In the Matter of the Acquisition of Control of ConnectiCare of Massachusetts, Inc., by Health Insurance Plan of Greater New York ("HIP-NY") and its wholly-owned subsidiaries, HIP Holdings, Inc. and Hydrogen Subsidiary, Inc.
Docket Number F2004-02

Final Order

Introduction

On January 19, 2005, pursuant to G.L. c. 176G, §27, a Public Hearing was held regarding the application by Health Insurance Plan of Greater New York, a New York not-for-profit corporation; HIP Holdings, a Delaware corporation; and Hydrogen Subsidiary, Inc., a Connecticut corporation, seeking approval by the Massachusetts Commissioner of Insurance ("Commissioner") of their proposal to acquire control of ConnectiCare of Massachusetts, Inc., a Massachusetts domiciled stock corporation ("the proposed acquisition").

In the course of this Final Order, Health Insurance Plan of Greater New York may be referred to as "HIP-NY." HIP Holdings, Inc. may be referred to as "HIP Holdings." Hydrogen Subsidiary, Inc. may be referred to as "Hydrogen." HIP-NY and HIP Holdings collectively may be referred to as "HIP." Furthermore, HIP-NY, HIP Holdings and Hydrogen collectively may be referred to as "the Applicants." ConnectiCare of Massachusetts, Inc. may be referred to as "CMI" or "the HMO."

Procedural History

Pursuant to G.L. c. 176G, §27, the Massachusetts statute governing the acquisition of control of a Massachusetts health maintenance organization, the Commissioner on December 21, 2004 issued a Notice of Hearing ("Hearing Notice") concerning the Applicants' request for approval of their proposal to acquire control of CMI.

The Hearing Notice stated that a public hearing would be conducted at the Division of Insurance ("Division") on January 19, 2005 to afford the Applicants, CMI, persons to whom the Division sends notice, and all persons whose interest may be affected by the acquisition of control of the HMO, the opportunity to present evidence, examine and cross-examine witnesses, and offer oral and written arguments in connection therewith. The Hearing Notice stated that such persons also would have the opportunity to conduct discovery proceedings in the same manner as is presently allowed in the Superior Court Department of the Trial Court, such discovery proceedings to be concluded not later than three (3) days before the commencement of the public hearing. The Hearing Notice required any person whose interest may be affected by the acquisition of control of the HMO and who wished to participate in the public hearing to submit to the Division a Notice of Intent to Participate no later than three (3) days prior to the commencement of the public hearing. The Hearing Notice further required that those claiming an interest needed to specify both the person's basis for the asserted interest as well as whether he or she intended to make an oral statement, to present evidence or to cross-examine.

The Hearing Notice was published in the Springfield *Republican* on December 30, 2004 and in the Boston *Globe* on December 31, 2004.

On January 12, 2005, Greater Springfield Senior Services, Inc. ("GSSSI"), represented by Lawrence J. Kirsch of IMR Health Economics, LLC, who is not an attorney, filed a document styled "Motion to Intervene as a Party" ("GSSSI's Initial Motion"), identifying itself as a premium-paying policyholder under a group contract with CMI.

On January 13, 2005, HIP-NY filed a document titled "Memorandum in Opposition to [GSSSI's] Motion to Intervene as a Party," in which it argued, among other issues, that G.L. c. 176G, §27 does not provide for the type of motion made by GSSSI. HIP-NY also asserted that GSSSI's Initial Motion did not comply with the procedural or the substantive requirements for participation in this proceeding.

In consideration of the short time left before the date of the public hearing, and because neither GSSSI nor HIP-NY had requested oral argument on GSSSI's Initial Motion, I ruled on GSSSI's Initial Motion based on the written submissions that had been filed. By an Order issued January 14, 2005, I denied GSSSI's Initial Motion to the extent that GSSSI sought to be allowed to intervene as a party. *Order on the "Motion to Intervene as a Party" of Greater Springfield Senior Services, Inc.* To the extent that GSSSI's Initial Motion constituted a Notice of Intent to Participate and sought permission to conduct pre-hearing discovery and cross-examination of the parties, I found that in part it was untimely and in part it was inadequate.

With respect to conducting pre-hearing discovery, the lateness of GSSSI's Initial Motion meant that it had acted too late to comply with the timeframe for discovery that is established both by the statute -- G.L. c. 176G, §27(d)(2) -- and by the Hearing Notice. Therefore, I observed that GSSSI, as a practical matter, had foreclosed itself from pre-hearing discovery since such discovery must have been *concluded* not later than three (3) days *before* the *commencement* of the public hearing pursuant to §27. [1]

On the other hand, in light of the clear manifestation in G.L. c. 176G, §27 of a Legislative intent that public participation is to be accommodated in health maintenance organization acquisition matters, I treated GSSSI's Initial Motion as constituting a notice of intent to participate, a procedure that was discussed in the Hearing Notice. However, I found that GSSSI's Initial Motion was inadequate in that "fairness requires that GSSSI identify for the Applicants . . . the nature and substance of the cross-examination that it seeks to pursue in this docket."

The reasons that GSSSI should give some advance indication of the nature and substance of the cross-examination that it seeks to pursue are many, and involve not only fairness to the Applicants but also the efficient handling of matters that come before the Division. Only when a person such as GSSSI identifies the nature and substance of the cross-examination that it intends to undertake, can the Applicants make sure that the persons most knowledgeable about the areas

[1] G.L. c. 176G, §27(d)(2) provides in relevant part as follows:

> At the hearing, the person filing the statement, the health maintenance organization, any person to whom notice of hearing was sent, and any other person whose interest may be affected thereby, shall have the right to present evidence, examine and cross-examine witnesses, offer oral or written arguments in connection therewith, and shall be entitled to conduct discovery proceedings in the same manner as is presently allowed in the superior court department of the trial court. All discovery proceedings shall be concluded not later than 3 days before the commencement of the public hearing.

of inquiry or concern are present and ready to respond to the cross-examination questions on the day of the scheduled public hearing. The efficient administration of public hearings in the Division includes an interest in avoiding unnecessary postponements or continuances. It may be noted that the Legislature when it enacted §27(d)(2) seems to have been particularly responsive to the possible time sensitivities that may impact an acquisition process. The timely identifying of the nature and substance of proposed cross-examination also enables a determination to be made about the relevance and materiality of the proposed cross-examination. With respect to §27, for example, the Legislature has required the Commissioner to approve proposed acquisitions unless certain findings are made.

