

Proposed grant of exclusive right to offer radiology services at a hospital would not violate the FTC Act. [833 0003, Burnham Hospital]

February 24, 1983

Dear Mr. Nord:

This is in response to your request for an advisory opinion concerning a contract by which Burnham Hospital has granted to a physician group the exclusive right to provide radiology services to patients in the hospital. You have asked whether any law enforced by the Commission would be violated if Burnham, acting pursuant to the contract, determines that a physician not affiliated with that group should not be given access to its radiology facilities or authorization to provide radiology services to Burnham's patients.

Based on the information you have supplied, it is the Commission's understanding that Burnham Hospital is a nonprofit general acute care hospital located in Champaign, Illinois. Among the services Burnham offers to the public are diagnostic radiology services. The hospital owns radiology laboratory facilities and employs approximately 20 radiology technicians. Throughout its history, Burnham has provided radiology services either through a radiologist employed by the hospital or a radiology group under exclusive contract with it.

You have explained that in 1980 the hospital, after receiving and considering proposals from other radiology groups, entered into a contract with a group of radiologists practicing under the name Prairie Professionals ("Prairie") that gives Prairie the exclusive right to operate the hospital's radiology laboratory and to render radiology services to patients at the hospital. Prairie is responsible for providing radiology services as needed; supervising and discharging the radiology technicians who are employed by the hospital; consulting with the hospital on the selection and replacement of equipment; and participating in educational and scientific activities at the hospital, including the training of radiology technicians. In addition, Prairie is to designate a radiologist to function as department chief, who will be responsible for operating the department and helping the hospital to control the department's budget. The contract has a term of three years; thereafter it is renewable for one-year periods and may be terminated by either party on 180-days notice. The hospital bills patients for the use of its radiology facilities. Prairie bills the patient separately for its professional services on a fee-for-service basis.

Prairie physicians are members of Christie Clinic ("Christie"), a large multispecialty physician group. Pursuant to a separate contract with Burnham, Christie purchased a full-body computed tomographic

("CT") scanner which it installed on hospital premises. Under the contract, Christie designates the physicians who may use the scanner.

You state that a physician has requested to practice radiology independently at Burnham notwithstanding the exclusive agreement with Prairie. Burnham would like to deny this physician access to its radiology facilities in order to adhere to, and retain the benefits of, the contract with Prairie.

According to your letter, Burnham believes that the contract is in the hospital's economic interest and that it improves the quality of services provided at the hospital. Specifically, the hospital believes that the contract creates cost efficiencies in procuring radiological services for its patients, operating and maintaining its equipment, and supervising its radiology technicians.

In addition to Burnham Hospital, there are three other general acute care hospitals in the Champaign-Urbana area from which Burnham draws patients. Burnham has 214 beds, Mercy Hospital has 255 beds, Carle Foundation Hospital has 281 beds, and Cole Hospital has 65 beds.¹ Thus, Burnham has about 26 percent of the beds in what Burnham describes as the relevant area. Carle is associated with a clinic, and only members of the clinic are permitted to have privileges at that hospital. Mercy and Cole each has an exclusive contract with a different group of radiologists; Carle has a closed staff in all its departments. The radiology contracts at both Cole and Burnham have changed hands in recent years.

Your letter states that Burnham offers no facilities or services not available in at least one of the other area hospitals. Both Carle and Burnham have full-body CT scans, the one at Burnham being owned by Christie Clinic rather than by the hospital. Both Carle and Mercy offer therapeutic radiological services that are not available at Burnham.

You also state that some Champaign-Urbana radiologists provide services to hospitals in surrounding communities. Radiology services are also available outside the hospital from independent radiology laboratories. Burnham accepts radiological studies from other hospitals or from independent laboratories at the discretion of the attending physician.

