Dr. Barbara Fields

Director, National Park Service, Ex-Officio member

The matters to be discussed at this meeting include the status of park development and planning activities. This meeting will be open to the public. However, facilities and space for accommodating members of the public are limited. Any member of the public may file with the commission a written statement concerning the matters to be discussed. Written statements may also be submitted to the Superintendent at the address above. Minutes of the meeting will be available at Park Headquarters for public inspection approximately 4 weeks after the meetings.

Dated: July 30, 1996.

Jean Belson,

Acting Field Director.

[FR Doc. 96–21363 Filed 8–21–96; 8:45 am]

BILLING CODE 4310–70–M

Mojave National Preserve, Advisory Commission; Notice of Meetings

Notice is hereby given in accordance with the Federal Advisory Committee Act that meetings of the Mojave National Preserve Advisory Commission will be held September 11, 1996; assemble at 9:30 AM at the Hole-in-the-Wall Campground, Mojave National Preserve, California. September 12, 1996, leave at 9:30 AM from the Hole-in-the-Wall Information Center, Mojave National Preserve; travel by vehicle to Zzyzx at Soda Dry Lake.

The agenda: Project Agreement for Northern and Eastern Mojave Planning Effort; Status Report update; Wild Horse and Burro Management and Soda Springs Management Options (Zzyzx).

The Advisory Commission was established by Public Law 103–433 to provide for the advice on the development and implementation of the General Management Plan.

Members of the Commission are: Micheal Attaway, Irene Ausmus, Rob Blair, Peter Burk, Dennis Casebier, Donna Davis, Nathan 'Levi' Esquerra, Gerald Freeman, Willis Herron, Eldon Hughes, Claudia Luke, Clay Overson, Norbert Riedy, Mal Wessel.

This meeting is open to the public.

Mary G. Martin,

Superintendent, Mojave National Preserve.

[FR Doc. 96–21362 Filed 8–21–96; 8:45 am]

BILLING CODE 4310–70–P

DEPARTMENT OF JUSTICE

Antitrust Division

[Civil Action No. 96–389–BMZ]

United States v. Woman's Hospital Foundation and Woman's Physician Health Organization; Public Comments and United States' Response to Public Comments

Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)–(h), the United States publishes below the comments received on the proposed Final Judgment in *United States* v. *Woman's Hospital Foundation and Woman's Physician Health Organization*, Civil Action 96–389–BMZ, United States District Court for the Middle District of Louisiana, together with the response of the United States to the comments.

Copies of the response and the public comments are available on request for inspection and copying in Room 200 of the U.S. Department of Justice, Antitrust Division, 325 7th Street, NW., Washington, DC 20530, and for inspection at the Office of the Clerk of the United States District Court for the Middle District of Louisiana, United States Courthouse, 777 Florida Street, Suite 208, Baton Rouge, Louisiana 70801.

Rebecca P. Dick,

Deputy Director of Operations, Antitrust Division.

United States' Response to Public Comments

Pursuant to the requirements of the Antitrust Procedures and Penalties Act (commonly referred to as the ''Tunney Act''), 15 U.S.C. 16(b)–(h), the United States hereby responds to public comments regarding the Consent Decree proposed to settle this proceeding in the public interest. The United States received several comments from a single source, General Health, Inc. (''General Health''). General Health does not oppose entry of the Consent Decree. Rather, one of its comments points out an inadvertent mistake in the language of the Decree which has been corrected to reflect the original intent of the parties. (A revised Final Judgment will be filed shortly with the Court as an attachment to a motion for entry of the Judgment.) General Health's two other comments suggest additional prophylactic relief. After careful consideration of these comments, the United States concludes that the additional relief suggested by General Health is not necessary because the proposed Consent Decree, as amended, will provide an effective and appropriate remedy for the antitrust violations alleged in the Complaint. Once the public comments and this Response have been published in the Federal Register, pursuant to 15 U.S.C. 16(d), the United States will move the Court to enter the Consent Decree.

