

role of the Commission as an unbiased decisionmaker.¹⁰

A third scenario is that the case is weak, respondents move to withdraw the matter from adjudication, and complaint counsel file nothing in support of the complaint.¹¹ In such an instance, the Commission may agree with the respondents and dismiss the adjudication, or it may disagree and order that the proceeding continue. There seems no good reason not to have this occur on the public record. Again, private discussions between the Commission and its staff can create a public perception of unfairness to the respondents arising from apparent complicity between the prosecuting attorneys and the purportedly impartial adjudicators—the very danger the separation of functions requirements of the Administrative Procedure Act and the Commission's *ex parte* rule are designed to avoid.¹²

In addition to undermining the separation of functions at the Commission, the new rule limits the Commission's discretion to decide when individual cases should be in adjudication and remain on the public record. The exercise of discretion in an adjudicative matter is a responsibility of the Commission, not an occasion for apology. This responsibility, which must be carried out consistent with the law and with fundamental fairness, should not be ceded without a reason for doing so. Here, I see none. Both the policy to maintain the separation of deliberative and prosecutorial functions and the appearance of having done so are enhanced when the Commission retains its discretion to determine the appropriate disposition of a motion to withdraw from adjudication. The shifting of a portion of that discretion in favor of the respondents may appear open-minded, but, in the long term, it will disserve the Commission and the public interest.

On balance, the Commission and the public would be better served if the

Commission retained its discretion to decide which, if any, cases should be withdrawn from adjudication following denial of a preliminary injunction. The new rule is likely to undermine the integrity of the Commission and its adjudicative process by breaking down the wall between the Commission's prosecutorial and adjudicatory roles in a manner inconsistent with the separation of functions requirement of the Administrative Procedure Act and its own *ex parte* rule.

I dissent.

[FR Doc. 95-19110 Filed 8-2-95; 8:45 am]

BILLING CODE 6750-01-M

Notice and Request for Comment Regarding Statement of Policy Concerning Prior Approval and Prior Notice Provisions in Merger Cases

AGENCY: Federal Trade Commission.

ACTION: Notice of policy statement and request for public comment.

SUMMARY: The Federal Trade Commission has adopted a policy statement regarding the use of prior approval and prior notice provisions in Commission orders entered in merger cases. Under the policy, the Commission will no longer require prior approval of certain future acquisitions in such orders as a routine matter. The Commission will henceforth rely on the premerger notification and waiting period requirements of Section 7A of the Clayton Act, commonly referred to as the Hart-Scott-Rodino (HSR) Act, as the principal means of learning about and reviewing mergers proposed by such companies. Narrow prior notice or approval requirements will be retained for certain limited situations described in the Commission's Statement of Policy. The Commission also stated that it would initiate a process for reviewing the retention or modification of prior approval requirements in existing Commission orders.

Although these policies are already in effect, the Commission is soliciting comment from interested persons.

DATES: The policy statement was effective on June 21, 1995. Comments will be received until September 5, 1995.

ADDRESSES: Comments should be sent to the Secretary, Federal Trade Commission, Sixth Street and Pennsylvania Avenue, NW., Washington, DC 20580. Comments will be entered on the public record of the Commission and will be available for public inspection in Room 130 during the hours of 9 a.m. until 5 p.m.

FOR FURTHER INFORMATION CONTACT: Daniel P. Ducore, Assistant Director for Compliance, Bureau of Competition, (202) 326-2526.

SUPPLEMENTARY INFORMATION: Under previous Commission policy, Commission orders entered in merger cases generally have required that the respondent obtain the Commission's prior approval for certain future acquisitions in the same market. The Commission has reassessed that policy and has determined that prior approval of future acquisitions by a respondent should no longer be required as a routine matter. The Commission has issued the following Policy Statement as an exercise of its discretion.

The Commission invites comments on the issues discussed in this notice, in the Policy Statement and in the separate statement of Commissioner Azcuenaga.

Statement of Federal Trade Commission Policy Concerning Prior Approval and Prior Notice Provisions

Introduction

Under longstanding Commission policy, Commission orders entered in merger cases generally have contained a requirement that the respondent seek the Commission's prior approval for any future acquisition over a de minimis threshold within certain markets for a ten-year period.¹ In a few cases, the Commission also has required prior notice of intended transactions that would not be subject to the premerger notification and waiting period requirements of section 7A of the Clayton Act, commonly referred to as the Hart-Scott-Rodino (HSR) Act.² Prior approval and notice requirements are imposed pursuant to the Commission's broad authority to fashion remedies to prevent the recurrence of anticompetitive conduct.

In light of its now extensive experience with the HSR Act, the Commission has reassessed whether it needs to continue regularly to impose prior approval requirements. Although prior approval requirements in some cases may save the Commission the costs of re-litigating issues that already have been resolved, prior approval provisions also may impose costs on a company subject to such a requirement. Moreover, the HSR Act has proven to be an effective means of investigating and challenging most anticompetitive transactions before they occur.

