

# FTC Lawsuit Causes HCA and Steward Health to Abandon Utah Hospital Deal

Jordan M. Passmore, Clifford Chance US LLP

*This article is brought to you by AHILA's Antitrust Practice Group.*

On June 2, 2022, the Federal Trade Commission (FTC) issued an administrative complaint to block the proposed acquisition of Steward Health Care System, LLC (Steward) by HCA Healthcare, Inc. (HCA). The FTC argued that the proposed acquisition violated Section 5 of the FTC Act,<sup>1</sup> and Section 7 of the Clayton Act.<sup>2</sup> In its press release, the FTC alleged that "the deal would eliminate the second and fourth largest healthcare systems in the Wasatch Front region, where approximately 80 percent of Utah's residents live."<sup>3</sup> The Commission voted 5-0 to issue the administrative complaint, along with authorizing staff to seek a temporary restraining order and preliminary injunction in the U.S. District Court for the District of Utah. As discussed below, the parties ultimately decided to abandon the proposed transaction.

The FTC defined the relevant geographic market as the Wasatch Front region. The FTC then subdivided this area into three smaller markets: the Northern Market, consisting of Weber County and northern Davis County approximately as far south as Farmington, UT; the Central Market, consisting of Salt Lake County and southern Davis County approximately as far north as Centerville, UT; and the Southern Market, consisting of Utah County.

According to the FTC's complaint, HCA operates 182 hospitals in the United States, with 2021 revenues totaling \$58.8 billion. In Utah, HCA is the second largest provider of inpatient general acute care (GAC) hospital services in the Wasatch Front region with six GAC hospitals operating under its MountainStar Healthcare division. HCA also operates ambulatory surgery centers, outpatient medical imaging centers, free-standing emergency departments, and urgent care centers in the relevant geographic market. In total, HCA has approximately 947 beds in the Wasatch Front region. Steward operates 41 hospitals in the United States with revenues totaling \$5.4 billion. Steward is the fourth largest provider of inpatient GAC hospital services in the Wasatch Front region with five hospitals having 693 total beds.

The FTC defined the relevant service market as inpatient GAC hospital services sold and provided to commercial insurers and their members. Inpatient GAC hospital services include a broad cluster of medical, surgical, and diagnostic services requiring an overnight hospital stay. The FTC chose to analyze the proposed transaction using a cluster of inpatient GAC hospital services as opposed to each individual inpatient GAC hospital service since the services "are offered to patients under similar competitive conditions."<sup>4</sup>

The FTC analyzed the anticompetitive effects as taking place in two separate but related stages. In the first stage, hospitals compete for inclusion in commercial insurers' health plan provider networks. The FTC alleged that, as a result of the transaction, HCA would have increased bargaining leverage in contract negotiations, which would allow higher reimbursement rates and more favorable reimbursement terms. It would also eliminate incentives to provide discounts to gain inpatient volume. The FTC classified Steward as a low-cost provider of inpatient GAC

hospital services pre-transaction and alleged that the proposed transaction would leave Steward with little incentive to offer low rates or innovative reimbursement terms.

In the second stage, in-network hospitals compete to attract patients. The FTC claimed that, in this stage, the transaction would eliminate vital quality and service competition. Competition between HCA and Steward, the FTC argued, had led to improved facilities and services to gain patient volume and competition to recruit physicians. For example, after successfully recruiting OB/GYN physicians and orthopedists, HCA was able to orchestrate a \$70 million expansion of its Lone Peak Hospital.

According to the FTC, HCA's proximity to Steward resulted in significant head-to-head competition in the Wasatch Front region. Steward's five Utah hospitals are located within 12 miles of an HCA hospital, with some as close as seven miles away. Internal documents showed HCA and Steward as close competitors as the two companies closely tracked each other's market shares, quality scores, and strategic initiatives. Further, the FTC pointed out that HCA sought to acquire three of the five hospitals it agreed to divest in 1995 to avoid an antitrust challenge.

The FTC also alleged that the GAC market is highly concentrated in the Wasatch Front region. There are only four providers of inpatient GAC hospital services: HCA, Steward, Intermountain Healthcare, and University of Utah Health. The proposed transaction would have reduced the number of health care systems offering inpatient GAC hospital services from four to three in the Central Market, and three to two in the Northern and Southern Markets.

The FTC also utilized the Herfindahl-Hirschman Index (HHI) to calculate the market concentration post-transaction. Per the Merger Guidelines, a post-acquisition market concentration above 2,500 points, with an increase in market concentration of over 200 points, establishes a presumption of illegality. The FTC's HHI calculations indicated that the transaction would have been presumptively anticompetitive in all three sub-markets as follows:

- In the Northern Market, a post-merger HHI over 4,500 points with an increase in HHI of over 750 points
- In the Central Market, a post-merger HHI over 3,900 points with an increase in HHI of over 300 points
- In the Southern Market, a post-merger HHI over 5,800 points with an increase in HHI of over 250 points

The FTC also argued that significant barriers to entry likely would prevent new hospitals from counteracting the merger's anticompetitive effects. As building a new hospital is a multi-million dollar, multi-year endeavor, entry was "not timely, likely, or sufficient" to counteract the anticompetitive effects of the proposed acquisition. The complaint noted that the University of Utah planned to open a 187-bed hospital in Salt Lake County, but its opening was not expected until 2026 and would not have a significant impact on market concentration levels.

On June 6, 2022, Judge Tena Campbell of the U.S. District Court for the District of Utah granted a preliminary injunction to block the proposed transaction.<sup>5</sup> Ten days later, on June 16, 2022, the parties agreed to abandon the proposed transaction.

Following the abandonment of the proposed transaction, the FTC's Bureau of Competition Director Holly Vedova issued the following statement, "For the second time in a week, parties who proposed an anticompetitive hospital merger have called their deal off after the FTC filed a complaint to block the deal. This transaction, like the RWJBarnabas Health/Saint Peter's transaction that was abandoned two days ago, should never have been proposed in the first place. This should be a lesson learned to hospital systems all over the country and their

---

counsel: the FTC will not hesitate to take action in enforcing the antitrust laws to protect healthcare consumers who are faced with unlawful hospital consolidation.”<sup>6</sup>

---

<sup>1</sup> 15 U.S.C. § 45.

<sup>2</sup> 15 U.S.C. § 18.

<sup>3</sup> Fed. Trade Comm'n, Press Release, *FTC Sues to Block Merger Between Utah Healthcare Rivals HCA Healthcare and Steward Health Care System* (June 2, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-sues-block-merger-between-utah-healthcare-rivals-hca-healthcare-steward-health-care-system>.

<sup>4</sup> Complaint, *In the Matter of HCA Healthcare, Inc.*, Fed. Trade Comm'n No. 9410 (June 2, 2022).

<sup>5</sup> Order Entering Stipulated Temporary Restraining Order, *FTC v. HCA Healthcare, Inc.*, Case 2:22-cv-00375-TC (D. Utah June 6, 2022), ECF No. 6.

<sup>6</sup> Fed. Trade Comm'n, Press Release, *Statement of Bureau of Competition Director Holly Vedova Regarding the Decision of Utah Healthcare Competitors HCA Healthcare and Steward Health Care System to Abandon Their Proposed Merger* (June 16, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/06/statement-bureau-competition-director-holly-vedova-regarding-decision-utah-healthcare-competitors>.