

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of)	
)	
MONTANA ASSOCIATED PHYSICIANS, INC.,)	
a corporation, and)	
)	FILE NO. 911-0008
BILLINGS PHYSICIAN HOSPITAL)	AGREEMENT CONTAINING
ALLIANCE, INC.,)	CONSENT ORDER TO
a corporation.)	CEASE AND DESIST

The Federal Trade Commission having initiated an investigation of certain acts and practices of Montana Associated Physicians, Inc. ("MAPI") and Billings Physician Hospital Alliance, Inc. ("BPHA"), hereinafter sometimes referred to as proposed respondents, and it now appearing that proposed respondents are willing to enter into an agreement containing an order to cease and desist from the use of the acts and practices being investigated,

IT IS HEREBY AGREED by and between MAPI and BPHA, by their duly authorized officers and their attorneys, and counsel for the Federal Trade Commission that:

1. Proposed respondent MAPI is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Montana, with its office and principal place of business located at 1242 North 28th Street, Suite 1A, Billings, Montana 59101.

2. Proposed respondent BPHA is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Montana, with its office and principal place of business located at 1233 North 30th Street, Billings, Montana 59101.

3. Proposed respondents admit all the jurisdictional facts
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- (b) The requirement that the Commission's decision contain a statement of findings of fact and conclusions of law;
- (c) All rights to seek judicial review or otherwise to challenge or contest the validity of the order entered pursuant to this agreement; and
- (d) Any claim under the Equal Access to Justice Act.

5. This agreement shall not become part of the public record of the proceeding unless and until it is accepted by the Commission. If this agreement is accepted by the Commission it, together with the draft of complaint contemplated thereby, will be placed on the public record for a period of sixty (60) days and information with respect thereto will be publicly released. The Commission thereafter may either withdraw its acceptance of this agreement and so notify the proposed respondents, in which event it will take such action as it may consider appropriate, or issue and serve its complaint (in such form as the circumstances may require) and decision, in disposition of the proceeding.

6. This agreement is for settlement purposes only and does not constitute an admission by proposed respondents that the law has been violated as alleged in the draft of complaint here attached, or that the facts as alleged in the draft complaint, other than jurisdictional facts, are true.

7. This agreement contemplates that, if it is accepted by the Commission, and if such acceptance is not subsequently withdrawn by the Commission pursuant to the provisions of § 2.34 of the Commission's Rules, the Commission may, without further notice to proposed respondents, (1) issue its complaint corresponding in form and substance with the draft of complaint here attached and its decision containing the following order to cease and desist in disposition of the proceeding and (2) make information public in respect thereto. When so entered, the order

8. Proposed respondents have read the proposed complaint and order contemplated hereby. Proposed respondents understand that once the order has been issued, they will be required to file one or more compliance reports showing that they have fully complied with the order. Proposed respondents further understand that they may be liable for civil penalties in the amount provided by law for each violation of the order after the order becomes final.

ORDER

I.

IT IS ORDERED that, for purposes of this order, the following definitions shall apply:

A. "Montana Associated Physicians, Inc." or "MAPI" means Montana Associated Physicians, Inc., its subsidiaries, divisions, committees, and groups and affiliates controlled by MAPI; their directors, officers, representatives, agents, and employees; and their successors and assigns.

B. "Billings Physician Hospital Alliance, Inc." or "BPHA" means Billings Physician Hospital Alliance, Inc., its subsidiaries, divisions, committees, and groups and affiliates controlled by BPHA; their directors, officers, representatives, agents, and employees; and their successors and assigns.

C. "Third-party payer" means any person or entity that reimburses for, purchases, or pays for all or any part of the health care services provided to any other person, and includes, but is not limited to: health insurance companies; prepaid hospital, medical, or other health service plans, such as Blue Shield and Blue Cross plans; health maintenance organizations; preferred provider organizations; government health benefits programs; administrators of self-insured health benefits programs; and employers or other entities providing self-insured health benefits programs.

D. "Risk-sharing joint venture" means a joint arrangement to provide health care services in which physicians who would otherwise be competitors share a substantial risk of loss from their participation in the venture.

