In the Matter of Evanston Northwestern Healthcare Corporation
Docket No. 9315

OPINION OF THE COMMISSION ON REMEDY

By ROSCH, Commissioner, For A Unanimous Commission:

I. INTRODUCTION[1]

On August 6, 2007, the Commission ruled that the acquisition by Evanston Northwestern Healthcare Corporation ("ENH") of Highland Park Hospital ("Highland Park") in 2000 was anticompetitive and violated Section 7 of the Clayton Act. Although the Commission recognized that "[s]tructural remedies are preferred for Section 7 violations," it found that "this is the highly unusual case in which a conduct remedy, rather than divestiture, is more appropriate." Op. at 89. Specifically, the Commission determined that a more appropriate remedy here would be to require ENH to establish separate and independent negotiating teams – one for Evanston Hospital and Glenbrook Hospital (collectively referred to as "Evanston"), and another for Highland Park – to "allow MCOs [managed care organizations] to negotiate separately again for those competing hospitals, thus re-injecting competition between them for the business of MCOs." *Id.* at 90. The purpose of having separate and independent negotiating teams for Evanston and Highland Park is to replicate the competitive conditions that existed prior to ENH's 2000 acquisition of Highland Park as much as possible, short of divestiture. The accompanying Order should be read in that light. Prior to the acquisition, MCOs had the ability to negotiate separately with each hospital. Our Order restores that ability to MCOs, and is designed to ensure that MCOs and patients in the Chicago North Shore suburbs will not have to pay supracompetitive prices.

Because the Commission lacked sufficiently detailed information about the personnel involved in ENH's contract negotiations, or ENH's overall business operations, to craft a remedial order with precision, in our liability decision we asked Respondent to submit a detailed proposal for implementing the type of injunctive relief selected by the Commission. Respondent submitted a proposed final order on September 17, 2007; complaint counsel submitted their

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[1] This opinion uses the following abbreviations:

CCFO - Complaint Counsel's Comments on Respondent's Proposed Final Order
IDF - Numbered Findings of Fact in the ALJ's Initial Decision
Op. - Commission's Liability Opinion
RCAB - Respondent's Corrected Appeal Brief
RFO - Respondent's Submission in Support of its Proposed Final Order
RPTB - Respondent's Post-Trial Brief
RRFO - Respondent's Corrected Response on Proposed Final Order
TR - Transcript of Trial before the ALJ

[4] While Respondent asserted that we found that competitive harm occurred only with respect to inpatient services, RRFO at 2, in fact, we found that including hospital-based outpatient services in the relevant product market would not alter our findings of competitive harm. Op. at 57.

[5] *See* RPTB at 5 ("The undisputed evidence confirms that MCOs contract with hospitals for the entire bundle of inpatient and outpatient services that hospitals provide, often 'trading off' the price of inpatient and outpatient services against one another to get a deal done."); *id.* at 17 ("[i]t is undisputed that payors contract with hospitals for the entire bundle of inpatient . . . and outpatient services that hospitals provide . . . .").

Darcy), *in camera*; TR 2299-300 (Spaeth). The evidence showing that payors make contracting decisions based on the price of the entire set of hospital services, sometimes trading off the price of inpatient services and outpatient services to get an acceptable total price, is not, as Respondent contended, inconsistent with our finding of a distinct inpatient services product market in which the competitive effects of this transaction can be assessed. TR 2663-65 (Haas-Wilson). It does, however, demonstrate that, for payors, the option to negotiate separately with Highland Park solely for inpatient services would be of dubious value. Accordingly, we find that, in order to meaningfully and effectively restore competition between Highland Park and Evanston for the business of MCOs, payors must be able to negotiate separately with Highland Park for all hospital services, not just inpatient services.

Complaint counsel also pointed out that there may be certain services that, prior to the merger, were furnished at Highland Park and Evanston, that are now provided by ENH on a centralized basis to patients discharged from any of the hospitals in the ENH system. The Order's definition of "Hospital Services," which includes all "services that are included as part of an admission of a patient to an inpatient bed" within the hospital and "all outpatient services that are related to the use of that hospital" is intended to make clear that if a payor elects to contract exclusively with one of the hospitals, it can obtain, through negotiations with that hospital's negotiating team, the full panoply of services needed to serve its plan enrollees, including any such services that are provided by ENH on a centralized basis.

The other question the parties have raised concerning the scope of our Order relates to the definition of a "payor" who must be allowed to negotiate separately with Highland Park and Evanston. Complaint counsel proposed a definition that has been used in other health care orders issued by the Commission, including the 2005 consent order in this matter that settled the allegations of physician price fixing in Count III of the administrative complaint.[6] Respondent

[6] *See Evanston Northwestern Healthcare Corporation and ENH Medical Group, Inc.*, Docket No. 9315, Decision and Order (issued May 17, 2005), at 3, *available at* http://www.ftc.gov/os/adjpro/d9315/050520do.pdf.

