AMERICA'S HOSPITALS AND HEALTH SYSTEMS

May 17, 2023

The Honorable Lina M. Khan
Chair
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

Dear Chair Khan:

We write to share our serious concerns about the Federal Trade Commission's unprecedented attempt to enforce the Hart-Scott-Rodino Act (HSR) against a Louisiana hospital's acquisition of three hospitals in the New Orleans area. The state of Louisiana correctly recognized that many of its hospitals are struggling to serve their communities and, like in this instance, mergers or acquisitions can improve public access to quality health care. The Commission's position that HSR is carved out from the state action doctrine, by contrast, is an unjustifiable overreach. **The Commission's actions appear to be part of a growing pattern of what one former commissioner called an agency-wide policy of "gratuitously taxing" mergers and acquisitions, which he explained "does nothing for competition."[1] We urge the Commission to rethink this policy and abandon its efforts to impede this merger through a costly and burdensome regulatory process.**

On April 20, the Commission filed a petition against Louisiana Children's Medical Center (LCMC) and HCA Healthcare Inc. (HCA), contending they illegally consummated a New Orleans-area transaction without satisfying the premerger notification program.[2] The contested acquisition, however, was expressly authorized and supervised by the Louisiana legislature and Louisiana attorney general. Nevertheless, the petition asks a court in the District of Columbia to enjoin this purely intrastate Louisiana transaction that is under the direct supervision and control of the state of Louisiana. This is extraordinary. Never before has the Commission attempted to enforce HSR against a state-controlled merger or acquisition. Nor has any court ever held that HSR applies to such transactions. This action disregards Supreme Court precedent holding that "state action or official action directed by a state" is exempt from the federal antitrust laws. *Parker v. Brown*, 317 U.S. 341, 351 (1943).

State action doctrine establishes that "federal antitrust laws are subject to supersession by state regulatory programs." *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 632 (1992). When "nonstate actors" participate in a transaction that is authorized and supervised by

[1] Commissioner Noah Phillips, *Disparate Impact: Winners and Losers from the New M&A Policy* at 6, 5, Eighth Annual Berkely Spring Forum on M&A and the Boardroom (April 27, 2022), *available at* https://www.ftc.gov/system/files/ftc_gov/pdf/Phillips_Keynote-Berkeley_Forum_on_MA_FINAL.pdf.

[2] *FTC v. LCMC et al.*, No. 23-cv-1103 (D.D.C.).

a state, the transaction is "exempt from scrutiny under the federal antitrust laws." *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 219, 225 (2013).

Using its authority to supersede federal antitrust laws, the state of Louisiana enacted a regulatory program to authorize health care mergers and place them under the "supervision and control" of the Louisiana attorney general. La. Stat. § 40:2254.1. The Louisiana legislature unequivocally stated its intent to "substitute state regulation of [health care] facilities for competition between facilities," and to "grant[] the parties to the … mergers … state action immunity." *Id*.

LCMC's acquisition was authorized and supervised under this regulatory program. The Louisiana attorney general approved the transaction after extensive review and granted a "certificate of public advantage" (COPA) conditioned on a detailed set of requirements for the attorney general's active supervision of the transaction.[3] The merged entity is now under state "supervision and control" (La. Stat. § 40:2254.1), and therefore, it is "exempt" from "the federal antitrust laws." *Phoebe Putney*, 568 U.S. at 219.