Antitrust analysis of hospital exclusive contracts can be complicated because the contracts create relationships among hospitals, physicians, and patients that have no clear parallels in commercial practice and that are difficult to characterize. The contract occurs at one level—between the hospital and the physician—while the direct financial transaction occurs at a different level—between the physi-

¹ There are three other hospitals in the Champaign-Urbana area that do not seem to be in substantial competition with the four mentioned above. McKinley Memorial Hospital has 31 beds and is affiliated with the University of Illinois. Herman Adler Mental Health Center is a state-run long-term care facility for children with 46 beds. The hospital at Chanute Air Force Base has 56 beds, but apparently is not open to the general public.

cian and the patient, and court decisions suggest that a patient should be considered a member of the physician group the sellers suggested that the hospital erred in the cases where the patient obtained the service. The Commission is of the opinion that in some circumstances, a petition among physicians to the Commission for antitrust analysis should account for the impact on patients.

An exclusive contract between a hospital and a physician and thereby limits the physician to choose among radiologists contract in the area. It prevents physicians to enter into an exclusive contract with an existing group or firm.

A contract of this nature may focus of competition on the securing of the contract and to their patient's best interests at least, if the departments can find other ways. It can in the hospital department, ensure through standardization of the department's facilities, facilitate management support staff and physicians, and improve performance enough to provide an incentive to upgrade hospital standards of care.

² *Robinson v. Magovern*, 51 U.S.L.W. 3340 (U.S. Nov. 1961), *rev'd on other grounds*.
³ *Das Santos v. Columbia*.
⁴ See, e.g., *Foster, Excelsior Health*, 26 St. Louis U.L. (1979).

cian and the patient, with payment usually made by an insurer. Some court decisions suggest that in analyzing exclusive contracts the patient should be considered the buyer and the hospital and the physician group the sellers of the service in question.² Another court has suggested that the hospital rather than the patient should be considered the buyer of the service, and the physician group the seller, in cases where the patient generally does not make a personal decision to obtain the service and does not personally select the provider.³ The Commission is of the opinion that each approach may be helpful in some circumstances, because exclusive contracts may affect both competition among physicians and hospitals for patients and competition among physicians to market their services to hospitals. Accordingly, antitrust analysis should be flexible enough realistically to take into account the impact of these contracts on hospitals, physicians, and patients.

An exclusive contract for radiology services can have both procompetitive and anticompetitive aspects. The contract grants exclusivity within the hospital to a particular radiologist or group of radiologists and thereby limits the ability of the patient and the attending physician to choose among competing radiologists. It may also, if radiologists contract in groups, make it more difficult for individual physicians to enter the market since a physician may have to join an existing group or form a new group in order to practice in the area.

A contract of reasonable duration does not, however, eliminate competition among radiologists or prevent entry. Instead, it shifts the focus of competition among both established and entering radiologists to the securing of the contract. The exclusive contract may also have procompetitive effects by providing a number of benefits to hospitals and to their patients. There is reason to believe that in some circumstances at least, the use of exclusive contracts in certain hospital departments can facilitate efficient delivery of services in a number of ways. It can increase the hospital's control over operation of the department, ensure full-time availability of services, lower costs through standardization of procedures and centralized administration of the department, permit better scheduling of the use of facilities, facilitate maintenance of equipment, improve supervision of support staff and working relationships between the staff and physicians, and improve the quality of services by assuring that physicians perform enough procedures to maintain their proficiency, have an incentive to upgrade their skills, and are effectively subject to hospital standards of quality.⁴ To the extent that these objectives are real-

² *Robinson v. Magovern*, 521 F.Supp. 842, 885 (W.D. Pa. 1981), *aff'd mem.*, 688 F.2d 842 (3d Cir. 1982), *cert. denied*, 51 U.S.L.W. 3340 (U.S. Nov. 1, 1982) (No. 82-415); *Hyde v. Jefferson Parish Hosp. Dist. No. 2*, 513 F.Supp. 532 (E.D. La. 1981), *rev'd on other grounds*, 686 F.2d 286 (5th Cir. 1982), *petition for cert. filed*, No. 82-1031 (Dec. 17, 1982).

³ *Deo Santos v. Columbus-Cuneo-Cabrini Medical Center*, 684 F.2d 1346 (7th Cir. 1982).

