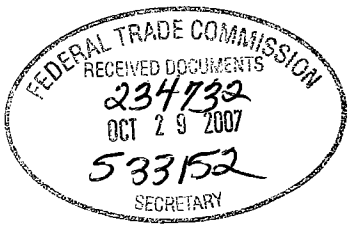
ORIGINAL



UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the matter of	)	
Evanston Northwestern Healthcare Corporation, a corporation, and	)	**Docket No. 9315**
ENH Medical Group, Inc., a corporation.	)	**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,[1] 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.[2] We respectfully submit the following comments.

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[1] 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.

[2] 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.[3] *Id.* at 90.

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[3] 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.

We have faced a dilemma in formulating and proposing meaningful comments on ENH's proposal. As the Commission has stated, divestiture remedies are well established in antitrust law and supported by decades of judicial precedent, agency experience and study. The type of conduct approach embodied in ENH's proposal has not been studied and does not have a record of success.[4] Although ENH's proposal generally appears to conform to the requirements of the Commission's August 2 order, we believe that this approach – establishing two different negotiating teams with a firewall to inhibit information flows between them – is unlikely to restore competition or to result in lower prices to affected consumers. We are also concerned that attempting to improve upon ENH's proposal (or any conduct-type remedy) by requiring more extensive and complex mechanisms and procedures may only create inefficiencies and increase ENH's costs of operation systemwide, without an offsetting improvement to competitive conditions in the market. Such cost increases to ENH would likely lead to higher prices to its managed care organization (MCO) customers, and to higher premiums, deductibles and co-

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[4] In the only instance in which an analogous approach was attempted at the federal enforcement level, it failed. *See United States and State of Florida v. Morton Plant Health System, Inc. and Trustees of Mease Hospital, Inc.,* Civ. No. 94-748-CIV-T-23E (M.D. Fla. 1994), cited by ENH. *See* ENH submission at 5. The *Morton Plant/Mease* case was brought by the Department of Justice Antitrust Division and the Florida State Attorney General to challenge the proposed merger of two hospitals in central Florida. It resulted in an injunctive consent decree that permitted the merging parties to combine administrative functions and the provision of outpatient and specified inpatient services, but required that all other services be provided separately, and all medical services be marketed and sold separately and independently. The defendants began violating the consent decree shortly after it was entered and continued to do so for the decree's entire 5-year term. Among other things, the hospitals committed repeated violations by coordinating the negotiation and sale of hospital services through the very mechanism, a *bona fide* partnership, that the decree allowed for shared functions. *See* Memorandum of the United States and the State of Florida in Support of the Motion and Stipulation for Entry of an Enforcement Order (September 26, 2000), http://www.usdoj.gov/atr/cases/f5100/5156.htm.

payments and lower coverage for MCO plan enrollees.

We have therefore evaluated ENH's proposal to determine whether there are any appropriate changes or additions that we could propose or suggest. Our proposals, suggestions and specific comments are set forth below.

SPECIFIC COMMENTS ON ENH'S PROPOSED ORDER

ENH's proposed order includes a number of definitions and provisions that are inconsistent with the ordering language and approach used in other Commission healthcare orders,[5] including ENH's own consent order in this matter that settled the physician price-fixing allegations in Count III of the Commission's Complaint (hereinafter ENH 2005 consent order),[6] or that are at odds with general Commission practice. In addition, certain provisions in ENH's proposed order fail to conform to managed care contracting practices, which could potentially be detrimental to the bargaining position of MCO contract negotiators. We propose a number of conforming changes, deletions and additions to address these inconsistencies and to improve order administrability and compliance oversight.

