UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Deborah Platt Majoras, Chairman**
Pamela Jones Harbour
Jon Leibowitz
William E. Kovacic
J. Thomas Rosch

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

RESPONDENTS' OPPOSITION TO MOTION TO STRIKE RESPONSE TO NOTICE OF SUPPLEMENTAL AUTHORITY

Evanston Northwestern Healthcare's Response to Complaint Counsel's Notice of Supplemental Authority ("Notice") is every bit as proper as the Notice itself. Contrary to Complaint Counsel's Motion to Strike, the Notice was not simply an effort to inform the Commission of a *legal* development. *See* Motion to Strike at 1. Instead, it was an obvious attempt to resurrect a discredited *factual* argument that Complaint Counsel made at trial – namely, that the Illinois Certificate of Need ("CON") program raises "significant legal barriers both to market entry by new facilities and to the major expansion of existing facilities." *See* Notice at 1; *but see* Respondents' Appeal Brief at 43-45.

Respondents' Response was proper rebuttal to Complaint Counsel's attempted addition to the factual record, and Complaint Counsel's Motion to Strike should therefore be summarily denied.

1. There can be no doubt that Complaint Counsel's Notice was designed to address a factual issue, not simply present new legal authority. Contrary to Complaint Counsel's assertion, neither Complaint Counsel's nor Respondents' briefs before this Commission ever cited the Illinois CON law as legal authority. *See* Motion to Strike at 3. In fact, Complaint Counsel's Cross Appeal is devoid of any mention of the Illinois CON law. Respondents' briefs, moreover, referenced the CON law only for a simple point – i.e., that the presence of CON laws has not in the past and will not in the future act as a barrier to market entry or expansion of area hospitals. *See* Respondents' Appeal Brief at 44-45; Respondents' Reply Brief at 21-22.

This point is illustrated by the trial cross-examination of a Complaint Counsel witness. During trial, Complaint Counsel in its case-in-chief called Donald Jones of the Illinois Department of Health in an attempt to illustrate barriers to entry imposed by the Illinois CON laws. Instead, he testified that the opposite was true because the overwhelming majority (88%) of CON applications are approved and specifically detailed the ongoing expansions and market entry of area hospitals. (D. Jones, Tr. 1671-72, 1681-85; *see also* Respondents' Findings of Fact 2280-97).[1] Complaint Counsel's

[1] The trial record demonstrates that area hospital expansion and new hospital construction continued even under the then controlling CON law. (D. Jones, Tr. 1681-85).

Notice is thus not a fulfillment of its "obligation" to advise the Commission of new legal authority, but rather an attempt to resurrect trial testimony that was discredited at trial.

2. Complaint Counsel is also wrong in claiming that Respondents' Response contains unreliable hearsay evidence that has been introduced improperly after the close of trial. *See* Motion to Strike at 3. This misses the point. Respondents' Response is a valid and proper factual response to Complaint Counsel's factual claim that the Illinois CON laws represent a barrier to market entry and expansion. *See* Notice at 1. Complaint Counsel first raised the issue of barriers to entry, and Respondents' Response should be placed in the record for completeness. *See, e.g., U.S. v. Glover*, 101 F.3d 1183, 1189-90 (7th Cir. 1996) (finding "a party against whom a fragmentary statement is introduced may demand that any other part of the statement be admitted as would be necessary to clarify or explain the portion already received.").

There is nothing procedurally improper about Respondents' Response, which contains reliable information that can properly be considered by the Commission even at this stage of the proceeding. Pursuant to Commission Rule 3.15(b), the finder of fact is entitled to "permit service of a supplemental pleading or notice setting forth transactions, occurrences, or events which have happened since the date of the pleading or notice sought to be supplemented and which are relevant to any of the issues involved." *See* Rule 3.15(b); *see also* Rule 3.72 (Commission has the authority to reopen the record); *In re Chrysler Corp.*, 87 F.T.C. 719, Dkt. No. 8995 (April 13, 1976) (permitting new evidence into the record which was not previously available).

Complaint Counsel also cannot dispute the accuracy or reliability of the new market information presented in Respondents' Response.[2] For example, the 8-story, 192-bed, $200 million tower currently under construction at Advocate Lutheran General (10.2 miles from Evanston Hospital and included in the ALJ's market) is larger than Highland Park Hospital and is not, as Complaint Counsel suggests, a "pipe-dream." *See* Respondents' Response at 2; Motion to Strike at 2.

In sum, Respondents had every right to respond to Complaint Counsel's factual presentation about the competitive effects of the new Illinois CON law on the relevant market with a factual presentation explaining why Complaint Counsel's views on competition in the market are fundamentally misguided. Complaint Counsel's Motion to Strike should therefore be denied.

[2] Commission Rule 3.43(b) states that "relevant, material, and reliable evidence shall be admitted."

June 27, 2007

Respectfully submitted,

Duane M. Kelley /FPG

Duane M. Kelley
David E. Dahlquist
WINSTON & STRAWN LLP
35 West Wacker Drive
Chicago, IL 60601
(312) 558-5600 (voice)
(312) 558-5700 (fax)

Gene C. Schaerr
Michael L. Sibarium
WINSTON & STRAWN LLP
1700 K Street, NW
Washington, D.C. 20005
(202) 282-5000 (voice)
(202) 282-5100 (fax)

Stephen M. Shapiro
Jeffrey W. Sarles
MAYER BROWN ROWE & MAW LLP
71 South Wacker Drive
Chicago, IL 60606
(312) 782-0600 (voice)
(312) 701-7711 (fax)

Counsel for Respondent
Evanston Northwestern Healthcare
Corporation and ENH Medical Group,
Inc.

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Deborah Platt Majoras, Chairman**
Pamela Jones Harbour
Jon Leibowitz
William E. Kovacic
J. Thomas Rosch

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

ORDER

Upon consideration of Complaint Counsel's Motion to Strike and Respondents' Opposition thereto, it is hereby ORDERED that Complaint Counsel's Motion is hereby DENIED.

DATED:

For the Federal Trade Commission

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing document was served by delivering copies to:

Office of the Secretary
Federal Trade Commission
Room H-159
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

Thomas H. Brock
Federal Trade Commission
601 New Jersey Ave., N.W.
Washington, D.C. 20580

Dated: June 27, 2007

Frank Gainer

CHI:1933372.5