⁴ See, e.g., Foster, *Exclusive Arrangements Between Hospitals and Physicians: Antitrust's Next Frontier in Health?*, 26 St. Louis U.L.J. 535, 540-41 (1982); M. Thompson, *Antitrust and the Health Care Provider* 151-52, 154 (1979).

ized, a hospital is better able to compete with other hospitals.

Hospitals must assure that radiology services are available as needed and of acceptable quality if they are to attract attending physicians and their patients. When the decision to use an exclusive contract to staff a hospital-based department is made unilaterally by a hospital in order to promote efficient operation of the department, when the hospital lacks significant power in the relevant market, and when the contract is of reasonable duration or terminable by the hospital on reasonable notice, the contract would not generally be likely to have a substantial anticompetitive effect in any market.⁵

Several courts considering antitrust challenges to exclusive contracts for hospital services have treated the agreements as vertical restraints subject to rule of reason analysis.⁶ In balancing the procompetitive and anticompetitive effects of the contracts in the hospital and physician services markets, the courts have considered such factors as the characteristics of the market, particularly the market power of the hospital in question; the purpose of the contract; its duration; the manner in which the decision was made to use an exclusive arrangement; and the procompetitive benefits of the contract. These courts have not found that the exclusive contracts considered had significantly anticompetitive effects, and they have found that the contracts resulted in significant competitive benefits to the hospitals.

One recent decision, however, held that an exclusive contract for anesthesia services constituted a per se illegal tying arrangement. *Hyde v. Jefferson Parish Hospital District No. 2*, 686 F.2d 286 (5th Cir. 1982), petition for cert. filed, No. 82-1031 (Dec. 17, 1982). The court in that case construed the contract as tying the sale of the hospital's chosen anesthesia service to the use of its operating rooms, found that the hospital had appreciable economic power in the township in which it was located, and concluded that the contract restrained, and indeed eliminated, competition among anesthesiologists in the hospital.

The Commission is of the opinion that the per se rule of illegality for tie-ins is not applicable to Burnham's contract with Prairie Profes-

⁵ A different case would be presented if the hospital joined a conspiracy among members of the medical staff to restrain competition among hospital-based physicians. See *Robinson v. Magovern*, 521 F.Supp. 842, 906 (W.D. Pa. 1981), *aff'd mem.*, 688 F.2d 824 (3d Cir. 1982), *cert. denied*, 51 U.S.L.W. 3340 (U.S. Nov. 1, 1982) (No. 82-415); *State of Maryland v. The Medical Staff of Harford Memorial Hospital*, Circuit Court for Harford County, Equity No. 27734 (Oct. 29, 1981) (assurance of discontinuance obtained from hospital staff that allegedly threatened to refuse to deal with any but a specified group of radiologists in an attempt to coerce the hospital into contracting with the group on terms demanded by it). In addition, different questions would be raised under the antitrust laws if a large proportion of the specialists in a market formed a group and negotiated jointly with a number of hospitals in the area.

⁶ *Hyde v. Jefferson Parish Hosp. Dist. No. 2*, 513 F.Supp. 532 (E.D. La. 1981), *rev'd*, 686 F.2d 286 (5th Cir. 1982), *petition for cert. filed*, No. 82-1031 (Dec. 17, 1982); *Smith v. Northern Michigan Hospitals, Inc.*, 518 F.Supp. 644 (W.D. Mich. 1981), No. 81-1513 (6th Cir. argued Oct. 21, 1982). See also *Dos Santos v. Columbus-Cuneo-Cabrini Medical Center*, 684 F.2d 1346 (7th Cir. 1982); *Robinson v. Magovern*, 521 F.Supp. 842 (W.D. Pa. 1981), *aff'd mem.*, 688 F.2d 824 (3rd Cir. 1982), *cert. denied*, 51 U.S.L.W. 3340 (U.S. Nov. 1, 1982) (No. 82-415).

sionals. Although radiology services and other services and facilities are not a sufficient basis for a restraint, the function of the restraint represents the ability to leverage power from competition on the market in question are very different. Avoiding competition or competing with other hospitals of quality and service is a submission. Using a formally related services, the array of health care services case law indicates that here, the hospital derives from requiring that all provided by a particular is not the type of per se rule of illegality applied.