We also propose the addition of a prior notification requirement for any future acquisitions of hospitals that ENH may make within the Chicago Metropolitan Statistical Area, as well as for any management contracts or similar arrangements that ENH may enter into for a hospital located within that area. The prior notification requirement we propose is similar to those used in past hospital orders, and we believe it has the potential to provide the Commission with useful

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[5] *See, e.g., North Texas Specialty Physicians*, Docket No. 9312, http://www.ftc.gov/os/adjpro/d9312/051201finalorder.pdf

[6] *See Evanston Northwestern Healthcare Corporation and ENH Medical Group, Inc.*, Docket No. 9315 (issued May 17, 2005), http://www.ftc.gov/os/adjpro/d9315/050520do.pdf

information about transactions in which ENH engages that are not subject to the reporting requirements of the Hart-Scott-Rodino Act.

Our proposed alternative language and provisions are set forth in the Attachment to this submission.

Our comments on ENH's proposal are provided with the caveat that, although ENH's compliance with the contract negotiating and firewall procedures required by any final order entered by the Commission can be monitored, it is highly unlikely (and we can therefore make no assurances) that a competitive market performance outcome will result or that competition between the Evanston and Highland Park hospitals will be re-created.

A. Comments on PARAGRAPH I – Definitions

We propose the following changes to the Paragraph I definitions to align ENH's proposed order with the ordering language and approach used in other healthcare orders issued by the Commission, including the ENH 2005 consent order in this matter, and to conform to managed care contracting practices. Certain additional definitions are also necessary to implement the proposed prior notification requirement.

1. Proposed changes to ENH's proposed order:

¶ I.H. "Payor": To assure consistency in order language and thereby avoid ambiguity in compliance and enforcement, the definition of "Payor" should conform to that used in the ENH 2005 consent order in this matter as well as in other Commission healthcare orders.

¶ I.J. "Managed Care Contract": We propose that ENH's definition of "Managed Care Contract" be modified to make clear that, if a Payor should elect to negotiate with the separate Highland Park and Evanston teams, the pricing methodology used, whether per diem, percentage

discount off charges or some other method, is among the terms and provisions that can be subject to reopening and renegotiation. This is consistent with the separate contract negotiation proposal that ENH made to Chief Administrative Law Judge McGuire at trial.[7]

¶ I.K. "Current Contract": To assure consistency with the ENH 2005 consent order in this matter and with other recent Commission healthcare orders, we propose that a definition for a "Preexisting Contract" be substituted for ENH's proposed "Current Contract."

¶ I.L. "Inpatient Services": ENH's proposal is to set up two separate negotiating teams, the "ENH Negotiating Team" and the "Highland Park Negotiating Team." If a Payor does not elect to engage in separate negotiations, the ENH Negotiating Team would negotiate Managed Care Contracts for both inpatient and outpatient services at all ENH hospitals. If the Payor does elect to negotiate separate contracts, the ENH Negotiating Team would negotiate Managed Care Contracts for outpatient services at Highland Park as well as for all services at Evanston. The Highland Park Negotiating Team will negotiate Managed Care Contracts only for "Inpatient Services," as defined, at Highland Park.

This proposal, among other things, unrealistically separates negotiating for outpatient services at Highland Park from negotiating for inpatient services at Highland Park. ENH's limitation on the scope of services covered by its separate negotiating team proposal ignores the reality of competitive negotiations for hospital services and potentially deprives Payors of the opportunity to weigh the benefits of contracting exclusively with one hospital versus the other on

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[7] *See* Post-Trial Brief of Respondent Evanston Northwestern Healthcare Corporation (May 27, 2005), at 125-126 and Attachment E.

the basis of the total price they may be willing to pay for all of the services they are purchasing.[8] We therefore propose a broader definition for "hospital services" that encompasses all inpatient and outpatient services.[9] This change is intended to accommodate the contracting reality that ENH and a payor may negotiate a single, omnibus contract covering both inpatient and outpatient services at either Evanston or Highland Park,[10] and has no bearing on the Commission's findings related to the issue of relevant product market. *See generally* Slip Op. at 55.

