

Complaint

120 F.T.C.

IN THE MATTER OF

LOCAL HEALTH SYSTEM, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 7 OF THE CLAYTON ACT*Docket C-3618. Complaint, Oct. 3, 1995--Decision, Oct. 3, 1995*

This consent order, among other things, prohibits the merger of the two largest hospitals in St. Clair County, Michigan, and requires the respondents, for three years, to notify the Commission or obtain Commission approval before acquiring certain hospital assets in the Port Huron area.

Appearances

For the Commission: *Phillip L. Broyles* and *William Baer*.

For the respondents: *David Ettinger, Honigman, Miller, Schwartz & Cohn*, Detroit, MI.

COMPLAINT

The Federal Trade Commission, having reason to believe that respondent Local Health System, Inc. (hereinafter sometimes referred to as "Local Health"), has entered into an agreement to acquire the assets of Mercy Hospital-Port Huron and Port Huron Hospital; that the proposed acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18; and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, the Commission hereby issues its complaint, pursuant to Section 11 of the Clayton Act, 15 U.S.C. 21, stating its charges as follows:

I. DEFINITION

1. For purposes of this complaint, "*acute care inpatient hospital services*" means 24-hour inpatient health care, and related medical or surgical diagnostic and treatment services, for physically injured or sick persons with short-term or episodic health problems or infirmities.

II. THE PARTIES

2. Respondent Local Health is a non-profit corporation organized and existing under the laws of the State of Delaware with its principal place of business at 1001 Kearney Street, Port Huron, Michigan. Local Health was created by St. John Health System and Mercy Health Services for the purpose of acquiring the assets of Port Huron Hospital and Mercy Hospital-Port Huron and operating the acquired entity. Mercy Health and St. John Health jointly exercise ultimate control over the activities of Local Health. St. John Health is responsible for paying the chief executive officer of Local Health.

3. Respondent Mercy Health Services ("Mercy Health") is a non-profit corporation organized and existing under the laws of the State of Michigan with its principal place of business at 34605 Twelve Mile Road, Farmington Hills, Michigan. Mercy Health owns and operates a substantial number of hospitals and other health care providers in Michigan, including Mercy Hospital-Port Huron.

4. Respondent Blue Water Health Services Corp. ("Blue Water Health") is a corporation organized, existing and doing business under and by virtue of the laws of the State of Michigan, with its office and principal place of business located at 1001 Kearney Street, Port Huron, Michigan. Blue Water Health owns and operates Port Huron Hospital.

5. St. John Health System, Inc. ("St. John Health") is a non-profit corporation organized and existing under the laws of the State of Michigan with its principal place of business at 22101 Moross Road, Detroit, Michigan. St. John Health owns and operates a substantial number of hospitals and other health care providers in Michigan, including River District Hospital in St. Clair County.

III. JURISDICTION

6. Local Health, Mercy Health and Blue Water Health are, and at all times relevant herein have been, engaged in or affecting commerce, as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12.

7. Local Health, Mercy Health and Blue Water Health are each persons subject to the jurisdiction of the Federal Trade Commission, pursuant to Section 11 of the Clayton Act, 15 U.S.C. 21.

IV. THE PROPOSED ACQUISITION

8. On or about January 19, 1994, Local Health, Mercy Health and Blue Water Health entered into an agreement pursuant to which Local Health would acquire Mercy Hospital-Port Huron and Port Huron Hospital and affiliate with Mercy Health and St. John Health. The total value of assets and other interests to be acquired by Local Health is in excess of \$110 million.

V. NATURE OF TRADE AND COMMERCE

9. For purposes of this complaint, the relevant line of commerce in which to analyze the proposed acquisition is the production and sale of acute care inpatient hospital services and/or any narrower group of services contained therein.

10. For purposes of this complaint, the relevant section of the country is Greater Port Huron, Michigan, consisting of the cities of Port Huron, Marysville, Kimball Township, Port Huron Township and Fort Gratiot, Michigan.

VI. MARKET STRUCTURE

11. The relevant market -- *i.e.*, the relevant line of commerce in the relevant section of the country -- is highly concentrated, whether measured by the Herfindahl-Hirschmann Index ("HHI") or by four-firm concentration ratios.

VII. ENTRY CONDITIONS

12. Entry into the relevant market is difficult due to, among other things, certificate-of-need regulation of hospital entry by the State of Michigan and substantial entry lead times.

VIII. COMPETITION

13. Port Huron Hospital and Mercy Hospital-Port Huron are actual and potential competitors in the relevant market.

IX. EFFECTS

14. The effects of the aforesaid acquisition, if consummated, may be substantially to lessen competition in the relevant market in the following ways, among others:

- (a) By eliminating actual and potential competition between Port Huron Hospital and Mercy Hospital-Port Huron, and others; and
- (b) By significantly increasing the already high levels of concentration.