E. "Fees" means any and all cash or non-cash charges, rates, prices, benefits, or other compensation received, to be

received, or charged to a patient or third-party payer for the rendering of physician services.

II.

IT IS FURTHER ORDERED that MAPI, directly or indirectly, or through any corporate or other device, in connection with the provision of physician services in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, forthwith shall cease and desist from entering into, attempting to enter into, organizing, attempting to organize, implementing, attempting to implement, continuing, attempting to continue, facilitating, attempting to facilitate, ratifying, or attempting to ratify any combination, contract, agreement, understanding, or conspiracy with or among any physician(s) to:

- A. Negotiate, deal, or refuse to deal with any third-party payer, employer, hospital, or any other provider of health care services;
- B. Determine the terms, conditions, requirements, or any other aspect of becoming or remaining a participating physician in any program or plan of any third-party payer; and
- C. Fix, raise, stabilize, establish, maintain, adjust, or tamper with any fee, fee schedule, price, pricing formula, discount, conversion factor, or other aspect or term of the fees charged or the fees to be charged for any physician's services.

PROVIDED THAT nothing in this order shall be construed to prohibit MAPI from forming, facilitating, or participating in the formation of a risk-sharing joint venture, which may deal with a third-party payer on collectively determined terms, as long as the physicians participating in the risk-sharing joint venture also remain free to deal individually with any third-party payer.

FURTHER PROVIDED THAT nothing in this order shall be construed to prohibit MAPI from forming, facilitating, or participating in the formation of any other joint venture for which MAPI receives the prior approval of the Commission.

III.

IT IS FURTHER ORDERED that MAPI, directly or indirectly, or through any corporate or other device, in connection with the provision of physician services in or affecting commerce, as

"commerce" is defined in the Federal Trade Commission Act, forthwith shall cease and desist from:

- A. Requesting, proposing, urging, advising, recommending, advocating, or attempting to persuade in any way any physician or physician's practice to fix, raise, stabilize, establish, maintain, adjust, or tamper with any fee, fee schedule, price, pricing formula, discount, conversion factor, or other aspect or term of the fees charged or the fees to be charged for any physician's services;
- B. Creating, formulating, suggesting, encouraging adherence to, endorsing, or authorizing any list or schedule of fees for physicians' services, including, but not limited to, suggested fees, proposed fees, fee guidelines, discounts, discounted fees, standard fees, or recommended fees;
- C. Encouraging, advising, pressuring, inducing, or attempting to induce any person to engage in any action prohibited by this order; and

IV.

IT IS FURTHER ORDERED that BPHA, directly or indirectly, or through any corporate or other device, in connection with the provision of physician services in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, forthwith shall cease and desist from entering into, attempting to enter into, organizing, attempting to organize, implementing, attempting to implement, continuing, attempting to continue, facilitating, attempting to facilitate, ratifying, or attempting to ratify any combination, contract, agreement, understanding, or conspiracy with or among any physician(s) to:

- A. Negotiate, deal, or refuse to deal with any third-party payer for physician services;
- B. Determine the terms, conditions, requirements, or any other aspect of becoming or remaining a participating physician in any program or plan of any third-party payer; and
- C. Fix, raise, stabilize, establish, maintain, adjust, or tamper with any fee, fee schedule,

price, pricing formula, discount, conversion factor, or other aspect or term of the fees charged or the fees to be charged for any physician's services.

PROVIDED THAT nothing in this order shall be construed to prohibit BPHA from forming, facilitating, or participating in the formation of a risk-sharing joint venture, which may deal with a third-party payer on collectively determined terms, as long as the physicians participating in the risk-sharing joint venture also remain free to deal individually with any third-party payer.

FURTHER PROVIDED THAT nothing in this order shall be construed to prohibit BPHA from forming, facilitating, or participating in the formation of any other joint venture for which BPHA receives the prior approval of the Commission.

FURTHER PROVIDED THAT nothing in this order shall be construed to prohibit BPHA from implementing, attempting to implement, continuing, or attempting to continue, for the express term thereof, contracts with third-party payers that were in effect on September 30, 1994.