2. Proposed new definitions:

We propose the addition of several new definitions to align ENH's proposed order with the ordering language and approach used in other orders issued by the Commission, and to implement the proposed prior notification requirement. In particular, we propose the addition of a definition for "hospital" that would cover any medical care facility licensed as a hospital in the state in which it is located. This definition is needed for the broader definition of services that we propose be covered by the separate negotiating option, as well as for the prior notification

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[8] *See* IDF 717-719 (testimony of Complaint Counsel's expert witness Dr. Haas-Wilson).

[9] We are uncertain as to the current division of responsibility for providing certain outpatient services, such as home-care services (*e.g.*, physical and occupational therapy; hospice; skilled and private duty nursing) furnished at Evanston and Highland Park, that are now apparently provided through a single subsidiary of ENH on a centralized basis to patients being discharged from any of the hospitals in the ENH system. We lack sufficient information regarding the relationship of these shared services to the provision of inpatient and outpatient services furnished directly by the hospitals to make meaningful comments on this issue. Under any circumstances, we believe that, however this should be resolved, it is ENH's responsibility to ensure that if an MCO elects to contract exclusively with Highland Park, it can obtain the full panoply of services needed to serve its plan enrollees by negotiating with the Highland Park Negotiating Team.

[10] *See, e.g,* CX 216 at 6, Exhibit C (contract between ENH and a payor that covers inpatient acute and sub-acute care and outpatient care).

provision, and is consistent with the definition used in *The Maine Health Alliance* matter.[11] We also propose additional definitions for the terms "operate," "ownership interest," and "person." These definitions are needed for the proposed prior notification provision to cover any acquisitions of a hospital that ENH may make and any management or similar contracts that ENH may enter into with a hospital. The approach and language used in this definition and in the proposed prior notification requirements are consistent with those used in more recent orders as well as in *HCA* and other past hospital orders.[12]

B. Comments on PARAGRAPHS II through XII

In general, we propose that conforming changes be made throughout the order to make it consistent with current Commission practice and the proposed changes and additions to the definitions discussed above. We also propose that: (i) further specific requirements be added to Paragraph V to clarify ENH's notification obligations to MCOs regarding their option to reopen and renegotiate their Managed Care Contracts; (ii) additional requirements be added to Paragraph VII to clarify ENH's record maintenance obligations with respect to the confidentiality required from its relevant employees; and (iii) ENH's reporting obligations in Paragraph VIII be modified to conform to standard provisions in Commission orders. These proposals and changes are set forth in the Attachment to this submission.

We also propose that Paragraph X of ENH's proposed order be deleted in its entirety

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[11] *See The Maine Health Alliance, et al.,* Docket No. C-4095 (consent order), http://ftc.gov/os/2003/08/mainehealthdo.pdf

[12] *See, e.g., Hospital Corporation of America v. Federal Trade Commission*, 807 F.2d 1381, 1393 (7th Cir. 1986); *Columbia/HCA Healthcare Corporation*, Docket No. C-3619 (consent order), 120 F.T.C. 743 (1995).

because it is at odds with general Commission practice in connection with FTC orders. As proposed by ENH, Paragraph X provides that:

> "[a]ny and all disputes between ENH and Payors with respect to Respondent's compliance with this Order shall be solely and exclusively resolved in accordance with this section. ENH and the Payor shall first try to settle the dispute by mediation under the Commercial Mediation Rules of the American Arbitration Association ("AAA"). If the dispute cannot be settled by mediation, then by arbitration administered by the AAA under its Commercial Arbitration Rules before a single arbitrator mutually agreed upon by ENH and the Payor."