[7] Rates for Medicare and Medicaid are set unilaterally by the government, and are not determined by negotiation or contract. IDF 128.

and Medicaid, contract and pay for health care services. For example, a municipality may procure and pay for health care coverage for its employees as a self-insured entity, much in the same way that some private employers do. To the extent that such a governmental entity may seek to

C. The Two Negotiating Teams Shall Remain Separate

In our liability decision, we ordered Respondent to identify and describe a firewall-type mechanism that would prevent the Evanston and Highland Park negotiating teams (and other relevant personnel) from sharing any information that would inhibit them from competing with each other and with other hospitals. We are not satisfied with the firewall mechanisms that Respondent has proposed. Respondent defined the ENH negotiating team as the team responsible not just for the negotiations with Evanston when payors elect to negotiate for Evanston separate from Highland Park, but as the team also responsible for negotiating all services at all ENH hospitals when payors opt to negotiate for all three ENH hospitals together. The ENH negotiating team thus wears two hats. Respondent's firewall proposal did not discuss, much less explain, how the ENH negotiating team would be prevented from utilizing competitive information gained from its negotiations wearing one hat versus the other. For example, there is nothing to prevent the ENH negotiating team from using competitive information gained from negotiating with payors on behalf of all three hospitals in a strategic manner when that same negotiating team conducts negotiations with payors who elect to negotiate separately with Evanston Hospital (as separate from Highland Park).

This result is inconsistent with the Commission's purpose in creating the separate and independent negotiating teams on behalf of Evanston and Highland Park, and it undermines our determination that separate negotiations be the default setting. The teams are to be *separate and independent* so as to replicate as best possible, short of divestiture, the competitive conditions that would have existed without the merger of ENH and Highland Park. The negotiating teams cannot be "separate and independent" if the ENH negotiating team also negotiates on behalf of all three hospitals.

Consequently, we think the firewall mechanism will be effective only if the Evanston and Highland Park negotiating teams are not permitted to engage in negotiations with payors who opt to negotiate jointly for hospital services at all three ENH hospitals. Our Order in this respect defines the Evanston negotiating team as only negotiating contracts for the two Evanston hospitals, and not all three hospitals as Respondent proposes. This is consistent with the purpose of the Order to ensure that competition between Highland Park and Evanston for the business of MCOs is re-established as the norm, rather than treated by ENH (and, more to the point, by its personnel responsible for negotiating managed care contracts) as a departure from ENH's standard procedures for contract negotiations. This approach will minimize the risk that competitively sensitive information will be shared by the Evanston and Highland Park negotiating teams.

III. DISPUTE RESOLUTION MECH This result ist1 . ddlt ist3 a . m

restore competition lost because of the merger. In its liability brief to the Commission,

other terms resulting from the separate negotiations required under the Order.[8] We consider this reasonably necessary and appropriate to stimulate compliance with Respondent's suggestion that separate negotiations be implemented. Lest there be any doubt about the Commission retaining jurisdiction over violations or possible violations of the Order, the Order provides that neither the mediator nor the arbitrator shall have any responsibility or authority to resolve issues concerning any violation or possible violation of the Order.

We require Respondent, at the option of the payor, to first try in good faith to settle the dispute by mediation in accordance with the Commercial Mediation Rules of the AAA. If the dispute cannot be settled by mediation, then it must be settled by binding arbitration in accordance with the AAA's Commercial Arbitration Rules. In order to best ensure that the arbitrator will be qualified to resolve such disputes, we order that the arbitration be held before a single arbitrator mutually agreed upon by Respondent and the payor. Unless otherwise agreed between the parties to the arbitration, the manner of binding arbitration will be Final Offer Arbitration (sometimes referred to as "baseball style arbitration"), whereby each side must submit its best and final offer and the mutually agreed arbitrator shall then be obliged to pick what it believes is the best offer. We consider Final Offer Arbitration to be attractive here because it has the "ability to induce two sides to reach their own agreement, lest they risk the possibility that a relatively extreme offer of the other side may be selected by the arbitrator."[9] The standard to be used by the arbitrator in making its decision shall be what pricing/terms are fair and reasonable assuming competition between the hospitals as would exist but for the merger. In order further to motivate the submission of fair and reasonable proposals, the loser shall pay the cost of the arbitration (excluding attorneys fees), unless the parties settle prior to final decision of the arbitrator or the method of arbitration adopted by mutual agreement is not Final Offer Arbitration. In that event, if the parties do not agree how the costs shall be divided, the arbitrator shall decide.

The dispute resolution mechanism described above is reasonably related and ancillary to the primary remedial purpose of the separate negotiating teams required in the Order. As previously described, Respondent itself suggested the remedy of separate negotiating teams to the Commission in its appeal brief as an effective means for the Commission to restore competition lost from the merger. RCAB at 91-92. Respondent itself also suggested mediation, and if necessary, binding arbitration, as its mechanism of choice for resolving disputes with payors, and explained that arbitration is common in many commercial contexts, as discussed above. RFO at 5. In sum, the binding arbitration provision we have ordered is aimed at overcoming the structural

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[8] The arbitration provision does not apply when a payor opts to negotiate jointly with all three hospitals.

[9] STEVEN J. BRAMS, NEGOTIATION GAMES: APPLYING GAME THEORY TO BARGAINING AND ARBITRATION 264 (2d ed. 2003).

difficulties of an order requiring separate negotiations by teams which are part of a single corporate entity, and is thus reasonably necessary to promote the effectiveness of the Order.

Separate negotiations without a binding arbitration provision are a non-starter in this case. Our only other choice absent inclusion of binding arbitration would be to order divestiture, and

negotiations, but the two teams used to negotiate for Evanston and Highland Park separately shall

[10] *See* Policy Statement Regarding Duration of Competition and Consumer Protection Orders, 60 Fed. Reg. 42,569 (Aug. 16, 1995); Duration of Existing Competition and Consumer Protection Orders, 60 Fed. Reg. 58,514 (Nov. 28, 1995).

[11] 16 C.F.R. § 2.51.

[12] A delay in reestablishing Highland Park's cardiac surgery program also puts at risk Highland Park's interventional cardiology services, which involve procedures that may be scheduled in advance. To have an interventional program, it is necessary to have a backup