FURTHER PROVIDED THAT nothing in this order shall be construed to prohibit BPHA from continuing to function as a physician-hospital organization that is not a risk-sharing or otherwise integrated entity, as long as each of the following conditions is met:

(a) Saint Vincent Hospital and Health Center is the only hospital in Yellowstone County, Montana, that participates in BPHA;

(b) BPHA's role in the contracting process between third-party payers and physician members of BPHA is limited to:

(i) soliciting or receiving from an individual physician member of BPHA, and conveying to a third-party payer, information relating to fees or other aspects of reimbursement, outcomes data, practice parameters, utilization patterns, credentials, and qualifications;

(ii) conveying to a physician member of BPHA any contract offer made by a third-party payer;

(iii) soliciting or receiving from a third-party payer, and conveying to a physician member of BPHA, clarifications of proposed contract terms;

(iv) providing to a physician member of BPHA objective information about proposed contract terms, including comparisons with terms offered by other third-party payers;

(v) conveying to a physician member of BPHA any response made by a third-party payer to information conveyed, or clarifications sought, by BPHA;

(vi) conveying, in individual or aggregate form, to a third-party payer, the acceptance or rejection by a physician member of BPHA of any contract offer made by such third-party payer; and

(vii) at the request of a third-party payer, providing the individual response, information, or views of each physician member of BPHA concerning any contract offer made by such third-party payer.

(c) each physician member of BPHA makes an independent, unilateral decision to accept or reject each contract offer made by a third-party payer;

(d) BPHA does not: (i) disseminate to any physician another physician's fees, other aspects of reimbursement, or views or intentions as to possible terms of dealing with a third-party payer; (ii) act as an agent for the collective negotiation or agreement by the physician members of BPHA; or (iii) encourage or facilitate collusive behavior among physician members of BPHA; and

(e) each physician member of BPHA remains free to deal individually with any third-party payer.

V.

IT IS FURTHER ORDERED that MAPI and BPHA shall:

A. Within thirty (30) days after the date on which this order becomes final, distribute by first-class mail a copy of this order and the accompanying complaint to each of their members, officers, directors, managers, and employees;

B. For a period of five (5) years after the date this order becomes final, distribute by first-class mail a copy of this order and the accompanying complaint to each new MAPI or BPHA member, officer, director, manager, and employee within thirty (30) days of their admission, election, appointment, or employment; and

C. For a period of five (5) years after the date this order becomes final, publish annually in an official annual report or newsletter sent to all members, a copy of this order and the accompanying complaint with such prominence therein as is given to regularly featured articles.

VI.

IT IS FURTHERED ORDERED that MAPI and BPHA shall each file a verified written report within sixty (60) days after the date this order becomes final, annually thereafter for five (5) years on the anniversary of the date this order became final, and at such other times as the Commission or its staff may by written notice require, setting forth in detail the manner and form in which they have complied and are complying with the order.

VII.

IT IS FURTHER ORDERED that MAPI and BPHA shall:

A. Notify the Commission at least thirty (30) days prior to any proposed change in such corporate respondent such as dissolution, assignment, sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in such corporation that may affect compliance obligations arising out of the order; and

B. For a period of five (5) years after the date this order becomes final, notify the Commission in writing forty-five (45) days prior to forming or participating in the formation of, or joining or participating in, any risk-sharing joint venture.

VIII.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this order, MAPI and BPHA shall permit any duly authorized representative of the Commission:

A. Access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda, calendars, and other records and documents in the possession or under the control of a respondent relating to any matters contained in this order; and

B. Upon five days' notice to a respondent and without restraint or interference from it, to interview officers, directors, or employees of a respondent.

IX.

IT IS FURTHER ORDERED that this order shall terminate twenty (20) years from the date this order becomes final.

Signed this _____ day of _____, 199__.

Montana Associated Physicians, Inc.

By _____
Alan D. Muskett
President of Montana Associated Physicians, Inc.

James A. Kirkland, Esq.
Attorney for Montana Associated Physicians, Inc.

Billings Physician Hospital Alliance, Inc.

By _____
Mark A. Burzynski
Treasurer of Billings Physician Hospital Alliance, Inc.

James H. Sneed, Esq.
Attorney for Billings Physician Hospital Alliance, Inc.