Accordingly, the Order issued on January 14, 2005 granted GSSSI an opportunity to remedy these deficiencies. GSSSI was authorized to file, no later that 2:00 p.m. on January 18, 2005, a supplementary statement specifying the nature of its interest that would be affected by the acquisition of the HMO and the nature and substance of the cross-examination of the parties that it desired to undertake.

On January 17, 2005, GSSSI filed a "Motion for Reconsideration of Greater Springfield Senior Services, Inc.'s Motion to Intervene as a Party."

On January 18, 2005, GSSSI filed a second document, titled "Greater Springfield Senior Services Inc.'s Motion for Reconsideration," consisting of two pages and a replacement page for what it had submitted on January 17, 2005. This replacement page changed the title of what GSSSI had submitted on January 17, 2005 to "Memorandum in Support of Motion for Reconsideration of Greater Springfield Senior Services, Inc.'s Motion to Intervene as a Party." On January 18, 2005, GSSSI also filed a document styled "Amended Notice of Participation" ("Amended Notice of Participation").

On January 18, 2005, HIP-NY filed a document titled "Memorandum in Opposition to Motion for Reconsideration."

At the public hearing held on January 19, 2005, the Applicants were represented by David A. Garbus, Esq.; Theodore J. Tucci, Esq. and Ed Samorajczyk. Esq. The Division was represented by Abigail P. Morgan, Esq. GSSSI was represented by Lawrence J. Kirsch.

Testifying at the public hearing were the following: Marcel Gus Gamache, Chief Executive Officer of ConnectiCare; Daniel McGowan, President and Chief Operating Officer of

HIP; Michael Fullwood, Executive Vice President, Chief Financial Officer, General Counsel and Corporate Secretary of HIP-NY; Thomas Tran, Senior Vice President and Chief Financial Officer of ConnectiCare, and Gail Bogossian, Vice President and General Counsel of ConnectiCare.

At the public hearing, GSSSI presented oral arguments in support of its motions. It asked for reconsideration of the Order issued on January 14, 2005 insofar as it ruled against GSSSI's request for full party status and for leave to file prehearing discovery. GSSSI continued to assert that it was entitled to party status, citing three reasons in support of this assertion.

First, GSSSI argued that the January 19 hearing was held not only pursuant to G.L. c. 176G, §27, but also was an "adjudicatory hearing" pursuant to G.L. c. 30A. GSSSI argued that it was entitled to status as a "full party" in this docket because Chapter 30A defines "party" in part as "any other person who as a matter of constitutional right or by any provision of the General Laws is entitled to participate fully in the proceeding."[2]

Second, GSSSI asserted that it was an abuse of the Presiding Officer's discretion not to acknowledge GSSSI as an intervenor and authorize it to participate as a full party, since "[t]here was no reason for not allowing Greater Springfield to participate other than a conclusion that the form of its notice filed was inadequate, but that certainly was curable and indeed was cured in the amended notice of participation." Tr. 17. GSSSI stated that the Presiding Officer should have granted GSSSI, even as a matter of discretionary authority, the right to participate as a full party.

Third, on the issue of prehearing discovery, GSSSI argued that the Presiding Officer's ruling that the necessary filing was untimely was wrong because both the Hearing Notice and the statute indicate that a notice of participation or "what we [GSSSI] styled a motion to intervene as a party" (Tr. 19) must be made within three (3) days of the commencement of the public hearing, and that GSSSI had made its motion within seven (7) days of the commencement of the public hearing. GSSSI asserted that it was prepared immediately to file requests for documents and interrogatories. However, GSSSI proffered no such already-prepared requests for documents and interrogatories in support of this assertion. GSSSI also argued that it was within the Presiding Officer's authority to either commence the public hearing and then immediately continue it, in

[2] G.L. c. 30A, §1(3).

order to allow discovery to proceed, or to delay the public hearing so that discovery could proceed.

In response, the Applicants argued that GSSSI was not eligible for party status. They argued that the public hearing in this docket is governed by G.L. c. 176G, §27 and no other statute. Asserting that when the Massachusetts legislature writes statutes, it knows the difference between designating an entity as a party versus designating an entity as an interested participant, the Applicants stated that there is nothing in §27 that provides any legal basis for GSSSI's request to be designated as a party and to be afforded party status in this docket. Thus, the Applicants asserted, the Presiding Officer would have no discretion to afford GSSSI party status in this proceeding.

The Applicants also argued that GSSSI's request to be recognized as a party is a red herring, since whether GSSSI is afforded party status or is designated as an interested participant, §27(d)(2) clearly gives it the right to cross-examine witnesses, to introduce evidence and to make oral statements and arguments. The Applicants argued that GSSSI does not qualify for party status under Chapter 30A or any other statute or law.

With respect to the issue of discovery, the Applicants asserted that §27(d)(2) provides that discovery must be initiated, undertaken and concluded three (3) days prior to the commencement of the public hearing. Moreover, the Applicants observed that present at the hearing were a court reporter, several representatives of the Division, audience members and representatives of the Applicants, all ready immediately to proceed with the public hearing. The Applicants stated that it would be highly prejudicial to all these person to delay or postpone the public hearing and allow discovery proceedings to take place. Furthermore, the Applicants stated that there is no authority for such a process to take place under the clear language of §27 and the Hearing Notice that was issued.

With respect to the Amended Notice of Participation that GSSSI filed, the Applicants indicated that they had no wish to foreclose the opportunity for GSSSI to be afforded participant status in this proceeding and to participate in this docket, including cross-examination of its witnesses.

Procedural Rulings

After careful consideration of the arguments made by GSSSI and the Applicants at the January 19 hearing, I made the following observations and rulings on the record.

