedy).

Moreover, the Court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its Complaint; the APPA does not authorize the Court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459. Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States did not pursue. *Id.* at 1459-60.

## VIII. Determinative Documents

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Dated: February 6, 2006.

Respectfully submitted,

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