The Commission believes that the arrangement is analogous to a requirement, that in a fashion similar to the Commission's analysis on competition among services, the proportions of the services involved in the contract to which it public derive from it. Based on the information appear on balance Prairie Professional Act or any other law contract was intended radiology department.

⁷ See *Times-Picayune Publishing Co. v. American Publ. Co.*, 399 U.S. 117 (1971), *aff'd*, 474 F.2d 1343 (9th Cir. 1982); *Robbins Ice Cream Co.*, 664 F.2d 1000 (5th Cir. 1981), *cert. denied*, 451 U.S. 970 (1981).

⁸ See, e.g., *Boddicher v. Ar Corp.*, 748 F.2d 1000 (9th Cir. March 24, 1982); *Keener Corp. v. Diversified Packaging Corp.*, 748 F.2d 1000 (9th Cir. E.D. La. 1976); *Crawford v. Bloomington Hospital*, 422 F.2d 1000 (7th Cir. 1970).

⁹ See *Tampo Electric Co. v. Finley & Co.*, 676 F.2d 1291 (5th Cir. 1982).

¹⁰ See *Beltone Electronic*.

sionals. Although radiology services are physically separable from other services and facilities supplied by Burnham, mere separability is not a sufficient basis for characterizing an arrangement as a tie-in. Instead, the function of the aggregation must be examined to see if the restraint represents the forced purchase of a second distinct commodity to leverage power from one market to another in order to avoid competition on the merits.⁷ The purposes and effects of the contract in question are very different from such a classic tie. Rather than avoiding competition on the merits, Burnham is attempting to compete with other hospitals by obtaining efficiencies and a desired level of quality and service in its radiology department, according to the submission. Using a form of vertical integration to combine functionally related services, the hospital is apparently seeking to improve the array of health care services that it offers to the public. Moreover, the case law indicates that no tie-in should be found to exist where, as here, the hospital derives no direct or exploitative financial benefit from requiring that all diagnostic radiology services in the hospital be provided by a particular group of physicians.⁸ In short, the contract is not the type of pernicious, naked restraint of trade to which the per se rule of illegality applies.

The Commission believes that Burnham's contract is most closely analogous to a requirements contract, a type of exclusive dealing arrangement, that should be judged under the rule of reason in a fashion similar to that for more traditional vertical restraints.⁹ The Commission's analysis of the contract focuses on whether its effects on competition among radiologists and among hospitals are on balance harmful or beneficial. Factors relevant to the analysis include the proportions of the hospital and physician services markets involved in the contract, the purposes of the contract, its duration, the extent to which it deters entry, the benefits the hospital and the public derive from it, and the extent of competition for the contract.¹⁰

Based on the information available to the Commission, it does not appear on balance that Burnham's adherence to its contract with Prairie Professionals would violate the Federal Trade Commission Act or any other law enforced by the Commission. You report that the contract was intended to, and does, facilitate efficient operation of the radiology department. The Commission understands that the decision

⁷ See *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 614 (1953); *Hirsh v. Martindale-Hubbell, Inc.*, 674 F.2d 1343 (9th Cir. 1982), cert. denied, 51 U.S.L.W. 3340 (U.S. Nov. 1, 1982) (No. 82-570); *Krehl v. Baskin-Robbins Ice Cream Co.*, 664 F.2d 1348 (9th Cir. 1982); *Principe v. McDonald's Corp.*, 631 F.2d 303 (4th Cir. 1980), cert. denied, 451 U.S. 970 (1981).