On April 23, 1996, the United States filed a Complaint alleging that Defendants Woman's Hospital Foundation and Woman's Physician Health Organization (''WPHO'') violated sections 1 and 2 of the Sherman Act, 15 U.S.C. 1, 2. At the same time, the United States filed a proposed Consent Decree, a Stipulation signed by all parties agreeing to entry of the Decree following compliance with the Tunney Act, and a Competitive Impact Statement (''CIS''). On May 6, 1996, the United States filed a Notice of Amendment of Competitive Impact Statement and an Amended Competitive Impact Statement.

Pursuant to the Tunney Act, on May 3, 1996, the Defendants filed the required description of certain written and oral communications made on their behalf. A summary of the terms of the proposed Decree and the CIS and directions for the submission of written comments were published in the *Washington Post* for seven consecutive days, from April 28, through May 4, 1996, and in the *Baton Rouge Advocate* from April 30, through May 7, 1996. The proposed Consent Decree and the CIS were published in the Federal Register on May 10, 1996. 61 FR 21,489 (1996).

The 60-day period for public comments began on May 10, 1996, and expired on July 9, 1996. General Health submitted several comments; the United States is filing them as attachments to this Response. The United States has concluded that the Consent Decree, as amended, reasonably, adequately, and appropriately addresses the harm alleged in the Complaint. Therefore, following publication of the comments and this Response, the United States will move this Court to hold that entry of the proposed Consent Decree, as amended, is in the public interest.

I. Background

Woman's Hospital Foundation owns and operates Woman's Hospital, a facility with 149 staffed acute care beds. Woman's Hospital provides a range of care, including inpatient, outpatient, and home health services, to women and infants in the Baton Rouge area. It is the dominant provider of private inpatient obstetrical care in Baton Rouge.

In the late 1980's, competition among doctors for participation in managed care plans created the opportunity for the entry of other Baton Rouge area

hospitals into the market for inpatient obstetrical care. Woman's Hospital viewed the new entrants, particularly the Health Center, owned by General Health, as a serious competitive threat because General Health also owned the Gulf South Health Plans, Inc. (''Gulf South''), the largest managed care plan in Baton Rouge.

In June 1992, in an effort to stave off competition from the new Health Center, Woman's Hospital entered into negotiations with General Health offering to continue contracting at discounted hospital rates with Gulf South in return for General Health's agreement not to provide inpatient obstetrical services for the next 5 to 7 years. Woman's Hospital eventually retreated from this particular attempt to foreclose competition from the Health Center.

In 1993, Woman's Hospital made another effort to prevent new entrants from becoming significant competitors. Woman's Hospital formed an economic alliance with its medical staff in the form of defendant WPHO, a physician hospital organization. WPHO's purpose was to establish a minimum physician fee schedule and serve as a joint bargaining agent on behalf of Woman's Hospital and participating doctors with managed care payers. Through WPHO, Woman's Hospital hoped to assure the continued ''loyalty'' of its medical staff. Nearly every OB/GYN on Woman's Hospital's medical staff joined WPHO. The physicians' agreement with WPHO authorized it to contract with managed care plans on behalf of doctors at or above a minimum fee schedule. WPHO did not develop utilization review standards, and the agreement to limit price competition was not reasonably necessary to further any efforts by WPHO to encourage physicians to practice more cost effectively.

Defendants and WPHO physicians collectively obtained higher fees for OB/GYNs, deprived managed care plans of the ability to selectively contract with OB/GYNs, and prevented the development of competition for inpatient obstetrical services.

These actions, along with the additional conduct alleged in the Complaint, violated Sections 1 and 2 of the Sherman Act.

II. Response to Public Comments

The comments on the Consent Decree are from a single source, General Health, whose relationship with Woman's Hospital is discussed above. General Health does not object to the entry of the proposed Decree, rather its comments suggest changes or additions to the relief set forth. Each of General Health's comments is discussed separately below.

1. General Health's first comment refers to the language used in the definition of ''qualified managed care plan'' (''QMCP''). General Health proposes that the last phrase of Section II (G)(1)(b) be amended to add the underscored word ''or'' as follows: ''so long as Woman's Hospital *or* WPHO and they do not own an interest in another physician network * * *.'' (''They'' refers to any single physician or single pre-existing physician practice group.) The rationale for the proposed change is to make clear that the prohibition against ownership in another physician network applies to any physician network in which Woman's Hospital and ''they'' or WPHO and ''they'' are involved, rather than only to physician networks in which all three entities are involved. The United States discussed this comment with Defendants' counsel who concurs that the proposed change actually clarifies the original intent of the parties.