¹ As used herein, the term "merger" includes mergers, acquisitions, joint ventures, and equivalent transactions.

² Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. 18a.

¹⁰ Off-the-record discussions with the respondents, followed by dismissal of the complaint, also may create misperceptions of unfairness and favoritism, with the implication that nonpublic communications that could not bear the light of day influenced the Commission's decision.

¹¹ This assumes that complaint counsel find themselves unable to make a principled argument in support of the complaint. See Jose Calimlin, M.D., Dkt. No. 9199 (June 24, 1986) ("complaint counsel represent the Commission's prosecutorial decision as embodied in the allegations of complaint and in the notice of contemplated relief"); *accord* R.J. Reynolds Tobacco Co., Dkt. No. 9206 (interlocutory order, Dec. 1, 1986); see also R.J. Reynolds Tobacco Co. (interlocutory order, Dec. 10, 1986) (purpose of adjudication is "to subject the Commission's complaint to an adversarial test").

¹² See 5 U.S.C. § 552(d); 16 C.F.R. § 4.7.

Consequently, the Commission has concluded that a general policy of requiring prior approval is no longer needed. Narrow prior notice or approval requirements will be retained for certain situations, as described below.

Statement of Policy Concerning Future Orders

The Commission will henceforth rely on the HSR process as its principal means of learning about and reviewing mergers by companies as to which the Commission had previously found a reason to believe that the companies had engaged or attempted to engage in an illegal merger. The Commission believes that in most such situations the availability of HSR premerger notification and waiting period requirements will adequately protect the public interest in effective merger enforcement, without being unduly burdensome. Therefore, as a general matter, Commission orders in such cases will not include prior approval or prior notification requirements.

The Commission reserves its equitable power to fashion remedies needed to protect the public interest, including by ordering limited prior approval and/or notification in certain limited circumstances. Such orders are most likely to be used in two situations:

First, a narrow prior approval provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for the provision, attempt the same or approximately the same merger.³ The prior approval requirement in such cases would typically be limited to the proposed merger or other combination of essentially the same relevant assets that were involved in the challenged transaction.

Second, a narrow prior notification provision may be used where there is a credible risk that a company that engaged or attempted to engage in an anticompetitive merger would, but for an order, engage in an otherwise unreportable anticompetitive merger.⁴ The need for this supplemental, HSR-like premerger notification and waiting

period requirement will depend on circumstances such as the structural characteristics of the relevant markets, the size and other characteristics of the market participants, and other relevant factors (including whether the challenged transaction itself was not reportable).

Statement of Policy for Existing Prior Approval Orders

There are approximately 90 outstanding Commission orders that contain a current prior approval requirement; some of these orders also contain a prior notice requirement. The Commission has determined to initiate a process for reviewing the retention or modification of these existing requirements. The Commission will issue to each person subject to such an order a notice regarding the Commission's prior approval policy as set forth in this Statement and an invitation to submit a request to reopen the order, pursuant to section 5(b) of the Federal Trade Commission Act and Rule 2.51 of the Commission's rules of practice.

The Commission has determined that, when a petition is filed to reopen and modify an order pursuant to this Statement of Policy, the Commission will apply a rebuttable presumption that the public interest requires reopening of the order and modification of the prior approval requirement consistent with the policy announced in this Statement. No presumption will apply to existing prior notice requirements, which have been adopted on a case-by-case basis and will continue to be considered on a case-by-case basis under the policy announced in this Statement.

Although the policies set forth in this Statement are effective immediately, the Commission will issue within thirty days a **Federal Register** notice soliciting public comment on them.

By direction of the Commission,
Commissioner Azcuenaga dissenting.

Donald S. Clark,

Secretary.

Dissenting Statement of Commissioner Mary L. Azcuenaga on Decision to Abandon Prior Approval Requirements in Merger Orders

The Commission has abandoned its longstanding policy to include prior approval as a remedy in cases involving transactions that are unlawful under section 7 of the Clayton Act.¹ The

Commission cites in support of its decision the effectiveness of premerger notification under the Hart-Scott-Rodino Act as a "means of investigating and challenging most anticompetitive transactions before they occur" and the possibility that "prior approval provisions * * * may impose costs on a company subject to such a requirement."² In my view, the policy should be retained because the benefits of prior approval requirements easily outweigh the costs.

Our authority to impose prior approval requirements is unquestioned, and the Commission reaffirmed its policy to require prior approval clauses in section 7 orders in 1988³ and, most recently, in 1994 in its adjudicative opinion in the *Coca Cola* case.⁴ The Commission imposes a variety of more costly requirements in its orders every day, ranging from complete bans on engaging in certain businesses and activities⁵ to provisions that some might characterize as highly regulatory.⁶ Why the Commission would choose now to eliminate this straightforward, modest, fencing-in relief for unlawful mergers is mystifying.

