

**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

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)		
In the Matter of)	Docket No. 9315	
)		
EVANSTON NORTHWESTERN)	Public Record	
HEALTHCARE CORPORATION,)		
)		
a corporation.)		
)		

**AMERICAN HOSPITAL ASSOCIATION’S REPLY TO COMPLAINT COUNSEL’S
RESPONSE TO MOTIONS FOR LEAVE TO FILE AMICUS CURIAE BRIEFS**

The American Hospital Association (“AHA”) respectfully submits this Reply to Complaint Counsel’s Response to Motions for Leave to File Amicus Curiae Briefs. In its Response, Complaint Counsel does not explicitly oppose the Commission’s consideration of AHA’s brief *amicus curiae*; nor does it contest AHA’s dual contentions that the Commission will be aided by consideration of AHA’s brief and that AHA and its member hospitals will be uniquely and significantly impacted by the Commission’s ruling in this matter.¹ In fact, Complaint Counsel acknowledges “the Commission’s commitment to considering the views of *amicus curiae*,” including those of AHA. See 16 C.F.R. § 3.52j (allowing for consideration of briefs *amicus curiae*).

Instead, citing and misconstruing only two footnotes from AHA’s proposed brief, Complaint Counsel urges that the Commission ignore any purported factual representations

¹ Complaint Counsel observes that ENH is an AHA member hospital. Quite true; also irrelevant. It is, of course, commonplace for associations, one or more of whose members find themselves in litigation, to contribute views as *amici* on behalf of the collective members of the association. The Chamber of Commerce, the National Association of Manufacturers, the National Association of Automobile Manufacturers, and AHA itself, to name just a handful of associations, all have repeatedly contributed submissions as *amici curiae* in agency, state court, federal court, and Supreme Court proceedings.

made by AHA. However, AHA's proposed brief does not include factual representations; that is not AHA's charge in its *amicus* submission. The two footnotes Complaint Counsel cites merely provide illustrative explanations of the purposes and uses of patient flow data that are consistent not only with testimony presented to the ALJ (which was subject to rebuttal by Complaint Counsel) but also with years of federal precedent cited in AHA's brief.

Moreover, as implicitly conceded by Complaint Counsel, AHA's proposed brief provides soundly based legal and policy challenges to the Initial Decision. The brief contends that the Initial Decision abandoned the Merger Guidelines and years of federal precedent governing the defining of the geographic market, determining competitive effects, and evaluating the value of quality improvements; and that if allowed to stand will not only cause confusion as to the applicable standards for evaluating hospital mergers, but will also deter hospitals from pursuing pro-competitive mergers designed to decrease healthcare costs and improve quality of care for patients. These legal and policy arguments do not require, or include, any new factual assertions or representations.

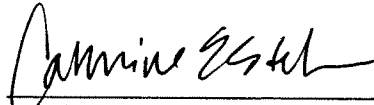
Complaint Counsel finally complains that the Respondent's brief and the three proposed *amicus* briefs, taken all together, exceed the word limit in the Commission's December 8, 2005 Order. That is nothing more than an attempt to distract the Commission from the significant substantive problems with the Initial Decision. The Commission's rules contemplate the filing of *amicus* briefs. See 16 C.F.R. § 3.52j. Consistent with the Commission's order, neither the AHA's brief nor those of any of the other proposed *amici* exceed the Commission's word limit. That these briefs collectively exceed the word limit is consistent with every other occasion that this Commission has chosen to consider briefs submitted by outside parties. Word limits apply to briefs, not to entire sides of arguments. To institute such a collective word limit would effectively eliminate the filing of *amicus*

briefs, which is clearly inconsistent with the intent of 16 C.F.R. § 3.52j and the practice of this body.

The Commission should reject Complaint Counsel's baseless assertions and consider AHA's proposed brief *amicus curiae* in its entirety.

Dated: January 6, 2006

Respectfully submitted,



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CERTIFICATE OF SERVICE

In the Matter of Evanston Northwestern Healthcare Corporation

Docket No. 9315

I, Catherine E. Stetson, hereby certify that on this 6th day of January, 2006, copies of the Reply of *Amicus Curiae* the American Hospital Association (AHA) to Complaint Counsel's Response to AHA's Motion for Leave to File an *Amicus Curiae* brief in Support of Evanston Northwestern Healthcare Corporation were served by electronic mail and hand delivery (except where otherwise indicated), on:

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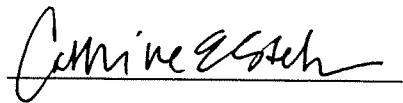
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I further certify that all parties required to be served have been served.



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