

**ANALYSIS OF AGREEMENT CONTAINING
CONSENT ORDER TO AID PUBLIC COMMENT
In the Matter of Tenet Healthcare Corporation and Frye Regional Medical Center
File No. 021 0119**

The Federal Trade Commission has accepted, subject to final approval, an agreement containing a proposed consent order with Tenet Healthcare Corporation (“Tenet”) and Frye Regional Medical Center, Inc. (“Frye”). The agreement settles charges that Tenet and Frye (“Respondents”) violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by directly facilitating the orchestration and implementation of agreements among the physician members of Piedmont Health Alliance, Inc. (“PHA”) to fix prices and other terms on which the physicians would deal with health plans, and to refuse to deal with such purchasers except on collectively-determined terms. The proposed consent order has been placed on the public record for 30 days to receive comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make the proposed order final.

The purpose of this analysis is to facilitate public comment on the proposed order. The analysis is not intended to constitute an official interpretation of the agreement and proposed order, or to modify its terms in any way. Further, the proposed consent order has been entered into for settlement purposes only and does not constitute an admission by Tenet or Frye that they violated the law or that the facts alleged in the complaint (other than jurisdictional facts) are true.

The Complaint Allegations

Frye is a for-profit corporation that operates a 338-bed hospital in Hickory, North Carolina. Tenet is a for-profit corporation that owns or operates over 100 hospitals throughout the United States, including Frye. Frye was instrumental in the foundation and operation of PHA, a for-profit physician-hospital organization (“PHO”), operating in the western North Carolina area of Catawba, Burke, Caldwell, and Alexander Counties that is known as the “Unifour” area. PHA has as members approximately 450 physicians, or roughly 75% of the physicians in the Unifour area, and three of the five Unifour area hospitals, including Frye. A separate complaint has been issued against PHA and 10 of its physician leaders relating to their activities.

In 1993, Frye’s Chief Executive Officer (“CEO”) developed a plan to create a PHO that would include Frye and the physicians practicing at Frye. He hired a consultant to survey the Frye physicians regarding what they would expect from a PHO. The consultant reported that the Frye practicing physicians “stated a need to form the group to negotiate with group clout and power” and “maintain their income” in anticipation of the arrival of managed care organizations in the Unifour area. Frye’s CEO and Chief Operating Officer (“COO”), along with eight physicians practicing at Frye, formed a steering committee, which was responsible for establishing and organizing the PHO.

PHA was established in 1994 with the aim of facilitating collective bargaining by physicians with health plans in order to obtain more favorable fees and other terms than PHA's physician members could obtain through dealing individually with health plans. In early 1994, the PHA steering committee established the Contracts Committee to negotiate contracts with payors on behalf of PHA's physician members. Frye's Chief Financial Officer ("CFO") and COO actively participated on the Contracts Committee, and were the PHA physicians' principal contract negotiators between 1994 and 1996. In 1996, PHA expanded to include Caldwell Memorial Hospital ("Caldwell Memorial") and Grace Hospital ("Grace"), both nonprofit hospitals, and their respective medical staffs.

PHA is managed and controlled by a Board of Directors made up of 14 physician directors and six hospital directors, two representing each hospital member (but with only one vote per hospital member). Thus, Frye has two representatives on the PHA Board of Directors. Both a majority of PHA physician directors and two of the three voting hospital directors must approve each payor contract entered into on behalf of PHA's physician members. The PHA Board representatives voted on the approval of contracts containing physician fee schedules that PHA collectively negotiated with payors. Since 1994, PHA has negotiated and executed over 50 contracts with payors.

The complaint alleges that with the assistance of Frye and Tenet, PHA has successfully coerced a number of health plans to pay artificially high prices to PHA physician members, and thereby raised the cost of medical care in the Unifour area. As a result of the challenged actions of Tenet and Frye, consumers in the Unifour area have been, and are, deprived of the benefits of competition among physicians. By facilitating agreements among PHA member physicians to deal only on collectively-determined terms, and through PHA's and its members' actual or threatened refusals to deal with health plans that would not meet those terms, Tenet and Frye have violated Section 5 of the FTC Act. The collective negotiation of fees and other competitively significant terms by PHA physician members with the assistance of Frye and Tenet has not been, and is not, reasonably necessary to achieving any efficiency-enhancing integration.

The Proposed Consent Order

The proposed consent order is designed to remedy the illegal conduct charged in the complaint and prevent its recurrence, while allowing Tenet and Frye to engage in legitimate conduct that does not impair competition. For example, other than the limitation in Paragraph IV regarding acting as an agent or messenger, the proposed order does not prohibit involvement in vertical arrangements between Frye or Tenet and physicians that do not involve illegal horizontal agreements among physicians. The proposed order is similar to recent orders that the Commission has issued to settle charges relating to unlawful agreements to raise physician prices.

The proposed order's specific provisions are as follows:

The order's core prohibitions are contained in Paragraphs II, III, and IV. Paragraph II.A prohibits Tenet and Frye from entering into or facilitating any agreement between or among any physicians practicing in the Unifour area: (1) to negotiate with payors on any physician's behalf; (2) to deal, not to deal, or threaten not to deal with payors; (3) on what terms to deal with any payor; or (4) not to deal individually with any payor, or to deal with any payor only through an arrangement involving PHA.