2. General Health's second comment suggests adding two provisions to the proposed Decree. First, General Health would add a prohibition against Woman's Hospital and WPHO participating in ''any agreement relating to prices, terms, or conditions upon which physician services are provided to patients'' except in connection with a QMCP or messenger model. Second, General Health would add a provisions enjoining consenting physicians from participating in ''any agreement relating to the prices, terms or conditions upon which Woman's Hospital provides hospital services to patients'' except in connection with a QMCP or messenger model. The rationale asserted for these proposed changes is that the Final Judgment will not prevent the defendants and consenting physicians from ''informally'' engaging in the same types of anticompetitive conduct alleged in the Complaint.

The United States believes that the Court should enter the proposed Consent Decree without these additions. The proposed ''addition'' to the injunctive relief against Woman's Hospital and WPHO neither differs substantively from, nor adds to, the relief already provided. Contrary to General Health's contention, the proposed Final Judgment does not permit Woman's Hospital and WPHO to engage in ''informal'' anticompetitive conduct. Specifically, Section IV(A)(1) enjoins Woman's Hospital and WPHO from ''directly, or through any agent, organization or other third party, expressing views on, or conveying information on, competing physicians' prices or other terms and conditions, or negotiating on behalf of competing physicians.'' Any attempt by Woman's Hospital or WPHO informally to enter into an agreement relating to prices or other terms and conditions for the provision of competing physicians' services would violate this Section of the proposed Decree.

General Health's suggestion to prohibit consenting physicians from participating in agreements involving Woman's Hospital's fees would add a substantive provision that is inappropriate and unnecessary. This additional injunctive relief would prevent a single consenting physician from participating in a managed care plan controlled solely by another area hospital for the purpose of competing with other managed care companies simply because Woman's Hospital was also participating in the other hospital's plan. Such circumstances do not necessarily raise competitive concerns. In fact, to the extent that formation of such a plan offers consumers additional choice in the marketplace, its formation could be procompetitive.

Moreover, the allegations in the Complaint directed at physicians involve agreements among competing physicians concerning the prices charged for physician services. The United States has not alleged any anticompetitive conduct resulting from an agreement by physicians regarding the fees charged for Woman's Hospital services. The injunctive relief against consenting physicians in Section IV(B)(2) provides appropriate and adequate relief by prohibiting them from ''participating in or facilitating any agreement among competing physicians on fees or other terms and conditions for physician services, including the willingness of physicians to contract on any terms with particular payers or to use facilities competing with Woman's Hospital's facilities * * *.'' In sum, the proposed Decree provides appropriate and adequate relief for the violations alleged in the Complaint.

3. General Health's third comment suggests that any network operated by Defendants based on a messenger model should be subject to the 30% physician participation limitation placed on a QMCP and the requirement of prior written approval for its formation from the Department of Justice.

These additional limitations are inappropriate. The messenger model in the proposed Consent Decree uses an agent or third party to facilitate the transfer of information concerning prices and other competitively sensitive information between individual physicians and purchasers of physician

services. The critical feature of a properly devised and operated messenger model, as defined by the Decree, is that individual providers make their own separate decisions about whether to accept or reject a purchaser's proposal, independent of the other physicians' decisions and without any influence by the messenger. Thus, the messenger model in the Decree already contains adequate safeguards against its being used as a vehicle for organizing a physician boycott. As explained in the CIS, the messenger may not coordinate individual providers' responses to a particular proposal, disseminate to physicians the messenger's or other physician's views or intentions concerning the proposal, act as an agent for collective negotiation and agreement, or otherwise serve to facilitate collusive behavior. CIS at 18.

Because a QMCP, in contrast to a messenger model, allows for some collective decision-making among competing physicians, including agreements among competitors on the prices for their services, a QMCP presents a greater risk of collusive behavior. For this reason, in the circumstances of this case, the proposed Decree requires that defendants obtain prior approval from the Department of Justice to operate a QMCP and limits physician ownership participation to no more than 30% in any relevant market.