Steven J. Osnowitz
Counsel for the Federal Trade Commission

APPROVED:

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William J. Baer
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Bureau of Competition

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of)	
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MONTANA ASSOCIATED PHYSICIANS, INC.,)	
a corporation, and)	
)	DOCKET NO.
BILLINGS PHYSICIAN HOSPITAL)	
ALLIANCE, INC.,)	
a corporation.)	
)	
)	

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the Montana Associated Physicians, Inc. ("MAPI") and the Billings Physician Hospital Alliance, Inc. ("BPHA"), hereinafter sometimes referred to as respondents, have violated and are violating the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH ONE: Respondent MAPI is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Montana, with its office and principal place of business located at 1242 North 28th Street, Suite 1A, Billings, Montana 59101.

PARAGRAPH TWO: There are approximately 115 shareholders of MAPI, all of whom are physicians, and they constitute the membership of MAPI. MAPI's members provide medical services in over 30 independent physician practices in Billings, Montana. MAPI's members constitute approximately 43 percent of all physicians in Billings, Montana, and primarily practice fee-for-service medicine. An approximately equal number of the other

PARAGRAPH THREE: Respondent BPHA is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Montana, with its office and principal place of business located at 1233 North 30th Street, Billings, Montana 59101.

PARAGRAPH FOUR: BPHA is a physician-hospital organization, whose membership consists of Saint Vincent Hospital and Health Center ("Saint Vincent") of Billings, Montana, and a majority of the physicians on Saint Vincent's active medical staff. Almost all of MAPI's members are also physician members of BPHA. BPHA contracts with third-party payers on beh

contracts, third-party payers may obtain capitated payment systems or discounts from physicians' usual fees, and physicians may obtain access to additional patients.

PARAGRAPH EIGHT: Third-party payers in Billings, Montana, compete with each other on the basis of price, coverage offered, physician and hospital quality and availability, and other factors that are important to consumers. Payments to physicians for services rendered to third-party payer subscribers are a large component of a third-party payer's costs, and, therefore, are significant to a third-party payer in determining the price to charge consumers for health care coverage.

PARAGRAPH NINE: Absent agreements among competing physicians on the terms, including price, on which they will provide services to subscribers or enrollees in health care plans offered or provided by third-party payers, competing physicians decide individually whether to enter into contracts with third-party payers to provide services to subscribers or enrollees, and what prices to charge pursuant to such contracts.

PARAGRAPH TEN: In 1986, most of the independent physicians in Billings were members of an organization called Ultracare. At this time, there were no HMOs or PPOs operating in Billings. Ultracare concluded that such plans would soon attempt to contract with physicians in Billings, and that competitive pressure could force physicians to deal with such plans at reduced prices or on other than fee-for-service terms. Accordingly, in March 1987, physician members of Ultracare formed MAPI, in substantial part to be a vehicle for its members to deal collectively with managed care plans. The purpose of engaging in collective dealings was to obtain greater bargaining power with third-party payers by presenting a united front, and thereby to resist competitive pressures to discount fees and to avoid accepting reimbursement on other than the traditional fee-for-service basis.

PARAGRAPH ELEVEN: Beginning in 1986, and continuing to the present, MAPI and MAPI's predecessor, Ultracare, have acted as a combination of their members, have combined with at least some of their members, and have acted to implement agreements among their members to restrain competition by, among other things, facilitating, entering into, and implementing agreements, express or implied, to delay entry of HMOs and PPOs into Billings, to engage in collective negotiations over terms and conditions of dealing with third-party payers, to have MAPI members refrain from negotiating directly with third-party payers or contracting on terms other than those endorsed by MAPI, and to resist cost containment measures of third-party payers.

PARAGRAPH TWELVE: During 1987 and continuing into 1993, MAPI acted to prevent and delay HMO Montana, an HMO owned and operated by Blue Cross/Blue Shield of Montana, from successfully contracting with physicians in Billings. Beginning in 1987, Blue Cross/Blue Shield of Montana sought to enter into agreements with MAPI's members to participate in HMO Montana. MAPI, on behalf of its members collectively, negotiated with HMO Montana concerning the terms of physicians' contracts with HMO Montana, including price terms, and rejected all contracts proposed by HMO Montana. Members of MAPI told Blue Cross/Blue Shield of Montana that they would negotiate with HMO Montana only through MAPI, and no member of MAPI entered into a contract with HMO Montana.