I held that the §27 hearing in this docket is not a Chapter 30A "adjudicatory hearing," but that, even if it were, I agreed with the observation of the Applicants that GSSSI seemed to believe that party status would affect its rights to engage in prehearing discovery. On the contrary, I found that GSSSI's rights to prehearing discovery in this docket are the rights conferred by §27. Moreover, in this regard, I found that GSSSI's suggestion that the public hearing be continued so as to allow more time for pre-hearing discovery clearly is contrary to the plain language of §27(d)(2), which (a) requires that all discovery proceedings shall be *concluded* not later than three (3) days *before the commencement* of the §27 public hearing and (b) mandates that the §27 public hearing shall be held within thirty (30) days after the statement required by §27(a) is filed. Accordingly, on the day of the public hearing the period for discovery is already past. I also observed that I was not sure that GSSSI had appreciated the fact that discovery not only involves the asking of questions, but involves as well the answering of the questions; that it does not involve just the asking for documents, but the providing of the documents. Only when both the question and answer and the request and the production have been accomplished has the discovery been concluded. I noted that this was why I observed in the Order issued on January 14, 2005 that, as a practical matter, GSSSI was getting involved too late in this docket to be able to conduct pre-hearing discovery.

With respect to denoting GSSSI as a party to this proceeding, I stated that there was nothing in §27 that suggests or provides that someone in GSSSI's position can be a party to this proceeding.

Although I denied GSSSI status as a party, I ruled that GSSSI, based on its Amended Notice of Participation, had complied with what was required by §27 to establish that GSSSI is a "person whose interest may be affected by the acquisition of control" of CMI. Accordingly, I ruled that GSSSI had the rights granted such a person by §27(d)(2). Regarding the two matters listed in GSSSI's Amended Notice of Participation, I found that GSSSI's request to conduct prehearing discovery was too late. GSSSI's request to conduct cross-examination was granted,

such cross-examination to be done in its capacity as a person whose interest may be affected by the acquisition of CMI.

After careful consideration of the arguments made by GSSSI and the Applicants in their post-hearing memoranda, we make these further observations and findings about GSSSI's motions.

With respect to GSSSI's argument that this proceeding is a proceeding under G.L. c. 30A, we note that the definition of "adjudicatory hearing" for purposes of Chapter 30A is as follows:

> (1) "Adjudicatory proceeding" means a proceeding before an agency in which the legal rights, duties or privileges of specifically named persons are required by constitutional right or by any provision of the General Laws to be determined after opportunity for an agency hearing. Without enlarging the scope of this definition, adjudicatory proceeding does not include (a) proceedings solely to determine whether the agency shall institute or recommend institution of proceedings in a court; or (b) proceedings for the arbitration of labor disputes voluntarily submitted by the parties to such disputes; or (c) proceedings for the disposition of grievances of employees of the commonwealth; or (d) proceedings to classify or reclassify, or to allocate or reallocate, appointive offices and positions in the government of the commonwealth; or (e) proceedings to determine the equalized valuations of the several cities and towns; or (f) proceedings for the determination of wages under section twenty-six T of chapter one hundred and twenty-one.

G.L. c. 30A, §1(1). We are not persuaded that a proceeding pursuant to G.L. c. 176G, §27 determines the legal rights, duties or privileges of specifically named persons. Instead, following a §27 public hearing, the Commissioner either approves or does not approve a proposed change of control of a Massachusetts health maintenance organization. We continue to hold that this proceeding is not an "adjudicatory hearing" pursuant to Chapter 30A.

We note that GSSSI's argument is based on the premise that it can argue backwards from the participation rights that G.L. c. 176G, §27(d)(2) grants it as a "person whose interest may be affected" by the proposed acquisition transaction (the right to present evidence, examine and cross-examine witnesses, offer oral or written arguments in connection therewith, and to conduct discovery proceedings in the same manner as is presently allowed in the superior court department of the trial court) to obtain status as a party, since GSSSI asserts that these rights are the rights that define a "party" under G.L. c. 30A. In this regard, G.L. c. 30A(1)(3) provides as follows:

> "Party" to an adjudicatory proceeding means:- (a) the specifically named persons whose legal rights, duties or privileges are being determined in the proceeding; and (b) any other person who as a matter of constitutional right or by any provision of the General Laws is entitled to participate fully in the proceeding, and who upon notice as required in paragraph (1) of section eleven makes an appearance; and (c) any other person allowed by the agency to intervene as a party. Agencies may by regulation not inconsistent with this section further define the classes of persons who may become parties.

We find that if the Legislature had intended for a "person whose interest may be affected" by the transaction under review pursuant to G.L. c. 176G, §27 (sometimes referred to hereinafter as "interested persons") to be a party, that it would have provided for this by clearly stating that such persons could be parties. Instead, in §27(d)(2) the Legislature enumerated certain rights that such interested persons would be able to exercise in connection with a public hearing pursuant to G.L. c. 176G, §27. This enumeration of rights would not be necessary if these interested persons could become parties, because the rights and powers of parties are clearly understood under the law. Furthermore, although §27(d)(2) grants extensive rights to a person whose interests may be affected by the acquisition of control of a Massachusetts health maintenance organization, it does not give the right of appeal following the §27 public hearing to such interested persons, an important right that a party enjoys. *See generally* Ginther v. Commissioner of Insurance, 427 Mass. 319 (1998); *compare* G.L. 176K, §7(i) ("Any subscriber . . . or any other person aggrieved by any final action, order, finding, or decision of the commissioner [of insurance] under this section may . . . file a petition in the supreme judicial court . . . for a review of such action."). Indeed, it is interesting to note that GSSSI itself identified appeal rights as an important aspect of being a party,[3] but did not explain how §27 gives party status to "persons whose interests may be affected" when the Legislature clearly did not delineate appeal rights as one of the rights such interested persons would have in §27 proceedings.

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[3] GSSSI stated the following during the public hearing:

> Party status would entitle Greater Springfield, I presume, to enter into settlement negotiations with the applicants, it also would preserve appellate rights -- important appellate rights, and I -- not being a lawyer, I don't know all of the things, but I certainly would know enough to know that there is a difference between being a full party in an adjudicatory proceeding of this sort and being an interested participant.