ENH explains that such provisions are a commonly-accepted means for resolving private disputes that may arise in a commercial context and are therefore reasonable. ENH submission at 5. This may be true in the context of a private commercial transaction, and we would have no objection to the inclusion of such dispute resolution procedures to resolve purely private contractual issues that may be included in the ordinary course in ENH's contracts with payors. However, such provisions have not been used in Commission orders as a means of resolving issues with or disputes over a respondent's compliance with an FTC order, and the Commission should not be placed in the position of delegating decisions about order compliance to non-agency third parties. It is the role of the Commission, aided by Commission staff, to determine what constitutes compliance by a respondent with a Commission order, including whether or not to open a compliance investigation or to file an action enforcing compliance with the order and seeking civil penalties and other appropriate equitable relief pursuant to Section 5(*l*) of the FTC Act, 15 U.S.C. § 45(*l*). Moreover, providing that decisions about order compliance have been delegated to a non-agency arbiter may subject the order or any determination under such provision to challenge, either by payors or by respondents, as an unconstitutional delegation of the Commission's law

and/or order enforcement authority to a private entity.[13] The delegation doctrine is not offended so long as the Commission retains ultimate authority and control over the decision whether or not a respondent is in compliance with an agency order. Paragraph X contains no clear standards to guide a non-agency third party in its determination whether ENH's conduct complies with the Commission's order, nor does it reserve ultimate control and authority to the Commission over this determination. We therefore propose that it be deleted from any final order.

B. Proposed New Paragraph – Prior Notice Requirement

We also propose the addition of a prior notification requirement for any future acquisitions that ENH may make of hospitals located within the Chicago Metropolitan Statistical Area, as well as for any management contracts or similar arrangements that ENH may enter into for hospitals located within that area.[14] The prior notification requirement we propose is similar to ones that have been used in past hospital orders.[15] We believe the impact of this requirement on ENH will be relatively benign, and it has the potential to provide the Commission with useful information about transactions in which ENH engages that are not subject to the reporting requirements of the Hart-Scott-Rodino Act. The specific requirements of the proposed prior notification requirements are set forth in the Attachment to this submission.

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[13] *See generally Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

[14] At trial, ENH proposed to the Administrative Law Judge that, in lieu of divestiture, it instead be required to provide prior notification of any future acquisitions of providers of general acute care inpatient hospital services in a relevant geographic market. *See* Post-Trial Brief of Respondent Evanston Northwestern Healthcare Corporation (May 27, 2005), at 124-125 and Attachment D.

[15] *See, e.g., Hospital Corporation of America v. Federal Trade Commission*, 807 F.2d 1381, 1393 (7th Cir. 1986); *Columbia/HCA Healthcare Corporation*, Docket No. C-3619 (consent order), 120 F.T.C. 743 (1995).

CONCLUSION

Complaint Counsel have not been able to create suitable injunctive relief to replicate the relief achievable through divestiture. We have, however, conformed ENH's proposal to the Commission's standard language and approach when issuing final orders.

We accept the Commission's decision to forego divestiture so that ENH can continue to provide the hospital services it has developed, albeit financed in part with seven years of monopoly profits it extracted from consumers pending a final decision in this case. We must respectfully remind the Commission, however, that a remedy along the lines proposed by ENH, and contemplated by the Commission's decision, will not likely solve the competitive problems caused by this unlawful merger.

Respectfully submitted,

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Dated: October 29, 2007

ATTACHMENT

ATTACHMENT

Complaint Counsel's proposed changes and additions to ENH's proposed order:

PARAGRAPH I.

Under Paragraph I., add the following definitions and make such conforming changes as are necessary throughout the order:

"Commission" means the Federal Trade Commission.

"Hospital" means any human medical care facility licensed as a hospital in the state in which the facility is located.

"Operate" means to own, lease, manage or otherwise control or direct the operations of a Hospital, directly or indirectly.

"Ownership Interest" means any and all rights, present or contingent, of Respondent to hold any voting or nonvoting stock, share capital, equity or other interests or beneficial ownership in an entity.

"Person" means any individual, partnership, joint venture, firm, corporation, association, trust, unincorporated organization, joint venture, or other business or government entity, and any subsidiaries, divisions, groups or affiliates thereof.