PARAGRAPH THIRTEEN: Beginning in 1987, MAPI gathered detailed fee information from individual competing MAPI physicians and their physician practices, which enabled MAPI to determine for most physician services the prevailing fees and the maximum reimbursement allowed by Blue Cross/Blue Shield of Montana. After collecting and analyzing this fee information, MAPI advised certain physicians to raise their fees, and some fees were increased in accordance with these recommendations.

PARAGRAPH FOURTEEN: Beginning in 1988, MAPI acted to obstruct efforts by a health plan seeking to establish the first PPO program in Billings. The health plan entered into a PPO contract with Saint Vincent in November 1988 and then sought to contract with physicians on the hospital's medical staff. Some members of MAPI indicated to the plan that they would follow MAPI's recommendations in regard to dealings with the plan. MAPI, on behalf of its members collectively, offered its own proposed physician contract to the plan that provided for physicians to be paid their usual fees with no discounts, represented to the plan that this was what MAPI's members would accept, and objected to any discounts in fees to be paid by MAPI members. After negotiating with MAPI for a year without MAPI ever agreeing to MAPI physicians charging less than their usual fees, the plan contacted individual physicians about signing a PPO contract. When the plan sought to collect current fee information from MAPI members in order to devise a proposed fee schedule to offer to physicians, MAPI urged its members to submit prices higher than they were currently charging in order to inflate the fee schedule. By June 1990, the plan had contracts with only about 30 percent of MAPI's members.

PARAGRAPH FIFTEEN: MAPI was actively involved in the formation of BPHA, which wacolmemb in f

almost all MAPI physician members of BPHA with respect to their membership in BPHA. As a result, MAPI has the authority to elect and remove physician members of BPHA's Board of Directors. Until 1993, MAPI's agency authority extended to the acceptance or rejection of any contract negotiated by BPHA with any third-party payer.

PARAGRAPH SIXTEEN: The physician members of BPHA, most of whom are MAPI members, concertedly control BPHA's pricing and other terms of contracts for physician services. BPHA's Bylaws designate that its Contracting Committee shall negotiate the terms and conditions of contracts for physician services with third-party payers, including price terms of those contracts, and recommend acceptance or rejection of said contracts to the members of BPHA. BPHA's Contracting Committee consists almost entirely of physicians and their employees and agents, including for a significant period of time the Executive Director of MAPI. No action of BPHA's Contracting Committee or BPHA's Board of Directors can be taken without the support of a majority of physician representatives on each body. BPHA did not enter into any contract for physician services until nearly two years after its creation.

PARAGRAPH SEVENTEEN: MAPI has combined and is combining with its physician members, and has acted and is acting to implement an agreement among them, to restrain competition among physicians, through an agreement, express or implied, that BPHA would negotiate the terms and conditions of agreements between BPHA physician members and others, including the prices to be paid for their services.

PARAGRAPH EIGHTEEN: The physician members of MAPI and the physician members of BPHA have not integrated their practices in any economically significant way, nor have they created efficiencies sufficient to justify their acts or practices described in paragraphs ten through seventeen.

PARAGRAPH NINETEEN: By engaging in the acts or practices described above, both MAPI and BPHA have combined or conspired with their respective physician members to fix and/or increase the fees received from third-party payers for the provision of physician services, to conduct boycotts, or otherwise to restrain competition among physicians in Billings, Montana.

PARAGRAPH TWENTY: The actions of the respondents described in this complaint have had and have the purpose, tendency, and capacity to result in the following effects, among others:

A. restraining competition among physicians in Billings, Montana;

B. fixing or increasing the prices that are paid for physician services in Billings, Montana; and

C. depriving third-party payers, their subscribers, and patients of the benefits of competition among physicians in Billings, Montana.

PARAGRAPH TWENTY-ONE: The combinations or conspiracies and the acts and practices described above constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. The acts and practices, as herein alleged, are continuing and will continue in the absence of the relief herein requested.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this _____ day of _____, 199__, issues its complaint against said respondents.