Tr. 26.

From a broader perspective, when the nature of the interest that an entity such as GSSSI has in the acquisition of control of a health maintenance organization of which it is a policyholder is considered and weighed, it makes sense for an interested person such as GSSSI not to be granted the status of a party in §27 proceedings. A group policyholder such as GSSSI has the right to the particular terms of its current policy with a health maintenance organization, however, it has no legally enforceable right to obtain the same terms from the health maintenance organization for the period following the expiration of its current policy. The group policyholder's relations with the health maintenance organization can be changed whenever its current policy expires. For group policyholders with more than fifty (50) members, furthermore, the group policyholder does not even have the right to obtain a policy from its current health maintenance organization when its current policy expires. See G.L. c. 176J, §4(b)(1) ("Every health benefit plan shall be renewable with respect to all eligible persons and eligible dependents at the option of the eligible small business."). It would make no sense, therefore, for the Legislature to accord party status in a §27 setting to an entity with such a limited interest in the merger or acquisition of a health maintenance organization.

On the matter of pre-hearing discovery, we note that at the public hearing GSSSI made an admission that GSSSI's Initial Motion was not adequate. GSSSI conceded that its Initial Motion was not adequate, but that the inadequacy was "curable" and "indeed was cured" by the Amended Notice of Participation.[4] What GSSSI fails to appreciate, however, is that the document styled "Amended Notice of Participation" was filed only on January 18, 2005, the day before the public hearing. Thus, an adequate notice of intent to participate was filed only on the day before the public hearing. Clearly, this falls outside the timeframe permitted by §27(d)(2) for pre-hearing discovery.

Moreover, even if GSSSI's Initial Motion had been adequate, GSSSI's Initial Motion still was too late to support a practical right to participate in pre-hearing discovery. GSSSI's Initial Motion was filed on January 12, 2005. Pursuant to the mandate of §27, all discovery proceedings in this docket needed to be *concluded* not later than three (3) days *before the commencement* of the §27 public hearing on January 19. We find that this means that all

[4] "There was no reason for not allowing Greater Springfield to participate other than a conclusion that the form of its notice filed was inadequate, but *that certainly was curable and indeed was cured in the amended notice of participation*." Tr. 17 (emphasis added).

discovery needed to be completed no later than during the day on January 14, 2005.[5] This clearly would have been impossible even if GSSSI had filed an adequate motion to participate on January 12, 2005.

In its Post-hearing Memorandum, GSSSI objected that the Presiding Officer's ruling was not based on inquiries about the discovery that GSSSI might have undertaken if it had been able to exercise the opportunity to undertake discovery. GSSSI misplaces the responsibility for putting into the record the nature and extent of discovery that it might have undertaken. It was GSSSI's responsibility to make a proffer of proof about this matter at the public hearing on January 19, 2005 if it intended to make future arguments about lost opportunities. The areas of inquiry that GSSSI lists in its Post-hearing Memorandum, written many days after the public hearing and with that acquired hindsight, may be viewed with some degree of skepticism. Furthermore, the asserted foreclosures from inquiry at the public hearing are not persuasive.

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[5] To reach this conclusion, we followed the rules for computation of time set out in Rule 6(a) of the Massachusetts Rules of Civil Procedure, which would govern discovery in the Superior Court. Mass. R. Civ. Pro. 6(a) provides as follows:

> (a) Computation. In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute or rule, the day of the act, event, or default after which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this rule and in Rule 77(c), "legal holiday" includes those days specified in Mass. G.L. c. 4, s. 7 and any other day appointed as a holiday by the President or the Congress of the United States or designated by the laws of the Commonwealth.

Based on the language of §27(d)(2), which does not require the conclusion of discovery *within* three days of the public hearing, but, rather, requires completion no later than three days *before* the commencement of the public hearing, we counted back three (3) workdays from January 19, the date of the public hearing. This places the benchmark for the conclusion of discovery as January 14. Thus, discovery needed to have been concluded no later than January 14, 2005.

It may be noted that the same result would obtain if this proceeding were treated as a proceeding under Chapter 30A of the Massachusetts General Laws. The Rules for the Conduct of Administrative Proceedings, 980 Code Mass. Regs 1.03(6), provide the following rules for computation of time:

> Computation of Time. Unless otherwise specifically provided by 980 CMR 1.00 or by other applicable law, computation of any time period referred to in 980 CMR 1.00 shall begin with the first day following the act which initiates the running of the time period. The last day of the time period is included unless it is a Saturday, Sunday, or legal holiday or any other day on which the office of the Board is closed, in which case the period shall run until the end of the next following business day. When the time period is less than seven days, intervening days when the office of the Board is closed shall be excluded.

The Proposed Acquisition

At the Public Hearing on January 19, 2005, Michael Fullwood, Executive Vice President, Chief Financial Officer, General Counsel and Corporate Secretary of HIP-NY, verified under oath that his signature on the "Statement Regarding the Acquisition of Control of or Merger with a Health Maintenance Organization Pursuant to Massachusetts General Laws Chapter 176G, Section 27" filed by the Applicants pursuant to the requirement of G.L. c. 176G, §27 ("the Applicants' Statement") certifies that he is familiar with the application and the contents thereof and that the facts contained in the Applicants' Statement are true to the best of his knowledge and belief. He also testified that the Applicants' Statement contained in the Applicants' application, as amended and restated, remained true as of January 19, 2005 to the best of his knowledge and that, when the Applicants filed the Applicants' Statement, he ensured that he would become aware of any changes, facts or circumstances that would affect the Applicants' Statement.

Mr. Fullwood further testified that no material facts were omitted from the Applicants' Statement, as amended and restated, and that there were no material facts that he would like to add. Moreover, he testified that there were no statements in the Applicants' Statement, as amended and restated, that need to be changed and that there have been no material changes to the facts, statements or representations contained in the Applicants' Statement, as amended and restated.