The Louisiana attorney general had compelling reasons to approve this merger. It was designed to increase access to clinical services and high-quality health care in the New Orleans region and to create expanded hubs for specialty care, innovation and academic medicine.[4] The merger also contemplates a partnership between LCMC and Tulane University that promises significant benefits to the greater New Orleans community, even beyond the improvements in access to health care. Specifically, the transaction (1) provides an approximately $600 million commitment from Tulane to further develop downtown New Orleans, including new construction and enhancements; (2) establishes new nursing, clinical research and graduate scholarship programs; and (3) possesses the potential to establish new Centers of Excellence in Louisiana.[5] In addition, LCMC committed at least $220 million in capital investments to improve multiple hospitals in the first five years following the close of the transaction.[6]

For these and other reasons, the Louisiana attorney general concluded—as a matter of state policy—that the merger "is likely to result in lower health care costs or is likely to result in improved access to health care or higher quality health care without any undue increase in health care costs." La. Stat. § 40:2254.4. That policy judgment is for the state of Louisiana to make. The Commission should not—and cannot—second guess the state of Louisiana's judgment that LCMC's merger is in the best interests of the people of Louisiana.

When, as here, a transaction is exempt from the federal antitrust laws, there is no basis to subject it to the HSR waiting period and premerger review. For one thing, HSR is a

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[3] Respondents' Br. (Dkt. 23) at 4–6, *FTC v. LCMC et al.*, No. 23-cv-1103 (D.D.C.).

[4] *Id.* at 5.

[5] Compl. (Dkt. 1) ¶ 51, *LCMC v. Garland et al.*, No. 23-cv-1305 (E.D. La.).

[6] *Id.* ¶ 52.

federal antitrust law, and the state action doctrine exempts state-controlled mergers from HSR on that basis alone. For another, the purpose of HSR is to delay mergers so the Commission can assess, before a merger is consummated, whether a merger might significantly lessen competition and therefore violate section 7 of the Clayton Antitrust Act. 15 U.S.C. § 18. But because a state-controlled merger is exempt from section 7, any HSR review serves no purpose.

It is, at best, wasteful for the Commission to demand HSR review in the face of Louisiana's decision to implement LCMC's merger. Neither the Commission nor transacting parties should be expending scarce resources on a meaningless HSR review of a merger that is exempt from the federal antitrust laws. Even worse, the purposeful delay that HSR imposes on mergers is irreconcilable with the state action doctrine. Merger delays acutely "compromise the States' ability to regulate their domestic commerce" through COPA programs like Louisiana's. *S. Motor Carriers Rate Conf., Inc. v. United States*, 471 U.S. 48, 56 (1985). To see why, look no further than the Commission's request for a D.C. court to enjoin a Louisiana transaction that is authorized and supervised by the Louisiana legislature and Louisiana attorney general.

It is no answer for the Commission to claim that transacting parties cannot unilaterally determine they qualify for state action immunity. Parties routinely assess whether they are obligated to comply with HSR for any number of reasons, and the statute itself contemplates this as a matter of course. For example, HSR does not apply to "transactions specifically exempted from the antitrust laws by Federal statute," 15 U.S.C. § 18a(c)(5), or to "transfers to or from a … State or political subdivision," *id.* § 18a(c)(4). In those instances, merging parties unilaterally (and reasonably) determine whether a transaction is "exempted" or involves a "political subdivision." In the same way, parties who merge or acquire assets under a COPA can determine they are exempt under the state action doctrine. And, of course, if the Commission disagrees, the government can always bring an enforcement action.[7] But to say the state action doctrine is inapplicable to HSR is wrong as a matter of law and misguided as a matter of policy and practice.

Most concerning is that the delay of this state-controlled transaction seems to be the real goal. And it is consistent with observations by a recently departed commissioner that the Commission is "hostile to mergers and acquisitions" and views HSR as less a tool to spot illegal mergers and "more like an opportunity to slow or stop M&A activity in general."[8] The Commission has adopted policies aimed at "taxing M&A" through delay, costly proceedings and bureaucratic cudgeling.[9]

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[7] *See, e.g.*, Compl. (Dkt. 1), *United States v. VA Partners I, LLC*, No. 16-cv-1672 (N.D. Cal.) (enforcement action where defendant erroneously asserted it fit within HSR exemption "for acquisitions made solely for the purpose of investment").

[8] Phillips, *Disparate Impact*, supra n.7, at 1, 3.

[9] *Id.* at 4.