III. The Legal Standard Governing the Court's Public Interest Determination

The Tunney Act directs the Court to determine whether entry of the proposed Decree ''is in the public interest.'' 15 U.S.C. § 16(e). In making that determination, ''the court's function is not to determine whether the resulting array of rights and liabilities is one that will *best* serve society, but only to confirm the resulting settlement is within the *reaches* of the public interest.'' *United States* v. *Western Elec. Co.*, 993 F.2d 1572, 1576 (D.C. Cir.), *cert. denied*, 114 S. Ct. 487 (1993) (internal quotation and citation omitted).[1]

The Court should evaluate the relief set forth in the Decree in light of the claims alleged in the Complaint and should enter the Decree if it falls within the Government's ''rather broad discretion to settle with the defendant within the reaches of the public interest.'' *United States* v. *Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995).

The Court is not ''to make *de novo* determination of facts and issues.'' *Western Elec.*, 993 F.2d at 1577. Rather, ''[t]he balancing of competing social and political interests affected by a proposed antitrust decree must be left, in the first instance, to the discretion of the Attorney General.'' *Id.* (internal quotation and citation omitted throughout). In particular, the Court must defer to the Department's assessment of likely competitive consequences, which it may reject ''only if it has exceptional confidence that adverse antitrust consequences will result—perhaps akin to the confidence that would justify a court in overturning the predictive judgments of an administrative agency.'' *Id*[2]

The Tunney Act does not empower the Court to reject the remedies in the proposed Decree based on the belief that ''other remedies were preferable.'' *Microsoft*, 56 F.2d at 1460. To a great extent it is the realities and uncertainties of litigation that constrain the role of courts in Tunney Act proceedings. *See United States* v. *Gillette Co.*, 406 F. Supp. 713, 715–16 (D. Mass. 1975). As Judge Greene has observed:

> If courts acting under the Tunney Act disapproved proposed consent decrees merely because they did not contain the exact relief which the court would have imposed after a finding of liability, defendants would have no incentive to consent to judgment and this element of compromise would be destroyed. The consent decree would thus as a practical matter be eliminated as an antitrust enforcement tool, despite Congress' directive that it be preserved.

United States v. *American Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982), *aff'd sub nom., Maryland* v. United States, 460 U.S. 1001 (1983) (Mem.). Indeed, where, as here, the Consent Decree comes before the Court at the time the Complaint is filed, ''the district judge must be even more deferential to the government's predictions as to the effect of the proposed remedies * * *.'' *Microsoft*, 56 F.3d at 1461.

IV. Conclusion

As required by the Tunney Act, the United States will publish the public comments and this Response in the Federal Register. After such publication, the United States will notify this Court and move for entry of the proposed Consent Decree based on this Court's determination that the Decree is in the public interest.

Respectfully submitted,

Mark J. Botti, Pamela C. Girardi,

U.S. Department of Justice, Antitrust Division, Liberty Place—Suite 400, 325 7th St., N.W., Washington, D.C. 20530, (202) 307–0827.

L.J. Hymel,

United States Attorney.

By: _____

John J. Gaupp LBN # 14976,

Assistant United States Attorney, 777 Florida St., Suite 208, Baton Rouge, LA 70801, (504) 389–0443, Local Counsel.

June 25, 1996

Pam Girardi
United States Department of Justice
Health Care Task Force
Room 434
325 7th St., N.W.
Washington, D.C. 20530

Dear Ms. Girardi: As we discussed over the phone last week, we would like to comment, on behalf of our client General Health, Inc., on the Department's proposed consent order with Woman's Hospital and Woman's Physician Hospital Organization. We will formally submit our comments before the comment period expires on July 9th. However, I have attached a draft of our comments for your information, and to facilitate an informal discussion of our proposed comments. I would appreciate having an opportunity to discuss our comments with you before we formally submit them. I can be reached at (202) 861–1888. Thank you very much for your consideration.

Sincerely,

Michael R. Bissegger

II.