Mr. Fullwood also testified that, since the filing of the Applicants' Statement, he believes that there have been no material transactions, material lawsuits, material claims, material contracts or material events of any kind involving ConnectiCare, CMI or the Applicants that have not been disposed of.

Based on Mr. Fullwood's representations, we find that we can rely upon the materials that have been submitted by the Applicants prior to the Public Hearing on January 19, 2005, as continuing to represent accurately the proposed acquisition, the current status of the Applicants and the current status of the HMO.

Based upon the record, we make the following findings of fact.

HIP-NY was created in 1947 as a prepaid group practice health plan that provided low cost medical care to New York City workers. HIP-NY is a nonstock not-for-profit New York Corporation, with HIP Foundation, a not-for-profit charitable organization, as its sole member.

HIP-NY is the sole member of Vytra Health Plans Long Island, Inc., a licensed New York health maintenance organization ("Vytra"). HIP-NY owns all of the capital stock of HIP Holdings, a Delaware for-profit non-insurer corporation, which owns all of the capital stock of Hydrogen, which was formed solely for the purpose of effecting the proposed acquisition that is the subject of this docket. HIP Holdings also owns all the stock of HIP Insurance Company of New York, its main insurance subsidiary.

HIP at present has a diversified membership of well over a million members throughout the New York metropolitan area. HIP in 2003 had total revenues exceeding $3,300,000,000 and net income of approximately $275,000,000. HIP does not currently do business in Massachusetts.

CMI, a Massachusetts health maintenance organization, is a wholly-owned subsidiary of ConnectiCare Capital, LLC, a Connecticut limited liability company ("ConnectiCare Capital"). ConnectiCare, Inc., a health care center organized under the laws of Connecticut; ConnectiCare Insurance Company, Inc, a Connecticut insurer, and ConnectiCare of New York, Inc., a New York corporation, are also wholly-owned subsidiaries of ConnectiCare Capital. ConnectiCare Capital is a wholly-owned subsidiary of ConnectiCare Holding Company, Inc., a Connecticut corporation ("ConnectiCare Holding"). ConnectiCare Holding, ConnectiCare Capital, ConnectiCare Inc., ConnectiCare Insurance Company, ConnectiCare of New York, Inc., and CMI are sometimes collectively referred to herein as "ConnectiCare."

Since receiving approval to do business in the Commonwealth, CMI has written small and large group business in Hampden County and for an expanded service area including Hampshire and Franklin Counties. CMI currently has 12,500 members.

The proposed acquisition of control of CMI, if approved, will be achieved when the Applicants acquire its ultimate parent, ConnectiCare Holding.

The proposed acquisition will involve the following transactions. Hydrogen will merge with and into ConnectiCare Holding. Following the completion of the transaction, ConnectiCare Holding will be a wholly-owned subsidiary of HIP Holdings. ConnectiCare Capital will continue to be a wholly-owned subsidiary of ConnectiCare Holding. CMI will continue to be a wholly-owned subsidiary of ConnectiCare Capital.

As testified to by Mr. Fullwood, the proposed acquisition is a merger between Hydrogen and the senior Connecticut ConnectiCare entity in which the surviving entity, the senior ConnectiCare entity, will become a direct subsidiary of HIP Holdings. Hydrogen will disappear in the merger, having been created solely for the purpose of effectuating a statutory merger. The transaction thus will result in the indirect control of CMI by HIP, meaning that there will be no change in the corporate relationship that currently exists between CMI and its current parent within the ConnectiCare family of companies. The stock of CMI will not be directly held by a HIP entity.

As testified to by Mr. Fullwood, there will be no transfer of assets or cash from CMI or ConnectiCare to HIP as a result of the proposed acquisition and there will be no pooling of actuarial risk between HIP and CMI as a result of the proposed acquisition.

In accordance with the agreement governing the proposed acquisition, all outstanding shares of capital stock of ConnectiCare Holding, other than dissenting shares, will be converted into the right to receive a relative portion of the consideration for the transaction, which will consist of cash in the amount of $350,000,000, subject to several adjustments as are set forth in the agreement. HIP calculates that its risk based capital ratio will drop from 432.5% to 237% and surplus will drop from $832,700,000 to $563,700,000 if the proposed acquisition is approved.

HIP's unaudited consolidated balance sheets as of September 30, 2004 reported that, as of that date, HIP had cash, cash equivalents and marketable securities of approximately $1,033,000,000. HIP does not intend to borrow funds to pay for ConnectiCare. Approximately $90,000,000 of the purchase price paid by HIP will be used to pay off all of ConnectiCare's outstanding indebtedness.

The proposed acquisition has been approved by the boards of HIP and ConnectiCare Holding. ConnectiCare Holding's shareholders also have approved the proposed acquisition. No other corporate approvals are necessary.

The New York Department of Insurance approved the proposed acquisition on December 23, 2004. New York does not require a hearing, but the Applicants submitted information to regulatory authorities as required by New York law.

The Insurance Commissioner for the State of Connecticut, following a hearing held on January 6, 2005, approved the proposed acquisition by an Order dated January 19, 2005.

Discussion and Subsidiary Conclusions

The Massachusetts statute governing the acquisition or merger of a Massachusetts health maintenance organization, §27 of Chapter 176G of the General Laws of Massachusetts, requires the Commissioner of Insurance to approve the proposed acquisition of control of a health maintenance organization unless, after a public hearing on the merger or other acquisition, she finds that any of seven stated conditions exists or will exist after the closing of the proposed acquisition of control. G.L. c. 176G, §27(d)(1) provides as follows (emphasis supplied):