In Paragraph I.K., change the following definition to add the language bracketed in **BOLD** and to delete the language that is struck out, and make conforming changes throughout the order to substitute the term "Pre-existing Contract" for the term "Current Contract":

K. **["Pre-existing]** ~~Current~~ Contract" means a Managed Care Contract between a Payor and ENH **[that is]** in effect ~~at the time of the entry of~~ **[on the date]** this Order **[becomes final.]**

In Paragraph I.G., change the following definition to add the language bracketed in **BOLD**:

G. "ENH Negotiating Team" means the team responsible for negotiating a Managed Care Contract for ~~all~~ **[Hospital S]**services at Evanston ~~as well as outpatient services for Highland Park~~ when Payors elect separate negotiations, and for ~~all~~ **[Hospital S]**services at all ENH hospitals when Payors do not elect separate negotiations. The ENH Negotiating Team will be separate and distinct from the Highland Park Negotiating Team. The ENH Negotiating Team shall consist of employees or advisors that report to the ENH Chief Operations Officer ("COO") and will be located at Evanston. The ENH COO is the

authorized representative to execute and sign Managed Care Contracts negotiated by the ENH Negotiating Team.

In Paragraph I.H., delete ENH's entire definition of "Payor" (struck out language) and substitute the language bracketed in **BOLD**:

H. ["Payor" means any Person that pays, or arranges for payment, for all or any part of any Hospital Services for itself or for any other Person. Payor includes any Person that develops, leases, or sells access to networks of Hospitals.**]**

H. ~~"Payor" means a managed care company, its officers, directors, employees, agents, representatives, successors, and assigns, subsidiaries, divisions, groups, and affiliates controlled by it, and the representative officers, directors, employees, agent, representatives, successors, and assigns of each, that provides access to health care services on an insured, partially insured or a self-insured basis, including plans such as health maintenance organizations (HMO), preferred provider organizations (PPO), and point of service plans (POS). A Payor may be a licensed insurer, an administrative services organization, or both. The services may include network access and development, contract negotiation with providers, provider relations, medical and utilization management and claims administration. This definition specifically excludes all Federal, State and Local Government Payors (including Medicare, Medicaid, and Medicare benefits administered by Managed Care Payors, i.e., Medicare Advantage Plans), provider groups including but not limited to Home Health, Hospice Agencies, Independent Physicians Associations (IPA), ENH self-funded employee insurance plan and any employer direct agreement.~~

In Paragraph I.L., change the following definition to add the language bracketed in **BOLD** and to delete the language that is struck out, and make conforming changes throughout the Order to substitute the term "Hospital Services" for the term "Inpatient Services":

L. "~~Inpatient~~ **[Hospital]** Services" means ~~general acute care~~ **[all]** inpatient hospital services which include a broad cluster of medical, surgical, diagnostic, treatment, and **[all]** other services that are included as part of an admission of a patient to an inpatient bed within Evanston Hospital or Highland Park Hospital, **[and all outpatient services that are related to the use of that Hospital.]**

In Paragraph I.J., change the following definition to add the language bracketed in **BOLD** and to delete the language that is struck out:

J. "Managed Care Contract" means a contract or agreement for **[Hospital S]**services between ENH and a Payor including but not limited to rates, definitions, terms, conditions ~~and~~ policies**[, and pricing methodology (*e.g.*, per diem, discount rate, and case rate)**.

PARAGRAPH III.B. AND III.C.

In Paragraph III.B. and III.C., add the language bracketed in **BOLD** and delete the language that is struck out:

B. When Payors request separate negotiations for ~~Inpatient~~ **[Hospital]** Services at Highland Park, the ENH Negotiating Team shall negotiate **[only]** for ~~all~~ **[Hospital S]**services at Evanston ~~and only outpatient services at Highland Park~~.

C. At the request of any specific Payor, the ENH Negotiating Team shall be permitted to negotiate for ~~all~~ **[Hospital S]**Services at all ENH Hospitals for that specific Payor **[for that specific Managed Care Contract]**.

PARAGRAPH V.

