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**ANTITRUST NO-ACTION LETTER**

Date: November 21, 2005

Number NAL 05-01

Subject: Proposed Settlement of CON Litigation

Robert D. Newell, Esq.  
Counsel for Wellington Regional Medical Center, Inc.  
Law Offices of Newell & Terry  
817 North Gadsden Street  
Tallahassee, Florida 32303-6313

RE: FLORIDA HEALTH CARE COMMUNITY GUIDANCE ACT - ANTITRUST NO-ACTION LETTER -  
PROPOSED SETTLEMENT OF CON 9811 LITIGATION.

Dear Mr. Newell:

On behalf of Wellington Regional Medical Center, Inc. d/b/a Wellington Regional Medical Center ("WRMC") you have requested an antitrust no action letter pursuant to the Florida HealthCare Community Antitrust Guidance Act<sup>1</sup> regarding the proposed Settlement Agreement ("Agreement") between WRMC, the State of Florida Agency for Health Care Administration ("AHCA") and Tenet St. Mary's, Inc., d/b/a St. Mary's Medical Center ("St. Mary's"). Attorney General Charlie Crist has asked us to respond to your request.

After reviewing your request it is this Office's conclusion that, under the circumstances you've presented, the Agreement is not likely to be anticompetitive in overall effect. Accordingly, it is the present intention of this Office not to take antitrust enforcement action against WRMC regarding the Agreement.

You have advised that WRMC intends to enter into an Agreement with AHCA and St. Mary's which would resolve litigation relating to WRMC's application for Certificate of Need ("CON") 9811 to establish a Level

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III Neonatal Intensive Care Unit ("NICU") consisting of fifteen (15) beds at WRMC. AHCA initially approved the CON on December 10, 2004. Pursuant to Section 408.039 (5) Fla. Stat., two existing providers of NICU Level III services in Palm Beach County, St. Mary's and Bethesda Healthcare System, d/b/a Bethesda Memorial Hospital ("Bethesda") filed formal challenges to AHCA's preliminary approval of the CON. After discovery, but before the formal hearing, Bethesda dismissed its challenge. Thereafter, but prior to the formal hearing, WRMC, St. Mary's, and AHCA negotiated a settlement in principle. You have furnished this office with a copy of the Agreement.

According to the terms of the Agreement, in exchange for St. Mary's discontinuing its challenge to the award of the CON to WRMC, WRMC agrees, among other things, that [it] "will not implement the CON for a 15 bed Level III NICU unit before December 31, 2008 (the implementation date)."

However, if after execution of the Settlement Agreement the Florida Legislature abolishes the CON requirement for NICU Level III beds WRMC will be relieved of its obligation to wait until December 31, 2008, to implement the CON.

Under the Agreement AHCA agrees, following the relinquishment of jurisdiction in DOAH Case No. 05-0299, to enter a final order:

approving [WRMC CON] Application No. 9811 to establish a 15 bed Level III Neonatal Intensive Care Unit, with the condition that it will set aside 28.9 percent of its patient days in the Level III NICU to Medicaid/Medicare HMO and charity care patients on a combined basis.

It is our understanding, based on conversations with AHCA, that the condition described above was included in the original CON application submitted by WRMC. It is also our understanding that AHCA will monitor compliance with this provision and that WRMC is required to file reports reflecting the amount of

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charity care provided. There are also specific remedies that AHCA may obtain from WRMC for non-compliance.

Finally, the Agreement expressly provides that:

This Settlement Agreement contains the entire agreement between the parties, hereto, and no representations or agreements, oral or otherwise, between the parties not embodied or attached hereto shall be of any force or effect.

The proposed Agreement, the key provisions of which are described above, is not manifestly anti-competitive. On its face it does not purport to settle any claims other than those arising out of the CON litigation. It does not appear to allocate among the parties any additional non-CON regulated services.<sup>2</sup> Therefore, in evaluating the lawfulness of the Agreement under the Florida Antitrust Act and Section 1 of the Sherman Antitrust Act, this Office will apply the rule of reason. In a rule of reason analysis, an agreement is deemed unlawful only if it is likely to result in an unreasonable restraint of trade, that is, if under the circumstances, its likely anticompetitive economic effects in a related market will outweigh its likely pro-competitive effects in that market.<sup>3</sup>

In preliminarily approving WRMC's CON application ACHA recognized the pro-competitive effects of adding 15 new NICU Level III beds to District 9:

- WRMC is geographically isolated from existing NICU Level III providers and is closer to the medically indigent and traditionally under served Western part of Palm Beach County.
  