Definitions

(C) ''Qualified managed care plan'' means an organization that is owned, in whole or in part, by either or both of the defendants, offers a provider panel and satisfies each of the following criteria:

(1) Its owners or not-for-profit members (''members'') who compete with other owners or members or with subcontracting physicians participating in the plan, (a) [NO CHANGE] and (b) in combination with the owners and members of all other physician networks in which Woman's Hospital, WPHO or any of them who own an interest constitute no more than 30% of the physicians in any relevant physician market, except that it may include any single physician, or any single preexisting physician practice group for each relevant physician market, so long as Woman's Hospital or WPHO and they

[1] The *Western Electric* decision concerned a consensual modification of an existing antitrust decree. The Court of Appeals assumed that the Tunney Act was applicable.

[2] The Tunney Act does not give a court authority to impose different terms on the parties. *See, e.g., United States* v. *American Tel. & Tel. Co.*, 552 F. Supp. 131, 153 n.95 (D.D.C. 1982), *aff'd sub nom. Maryland* v. *United States*, 460 U.S. 1001 (1983) (Mem.); *accord* H.R. Rep. No. 1463, 93d Cong., 2d Sess. 8 (1974). A court, of course, may condition entry of a decree on the parties' agreement to a different bargain, *see, e.g., AT&T*, 552 F. Supp. at 225, but if the parties do not agree to such terms, the court's only choices are to enter the decree the parties proposed or to leave the parties to litigate.

do not own an interest in another physician network;

(2) [NO CHANGE]

(3) [NO CHANGE]

(4) [NO CHANGE]

(5) [NO CHANGE]

The organization * * * [NO CHANGE]

[RATIONALE FOR CHANGE]

The word ''or'' (at the bottom of page 7) is needed to make it clear that the prohibition identified after the phrase ''so long as'' (at the bottom of page 7) is against any physician network in which two of the three parties (*e.g.*, Woman's Hospital and the single physician or preexisting physician group practice, but not WPHO), rather than only prohibiting a physician network in which all three are involved (*e.g.*, Woman's Hospital, WPHO, and a single physician or preexisting physician group).

IV.

Injunctive Relief

(A) Woman's Hospital and WPHO are enjoined from:

(7) Directly, or indirectly, entering into, or participating in, any agreement relating to the prices, terms, or conditions upon which physician services are provided to patients; unless such an agreement is necessary for the formation, organization, or operation of a qualified managed care plan or messenger model as defined herein, and approved in writing by the Department of Justice. Nothing in this paragraph IV(A)(7) prevents Woman's Hospital or WPHO from entering an agreement with a managed care plan or network for the provision of hospital services, provided that such managed care plan or network is not owned or controlled by Woman's Hospital, WPHO, or any consenting physician.

(B) Each consenting physician is enjoined from:

(3) Directly, or indirectly, entering into, or participating in, any agreement relating to the prices, terms, or conditions upon which Woman's Hospital provides hospital services to patients; unless such an agreement is necessary for the formation, organization, or operation of a qualified managed care plan or messenger model as defined herein, and approved in writing by the Department of Justice.

[RATIONALE FOR CHANGE]

The formation of WPHO and the other acts included in the complaint represent the continuation of a long-standing pattern of concerted action among many of the physicians in the community and Woman's Hospital. The restrictions and limitations placed on the defendants and consenting physicians go a long way toward preventing future agreements on price, concerted refusals to deal, and other forms of anticompetitive concerted action undertaken through a formal agreement or organization such as WPHO. However, without the type of prohibition or fencing in provision suggested above, the defendants and consenting physicians will remain relatively free to informally engage in the same types of anticompetitive conduct as alleged in the complaint through other means.

Given the fact that the defendants and consenting physicians have a history of coordinating their actions and have already ironed out a lot of the mechanics of concerted action, it would be particularly easy for these defendants and consenting physicians to continue their previous course of conduct without creating the formal agreements and organizational structure prohibited by the Final Order. Consequently, we believe it is imperative that the Final Order address the potential for the traditional, informal price agreements, boycotts, etc. that have been such a significant part of antitrust enforcement for almost a century.

