**UNITED STATES OF AMERICA**
**BEFORE FEDERAL TRADE COMMISSION**

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| In the matter of | ) | |
| **Evanston Northwestern Healthcare Corporation,** | ) | **PUBLIC** |
| and | ) | Docket No. 9315 |
| **ENH Medical Group, Inc.** | ) | |

**COMPLAINT COUNSEL'S NOTICE OF SUPPLEMENTAL AUTHORITY**

Complaint Counsel submit this notice of supplemental authority relating to the appeal of the Initial Decision dated October 20, 2005, in which Judge Stephen J. McGuire held that the consummated merger of Evanston Northwestern Healthcare Corporation and Highland Park Hospital violated section 7 of the Clayton Act, 15 U.S.C. § 18.

On appeal, Respondents contend that, after the merger, the hospitals were incapable of increasing their prices for services because, *inter alia*, "competitor hospitals [are] able to expand their capacity and service offerings . . . ." Respondents' Corrected Appeal Brief dated January 12, 2006, at 44. To support this contention, Respondents correctly noted that, at the time they filed their brief, the Illinois Certificate of Need program – which established significant legal barriers both to market entry by new facilities and to the major expansion of existing facilities – was scheduled to expire on July 1, 2006. *Id.*

We advise the Commission that since Respondents filed their brief, and after oral argument, the State of Illinois has thrice extended its Certificate of Need program.[1] Most

[1] By Public Act 94-983, the State first extended the scheduled sunset date of the Illinois Certificate of Need law from July 1, 2006, to April 1, 2007. By Public Act 95-0001, the State then extended the scheduled sunset date of the statute from April 1, 2007, to May 31, 2007.

recently, in Public Act 095-0005, which was enacted on May 31, 2007, the State extended the Certificate of Need program to August 31, 2008.

Public Act 095-0005 also establishes a task force to assess long term reforms to the State Certificate of Need program. The task force is specifically directed to make recommendations regarding, *inter alia,* the impact of a sunset provision in the Certificate of Need Act and "[r]eforms that will enable the Illinois Health Facilities Planning Board to focus most of its project review efforts on 'Certificate-of-Need' applications involving new facilities, discontinuation of services, major expansions, and volume-sensitive services, and to expedite review of other projects to the maximum extent possible." Section 5, Public Act 095-0005, *codified at* 20 Ill. Code § 3960/15.5(c)(4).

A copy of Public Act 095-0005 is attached as Exhibit A.

Respectfully submitted,

Dated: June 19, 2007

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Complaint Counsel

# Exhibit A

# Public Act 095-0005

**Public Act 095-0005**

SB0244 Enrolled LRB095 08444 HLH 28621 b

AN ACT concerning State government.

WHEREAS, The 94th General Assembly funded a study by the Lewin Group, "An Evaluation of Illinois' 'Certificate of Need' Program", which recommended that "... the Illinois legislature move forward to continue the 'Certificate-of-Need' program with an abundance of caution...". Given the potential for harm to specific critical elements of the health care system, non-traditional arguments for maintaining "Certificate-of-Need" laws deserve consideration, until the evidence on the impact that specialty providers and ambulatory surgery centers may have on safety-net providers and services can be better quantified. In response to the Lewin analysis and additional concerns regarding health planning in Illinois, the 95th General Assembly enacted Senate Bill 611 (Public Act 95-0001) that extended the "sunset" date of the Illinois Health Facilities Planning Act from April 1, 2007 to May 31, 2007 so that interested parties could agree on a strategy to further extend the "sunset" date, and develop a more comprehensive reform agenda; therefore

**Be it enacted by the People of the State of Illinois, represented in the General Assembly:**

Section 5. The Illinois Health Facilities Planning Act is amended by changing Section 19.6 and by adding Sections 12.5 and 15.5 as follows:

(20 ILCS 3960/12.5 new)

Sec. 12.5. Update existing bed inventory and associated bed need projections. While the Task Force on Health Planning Reform will make long-term recommendations related to the method and formula for calculating the bed inventory and associated bed need projections, there is a current need for the bed inventory to be updated prior to the issuance of the recommendations of the Task Force. Therefore, the State Agency shall immediately update the existing bed inventory and associated bed need projections required by Sections 12 and 12.3 of this Act, using the most recently published historical utilization data, 10-year population projections, and an appropriate migration factor for the medical-surgical and pediatric category of service which shall be no less than 50%. The State Agency shall provide written documentation providing

the methodology and rationale used to determine the appropriate migration factor.