Other parts of Paragraph II reinforce these general prohibitions. Paragraph II.B prohibits the Respondents from facilitating exchanges of information between or among physicians concerning whether, or on what terms, to contract with a payor. Paragraph II.C bans them from attempting to engage in any action prohibited by Paragraph II.A or II.B. Paragraph II.D prohibits Respondents from inducing anyone to engage in any action prohibited by Paragraphs II.A through II.C.

As in other orders addressing health care providers' collective bargaining with payors, certain kinds of agreements are excluded from the general bar on joint negotiations. First, Tenet and Frye would not be barred from activities solely involving their employed physicians. Second, Tenet and Frye are not precluded from engaging in conduct that is reasonably necessary to form or participate in legitimate joint contracting arrangements among competing hospitals and physicians, whether a "qualified risk-sharing joint arrangement" or a "qualified clinically-integrated joint arrangement." However, such arrangements must not restrict the ability, or facilitate the refusal, of the arrangements' physician members to deal with payors on an individual basis or through any other arrangement. As discussed below in connection with Paragraph V, Tenet and Frye are required to notify the Commission about such an arrangement prior to negotiating on behalf of the arrangement's members or before those members jointly discuss any terms of dealing with a payor.

As defined in the proposed order, a "qualified risk-sharing joint arrangement" must satisfy two conditions. First, all physician and hospital participants must share substantial financial risk through the arrangement and thereby create incentives for the physician or hospital participants jointly to control costs and improve quality by managing the provision of services. Second, any agreement concerning reimbursement or other terms or conditions of dealing must be reasonably necessary to obtain significant efficiencies through the joint arrangement.

As defined in the proposed order, a "qualified clinically-integrated joint arrangement" also must satisfy two conditions. First, all physician and hospital participants must participate in active and ongoing programs to evaluate and modify their clinical practice patterns, creating a high degree of interdependence and cooperation among physicians and/or hospitals, in order to control costs and ensure the quality of services provided. Second, any agreement concerning reimbursement or other terms or conditions of dealing must be reasonably necessary to obtain significant efficiencies through the joint arrangement.

Paragraph III requires Tenet to assure that no physician practicing in a medical group practice owned or controlled in any manner by Tenet or Frye submits claims for payment pursuant to a preexisting contract between PHA and any payor, where such claims are for services provided at any time 90 or more days after the date the order becomes final. However, the order permits these physicians to continue to submit claims for services pursuant to certain PHA contracts listed in Confidential Appendix A. The purpose of Paragraph III is to prevent Tenet and Frye employed or contracted physicians from continuing to receive the benefit of the unlawfully fixed prices under PHA's contracts with payors.

Paragraph IV prohibits Tenet and Frye, for four years, from directly or indirectly entering into any arrangements with any physicians practicing in the Unifour area under which Tenet or Frye would act as an agent or messenger for those physicians regarding contracting or terms of dealing with payors. An exception is made for those physicians employed by Tenet or Frye.

In the event that Frye or Tenet forms a qualified risk-sharing joint arrangement or a qualified clinically-integrated joint arrangement, Paragraph V requires the Respondents, for five years, to notify the Commission at least 60 days prior to initially contacting, negotiating, or entering into agreements with payors concerning the arrangement. This notice is not required for arrangements in which all the physician participants are employed by Frye or Tenet. Notification is not required for subsequent negotiations or agreements with payors pursuant to any arrangement for which notice was already given under Paragraph V. Paragraph V.B sets out the information necessary to make the notification complete. Paragraph V.C establishes the Commission's right to obtain additional information regarding the arrangement.

Paragraph VI.A prohibits Tenet and Frye from challenging or interfering with the termination, required by any Commission order, of any contract between PHA and any payor, pursuant to which Frye is reimbursed for hospital, physician, or other healthcare services. This provision helps to ensure the effectiveness of any future Commission order against PHA.

Paragraph VI.B requires Tenet to distribute the order and complaint, within 30 days after the order becomes final, to each officer who is at the level of senior vice-president or higher, each member of the board of directors, and each Tenet regional director of managed care; to the CEO, the CFO, and each person having primary responsibility for managed care contracting of each hospital, other than Frye, owned or controlled by Tenet; and to each officer, each member of the board of directors, and each person having primary responsibility for managed care contracting for Frye.

Paragraph VI.C requires Tenet to distribute the complaint and order, within 30 days after the order becomes final, to every payor with which Frye has been in contact since January 1, 1994, regarding the provision of hospital or physician services.

Paragraph VI.E.3 requires Tenet to cooperate with Commission staff in any litigation, or other action taken by the Commission, against PHA and any of its member physicians.

The remaining provisions of Paragraph VI, and Paragraphs VII through IX, of the proposed order impose obligations on Tenet (or Frye, if it is no longer owned or controlled by Tenet), with respect to distributing the proposed complaint and order to payors that contract with Frye and to other specified persons, and the reporting of certain information to the Commission.

The proposed order will expire in 20 years.