UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Bureau of Competition
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Robert F. Leibenluft
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Direct Dial
(202) 326-3688

June 28, 1996

Joe Sims, Esquire
Jones, Day, Reavis & Pogue
Metropolitan Square
1450 G Street, N.W.
Washington, D.C. 20005-2088

Re: Columbus Hospital/Montana Deaconess Medical Center;
File No. 951-0117; PMN 96-1804

Dear Mr. Sims :

The Commission has conducted an investigation to determine whether the proposed merger of the only two hospitals in Great Falls, Montana -- Columbus Hospital and Montana Deaconess Medical Center (characterized by the parties as Montana Deaconess acquiring Columbus) -- may have violated § 7 of the Clayton Act, 15 U.S.C. § 18, or § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. This transaction raises significant antitrust concerns, as it may substantially lessen competition or tend to create a monopoly in the provision of hospital services to the residents of Great Falls and the surrounding area.

Upon review of this matter, however, it now appears that no further action is warranted at this time. Under the state action defense to the antitrust laws, a state must articulate a clear and affirmative policy to allow for anticompetitive conduct, and the state must actively supervise the anticompetitive conduct undertaken by private actors. See, e.g., FTC v. Ticor Title Ins. Co., 504 U.S. 621 (1992). Montana has enacted legislation stating the issuance of a "certificate of public advantage" (COPA) by the Montana Department of Justice signals its "intent" that "supervision and control over the implementation of . . . mergers . . . substitute state regulation . . . for competition . . . and that this regulation have the effect of granting the parties to the . . . mergers . . . state action immunity for actions that might otherwise be considered to be in violation of state or federal . . . antitrust laws." Mont. Code Ann. §§ 50-4-601, 50-4-605 (1995). The Montana Department of Justice ("the Department") issued a COPA for the merger of Montana

Deaconess and Columbus on March 7, 1996.

The Department issued the COPA after it had received public comments on the proposed transaction, and considered an independent analysis of the projected cost savings resulting from the consolidation. The Department rejected several of the grounds asserted by the hospitals in favor of the merger, and attached to the COPA numerous conditions which go beyond the obligations initially offered by the hospitals. These conditions are ongoing, and do not expire after a specified time period.

The conditions include the establishment of a "patient revenue cap" to ensure that the consolidated hospitals do not generate revenues in excess of those sufficient to provide the profit margin approved by the Department. All merger-related cost savings must be passed on to consumers in the form of price reductions, rebates to consumers, or funding for health care related programs as directed by the Department. The Department rejected requests from the hospitals that they be allowed to spend a portion of such savings on consumer benefits selected by the hospitals or to subsidize new services. The Department expects the COPA's requirements to result in price reductions of approximately 18% to 23% during the first four years after the consolidation. The Department will conduct an annual audit to assure proper implementation of this rate regulation.

The COPA also includes conditions relating to the quality of hospital services. Montana's Department of Justice and Department of Public Health and Human Services will oversee quality assurance. The COPA requires that the consolidated hospitals be accredited by the Joint Commission on Accreditation of Health Care Organizations, and that the hospitals have no material decrease in their scores in the Joint Commission's surveys in future years. Conditions are also attached to the number of operating rooms and their staffing. The hospitals must submit annual reports that include data pertaining to various quality indicators: the results of patient and staff surveys, and information about staffing ratios.

To address concerns about the merger's impact on access, the COPA requires that the hospitals must maintain or assist patients in obtaining all existing medical services available at either hospital prior to the merger. In addition, the hospitals must maintain the existing level of charitable programs and services for low-income persons.

Additional conditions are attached to the COPA concerning the hospitals' dealings with health plans, physicians, competitors, and ancillary service providers. The hospitals are prohibited from entering into exclusive provider agreements with managed care plans and physicians in certain specialties, without the prior approval of the Department. The hospitals are prohibited from employing more than 20% of the physicians in Great Falls specializing in certain primary care services. The hospitals must allow independent physicians to provide medical services outside the hospitals, as long as those activities will not interfere with the effective treatment of patients, and the hospitals may not acquire interests in any outpatient surgical

facilities without the approval of the Department. The hospitals must permit physicians to participate in health plans not affiliated with the hospital, and not discriminate against physicians who do so. The hospitals must grant equal access to all qualified physicians, and engage in good faith negotiations with all health plans. Referrals must be made in a non-discriminatory manner, and the hospitals may not oppose certificate-of-need applications without notifying the Department.

The hospitals will establish a Community Health Council composed of community and health care representatives to provide additional oversight in the regulatory scheme, with representatives of consumers and third-party payers appointed by the Attorney General. This entity will set community health goals, critique annual reports and strategic plans, and act on consumer complaints along with a Consumer Ombudsman.

The Department will supervise the COPA's implementation and will have the power to inspect records, interview personnel, and call special meetings of the board of directors. If the merged hospitals fail to correct any violation of the terms and conditions of the COPA, the Department may enforce those conditions by seeking any remedial action, including a court order to compel compliance. The hospitals are liable for all expenses incurred in analyzing progress reports and verifying compliance. If the Department determines that the COPA's terms and conditions are inadequate to effectuate its goals, it may impose further restrictions or modify any of the existing terms. The COPA and its conditions are binding on all successors and assigns.

In reaching the conclusion that a COPA should issue with the attached conditions, the State appears to have played a substantial role in determining the specifics of its regulation of the merged hospitals. Montana has recognized, by its ongoing regulation after the merger is consummated, that the merger is not a singular event in its effects, but a transaction with continuing consequences.

In examining this matter, we have not made a determination that the conditions attached to the COPA sufficiently address the substantial anticompetitive concerns stemming from this transaction. Indeed, there may be many reasons that they do not. Nor have we made a determination that the regulatory scheme devised by Montana is in any way more appropriate than the national policy favoring competition that is articulated in the antitrust laws. But in light of the intent of the statute allowing for the COPA, the comprehensive nature of the price regulations, the other conditions attached to the COPA, the State's substantial role in determining the specifics of the regulatory scheme, the ongoing nature of the regulations, and the State's intent to implement the regulations in their specific details, we do not plan to take further action at this time. Absent future evidence of inadequate active, ongoing supervision of the merged hospitals, no further action regarding this transaction is planned. Accordingly, the investigation is closed.

This action is not to be construed as a determination that a violation may not have occurred, just as the pendency of an investigation should not be construed as a determination that a violation occurred. The Commission reserves the right to take such further action as the public interest may require.

Sincerely,

Robert F. Leibenluft
Assistant Director