(20 ILCS 3960/15.5 new)

Sec. 15.5. Task Force on Health Planning Reform.

(a) The Task Force on Health Planning Reform is created.

(b) The Task Force shall consist of 19 voting members, as follows: 6 persons, who are not currently employed by a State agency, appointed by the Director of Public Health, 3 of whom shall be persons with knowledge and experience in the delivery of health care services, including at least one person representing organized health service workers, 2 of whom shall be persons with professional experience in the administration or management of health care facilities, and one of whom shall be a person with experience in health planning; 2 members of the Illinois Senate appointed by the President of the Senate, one of whom shall be a co-chair to the Task Force; 2 members of the Illinois Senate appointed by the Senate Minority Leader; 2 members of the Illinois House of Representatives appointed by the Speaker of the House of Representatives, one of whom shall be a co-chair to the Task Force; 2 members of the Illinois House of Representatives appointed by the House Minority Leader; the Attorney General, or his or her designee; and 4 members of the general public, representing health care consumers, appointed by the Attorney General of Illinois.

The following persons, or their designees, shall serve, ex officio, as nonvoting members of the Task Force: the Director of Public Health, the Secretary of the Illinois Health Facilities Planning Board, the Director of Healthcare and Family Services, the Secretary of Human Services, and the Director of the Governor's Office of Management and Budget.

Members shall serve without compensation, but may be reimbursed for their expenses in relation to duties on the Task Force.

A vote of 12 members appointed to the Task Force is required with respect to the adoption of recommendations to the Governor and General Assembly and the final report required by this Section.

(c) The Task Force shall gather information and make recommendations relating to at least the following topics in relation to the Illinois Health Facilities Planning Act:

(1) The impact of health planning on the provision of essential and accessible health care services; prevention of unnecessary duplication of facilities and services; improvement in the efficiency of the health care system; maintenance of an environment in the health care system that supports quality care; the most economic use of available resources; and the effect of repealing this Act.

(2) Reform of the Illinois Health Facilities Planning Board to enable it to undertake a more active role in health planning to provide guidance in the development of services to meet the health care needs of Illinois, including identifying and recommending initiatives to meet special needs.

(3) Reforms to ensure that health planning under the Illinois Health Facilities Planning Act is coordinated with other health planning laws and activities of the State.

(4) Reforms that will enable the Illinois Health

Facilities Planning Board to focus most of its project review efforts on "Certificate-of-Need" applications involving new facilities, discontinuation of services, major expansions, and volume-sensitive services, and to expedite review of other projects to the maximum extent possible.

(5) Reforms that will enable the Illinois Health Facilities Planning Board to determine how criteria, standards, and procedures for evaluating project applications involving specialty providers, ambulatory surgical facilities, and other alternative health care models should be amended to give special attention to the impact of those projects on traditional community hospitals to assure the availability and access to essential quality medical care in those communities.

(6) Implementation of policies and procedures necessary for the Illinois Health Facilities Planning Board to give special consideration to the impact of the projects it reviews on access to "safety net" services.

(7) Changes in policies and procedures to make the Illinois health facilities planning process predictable, transparent, and as efficient as possible; requiring the State Agency (the Illinois Department of Public Health) and the Illinois Health Facilities Planning Board to provide timely and appropriate explanations of its decisions and establish more effective procedures to enable public review and comment on facts set forth in State Agency staff analyses of project applications prior to the issuance of final decisions on each project.

(8) Reforms to ensure that patient access to new and modernized services will not be delayed during a transition period under any proposed system reform; and that the transition should minimize disruption of the process for current applicants.

(9) Identification of the resources necessary to support the work of the Agency and the Board.

(d) The Task Force shall recommend reforms regarding the following:

(1) The size and membership of current Illinois Health Facilities Planning Board. Review and make recommendations on the reorganization of the structure and function of the Illinois Health Facilities Planning Board and the State Agency responsible for health planning (the Illinois Department of Public Health), giving consideration to various options for reassigning the primary responsibility for the review, approval, and denial of project applications between the Board and the State Agency, so that the "Certificate-of-Need" process is administered in the most effective, efficient, and consistent manner possible in accordance with the objectives referenced in subsection (c) of this Section.