> (d)(1) The commissioner ***shall approve*** any merger or other acquisition of control referred to in subsection (a) unless, after a public hearing on the merger or other acquisition, he finds that:
>
> (i) after the change of control, the domestic health maintenance organization referred to in said subsection (a) would not be able to satisfy such requirements as the commissioner may, by rule or regulation, establish for an organization seeking approval as a health maintenance organization under this chapter;
>
> (ii) the effect of the merger or other acquisition of control would be substantially to lessen competition in the health care insurance market in this commonwealth or tend to create a monopoly in the commonwealth;
>
> (iii) the financial condition of any acquiring party is such as might jeopardize the financial stability of the health maintenance organization, or prejudice the interests of its subscribers, policyholders or enrolled members;
>
> (iv) the terms of the offer, request, invitation, agreement or acquisition referred to in said subsection (a) are unfair and unreasonable to the subscribers, policyholders or enrolled members of the health maintenance organization;
>
> (v) the plans or proposals which the acquiring party has to liquidate the health maintenance organization, sell its assets or any seat on its board of directors, or consolidate or merge it with any person, or to make any other material change in its business or corporate structure or management, are unfair and unreasonable to the subscribers, policyholders or enrolled members of the health maintenance organization and not in the public

interest;

> (vi) the competence, experience and integrity of those persons who would control the operation of the health maintenance organization are such that it would not be in the interest of the subscribers, policyholders or enrolled members of the health maintenance organization or of the public to permit the merger or other acquisition of control; or
>
> (vii) the acquisition is likely to be hazardous or prejudicial to the health insurance buying public or to the actual enrollees under health insurance plans in the commonwealth.

Each of these seven (7) statutory inquiries set out in G. L. c. 176G, §27(d)(1) will be discussed in turn with respect to the proposed acquisition that is the subject of this proceeding. The discussions will include summaries of the arguments made by GSSSI in its document styled "Post-hearing Memorandum of Greater Springfield Senior Services, Inc." ("Post-hearing Memorandum") and made by the Applicants in their document styled "Memorandum in Response to Post-hearing Memorandum of Greater Springfield Senior Services, Inc." ("Post-hearing Response"). Each discussion section is followed by our conclusions regarding that particular statutory inquiry. Subsequent to these subsidiary conclusions, we state our final conclusion.

> **G. L. c. 176G, §27(d)(1)(i): After the change of control, will CMI be able to satisfy such requirements as the commissioner may, by rule or regulation, establish for an organization seeking approval as a health maintenance organization under the General Laws of Massachusetts?**

Discussion:

Neither the Division, GSSSI nor any other person raised any issues about the subject of inquiry set out in G. L. c. 176G, §27(d)(1)(i). We note the following in connection with this first inquiry set out in G. L. c. 176G, §27(d)(1).

Gail Bogossian, Vice President and General Counsel of ConnectiCare, verified that ConnectiCare is in compliance with all of the applicable laws and regulations of the Commonwealth. With respect to the Massachusetts requirement that health maintenance organizations as well as other health carriers provide coverage in accordance with certain mandated benefit statutes (for example, hearing screening for newborns, infertility treatments and

lead poisoning screening), Ms. Bogossian testified that ConnectiCare is familiar with the Division's position on this matter, and has signed agreements so that affiliated companies, including CMI, will provide the required health care services to all Massachusetts residents.

Mr. Fullwood asserted that, following the proposed acquisition, ConnectiCare will continue to be able to satisfy the requirements imposed by any Division rule or regulation for the licensing of a health maintenance organization or the renewal of such licensure as required under Massachusetts law. He stated that no changes will be made to ConnectiCare's operations or its compliance with laws relating to the operation of Massachusetts health maintenance organizations that will jeopardize licensure status or renewal of the license for CMI, including solvency and mandated benefit requirements.

Conclusion Pertaining to G. L. c. 176G, §27(d)(1)(i):

After carefully considering the record in this docket, we conclude that no credible reason has been identified that would justify refusing to approve the proposed acquisition on the basis of G. L. c. 176G, §27(d)(1)(i) and that the evidence contained in the record supports a finding that, following the proposed acquisition, CMI will be able to satisfy such requirements as the Commissioner may, by rule or regulation, establish for an organization seeking approval as a health maintenance organization under the General Laws of Massachusetts.

G. L. c. 176G, §27(d)(1)(ii): Will the effect of the proposed acquisition be substantially to lessen competition in the health care insurance market in the Commonwealth or tend to create a monopoly in the Commonwealth?

Discussion:

Neither the Division, GSSSI nor any other person raised any issues about the subject of inquiry set out in G. L. c. 176G, §27(d)(1)(ii). We note the following in connection with this second inquiry set out in G. L. c. 176G, §27(d)(1).

Rather than lessening competition in Massachusetts, the Applicants asserted that the proposed acquisition will enhance competition by introducing into the Commonwealth an experienced and financially strong new competitor that currently conducts no business in Massachusetts. Daniel McGowan, President and Chief Operating Officer of HIP, stated that HIP's financial strength will support ConnectiCare's operations in Massachusetts and enhance the

potential for its future expansion in the Massachusetts market. Mr. McGowan believes that the companies, following the acquisition, will be able to achieve economies of scale and realize cost savings through potential operational synergies and should be able to provide more cost-effective, high-quality products and services to consumers in Massachusetts by using the experienced management teams and best practices from both HIP and ConnectiCare. Furthermore, Mr. McGowan asserted that HIP's commitment to technology would enable CMI to operate more efficiently while providing its customers with better information and improved customer interaction with its plans.

As required by the Hart-Scott-Rodino Antitrust Improvement Act, 15 U.S.C. §18, the Applicants filed an application with the Federal Trade Commission and the Antitrust Division of the Department of Justice. Due to the value of the proposed acquisition, its consummation was conditional upon the expiration of the waiting period prescribed by this Act. In the case of the proposed acquisition, early termination of the waiting period was granted effective July 30, 2004.

Conclusions Pertaining to G. L. c. 176G, §27(d)(1)(ii):

After carefully considering the record in this docket, we reach the following conclusions.

From the early termination of the waiting period required by the Hart-Scott-Rodino Antitrust Improvement Act by the Federal Trade Commission, we infer that the federal agency charged with overseeing and ensuring competition and guarding against monopolies did not find that the proposed acquisition would substantially lessen competition or tend to create a monopoly.