- The geographic service area of WRMC includes a significantly growing population of women between the ages of 15 and 44.

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- The ever increasing number of live births at WRMC . . . justifies Level III services for low birth weight babies born at WRMC.
- WRMC has developed a successful NICU Level II program and has demonstrated the commitment and resources necessary to successfully implement a Level III program.
- Approval of another provider will enhance competition and choice for mothers delivering low birth weight babies in District 9.

The Settlement does, however, require that WRMC wait until December 31, 2008 to implement its NICU Level III program. At first blush this would appear to place a burden on WRMC that might adversely affect competition for NICU Level III services in District 9. However, based on information provided by WRMC and discussions with AHCA this burden is, at best, minimal. Absent the Agreement, the CON litigation, even if WRMC were to prevail, could well delay the entry of WRMC into the market until at least the December 31, 2008 implementation date if not longer. Moreover, even if St. Mary's were to discontinue its challenge today without the Agreement, WRMC would likely not be able to enter the market much before the agreed to implementation date. This delay would be necessitated by the need of WRMC to obtain state and local construction approval and permits, to renovate and construct a new combined New Born Nursery and Level II and Level III NICU, as well as to hire and train the additional staff needed for the Level III program.

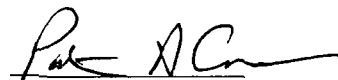
Weighing the potential pro-competitive justifications and effects from the Agreement against possible anti-competitive effects, it appears, on balance, that the Agreement is not likely to have a substantial adverse effect upon competition in any relevant Market.<sup>4</sup> Accordingly, based upon the information you have

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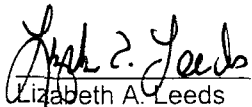
provided and the specific facts presented thereby, it is the present intent of this Office not to take antitrust enforcement action against WRMC regarding the Agreement.

This letter expresses this Office's present enforcement intention only. It applies only to the Agreement presented to this Office, as summarized above. This Office reserves the right to bring an enforcement action in the future if actions taken by WRMC in connection with the Agreement should prove anticompetitive in purpose or effect.

Sincerely,



Patricia A. Conners  
Antitrust Division Director



Elizabeth A. Leeds  
Senior Assistant Attorney General  
Antitrust Section

cc: Liz Dudek, AHCA  
Bill Roberts, AHCA

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1. §408.18 Fla. Stat.
  
2. See *State of Florida, Ex. Rel. Charles J. Crist, Jr., Attorney General v. HCA, Inc. et. al.* United States District Court of Florida, 2-03-CV-177-FIM-29DNF. In this action the State entered into a Consent Decree with Defendants as a result of Defendants alleged wrongful conduct. The State alleged that Defendants entered into an agreement to settle certain CON litigation which had the effect of unlawfully allocating among the Defendants certain geographic and products markets that were both related and unrelated to the CON litigation. The Agreement at issue here does not appear to allocate markets in any potentially unlawful manner.
  
3. See *All Care Nursing Service, Inc. v. High Tech Staffing Services, Inc.*, 135 F. 3d 740, 746 (11<sup>th</sup> Cir. 1998) (“a presumption exists that the circumstances of a case will be looked at in the light of the rule of reason standard and will not be deemed per se unreasonable”); *Levine v. Central Fla. Medical Affiliates, Inc.*, 72 F. 3d 1538, 1546 (11<sup>th</sup> Cir. 1996)(“Agreements that do not fit within an established per se category are analyzed under the rule of reason, i.e., courts will engage in a comprehensive analysis of the agreement’s purpose and effect to determine whether it unreasonably restrains competition”), cert. denied, 117 S. Ct. 75, 136 L. Ed. 2d 34 (1996).
  
4. For purposes of this letter, we have assumed that the relevant geographic market is District 9, and that the relevant product market is NICU Level III services. This Office will conduct a more complete rule of reason analysis, without such assumptions, in determining whether to bring enforcement action should it appear that the Agreement has been anti-competitive in purpose or effect.