Prior approval clauses benefit the Commission by conserving public law enforcement dollars. A respondent subject to a prior approval requirement must notify the Commission of the proposed transaction and demonstrate that it would not be anticompetitive before consummating the deal. From the Commission's perspective, this process is less costly than a new investigation of a proposed transaction and a second challenge under the law. In the absence of a prior approval requirement, subsequent acquisitions that was challenged and found unlawful, must be

remedy the effects of an unlawful acquisition. Prior approval was introduced as an "escape clause," "[t]o prevent the possibility of the injunction (against acquisitions) having unintended harsh results." *Luria Brothers*, 62 F.T.C. 243, 638 (1963), *aff'd*, 389 F.2d 847, 865-66 (3d Cir.), *cert. denied*, 393 U.S. 829 (1968). Early prior approval clauses varied in length, ranging from perpetual requirements to those with a duration of 5, 10 or 20 years.

² Statement of FTC Policy Concerning Prior Approval and Prior Notice Provisions at 4 (June 21, 1995) (hereafter "Prior Approval Statement").

³ See FTC Staff Bulletin 88-01 (May 18, 1988).

⁴ The *Coca-Cola Co.*, Docket 9707 (June 13, 1994), Commissioners Azcuenaga & Starek recused; *order modified* (May 17, 1995); *appeal dismissed per stipulation* (D.C. Cir. May 18, 1995).

⁵ See, e.g., *FTC v. Starlink, Inc.*, Civ. No. 91-1085 (E.D. Pa. Feb. 10, 1992) (lifetime ban on advertising, marketing or selling information concerning employment opportunities).

⁶ Examples of highly regulatory orders are unfortunately plentiful. See, e.g., *Dissenting Statement of Commissioner Mary L. Azcuenaga in Silicon Graphics, Inc.*, File 951-0064 (published for comment June 9, 1995).

³ Such a provision is included in some consent judgments in cases brought by the Department of Justice. See, e.g., *United States v. Browning-Ferris Indus. Inc.*, Civ. Action No. 1:94CV02588 (proposed final judgment) (D.D.C., filed Nov 1, 1994).

⁴ Such prior notice orders would require the company to comply with HSR-like premerger notification and waiting periods. From FY 1990 through FY 1994, the Commission undertook enforcement actions against twelve transactions that were not reportable under HSR. Four were hospital mergers, and the others covered a variety of markets including electrical products, scientific equipment, medical products or devices, security equipment, and food products.

¹ Prior approval provisions require the firm under order to obtain the approval of the Commission before making acquisitions in the same market in which the unlawful acquisition occurred.

Early cases enjoined future acquisitions entirely, often together with a divestiture requirement, to

investigated and challenged *de novo*.⁷ To the extent that the prospect of the prior approval requirement may deter unlawful acquisitions by a respondent, this would appear to be a benefit. To the extent that the prospect of prior approval may deter unlawful acquisitions by firms that are not under order, this, too, would appear to be a benefit.⁸

Despite considerable squawking from a few representatives of firms that are actual, alleged or potential violators of section 7, there is little if anything to suggest that the burden of prior approval requirements is undue. It is important to remember how very limited the Commission's prior approval requirements are. First, and most obviously, the prior approval requirement is imposed only on firms that have attempted unlawful acquisitions.⁹ It is limited to proposed acquisitions in the same geographic and product markets in which the Commission has found reason to believe that an acquisition by the respondent would violate the law. It is limited in time, usually to a duration of ten years. And it involves a minute universe of cases. For example, in the past five years, the Commission has issued 58 orders containing prior approval provisions, fewer than twelve per year. In comparison, in fiscal year 1994, 2,305 transactions were reported under the Hart-Scott-Rodino Act. In the first six months of fiscal year 1995, through the

⁷The Antitrust Division of the Department of Justice recently filed a civil antitrust complaint to block a company's second attempt in eight years to acquire its largest competitor. See *United States v. Engelhard Corp.*, Civ. Action No. 6:95-CV-454 (M.D. Ga. filed June 12, 1995). Engelhard abandoned its previous acquisition attempt in 1987, after the Department announced that it would challenge the transaction.

⁸If the prior approval requirement is costly in fact or if it is perceived to be costly, then the requirement may have a deterrent effect. Formerly, a firm contemplating an anticompetitive acquisition might have decided that on balance the risk of prosecution combined with the likelihood of becoming subject to a prior approval requirement was sufficient cause not to go forward. Because firms cannot know in advance whether their transaction will be reviewed by the Commission or by the Department of Justice, any deterrent effect from the Commission's policy would apply to all transactions.