HIP does not currently do business in Massachusetts, so that the proposed acquisition will further competition in the Commonwealth, not lessen it, and thus should positively impact the health insurance buying public in Massachusetts. The proposed acquisition has the potential to enhance ConnectiCare's ability to compete in Massachusetts both geographically and in terms of future product offerings

We conclude that no credible reason has been identified that would justify refusing to approve the proposed acquisition on the basis of G. L. c. 176G, §27(d)(1)(ii) and that the evidence contained in the record supports a finding that the proposed acquisition will not have the effect of substantially lessening competition in the health care insurance market in the Commonwealth or tend to create a monopoly in the Commonwealth.

G. L. c. 176G, §27(d)(1)(iii): Is the financial condition of the Applicants such as might jeopardize the financial stability of CMI, or prejudice the interests of its subscribers, policyholders or enrolled members?

Discussion:

GSSSI raised some issues about this inquiry set out in G. L. c. 176G, §27(d)(1)(iii). No other person raised any issues about this third inquiry pursuant to G. L. c. 176G, §27(d)(1).

In its Post-hearing Memorandum, GSSSI expressed concern about HIP's estimated post-transaction Risk Based Capital ("RBC") ratio of 237%.[6] GSSSI also asserted that "[t]he level of HIP's post-transaction capital is likely to have direct implications for the parent corporation's commitment to capitalize CMI's current business" and that "[i]f HIP's capital is squeezed, the funding commitment to GSSSI may not be maintained at current levels." GSSSI argued that the current state of the record does not allow the Commissioner to evaluate whether HIP has sufficient financial capacity to make an acquisition of this size without jeopardizing the security of the HMO or prejudicing the interests of policyholders. In conclusion, GSSSI argued that "the financial condition of HIP at the close of the transaction, measured by Risk-Based Capital, is likely to jeopardize the financial stability of CMI and will be prejudicial to the interests of GSSSI and other policyholders" and that "HIP has not demonstrated its capacity to rebuild capital and surplus to acceptable levels following the closing of the transaction."

In their Post-hearing Response, the Applicants asserted that HIP-NY is a financially strong company with in excess of $1,000,000,000 in cash or cash equivalents, which it can use to fund the acquisition and ongoing operation of its business. Furthermore, the Applicants point out that HIP-NY's statutory net worth as of December 31, 2003 was $651,000,000, which exceeds by approximately $400,000,000 the minimum requirement set by New York. Thus, the Applicants argue that it is inconceivable that HIP-NY will be unable to support the financial requirements necessary to support CMI, a health maintenance organization that currently serves 12,500 members in Massachusetts. In further response to GSSSI's Post-hearing Memorandum, the

[6] In footnote 21 of its Post-hearing Memorandum, GSSSI cites a "discrepancy" between this figure and the RBC ratio for 2003 that is stated in HIP's 2003 Annual Statement. GSSSI does not explain why it did not inquire about this "discrepancy" during the public hearing if this information constitutes data of the possible magnitude of importance that GSSSI speculates that it could be in footnote 21. This inaction by GSSSI especially is curious because the HIP Annual Statement for 2003 was in the record prior to January 19, 2005 and GSSSI stated that it had gone through the record prior to January 19, 2005. Tr. 101. GSSSI's assertion in its footnote 21 that an inability to conduct pre-hearing discovery is the reason this line of inquiry could not be pursued at the public hearing on January 19, 2005 is unpersuasive.

Applicants quoted Mr. Fullwood's sworn testimony, in which he made the following points. Although the cash and other resources spent in closing the proposed acquisition will reduce the RBC ratio of the Applicants, it still will be well above the required statutory level, and will, furthermore, be adequate. Post transaction, the Applicant's RBC ratio will be 237% of the authorization contract level, which is a minimum required amount before affirmative regulatory action is initiated. Mr. Fullwood further stated that the Applicants have no concerns about their ability to operate in an efficient and financially successful manner and there is no expectation by HIP's management or ConnectiCare's management that the proposed acquisition will have any adverse effect whatsoever upon premiums in Connecticut or Massachusetts since HIP's financials are strong, it projects continued financial strength, there is no outlay out of the normal course of business foreseen in the coming months and HIP expects to continue to generate additional surplus. The Applicants also quoted the letter dated September 13, 2004 from Nicholas P. Kambolis, Associate General Counsel for HIP-NY, to Lynne M. Hein of the Connecticut Department of Insurance regarding Amendment No. 2 to Form A, in which the Applicants stated the following in answer to a question about the ability of HIP to support any capital needs ConnectiCare may have going forward in light of HIP's calculation that its RBC will drop from 432.5% to 237% and surplus will drop from $832,700,000 to $563,700,000 after the proposed acquisition:

> At 237% of the Authorization Contract Level ("ACL"), HIP exceeds ACL by approximately $326 million. HIP's projected cash and investments position will be in excess of $700 million after the proposed acquisition. HIP is confident that any capital needs that ConnectiCare might require could be met by the surplus and cash remaining after the transaction.

In addition to the above, we note the following in connection with the inquiry pursuant to G. L. c. 176G, §27(d)(1)(iii).

The Connecticut Insurance Department retained DeWeese Consulting, Inc. to conduct an independent actuarial analysis of the proposed acquisition. Pursuant to this mandate, Charles C. DeWeese, Fellow of the Society of Actuaries and Member of the American Academy of Actuaries, prepared a report. *Report on Actuarial Review to Support Connecticut Department of Insurance Review of Form A Filing Health Insurance Plan of New York ("HIP") and Subsidiaries.* Mr. DeWeese, whose Report was filed in this docket on November 24, 2004,

reached the following conclusions. HIP's actuarial and financial areas were found by him to be well managed and staffed by competent and knowledgeable people. Mr. DeWeese found the unpaid claims and related liabilities reported by HIP and its subsidiaries to be reasonable and to make adequate provision for HIP's obligations. In particular, Mr. DeWeese found that the actuarial elements were determined using recognized actuarial methods and reasonable assumptions, the reserves contained an explicit margin for adverse deviation, and the accounting elements of unpaid claims were found to be determined in a reasonable manner. Furthermore, Mr. DeWeese was satisfied that HIP does not need to establish a reserve for future contingent benefits related to extension of benefits under health contracts. Mr. DeWeese found that reconciliation of prior period reserves showed margin in the claim reserves in each of the past three years. His opinion was that the reconciliation generally was reasonable, with some small anomalies that he judged not to be material to the overall result. Although Mr. DeWeese felt that health care receivables held by HIP as of June 30, 2004 should be evaluated for admissibility, the overall effect of non-admitting some portion of these receivables would not affect HIP's overall surplus significantly in his opinion. Based on HIP's several years of good earnings and a period of significant growth in surplus, Mr. DeWeese felt that HIP's business is such that it is reasonable to conclude that HIP should continue to experience growth in surplus. Mr. DeWeese concluded that HIP can afford the proposed acquisition of ConnectiCare and the associated goodwill, that HIP has adequate surplus to support the operation of its subsidiaries, and that HIP's strategic reasons for entering into the proposed acquisition make sense, those reasons being diversification of geographical risk, enhancement of its ability to serve customers in the tri-sate area and reduction of unit costs by increasing membership.