By the Commission.

SEAL

Donald S. Clark
Secretary

ANALYSIS OF PROPOSED CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission has agreed to accept, subject to final approval, a proposed consent order settling charges that Montana Associated Physicians, Inc. ("MAPI") and the Billings Physician Hospital Alliance, Inc. ("BPHA") violated Section 5 of the Federal Trade Commission Act.

The proposed consent order has been placed on the public record for sixty (60) days for reception of comments by interested persons. Comments received during this period will become part of the public record. After sixty (60) days, the Commission will again review the agreement and the comments received and will decide whether it should withdraw from the agreement or make final the agreement's proposed order.

The purpose of this analysis is to facilitate public comment on the agreement. The analysis is not intended to constitute an official interpretation of either the proposed complaint or the proposed consent order, or to modify their terms in any way.

The proposed consent order has been entered into for settlement purposes only and does not constitute an admission by MAPI or BPHA that the law has been violated as alleged in the complaint.

The Complaint

The complaint charges that MAPI restrained competition among physicians in the area of Billings, Montana, by, among other

things, combining or conspiring with its respective physician members or acting as a combination of its physician members to fix the terms under which they would deal with third-party payers, and to conduct boycotts and other resistance to cost-containment efforts. The complaint further charges that MAPI was extensively involved in BPHA's formation, had the power to affect and control BPHA's dealings with third-party payers seeking contracts for physician services, and that BPHA carried on MAPI's

organizations (PPOs) operating in Billings, but physicians there were concerned that such plans would soon attempt to enter Billings, and that competitive pressure could force physicians to deal with such plans at reduced prices or on other than usual fee-for-service terms. The purpose of engaging in collective dealings through MAPI was to obtain greater bargaining power with third-party payers by presenting a united front, and thereby to resist competitive pressures to discount fees and to avoid accepting reimbursement on other than the traditional fee-for-service basis.

In 1987, MAPI began negotiating with third-party payers on behalf of its members. Members of MAPI who were approached by managed care plans told the plans to deal with MAPI. When HMO Montana, an HMO owned and operated by Blue Cross/Blue Shield of

to submit prices higher than they were currently charging in order to inflate the fees the health plan developed for the schedule.

In addition, MAPI gathered detailed fee information from its members, enabling MAPI to determine for most physician services the prevailing fees and the maximum reimbursement allowed by Blue Cross/Blue Shield of Montana. Using this information, MAPI advised certain physicians to raise their fees, and some fees were raised in accordance with these recommendations.

In 1991, MAPI joined with Saint Vincent Hospital and Health Center in Billings to form BPHA, a physician-hospital organization. Almost all of MAPI's members joined BPHA, making MAPI members a substantial majority of BPHA's physician membership. BPHA's structure and governance gave MAPI substantial control over BPHA dealings with third-party payers regarding physician contracting, and thus allowed MAPI to continue to exercise the collective power of its physician members in BPHA's dealings with third-party payers seeking contracts.

Through BPHA's Physician Agreements, MAPI was designated as the agent of almost all BPHA physicians who were MAPI members with respect to their membership in BPHA. This agency designation gave MAPI the authority to accept or reject all contracts negotiated by BPHA with third-party payers, as well as the power to elect and remove physician members of BPHA's Board

of Directors. In addition, BPHA's structure gave its physician members (most of whom were MAPI members) the ability to control BPHA's pricing and other terms of contracts for physician services.

By virtue of this structure, MAPI was able to carry on its unlawful activities through BPHA. Though payers sought to contract with BPHA for physician services, and did contract with Saint Vincent directly for hospital services, BPHA did not enter into any contract for physician services until nearly two years after its creation, after the time BPHA and MAPI became aware of the Commission's investigation.

Although MAPI and BPHA did not explicitly bar their members from dealing with managed care plans individually or on terms other than ones endorsed by MAPI or BPHA, these physicians largely dealt with such plans exclusively through MAPI and BPHA. Physician members and officials of MAPI and BPHA directed payers to deal with MAPI and BPHA rather than with individual physicians. Few physicians who were members of MAPI or BPHA participated in any managed care plans.