⁹Prior approval is a form of fencing-in relief. Fencing-in provisions ordinarily impose a limited ban on otherwise lawful conduct to inhibit repetition of the unlawful conduct. See *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952) ("[T]he Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past. If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow land the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be bypassed with impunity.").

end of March 1, 348 transactions were filed.

According to the Commission, the policy should be changed because premerger notification under the Hart-Scott-Rodino Act is an adequate substitute. While the Hart-Scott-Rodino Act enables the Commission to investigate and challenge reported transactions before they occur, the success of the premerger notification program is not a recent discovery. If pre-transaction notice were the only purpose of prior approval clauses in orders, the policy could have been abandoned years ago. Instead, the Commission consistently has concluded (until now) that the Hart-Scott-Rodino Act does not eliminate the need for prior approval clauses in merger orders. See, e.g., *The Coca-Cola Co.*, Docket 9207, Order Denying Motion To Dismiss (August 9, 1988), Chairman Oliver dissenting¹⁰ and Commissioner Azcuenaga recused.¹¹

A prior approval requirement is a simple, direct and limited remedy to prevent recurrence of unlawful acquisitions. Even if we assume that prior approval is costly (*i.e.*, more costly than is compliance with the Hart-Scott-Rodino Act—and I am not persuaded that it is), the policy provides important law enforcement benefits. The decision to abandon prior approval in Commission orders relinquishes the benefits for no apparent return.¹²

I am against it.

[FR Doc. 95-19111 Filed 8-2-95; 8:45 am]

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¹⁰Then-Chairman Oliver favored dismissal of the complaint when "the only relief * * * would be an order requiring prior notice or prior approval," but he observed (as did the majority) that Coca-Cola and complaint counsel could "choose to withdraw this matter from adjudication" by negotiating a settlement containing "narrow prior approval provisions . . . [that in his view would] be preferable to the continuance of unwarranted litigation."

¹¹See also *Warner Communications, Inc.*, 105 F.T.C. 342, 343 (1985) ("nothing in its legislative history suggests that [premerger notification under the Hart-Scott-Rodino Act] was intended to supersede the use of fencing-in provisions imposed after a merger has actually been found improper"); *Louisiana-Pacific Corporation*, 112 F.T.C. 547, 566 (1989) (Hart-Scott-Rodino "premerger notification program is not coextensive with the order's prior approval requirement").

¹²Determining on a case-by-case basis whether to require prior approval, see *Prior Approval Statement* at 2-3, increases the costs of negotiating and litigating orders in merger cases. Given the benefits of prior approval, this is a waste of government resources.

[File No. 941-0076]

**Local Health System, Inc., et al;
Proposed Consent Agreement With
Analysis To Aid Public Comment**

AGENCY: Federal trade commission.

ACTION: Proposed consent agreement.

SUMMARY: In settlement of alleged violations of federal law prohibiting unfair acts and practices and unfair methods of competition, this consent agreement, accepted subject to final Commission approval, would prohibit the merger of the two largest hospitals in St. Clair County, Michigan and would require the hospitals, for a limited time, to notify the Commission or obtain Commission approval before acquiring certain hospital assets in the Port Huron, Michigan area.

DATES: Comments must be received on or before October 2, 1995.

ADDRESSES: Comments should be directed to: FTC/Office of the Secretary, Room 159, 6th St. and Pa. Ave., NW, Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: Phillip L. Broyles, Cleveland Regional Office, Federal Trade Commission, 668 Euclid Avenue, Suite 520-A, Cleveland, OH 44114. (216) 522-4207.

SUPPLEMENTARY INFORMATION: Pursuant to section 6(f) of the Federal Trade Commission Act, 38 Stat. 721, 15 U.S.C. 46 and section 2.34 of the Commission's rules of practice (16 CFR 2.34), notice is hereby given that the following consent agreement containing a consent order to cease and desist, having been filed with and accepted, subject to final approval, by the Commission, has been placed on the public record for a period of sixty (60) days. Public comment is invited. Such comments or views will be considered by the Commission and will be available for inspection and copying at its principal office in accordance with § 4.9(b)(6)(ii) of the Commission's rules of practice (16 CFR 4.9(b)(6)(ii)).

[File No. 941-0076]

Agreement Containing Consent Order

In the matter of LOCAL HEALTH SYSTEM, INC., a corporation, BLUE WATER HEALTH SERVICES CORP., a corporation, and MERCY HEALTH SERVICES, a corporation.

The Federal Trade Commission ("Commission"), having initiated an investigation of the proposed acquisition by Local Health System, Inc. ("Local Health"), of certain assets of Mercy Hospital Port Huron ("Mercy-Port Huron") from Mercy Health Services ("Mercy Health"), and of certain assets of Port Huron Hospital from Blue Water Health Services Corporation ("Blue Water Health"), and