

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

EVANSTON NORTHWESTERN)	
HEALTHCARE CORPORATION and)	
ENH MEDICAL GROUP, INC.,)	
)	
Petitioners,)	No. 07-3378
)	
v.)	
)	
FEDERAL TRADE COMMISSION)	
)	
Respondent.)	

JURISDICTIONAL MEMORANDUM
OF THE FEDERAL TRADE COMMISSION

As directed by order of this Court dated October 3, 2007, respondent the Federal Trade Commission (“FTC” or “Commission”) hereby submits this memorandum to address the question whether this appeal should be dismissed for lack of jurisdiction. It is the Commission’s position that its Order issued on August 2, 2007, which directs Evanston Northwestern Healthcare Corporation and ENH Medical Group (collectively “ENH”) to submit a proposed final order and from which ENH now petitions for review, is not a final cease and desist order and, thus, not appealable. Accordingly, because appellate jurisdiction is lacking, ENH’s petition for review should be dismissed.

BACKGROUND

In February 2004, the Commission issued an administrative complaint alleging that Evanston Northwestern Healthcare Corporation's acquisition of its nearest competitor, Highland Park Hospital ("Highland Park"), in January 2000, violated Section 7 of the Clayton Act, 15 U.S.C. § 18. The case was tried before an Administrative Law Judge ("ALJ"). In an Initial Decision issued in October 2005, the ALJ found that the acquisition was unlawful under the Clayton Act, and recommended entry of a cease and desist order requiring ENH to divest itself of Highland Park.

In an opinion issued on August 2, 2007, the Commission affirmed in material part the ALJ's decision that the transaction violated Section 7 of the Clayton Act, but disagreed that divestiture was the most appropriate remedy. Rather, the Commission found that the particular circumstances of this case warrant a remedy that restores lost competition through injunctive relief requiring ENH to establish separate and independent negotiating teams to allow managed care organizations to again negotiate separately for the competing hospitals. The Commission did not enter issue a final order on remedy at that time, however. Instead, it ordered ENH "to propose, for issuance by the Commission, a Final Order," including "a detailed proposal for implementing the type of injunctive

relief that the Commission has selected.” FTC Order dated Aug. 2, 2007 (attached as Exhibit A to ENH’s Petition for Review and Motion to Hold Petition in Abeyance). ENH submitted its proposed remedy on September 17, 2007; Complaint Counsel’s response to ENH’s proposed remedy is due on October 29; and ENH will have ten days thereafter to submit a reply.

ARGUMENT

The Court has jurisdiction to review final orders of the FTC under Section 5(c) of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 45(c), which provides that one “required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States” The Commission’s August 2 Order, however, is patently not a final cease and desist order. It does not require ENH to cease and desist from doing anything; it merely indicates the Commission’s intent – in a *future* order – to require ENH “to cease and desist from certain enumerated practices” (yet to be specified) and to establish separate negotiating teams.

The August 2 Order is analogous to a district court order finding liability and requiring parties to submit a remedial plan, which has widely been held not to constitute a final order appealable under 28 U.S.C. § 1291. *See, e.g., Mercer v.*

Magnant, 40 F.3d 893, 896 (7th Cir. 1994) (“[o]rders to prepare plans that when adopted will be injunctions are not themselves injunctions”); *Jackson by Jackson v. Fort Stanton Hosp. & Training School*, 964 F.2d 980, 987-88 (10th Cir. 1992) (citing cases from the Second, Third, Sixth, Eighth, and Ninth Circuits). Like a district court order requiring submission of a remedial plan, the Commission’s August 2 Order is not appealable because “[t]he actual scope of relief is yet to be defined. The plan to be submitted will be incorporated into an injunction and it is that injunction that will become a final order for appeal purposes.” *El-Tabech v. Gunter*, 992 F.3d 183, 185 (8th Cir. 1993).

Although the Commission has generally identified one element of injunctive relief (separate negotiating teams) it intends to include in a future final order, the August 2 Order “provides only a skeletal outline for later adjudication” and, thus, is not properly deemed an appealable final order. *See Spates v. Manson*, 619 F.2d 204, 209-10 (2nd Cir 1980) (holding that a district court order that “neither prohibited nor required anything other than the submission of a [remedial] plan” was not an appealable final order).¹ Moreover, although ENH asserts, in its

¹ *See also Jackson by Jackson*, 964 F.2d at 989 (order requiring submission of remedial plan not appealable because, although “not completely devoid of specifics,” it “did not outline in detail the nature and content of these plans”); *Groseclose v. Dutton*, 788 F.2d 356, 360 (6th Cir. 1986) (“jurisdiction is lacking when important issues regarding the nature and extent of relief to be

petition for review, that it is evident that “the Commission does not intend to revisit its finding of liability or its determination to require ENH to cease and desist from violating the Clayton Act,” Petition for Review at 2, these considerations (even assuming they are true) do not create the requisite finality. *See Franklin v. District of Columbia*, 163 F.3d 625, 629 (D.C. Cir. 1998) (a decision “adjudging liability but leaving the quantum of relief still to be determined has been a classic example of non-finality and non-appealability”) (internal quotation marks omitted); *Henrietta D. v. Giuliani*, 246 F.3d 176, 180-81 (2nd Cir 2001) (a declaratory judgment that “did nothing more than determine liability, leaving the measure of prospective relief for another day” was “a classic example of nonfinality”) (internal quotation marks omitted).

The Commission’s August 2 Order also fails the test of “finality” under the Administrative Procedures Act (“APA”), 5 U.S.C. § 704.² The Supreme Court has held:

As a general matter, two conditions must be satisfied for agency action to be ‘final’: First, the action must mark the ‘consummation’ of the agency’s decisionmaking process And, second, the action

afforded still remain to be resolved”)

² That provision states: “Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in court are subject to judicial review. . . .”

must be one by which the ‘rights or obligations have been determined,’ or from which ‘legal consequences will flow.’”

Bennett v. Spear, 520 U.S. 154, 177-78 (1997) (citations omitted); *accord Home Builders Ass’n of Greater Chicago v. U.S. Army Corps. of Engineers*, 335 F.3d 607, 614 (7th Cir. 2003). The August 2 Order, however, does not represent the “consummation” of the Commission’s decision-making process – that “consummation” will come only when the Commission issues a final cease and desist order after considering ENH’s and Complaint Counsel’s submissions regarding the appropriate remedy. Nor is the order one from which “legal consequences will flow.” As noted above, the August 2 Order does not require ENH to do anything other than to submit a proposed remedy.

Because the Commission has left for another day its final decision regarding the remedy to be entered in this case, the August 2 Order is non-final, and this Court lacks appellate jurisdiction. Accordingly, the Court should dismiss the petition for review. However, if the Court elects not to dismiss the petition, the Court should hold this appeal in abeyance until such time as the Commission enters its final cease and desist order in this case, for all the reasons stated in ENH’s Motion to Hold Petition in Abeyance.

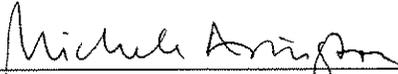
CONCLUSION

For the reasons state above, the Court should dismiss the present petition for review for lack of jurisdiction, or, in the alternative, hold the petition in abeyance until the Commission issues a final cease and desist order.

Respectfully submitted,

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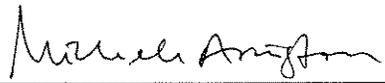
Dated: October 10, 2007

CERTIFICATE OF SERVICE

I hereby certify that on October 10, 2007, a true and correct copy of the foregoing Jurisdictional Memorandum was sent by regular U.S. mail to counsel for petitioners as follows:

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