⁸ See, e.g., *Boddicher v. Arizona State Dental Ass'n*, 680 F.2d 66 (1982), 1982-2 Trade Cas. (CCH) ¶ 64,812 (9th Cir. March 24, 1982); *Keener v. Sizzler Family Steak Houses*, 597 F.2d 453 (5th Cir. 1979); *Kentucky Fried Chicken Corp. v. Diversified Packaging Corp.*, 549 F.2d 368 (5th Cir. 1977); *Rodrigue v. Chrysler Motor Corp.*, 421 F.Supp. 903 (E.D. La. 1976); *Crawford Transport Co., Inc. v. Chrysler Corp.*, 338 F.2d 934 (6th Cir. 1964); *Rumple v. Bloomington Hospital*, 422 N.E. 2d 1309 (Ind. App. 1981).

⁹ See *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961); *Twin City Sportservice Inc. v. Charles O. Finley & Co.*, 676 F.2d 1291 (9th Cir. 1982), cert. denied, 51 U.S.L.W. 3354 (Nov. 8, 1982).

¹⁰ See *Beltone Electronics Corp.*, FTC Docket 8928, slip op. at 34 [100 F.T.C. 68 at 204] (July 6, 1982).

to enter into the contract, and thus to deny radiology privileges to other physicians, was made unilaterally in the interest of the hospital, and was neither coerced by members of the medical staff nor taken in furtherance of a combination between the hospital and the medical staff or any of its members to restrain competition among physicians. Burnham competes with at least three other hospitals, and does not occupy a dominant position in the market. It is not a unique facility. The contract has an initial term of three years with one-year extensions thereafter, and is terminable on 180-days notice by either party. Thus, opportunities for competition among radiology groups to secure the contract are preserved, and there is evidence that some competition for contracts does occur. In addition, radiology can be practiced to at least some extent on an outpatient basis, and Champaign-Urbana radiologists apparently have some access to hospitals in the surrounding area. In addition, there is no reason to believe that effectuation of the contract would result in higher prices for radiology services. Based on these factors, it appears that the contract does not unreasonably restrict competition among radiologists and that it may facilitate competition among hospitals.

Based on its understanding of the facts surrounding the decision to enter into the exclusive contract and the planned denial to other applicants of the right to practice radiology in the hospital, pursuant to that contract, as those facts are outlined above and further detailed in your submission, it is the Commission's opinion that Burnham Hospital's adherence to its grant to Prairie Professionals of the exclusive right to offer radiology services at the hospital would not violate the Federal Trade Commission Act or any other statute enforced by the Commission.¹¹

This advisory opinion, like all those issued by the Commission, is limited to the proposed conduct described in the petition being considered. Because by necessity it is based on factual representations by the hospital, it does not constitute approval of action taken by the hospital on any specific application for privileges that may become the subject of litigation before the Commission or any court, when those facts may be controverted. The conclusions stated in this letter are based on the Commission's understanding of present market conditions in the Champaign-Urbana area and in the health care field generally. The Commission retains the right to reconsider the questions involved or to rescind or revoke its opinion if the public interest so requires in accordance with Section 1.3(b) of the Rules of Practice.

By direction of the Commission.

¹¹ By responding to Burnham's request for an advisory opinion concerning the described facts, the Commission takes no position on the presence or absence of any or all of the jurisdictional prerequisites to a law enforcement proceeding under Section 5 of the FTC Act, 15 U.S.C. 45.

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Dear Mr. Thomas:

I am writing on behalf of Burnham Hospital, Illinois, for an advisory opinion on whether the Hospital's contract with Prairie Professionals entitles them to use it to render radiological services which the Hospital has exclusive rights in. The Hospital has exclusive rights in radiology services.

Burnham Hospital is a private hospital. Among other services it provides diagnostic radiology, laboratory facilities and employs radiology technicians. Through its contract with Prairie Professionals, the Hospital provides radiology services to its outpatients. The Hospital is not employed by the Hospital, and the contract is not a contract to the Hospital.

On April 9, 1980, the Hospital granted an exclusive right of radiologists, practicing in the area, that gives that group the right to use the Hospital's radiology laboratory, and to use the Hospital's facilities. The Prairie Professionals include providing and discharging radiology services to the Hospital; consulting with the Hospital on the use of equipment; and performing radiology activities at the Hospital. In addition, Prairie Professionals include a radiologist who serves as chairman of the Hospital and is responsible for operating the Hospital to control that doctor's patients for use of its radiology services. The Hospital submits its own bill to the outpatients on a fee-for-service basis. The contract may be renewed thereafter at any time by either party. The Agreement between Burnham Hospital and Prairie Professionals is attached.*

Physicians in Prairie Professionals have a large multi-specialty practice.