In Paragraph V.A., add the language bracketed in **BOLD**, and add a corresponding **Paragraph V.B.** to require ENH to provide similar notifications to any Payors commencing *de novo* contractual negotiations with ENH:

A. Within thirty (30) days after the date this order becomes final, ENH shall provide all Payors with which it has a ~~Current~~ **[Pre-existing]** Contract notification of this Order and offer the opportunity to negotiate separately with the Highland Park Negotiating Team for ~~Inpatient~~ **[Hospital]** Services for Highland Park **[for each such contract. Respondent shall give such notifications to the Chief Executive Officer, the General Counsel, and to the Network Manager of the Payor by both first class mail and by e-mail with return receipt requested or similar transmission, and keep a file of such receipts for three (3) years after the date on which this Order becomes final. Respondent shall maintain complete records of all such notifications at Respondent's headquarters and shall provide an officer's certification to the Commission stating that such notification program has been implemented and is being complied with.**

B. Not later than ten (10) days after being contacted by a Payor to negotiate a Managed Care Contract, ENH shall provide such Payor notification of this Order and offer the opportunity to negotiate separately with the Highland Park Negotiating Team for Hospital Services for Highland Park. Respondent shall give such notifications to the Chief Executive Officer, the General Counsel, and to the Network Manager of the Payor by both first class mail and by e-mail with return receipt requested or similar transmission, and keep a file of such receipts for three (3) years after the date on which such notification is sent to the Payor. Respondent shall maintain complete records of all such notifications at Respondent's headquarters and shall provide an officer's certification to the Commission stating that such notification program has been implemented and is being complied with.]

PARAGRAPH VI.D.

In Paragraph VI.D., add the language bracketed in **BOLD**:

D. Nothing in this Order shall prevent the ENH Negotiating Team from requesting, receiving, sharing or otherwise obtaining Managed Care Contracting Information with respect to ~~all~~ **[Hospital S]**services at Evanston ~~and outpatient services at Highland Park~~.

PARAGRAPH VII

In Paragraph VII., add the following language bracketed in **BOLD**:

IT IS FURTHER ORDERED that Respondent shall cause each of Respondent's employees having access to Managed Care Contracting Information to sign a statement that the individual will maintain the confidentiality required by the terms and conditions of this Order. **[Respondent shall maintain complete records of all such statements at Respondent's headquarters and shall provide an officer's certification to the Commission stating that such statements have been signed and are being complied with by all relevant employees.]**

PARAGRAPH VIII

In Paragraph VIII, add the following language bracketed in **BOLD** and delete the language that is struck out:

IT IS FURTHER ORDERED that Respondent shall,

[A.] One (1) year from the date this Order becomes final**[,]** ~~and~~ annually **[for the next nine years on the anniversary date this Order becomes final, and at such other times as the Commission may require]** ~~until the Order terminates or the Commission determines it no longer necessary~~, submit a verified written report to the Commission setting forth in detail the manner and form in which it has complied and is complying with the Order;

[B. Within sixty (60) days after the date this Order becomes final, and every sixty (60) days thereafter until Respondent has fully complied with Paragraphs II, V.A., VI.A., *INSERT PARAGRAPH NUMBER*,[16] and has obtained the signed statements of all of Respondent's employees described in Paragraph VII and who are employed by the

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[16] Insert Paragraph number corresponding to the provisions in Respondent's Proposed Order Paragraph XI. which states "**IT IS FURTHER ORDERED** that ENH shall, within sixty (60) days after the date this Order becomes final, send by first-class mail, return receipt requested, a copy of this Order to each officer and director of ENH."