Neither the physician members of MAPI, nor the physician members of BPHA, have integrated their practices in any economically significant way, nor have they created efficiencies sufficient to justify their acts or practices described above.

The complaint charges that the conduct of MAPI and BPHA has injured consumers by restraining competition among physicians,

fixing or increasing prices for physician services, and depriving third-party payers and patients of the benefits of competition among physicians.

The Proposed Consent Order

The proposed consent order would prohibit MAPI and BPHA from engaging in any agreement with physicians to (1) negotiate or refuse to deal with any third-party payer; (2) determine the terms upon which physicians deal with such payers; or (3) fix the fees charged for any physician's services. In addition, under Part III of the proposed consent order, MAPI is prohibited from: (1) advising physicians to raise, maintain, or otherwise adjust the fees charged for their medical services; (2) encouraging adherence to any fee schedule for physicians' services; and (3) encouraging any person to engage in any action prohibited by the order.

Notwithstanding these provisions, however, the proposed consent order would not prevent MAPI and BPHA from operating, or participating in, a legitimate joint venture. First, MAPI and BPHA respectively, if they are operating through a "risk-sharing joint venture," may enter into agreements with physicians regarding terms of dealing with third-party payers, provided that the physicians participating in the venture remain free to deal individually with third-party payers. A "risk sharing joint

venture,” for purposes of this order, is one in which physicians who would otherwise be competitors share a substantial risk of loss from their participation in the venture.

The order’s proviso permitting MAPI and BPHA to engage in joint dealing through “risk-sharing joint ventures” extends only to those that are “non-exclusive,” that is, those in which the participating physicians are available to contract with payers outside the venture. Although exclusive physician networks are not necessarily anticompetitive, they can impair competition, particularly when they include a large portion of the physicians in a market. Given the large share of the physicians in Billings that participated in MAPI and BPHA, along with evidence that as part of the challenged conduct these physicians largely refused to deal with managed care plans outside of MAPI or BPHA, the proviso does not permit exclusive risk-sharing ventures.

The proposed order allows MAPI and BPHA to operate or participate in joint ventures that involve collective price setting by competing physicians, even if those physicians do not share substantial financial risk as defined in the order, provided that they first receive the prior approval of the Commission. The order uses a prior approval provision because it is not feasible to define in an order all of the types of procompetitive joint ventures that MAPI or BPHA might seek to operate. The prior approval mechanism will allow the Commission to evaluate a specific proposal and assess its likely competitive

impact. Allowing MAPI and BPHA the opportunity to seek prior approval of non-risk-sharing joint ventures will help to ensure that they are able to respond to dynamic changes in health care markets in ways that promote competition, while guarding against the recurrence of acts and practices that have restrained competition and consumer choice.

In addition, the proposed order contains a provision designed to make it clear that BPHA, as a physician-hospital organization, can take actions to facilitate contracting between its physician members and third-party payers that do not create or facilitate the kind of agreements that the order prohibits. The provision sets forth the aspects of a "messenger model" that would not run afoul of the order. The messenger model used here is remedial, and tailored to particular facts and circumstances.

The proposed order would also specifically permit BPHA to keep in effect contracts with third-party payers that were in effect on September 30, 1994, in order to avoid any disruption that might result from applying the order's prohibitions to those existing contractual arrangements.

Part V of the proposed order would require MAPI and BPHA to publish and distribute copies of the order and accompanying complaint. Parts VI and VII of the order impose certain reporting requirements in order to assist the Commission in monitoring compliance with the order.

The proposed consent order would terminate 20 years after the date it is issued.

Concurring Statement of Commissioner Mary L. Azcuenaga
in Montana Associated Physicians, Inc., File No. 911-0008

I concur in the decision to issue the complaint and accept the order for public comment and write separately to emphasize two points. First, the complaint and order do not directly challenge the organization and conduct of the Billings Physician Hospital Alliance, Inc., as a physician hospital organization (PHO), and in my view, this order should cast no shadow on the activities of PHO's. Second, although I concur in the unusual and complicated fencing-in relief in the particular circumstances of this case, in my view, this negotiated order is not, and should not be viewed as, a guide for what a PHO can and cannot do.