(2) Changes in policies and procedures that will charge the Illinois Health Facilities Planning Board with developing a long-range health facilities plan (10 years) to be updated at least every 2 years, so that it is a rolling 10-year plan based upon data no older than 2 years. The plan should incorporate an inventory of the State's health facilities infrastructure including both facilities and services regulated under this Act, as well as

facilities and services that are not currently regulated under this Act, as determined by the Board. The planning criteria and standards should be adjusted to take into consideration services that are regulated under the Act, but are also offered by non-regulated providers. The Illinois Department of Public Health bed inventory should be updated each year using the most recent utilization data for both hospitals and long-term care facilities including 2003, 2004, 2005 and subsequent-year inpatient discharges and days. This revised bed supply should be used as the bed supply input for all Planning Area bed-need calculations. Ten-year population projection data should be incorporated into the plan. Plan updates may include redrawing planning area boundaries to reflect population changes. The Task Force shall consider whether the inventory formula should use migration factors for the medical/surgical, pediatrics, obstetrics, and other categories of service, and if so, what those migration factors should be. The Board should hold public hearings on the plan and its updates. There should be a mechanism for the public to request that the plan be updated more frequently to address emerging population and demographic trends. In developing the plan, the Board should consider health plans and other related publications that have been developed both in Illinois and nationally. In developing the plan, the need to ensure access to care, especially for "safety net" services, including rural and medically underserved communities, should be included.

(3) Changes in regulations that establish separate criteria, standards, and procedures when necessary to adjust for structural, functional, and operational differences between long-term care facilities and acute care facilities and that allow routine changes of ownership, facility sales, and closure requests to be processed on a timely basis. Consider rules to allow flexibility for facilities to modernize, expand, or convert to alternative uses that are in accord with health planning standards.

(4) Changes in policies and procedures so that the Illinois Health Facilities Planning Board updates the standards and criteria on a regular basis and proposes new standards to keep pace with the evolving health care delivery system. Proton Therapy and Treatment is an example of a new, cutting-edge procedure that may require the Board to immediately develop criteria, standards, and procedures for that type of facility. Temporary advisory committees may be appointed to assist in the development of revisions to the Board's standards and criteria, including experts with professional competence in the subject matter of the proposed standards or criteria that are to be developed.

(5) Changes in policies and procedures to expedite project approval, particularly for less complex projects, including standards for determining whether a project is in "substantial compliance" with the Board's review standards. The review standards must include a requirement for applicants to include a "Safety Net" Impact Statement. This Statement shall describe the project's impact on safety net services in the community. The State Agency Report shall include an assessment of the Statement.

(6) Changes to enforcement processes and compliance standards to ensure they are fair and consistent with the severity of the violation.

(7) Revisions in policies and procedures to prevent conflicts of interest by members of the Illinois Health Facilities Planning Board and State Agency staff, including increasing the penalties for violations.

(8) Other changes determined necessary to improve the administration of this Act.

(e) The State Agency, at the direction of the Task Force, may hire any necessary staff or consultants, enter into contracts, and make any expenditures necessary for carrying out the duties of the Task Force, all out of moneys appropriated for that purpose. Staff support services shall be provided to the Task Force by the State Agency from such appropriations.

(f) The Task Force may establish any advisory committee to ensure maximum public participation in the Task Force's planning, organization, and implementation review process. If established, advisory committees shall (i) advise and assist the Task Force in its duties and (ii) help the Task Force to identify issues of public concern.

(g) The Task Force shall submit findings and recommendations to the Governor and the General Assembly by March 1, 2008, including any necessary implementing legislation, and recommendations for changes to policies, rules, or procedures that are not incorporated in the implementing legislation.

(h) The Task Force is abolished on August 1, 2008.

(20 ILCS 3960/19.6)

(Section scheduled to be repealed on May 31, 2007)

Sec. 19.6. Repeal. This Act is repealed on August 31, 2008 ~~May 31, 2007~~.

(Source: P.A. 94-983, eff. 6-30-06; 95-1, eff. 3-30-07.)

Section 99. Effective date. This Act takes effect upon becoming law.

**Floor Actions**

| Date | Action |
|---|---|
| 5/31/2007 | Public Act . . . . . .095-0005 |

## CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing document was served by delivering copies to:

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Dated: June 19, 2007

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