Respondent as of the date this Order becomes final, submit a verified written report to the Commission setting forth in detail the manner and form in which it has complied and is complying with the Order;

C. **In each such verified written report, include, among other things that are required from time to time, the following:**

(i) **a full description of the efforts being made to comply with the each Paragraph of the Order; including, all internal memoranda, and all reports and recommendations concerning compliance with the requirements of this Order; and**

(ii) **The identity of each member of the ENH Negotiating Team, the Highland Park Negotiating Team, any Third Party Consultant(s), and the Corporate Managed Care Department.]**

PARAGRAPH IX

In Paragraph IX., add the following language in **BOLD** and delete the language that is struck out:

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order, **[and subject to any legally recognized privilege, and upon written request and upon five (5) days notice to the Respondent made to its headquarters address]**, Respondent shall, **[without restraint or interference]**, permit any duly authorized representative of the Commission:

A. access, during **[business]** office hours **[of the Respondent]** and in the presence of counsel, **[to all facilities and access]** to inspect and copy all books, ledgers, accounts, correspondence, memoranda, calendars, and **[all]** other records and documents in its possession, or under its control, relating to any matter contained in this Order, **[which copying services shall be provided by the Respondent at the request of the authorized representative(s) of the Commission and at the expense of the Respondent]**; and

B. ~~Upon five (5) days' notice to Respondent, and in the presence of counsel,~~ to interview officers, **[directors,]**or employees of the Respondent**[, who may have counsel present, regarding such matters]**.

PARAGRAPH X

Delete **Paragraph X.** in its entirety.

~~**IT IS FURTHER ORDERED** that, any and all disputes between ENH and Payors with respect to Respondent's compliance with this Order shall be solely and exclusively resolved in accordance with this section. ENH and the Payor shall first try in good faith to settle the dispute by mediation under the Commercial Mediation Rules of the American Arbitration Association ("AAA"). If the dispute cannot be settled by mediation, then by arbitration administered by the AAA under its Commercial Arbitration Rules before a single arbitrator mutually agreed upon by ENH and the Payor. Any mediation or arbitration proceeding shall be conducted in Chicago, Illinois.~~

PARAGRAPH XII

In Paragraph XII., add the following language in **BOLD** and delete the language that is struck out:

IT IS FURTHER ORDERED that~~,~~ this Order **[shall terminate]** ~~will remain in effect for~~ ten (10) years **[from]** ~~after~~ the date **[on which this Order becomes final]** ~~of its issuance. ENH may petition the Commission at any time for removal or expiration the Order.~~

PRIOR NOTIFICATION PROVISION

Add the following prior notification provision to ENH's proposed order:

IT IS FURTHER ORDERED that, for a period commencing on the date this Order becomes final and continuing for ten (10) years, Respondent shall not, directly or indirectly, through subsidiaries or otherwise, without providing advance written notification to the Commission:

A. acquire any Ownership Interest in:

(i) a Hospital that is located within the Chicago Metropolitan Statistical Area; or

(ii) any Person that Operates a Hospital that is located within the Chicago Metropolitan Statistical Area; or

B. enter into any agreement or other arrangement to Operate or otherwise obtain direct or indirect ownership, management, or control of a Hospital that is located within the Chicago Metropolitan Statistical Area, or any part thereof, including but not limited to a lease of or management contract for any such Hospital.

Said notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended (hereinafter referred to as "the Notification"), and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such Notification, Notification shall be filed with the Secretary of the Commission, Notification need not be made to the United States Department of Justice, and Notification is required only of the Respondents and not of any other party to the transaction. Respondents shall provide two (2) complete copies (with all attachments and exhibits) of the Notification to the Commission at least thirty (30) days prior to consummating any such transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Respondents shall not consummate the transaction until thirty (30) days after substantially complying with such request. Early termination of the waiting periods in this Paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition; *provided, however*, that prior notification shall not be required by this Paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a.

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing document was served by delivering copies to:

Office of the Secretary
Federal Trade Commission
Room H-159
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Michael L. Sibarium, Esq.
Charles B. Klein, Esq.
WINSTON & STRAWN, LLP
1700 K Street, NW
Washington, DC 20006-3817

and by mailing a copy, First Class Postage Prepaid to

Duane M. Kelley, Esq.
WINSTON & STRAWN, LLP
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