Answered 03/15/89: Non-Reportable under §802.20

JK

[redacted]

WRITER'S DIRECT DIAL NUMBER

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March 9, 1989

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<u>FEDERAL EXPRESS</u>
Mr. Jeffrey Kaplan
Staff Attorney
Premerger Notification Office
Bureau of Competition
Room 303
Federal Trade Commission
Washington, D.C. 20580

Re: Proposed Transaction between [redacted] and [redacted]

Dear Mr. Kaplan:

Please be advised that we represent [redacted], a not-for-profit parent holding company incorporated in 1983 in [redacted] The structure of the [redacted] at present, includes three subsidiaries, the major one being the [redacted] a 500 bed teaching hospital. The hospital provides a wide range of inpatient medical/surgical services, as well as pediatrics, obstetrics, and psychiatry. It also provides ambulatory care services both on the hospital campus and in several community outreach clinics.

In [redacted] with the incorporation of the [redacted] a multi-institutional non-profit health system, comprised of ten primary subordinate corporations, [redacted] became one of those primary subordinate corporations. The [redacted] primary subordinate corporations are located in six east coast states. The [redacted] does not have control over [redacted] relating to the decision to enter into the proposed transaction described in this letter.

[redacted] was incorporated in [redacted] in the [redacted] and is a not-for-profit parent holding company with four subsidiaries. The major subsidiary is [redacted] which has been serving the community since its founding in [redacted] Recent years have involved a corporate reorganization and continued

[redacted]

diversification of services at [redacted] primarily in behavorial health through a regional mental health/mental retardation contract. Through this non-profit corporation, [redacted] also operates a skilled nursing facility and a substance abuse treatment center.

For the past year, [redacted] and [redacted] officials have been exploring a possible affiliation between the two systems. [redacted], particularly, as with all of the [redacted], has been failing financially for some time, and is not expected to be able to remain a provider in the area unless an affiliation or other agreement is reached with a stronger health care entity.

The transaction proposed between the systems is that [redacted] will become the sole corporate member in [redacted]. After approximately one year, it is expected that [redacted] will dissolve, and that [redacted] will then become the parent organization of [redacted] and any remaining subsidiary corporations, if there are any remaining subsidiary corporations at that time.

This is not an "acquisition" or "merger" as those terms are typically used under the Clayton or Sherman Act. There will be no financial consideration transferred, title to the real estate will remain in the present corporations, there will be no lease or leaseback agreement to be executed by the parties, and there will not be a sale of assets from one system to another. Instead, it is expected that through the membership rights in [redacted] will provide added strength to [redacted] particularly [redacted]. The efficiencies to be gained will be the financial strength and managerial expertise of [redacted] in aiding [redacted] transition to become primarily a psychiatric site, although some primary care services will remain at the [redacted] site.

Our initial question is the applicability of either the Sherman or Clayton Act to these not for profit systems. We understand that the law is in a state of flux at the present time in light of the Roanoke and Rockford cases. We also have a question concerning the applicability of the Acts in that this is not truly an acquisition, merger, or other consolidation as that

[redacted]

term is usually used either in the for-profit or not-for-profit fields. We would appreciate any guidance that the Federal Trade Commission can give us on those points.

In the event that the Federal Trade Commission and Department of Justice do have jurisdiction, however, and that this transaction, or the subsequent transaction of the dissolution of [redacted] could be considered to be an acquisition, then [redacted] may be construed as the "acquiring person" under the Clayton Act, as it meets the threshold of having $100,000,000 in assets. If [redacted] is considered the "acquired person" under the Act, it meets the initial threshold of $10,000,000 in assets. Despite that fact, however, it is the opinion of the parties that this transaction fits within the Minimum Dollar Exemption found at 16 C.F.R. Section 802.20, since the total asset value of [redacted] and [redacted] is between ten and eleven million dollars. Therefore, [redacted] as the acquiring person will not hold assets of the acquired person valued at more than $15,000,000. Also, the net operating revenues of the acquired person are under $25,000,000.

It is our understanding that although you do not issue written interpretations as you did in the past, you will be able to give informal advice over the telephone concerning the Federal Trade Commission's position on this proposed transaction. We would greatly appreciate that assistance, so that we will know how to proceed. We sincerely do not believe that there are any anti-trust implications with the transaction, due to the nature of the proposed affiliation, the failing entity being [redacted] the efficiencies that can be gained by the transaction, and the expected benefit to the health care consumers in the [redacted] area.

I will look forward to hearing from you as soon as possible as the parties are anxious to proceed in the appropriate manner.

Very truly yours,

[redacted]

[redacted]

[redacted]