X. VIOLATIONS CHARGED

15. The acquisition described in paragraph eight, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18.

Commissioner Azcuenaga dissenting.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of the proposed acquisition by respondent Local Health System, Inc. ("Local Health") of certain assets and businesses of respondent Blue Water Health Services Corp. ("Blue Water Health") and respondent Mercy Health Services ("Mercy Health"), and the respondents having been furnished thereafter with a copy of a draft of complaint that the Cleveland Regional Office presented to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order; an admission, for the purposes only of that agreement and any proceedings arising out of, or to enforce that agreement and this order, by respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint; a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other

than jurisdictional facts, are true; and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that respondents have violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now, in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Local Health is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 1001 Kearney Street, Port Huron, Michigan.

2. Respondent Mercy Health is a corporation organized, existing and doing business under and by virtue of the laws of the State of Michigan, with its office and principal place of business located at 34605 Twelve Mile Road, Farmington Hills, Michigan.

3. Respondent Blue Water Health is a corporation organized, existing and doing business under and by virtue of the laws of the State of Michigan, with its office and principal place of business located at 1001 Kearney Street, Port Huron, Michigan.

4. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

I.

It is ordered, That, as used in this order, the following definitions shall apply:

A. "*Local Health*" means Local Health System, Inc., its predecessors, subsidiaries, divisions, and groups and affiliates controlled by Local Health System, Inc.; their directors, officers, employees, agents, and representatives; and their successors and assigns.

B. "*Mercy Health*" means Mercy Health Services, its predecessors, subsidiaries, divisions, and groups and affiliates controlled by Mercy Health Services; their directors, officers, employees, agents, and representatives; and their successors and assigns.

C. "*Blue Water Health*" means Blue Water Health Services Corporation, its predecessors, subsidiaries, divisions, and groups and affiliates controlled by Blue Water Health Services Corporation; their directors, officers, employees, agents, and representatives; and their successors and assigns.

D. "*Respondents*" means Local Health, Mercy Health and Blue Water Health, collectively and individually.

E. The "*Acquisition*" means the proposed acquisition of Port Huron Hospital and Mercy Hospital Port Huron by Local Health pursuant to the Memorandum of Understanding dated January 19, 1994.

F. "*Acute care hospital*" means a health facility, other than a federally owned facility, having a duly organized governing body with overall administrative and professional responsibility, and an organized medical staff, that provides 24-hour inpatient care, as well as outpatient services, and having as a primary function the provision of inpatient services for medical diagnosis, treatment and care of physically injured or sick persons with short-term or episodic health problems or infirmities.

G. To "*operate an acute care hospital*" means to own, lease, manage or otherwise control or direct the operations of an acute care hospital, directly or indirectly.

H. "*Affiliate*" means any entity whose management and policies are controlled in any way, directly or indirectly, by the person with which it is affiliated.

I. "*Person*" means any natural person, partnership, corporation, company, association, trust, joint venture or other business or legal entity, including any governmental agency.

J. "*Greater Port Huron*" means the area consisting of the cities of Port Huron, Marysville, Kimball Township, Port Huron Township and Fort Gratiot, Michigan.

K. "*Commission*" means the Federal Trade Commission.

II.

It is further ordered, That, unless they have already done so, respondents shall, no later than seven (7) days after the date this order becomes final: (1) terminate any agreement that provides for or contemplates the Acquisition; (2) return or destroy all documents containing or recording confidential information provided to respondents by any other person in connection with negotiations or agreements relating to the Acquisition; and (3) recover from any other person or have such other person destroy all documents containing or recording confidential information provided by respondents to such other person in connection with negotiations or agreements relating to the Acquisition.

III.

It is further ordered, That, for a period of three (3) years from the date this order becomes final, no respondent shall, without the prior approval of the Commission, directly or indirectly, through subsidiaries, partnerships or otherwise:

A. Acquire any majority or other controlling stock, share capital, equity or other interest in any other respondent that operates any acute care hospital facility in Greater Port Huron;

B. Acquire a majority of the assets of any acute care hospital facility operated by any other respondent in Greater Port Huron;

C. Enter into any agreement or other arrangement to obtain direct or indirect ownership, management or control of any acute care hospital facility operated by any other respondent in Greater Port Huron, including but not limited to, a lease of or management contract for any such acute care hospital facility, or an agreement to replace an acute care hospital facility operated by another person with an acute care hospital facility to be operated by any respondent;

D. Acquire or otherwise obtain the right to designate, directly or indirectly, a majority of the directors or trustees of any acute care hospital facility operated by any other respondent in Greater Port Huron; or

E. Permit any acute care hospital it operates in Greater Port Huron to be acquired (by stock acquisition, asset acquisition, lease, management contract, establishment of a replacement facility, right

to designate directors or trustees or otherwise) by any other respondent that operates, or will operate immediately following such acquisition, any other acute care hospital in Greater Port Huron.