(D) Nothing in this Final Judgment prohibits the defendants or the consenting physicians from

(1) Forming, operating, owning an interest in, or participating in (a) a messenger model (provided such messenger model satisfies each of the criteria used to define a qualified managed care plan in II.(G)), or (b) a qualified managed care plan, if defendants obtain prior written approval from the Department of Justice, which will not be withheld unreasonably, or

(2) [NO CHANGE]

[RATIONALE FOR CHANGE]

The Department's complaint alleges that the defendants engaged in two types of anticompetitive behavior: an agreement on price among and between physicians and Woman's Hospital; and an agreement among and between physicians and Woman's Hospital regarding with whom physicians would deal (only those payers willing to negotiate with WPHO), and would not deal (General Health's Health Center). The provisions in the Final Judgement relating to qualified managed care plans clearly address both the potential for price fixing and for collective agreements not to deal. However, while the messenger model provisions contain in the Final Judgement do apparently address the potential for price fixing agreements, the Final Judgement is ambiguous as to whether or not the messenger model provisions are subject to the limitations placed on qualified managed care plans that prevent or hinder the formation of collective agreements not to deal. Without similar limitations, a messenger model could be a vehicle for providers to collectively agree not to deal.

The Competitive Impact Statement would apparently allow Women's Hospital and WPHO to use a messenger model that is not subject to the limitations, including the percentage of physicians that can participate, that are placed on the defendants' development of a qualified managed care plan. We believe that any negotiating organization developed by the defendants using the messenger model should be subject to the same constraints as those placed on a qualified managed care plan, and that the language of the Final Judgement and Competitive Impact Statement should be modified to make that limitation explicit.

The price-fixing protections contained in the definition of the messenger model do not adequately protect against the messenger model becoming the means for boycott activity. A physician network organized and operating according to the messenger model defined in the Final Judgement is indeed, less likely to lead to price fixing behavior, but it is wholly inadequate to prevent or even significantly hinder attempts among the participants to collectively refuse to deal. For example, the messenger model as defined would not prohibit the messenger from informing participating physicians about the number of physicians that have agreed to participate in a given plan, as long as the messenger does not covey any information about prices or terms. Similarly, the messenger would not be prohibited from communicating to physicians how many other physicians were generally participating in the network. The messenger would also be allowed to provide physicians with a comparison of offers from various payers, which could easily become a means for conveying to physicians which payer contracts are favored, and which ones are not.

Obviously, the language of the messenger model provisions could be modified to address the problems noted above. However, it would be extremely difficult to ascertain whether defendants are complying with the substantive protections included in the messenger model provisions. Ensuring or verifying compliance is particularly important given the fact that WPHO has already

been used as a vehicle to boycott the new Health Center. Subjecting a messenger model network to a 30% limit on participation, as well as to the other qualified managed care plan limitations, is not only the most effective way to prevent a boycott from being effective, but also makes compliance easily verifiable.[1] Allowing defendants to operate a messenger model that does not require DOJ approval and does not limit the number of physicians who can participate, would be imprudent and would jeopardize the efficacy of the Final Judgment. Consequently, we believe that any network operated by defendants based on a messenger model should be subject to all the limitations placed on a qualified managed care plan.

A 30% participation limitation on the messenger model would also have a significant deterrent effect on any attempts to use the messenger model as a means to coordinate pricing because managed care plans competing with the Woman's Hospital/WPHO qualified managed care plan could exclude the 30% of the doctors involved in the price fix. Consequently, there would be little incentive for only 30% of the physicians to agree on prices. Therefore, the 30% participation limit goes a long way toward preventing such an agreement from taking place.

If it is important to prevent both price fixing and boycott activity via the formation of a managed care plan, it is illogical to address only the price fixing potential inherent in a negotiating organization of physician and hospital providers. The use of the messenger model alone does not address the potential for such a negotiating organization to be the vehicle for organizing a boycott. Without limitations such as those placed on qualified managed care plans, a messenger model could be a vehicle for providers to collectively agree not to deal. Similarly, we cannot see any distinction between a messenger model and qualified managed care plan that justifies not requiring prior written DOJ approval for operating a messenger model. Consequently, we believe that the messenger model should be limited to participation by 30% of the physicians in any relevant market, and should be subject to the other restrictions placed on qualified managed care plans. Finally, we recommend that the defendants and consenting physicians also be required to obtain prior written approval from the DOJ before forming, operating, owning an interest in, or participation in a messenger model.