* Not reproduced herein. Copies of all Prairie Professionals Agreements are available at the Chicago Branch, Federal Trade Commission, 6th Floor.

Physicians in Prairie Professionals are members of Christie Clinic, a large multi-specialty physician group located in Champaign, Illinois, attached.

Agreement between Burnham Hospital and this physician group is at any time by either party upon 180 days notice. A copy of the may be renewed thereafter for one year periods. It may be terminated on a fee-for-service basis. The contract has a term of three years and submits its own bill to the patient for professional services rendered, patients for use of its radiology facilities, while Prairie Professionals Hospital to control that department's budget. The Hospital bills pa- responsible for operating the department of radiology and helping the gist who serves as chairman of the department of radiology, who is technicians. In addition, Prairie Professionals designates the radiolo- activities at the Hospital, including the training of radiology ac- ment of equipment; and participating in education and scientific ac- Hospital; consulting with the Hospital on the selection and replace- vising and discharging radiology technicians who are employed by the Professionals include providing radiology services as needed; super- the Hospital's facilities. The contractual responsibilities of Prairie radiology laboratory, and to render radiological services to patients at that gives that group the exclusive right to operate the Hospital's of radiologists, practicing under the name of Prairie Professionals, On April 9, 1980, the Hospital entered into a contract with a group contract to the Hospital.

employed by the Hospital, or a single radiology group under exclusive provided radiology services to the public through either a radiologist radiology technicians. Throughout its history, the Hospital has pro- laboratory facilities and equipment, and employs approximately 20 provides diagnostic radiology services. It owns its own radiology hospital. Among other services that it offers the public, the Hospital Burnham Hospital is a public, not for profit, general acute care

which the Hospital has exclusively contracted to provide these ser- vices. physicians entitled to use its radiological laboratory equipment and render radiological services to inpatients to that physician group with Illinois, for an advisory opinion. The Hospital desires to limit the I am writing on behalf of Burnham Hospital, located in Champaign,

Dear Mr. Thomas:

November 17, 1982

Letter of Request

linois. Non-radiologists practicing as members of Christie Clinic also hold privileges at Burnham Hospital. By a separate contract, which preceded and is unrelated to the exclusive contract that is pertinent to this request, Christie Clinic has installed a full body CT scanner the Clinic owns at Burnham Hospital. Pursuant to that separate agreement, Christie Clinic receives a percentage of revenues attributable to use of the CT scanner, and limits the physicians who may use the CT scanner to certain specified radiologists and neurologists.

The Hospital believes that the exclusive contract with Prairie Professionals is in the Hospital's economic interest, and that it improves the quality of services provided at the Hospital. Specifically, the contract creates cost efficiencies in procuring radiological services for its patients, operating and maintaining its equipment, and supervising its radiology technicians.

A former employee of Prairie Professionals has requested that the Hospital permit him to use the Hospital's equipment and render radiological services to in-patients, notwithstanding the Hospital's exclusive agreement with the physician group. The physician withdrew from practice and resigned from Prairie Professionals due to disability. He retains privileges at Burnham Hospital and recently sought permission from the Hospital to reactivate his practice. The Hospital would like to adhere to its exclusive contract with the physician group and deny this physician access to its radiological facilities for that reason.

In addition to Burnham Hospital, three other general, acute care hospitals serve the same area (Champaign-Urbana, Illinois) from which Burnham Hospital draws its patients. Burnham Hospital has 214 beds, Mercy Hospital has 255 beds, Carle Foundation Hospital has 281 beds and Cole Hospital has 65 beds. In addition to these hospitals, two other hospitals in the area appear to serve a more restrict patient group (McKinley Memorial Hospital has 31 beds and is affiliated with the University of Illinois; Chanute Air Force Hospital, at the Air Force base of that name, has 55 beds). Without considering these hospitals that serve specific patient populations, Burnham Hospital has about 26 percent of the hospital beds in the relevant geographic area.