IV.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, no respondent shall, without providing advance written notification to the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise:

A. Acquire any stock, share capital, equity or other interest in any person who operates any acute care hospital facility in Greater Port Huron;

B. Acquire any assets of any acute care hospital facility in Greater Port Huron;

C. Enter into any agreement or other arrangement to obtain direct or indirect ownership, management or control of any acute care hospital facility or any part thereof in Greater Port Huron, including but not limited to, a lease of or management contract for any such acute care hospital facility, or an agreement to replace an acute care hospital facility operated by another person with an acute care hospital facility to be operated by any respondent;

D. Acquire or otherwise obtain the right to designate, directly or indirectly, directors or trustees of any acute care hospital facility in Greater Port Huron; or

E. Permit any acute care hospital it operates in Greater Port Huron to be acquired (in whole or in part, by stock acquisition, asset acquisition, lease, management contract, establishment of a replacement facility, right to designate directors or trustees, or otherwise) by any person who operates, or will operate immediately following such acquisition, any other acute care hospital in Greater Port Huron.

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 need not be made to

the United States Department of Justice, and notification is required only of respondents and not of any other party to the transaction. Respondents shall provide the Notification to the Commission at least thirty days prior to acquiring any such interest (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, respondents shall not consummate the acquisition until twenty days after substantially complying with such request for additional information. Early termination of the waiting periods in this paragraph may be requested and, where appropriate, granted in the same manner as is applicable under the requirements and provisions of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. 18a.

Provided, however, that prior notification shall not be required by this paragraph IV of this order for:

1. The establishment by a respondent of a new acute care hospital facility that is a replacement for that respondent's existing acute care hospital facility;
2. The establishment by a respondent of a new acute care hospital that is not a replacement for any other acute care hospital facility in Greater Port Huron;
3. Any transaction otherwise subject to this paragraph IV of this order if the fair market value of (or, in the case of a purchase acquisition, the consideration paid for) the acute care hospital facility or part thereof to be acquired does not exceed one million dollars (\$1,000,000);
4. Any transaction otherwise subject to this paragraph IV of this order if the acquisition is pursuant to a joint venture which is to engage in no activities other than the provision of the following services: laundry; data processing; joint ownership and management of inventory; materials management; billing and collection; dietary; industrial engineering; maintenance; printing; security; records management; laboratory testing; support services for charitable foundations; or personnel education, testing or training; or
5. Notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. 18a, or prior approval by the Commission is required, and has been granted pursuant to paragraph III of this order.

V.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, respondents shall not permit all or any substantial part of any acute care hospital they operate in Greater Port Huron to be acquired (in whole or in part, by stock acquisition, asset acquisition, lease, management contract, establishment of a replacement facility, right to designate directors or trustees or otherwise) by any other person unless the acquiring person files with the Commission, prior to the closing of such acquisition, a written agreement to be bound by the provisions of this order, which agreement respondents shall require as a condition precedent to the acquisition.

VI.

It is further ordered, That:

A. Within sixty (60) days of the date this order becomes final, each respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with paragraph II of this order; and

B. One (1) year from the date this order becomes final, annually for the next nine (9) years on the anniversary of the date this order becomes final, and at such other times as the Commission may require, each respondent shall file a verified written report with the Commission setting forth in detail the manner and form in which it has complied and is complying with paragraphs III, IV and V of this order.

VII.

It is further ordered, That respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents that may affect compliance obligations arising out of the order, such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries.

VIII.

It is further ordered, That, for the purpose of determining or securing compliance with this order, upon reasonable notice to respondents, respondents shall permit, for a period of ten (10) years from the date this order becomes final, any duly authorized representative of the Commission:

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

B. Upon five days' notice to respondents and without restraint or interference from them, to interview officers, directors, or employees of respondents, who may have counsel present.

Commissioner Azcuenaga dissenting.

DISSENTING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

Not having found reason to believe that the proposed merger of Port Huron Hospital and Mercy Hospital would be unlawful, I do not support the complaint and consent order.

IN THE MATTER OF

COLUMBIA/HCA HEALTHCARE CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT*Docket C-3619. Complaint, Oct. 3, 1995--Decision, Oct. 3, 1995*

This consent order, among other things, permits Columbia/HCA and Healthtrust, Inc. to merge, provided that Columbia/HCA divests seven hospitals within twelve months (nine months for the divestiture of three hospitals in the Salt Lake City area), and requires the respondent to terminate its participation in a joint venture with the Orlando Regional Health System. In a modification of the consent agreement, this consent order replaces a prior-approval requirement with a prior-notice provision that requires the respondent, for ten years, to notify the Commission before acquiring another acute care hospital in any of the six market areas at issue, and before transferring an acute care hospital in any of the areas to another entity that already operates one in that area.

Appearances

For the Commission: *Oscar M. Voss.*

For the respondent: *Ky Ewing, Vinson & Elkins, Washington, D.C.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that respondent Columbia/HCA Healthcare Corporation ("Columbia/HCA"), a corporation subject to the jurisdiction of the Commission, has entered into an agreement whereby Columbia/HCA will acquire Healthtrust, Inc. - The Hospital Company ("Healthtrust"); that the acquisition agreement violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; that the proposed acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and it appearing to the Commission that a proceeding by it in respect thereof would be in the