First, the Commission eliminated "early termination" of the HSR waiting period for "competitively innocuous deals," which "accomplishes nothing for competition and nothing good for M&A."[10] Second, when a merger review concludes with a consent order permitting the merger, the Commission now requires the merging parties to obtain prior approval before closing any future transaction for at least 10 years.[11] Only if the parties "abandon their transaction" prior to completing HSR review is the Commission "less likely to pursue a prior approval provision."[12] Third, even when the HSR waiting period concludes, the Commission's new practice is to issue pre-consummation letters warning merging parties that the Commission is still investigating. These "close-at-your-own-peril" letters are sent even when "the real investigation is over" and the Commission "lack[s] a reasonable basis to conclude the merger violates the law."[13] In those circumstances, as a former commissioner observed, the Commission is either "wasting staff's time and taxpayer dollars on needless investigation," or it is "misrepresenting to parties what is really happening."[14] The effect is to create uncertainty so that even *lawful* mergers are deterred.[15]

Given this history, the Commission's attempt to enforce HSR against a state-controlled merger appears to be another effort to "sow uncertainty and run up the cost of getting deals done" through onerous, unnecessary, and in this case unlawful HSR review.[16] It is no secret that HSR review is costly. "One study estimated the median cost of Second Request compliance at $4.3 million."[17] Worse, the waiting period "can impose costs beyond fees and distraction"—after all, mergers are time sensitive and delay can derail a deal.[18] These costs and delays are inconsistent with state regulatory programs, like Louisiana's, that impose their own timeline for merger approval, and make their own policy judgment as to when a consummated merger will be in the best interests of the state's residents. Subjecting these mergers to HSR is irreconcilable with the Supreme Court's mandate that federal antitrust laws are not to be used to "compromise the States' ability to regulate their domestic commerce." *Motor Carriers*, 471 U.S. at 56.

Perhaps most important, the Commission must remember that hospital transactions do not occur for their own sake. Instead, they take place because hospitals wish to improve the health of their patients and the vitality of the communities they serve. Unnecessary, costly delays imposed by federal authorities who are far less familiar with local

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[10] *Id.* at 6.

[11] *Id.* at 6–7.

[12] Statement of the Commission on Use of Prior Approval Provisions, at 2 (Oct. 25, 2021), https://www.ftc.gov/system/files/documents/public_statements/1597894/p859900priorapprovalstatement.pdf.

[13] Phillips, *Disparate Impact*, supra n.7, at 9–10.

[14] *Id.* at 10.

[15] *Id.*

[16] *Id.* at 3–4.

[17] *Id.* at 4.

[18] *Id.*

circumstances undermine those goals. This transaction is no different, as the state authorities in Louisiana recognized when authorizing it.

For these reasons, we urge the Commission to discontinue its policy regarding HSR enforcement following state M&A-approvals and abandon its opposition to LCMC's merger.

Sincerely,

American Hospital Association
America's Essential Hospitals
Association of American Medical Colleges
Children's Hospital Association
Federation of American Hospitals
Louisiana Hospital Association

cc:
Commissioner Rebecca Kelly Slaughter
Commissioner Alvaro Bedoya
The Honorable Jim Jordan, Chair, House Judiciary Committee
The Honorable Jerrold Nadler, Ranking Member, House Judiciary Committee
The Honorable Thomas Massie, Chair, House Subcommittee on Administrative State, Regulatory Reform and Antitrust
The Honorable David Cicilline, Ranking Member, Subcommittee on Administrative State, Regulatory Reform and Antitrust
The Honorable Dick Durbin, Chair, Senate Judiciary Committee
The Honorable Lindsey Graham, Ranking Member, Senate Judiciary Committee
The Honorable Amy Klobuchar, Chair, Senate Subcommittee on Competition Policy, Antitrust & Consumer Rights
The Honorable Mike Lee, Ranking Member Senate Subcommittee on Competition Policy, Antitrust & Consumer Rights