Burnham offers no facilities or services not available at one or more of the other area hospitals. Both Carle Foundation Hospital and Burnham Hospital have full body CT scanners (the one at Burnham being owned by Christie Clinic, rather than the Hospital). Both Carle Foundation Hospital and Mercy Hospital offer therapeutic radiological services that are not available at Burnham Hospital. Mercy Hospital and Cole Hospital are believed to have exclusive contracts for radiology services, each with a different group of radiologists. Carle Foundation Hospital is associated with the Carle Clinic, and only physicians

who are members of that clinic are granted privileges at that hospital; it therefore has a closed staff in all of its departments.

Within the past four years, Burnham Hospital has twice entered into an exclusive contract with different groups of radiologists. On both occasions, the Hospital received and considered competing proposals from several groups of radiologists before making its decision. In addition, it is believed that Cole Hospital has also changed the radiology group that provides its radiology services.

In addition to opportunities with radiology groups serving specific hospitals, radiologists in the Champaign-Urbana area also engage in independent, private practice through their own laboratories. Burnham Hospital accepts pre-admission radiological studies of patients by other hospitals or by independent radiology laboratories without any need for duplication of x-rays, except where the quality of the specific study is deemed to be unacceptable by the treating physician. Some radiologists in the Champaign-Urbana area also provide radiological services to hospitals up to 35 miles away, while a radiologist group from a nearby town serves one of the Champaign hospitals.

By consent decree, the Commission is understood to have created an opportunity for certain hospital-based physicians to practice as full time employees of the hospital, *In the Matter of The American Society of Anesthesiologists*, 93 F.T.C. 101 (1979). By permitting full time employment of hospital-based physicians, the Commission has correctly viewed the vertical integration of such hospital-physician services as pro-competitive. Where such integration of services is determined by a hospital to be in its competitive interest, by reducing a variety of its costs and increasing the quality of the service it provides to patients, the form of such vertical integration—by direct employment or by exclusive contract—is irrelevant to the effect of the particular hospital-physician arrangement upon competition in the provision of the service.

Burnham Hospital can compete in providing health care services only through the services rendered on its premises. The teaching of *Continental TV, Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), concerning a supplier's interest in fostering interbrand competition by diminishing the effects of intrabrand competition, should be directly applicable. No manufacturer is obligated by law to accept all prospective distributors nor to retain all distributors it has ever used. Similarly, no hospital should be required to permit any particular physician to practice at the hospital if it determines that to do so would make the hospital a less effective competitor. The hospital's competitive self-interest entitles it to determine both how it will organize itself and who it will employ (as employee or as independent contractor) to render hospital-based services to its patients.

Any theoretical benefit achieved by making every hospital a "physi-

cian's utility", as would exist if each hospital were required to organize and operate as a business forum for every qualified physician, is outweighed by increased costs of operation and the loss of substantial control over the quality of one's own "product", i.e., health care services. In such a system, the patient consumer would be the loser. Hospital services would cost more because of increased administrative costs to coordinate and manage the hospital's medical staff. And the patient's information costs would greatly increase because he or she could no longer rely on the hospital's choice of its staff as an indicator of quality.

The purpose of this request for an advisory opinion is to determine whether, by denying the request of this individual physician which Burnham Hospital believes to be in its economic self interest, the Hospital will thereby expose itself to possible prosecution by the Commission for violation of any law the Commission is charged to enforce. Moreover, with the burgeoning of suits filed against hospitals by physicians arising out of a denial or withdrawal of medical staff membership or hospital clinical privileges, Burnham Hospital believes that this question is a matter of significant public interest and involves a substantial question of law as to which there is no clear Commission or court precedent.

We request the opportunity to supplement the information as set forth in this letter insofar as Burnham Hospital, or the Commission, may determine that additional facts or analysis is appropriate.

Very truly yours,

/s/ Robert E. Nord