[1] While 30% of the physicians in a market could attempt a boycott, it is unlikely they would try because a boycott consisting of only 30% of the physicians in any relevant market would undoubtedly, and obviously fail.

Certificate of Service

I, Pamela Girardi, hereby certify that copies of the United States' Response to Public Comments in *U.S.* v. *Women's Hospital Foundation and Woman's Physician Health Organization,* Civ. No. 96–389–B–MZ were served on the 15th day of August 1996 by first class mail to counsel as follows:

John J. Miles,

Ober, Kaler, Grimes & Shriver, Fifth Floor, 1401 H Street, NW., Washington, DC 20005.

Toby G. Singer,

Jones, Day, Reavis & Pogue, 1450 G Street, NW., Washington, DC 20005.

Pamela C. Girardi.

[FR Doc. 96–21432 Filed 8–21–96; 8:45 am]

BILLING CODE 4410–01–M

Drug Enforcement Administration

Mitchell F. West, D.O., Denial of Application

On January 24, 1996, the Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration (DEA), issued an Order to Show Cause to Mitchell F. West, D.O., (Respondent) of Bethel Park, Pennsylvania, notifying him of an opportunity to show cause as to why DEA should not deny his application, dated July 7, 1993, for a DEA Certificate of Registration pursuant to 21 U.S.C. 823(f), as being inconsistent with the public interest. The order also notified the Respondent that, should no request for a hearing be filed within 30 days, the hearing right would be deemed waived. The order was mailed by certified mail, and a signed return receipt dated January 30, 1996, was received by the DEA. However, no request for a hearing or any other reply was received by the DEA from the Respondent or anyone purporting to represent him in this matter. Subsequently, on March 25, 1996 the investigative file was transmitted to the Deputy Administrator for final agency action.

Therefore, the Deputy Administrator, finding that (1) thirty days have passed since the issuance of the Order to Show Cause, and (2) no request for a hearing has been received, concludes that the Respondent is deemed to have waived his hearing right. After considering relevant material from the investigative file in this matter, the Deputy Administrator now enters his final order without a hearing pursuant to 21 CFR 1301.54(e) and 1301.57.

The Deputy Administrator finds that, in July of 1992, the Respondent voluntarily surrendered his DEA Certificate of Registration prior to receiving a misdemeanor conviction in the Court of Common Pleas of Allegheny County, Pennsylvania, for prescribing controlled substances ''not in good faith in the course of this professional practice.'' On July 7, 1993, the Respondent applied for a new Certificate of Registration, disclosing his prior voluntary surrender and for circumstances surrounding that event.

Further investigation disclosed that on September 23, 1993, and on October 8, 1993, the Respondent unlawfully wrote prescriptions without a legitimate medical purpose, and obtained possession of Schedule II controlled substances containing oxycodone. Consequently, on May 16, 1994, the Respondent pleaded guilty to two counts of unlawful possession of controlled substances by misrepresentation, in violation of the Pennsylvania Controlled Substance, Drug, Device and Cosmetic Act, (Drug Act) resulting in a state felony conviction. The investigation revealed that the Respondent had a substance abuse problem, and as part of his court sentence, he was ordered to seek evaluation for substance abuse and to ''follow all treatment recommendations.''

Also, on July 20, 1994, the Respondent pleaded guilty to one count of delivering a controlled substance in violation of the Drug Act, again a felony offense. Consequently, on December 5, 1994, the State Board of Osteopathic Medicine (Board) ordered the Respondent to ''cease and desist immediately from the practice of osteopathic medicine in the Commonwealth of Pennsylvania'' because of his felony convictions. From these facts, the Deputy Administrator infers that, since the Respondent is not authorized to practice medicine in Pennsylvania, he also lacks authorization to handle controlled substances in that state.

The Drug Enforcement Administration cannot register a practitioner who is not duly authorized to handle controlled substances in the state in which he conducts his business. *See* 21 U.S.C. 823(f) (authorizing the Attorney General to register a practitioner to dispense controlled substances only if the applicant is authorized to dispense controlled substances under the laws of the state in which he or she practices); and 802(21) (defining ''practitioner'' as one