Inasmuch as all of ConnectiCare's outstanding indebtedness of approximately $90,000,000 will be paid off at the closing of the proposed acquisition, Mr. Fullwood argued that ConnectiCare then will be considerably better financially situated than it is at present. Furthermore, Mr. Fullwood asserted that after the closing HIP will continue to provide support to ConnectiCare, including, but not limited to, support relating to capital and surplus requirements, which will allow CMI to continue to operate successfully in Massachusetts.

Mr. Fullwood testified that the Applicants anticipate rebuilding their surplus following the proposed acquisition and Mr. McGowan explained how the Applicants intend or anticipate

the rebuilding of surplus.[7] Mr. McGowan testified that this rebuilding of surplus following a transaction such as the one proposed would occur as follows:

> HIP is already profitable, and adding that profitability each year for surplus, ConnectiCare is also profitable, that will add to surplus; in addition, the synergies between ConnectiCare and HIP, particularly between western Connecticut and the western [sic] valley of New York, will lead people to greater membership, strong network, greater quality of service, offerings of products and profitability.

Tr. 114. Mr. McGowan stated that rather than increasing premium, the Applicants will increase membership. He stated that, since both companies involved in the merger are quite profitable already, the increase in profitability, and therefore the ability to add to surplus, would be principally a factor of their joint opportunity to grow.

Both Mr. McGowan and Mr. Fullwood stated that there will not be any increase in premium attributable to the proposed acquisition. In fact, Mr. McGowan stated that the impact could be in the other direction because ConnectiCare's $90,000,000 in debt will be eliminated, and with it the need to continue debt service. He asserted that, even though the issue of whether premiums are increased in Massachusetts is a result of many factors, one of the largest, ConnectiCare's debt, will be erased. Inasmuch as all of ConnectiCare's outstanding indebtedness of approximately $90,000,000 will be paid off at the closing of the proposed acquisition, Mr. Fullwood argued that ConnectiCare after the proposed acquisition will be considerably better financially situated than it is at present, so there should be no concern that the proposed acquisition will adversely affect the premiums charged GSSSI.

Conclusions Pertaining to G. L. c. 176G, §27(d)(1)(iii):

After carefully considering the arguments of GSSI and the Applicants and the record in this docket, we reach the following conclusions about the third statutory inquiry set out in G. L. c. 176G, §27(d)(1).

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[7] GSSSI was not allowed to inquire about the actual numbers that the Applicants had projected for the increase in surplus in 2005 as part of their financial plan and adopted budget for 2005, something GSSSI continued to complain about in its Post-hearing Memorandum. HIP at the public hearing objected to the inquiry about its projected numbers, arguing that the information that was sought was confidential and proprietary in nature. HIP also argued that it exceeded the scope of inquiry set out by §27. Tr. 110-111. I did not require the Applicants to answer the inquiry about HIP's projected numbers because I found that it asked for proprietary projections that could be useful to competitors.

We found it to be significant that HIP's surplus will still be a robust $563,700,000 following the proposed acquisition. This healthy surplus figure tempered our concern that HIP's RBC would drop from 432.5% to 237% as a result of the proposed acquisition.

We found the conclusions of Charles DeWeese in his *Report on Actuarial Review to Support Connecticut Department of Insurance Review of Form A Filing Health Insurance Plan of New York ("HIP" and Subsidiaries* to be persuasive generally as to the financial condition of the Applicants, and more particularly, to be persuasive on the matters of RBC ratio and surplus, which were issues raised by GSSSI. In particular, we note his findings that HIP's reserves were held to contain an explicit margin for adverse deviation, and the accounting elements of unpaid claims were found to be determined in a reasonable manner. Furthermore, based on HIP's several years of good earnings and a period of significant growth in surplus, Mr. DeWeese felt that HIP's business is such that it is reasonable to conclude that HIP should continue to experience growth in surplus. Mr. DeWeese concluded that HIP can afford the proposed acquisition of ConnectiCare and the associated goodwill, that HIP has adequate surplus to support the operation of its subsidiaries, and that HIP's strategic reasons for entering into the proposed acquisition make sense, those reasons being diversification of geographical risk, enhancement of its ability to serve customers in the tri-state area and reduction of unit costs by increasing membership. We found the conclusions of Mr. DeWeese to be more persuasive than the arguments of GSSSI about RBC ratio and GSSSI's skepticism about HIP's ability to increase surplus following the proposed acquisition.[8] We note that GSSSI did not challenge the DeWeese Report in its Post-hearing Memorandum.[9]

We note the statements made in GSSSI's Post-hearing Memorandum about what the Division allegedly has encouraged for statutory reserves by certain domestic health maintenance organizations and about an A. M. Best press release. GSSSI argues that, based on its representations, the Commissioner should make further inquiry into forecasts of the Applicants' financial condition following the proposed acquisition. Assuming, for sake of argument, that

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[8] GSSSI in its Post-hearing Memorandum writes (page 14) as follows:

> While we draw no firm cause and effect conclusions from these limited data, they do appear to suggest that HIP's "growth-driven" explanation of the post-transaction financial picture is highly questionable.

[9] GSSSI made no inquiries at the January 19 hearing about the DeWeese Report, even though it had the opportunity to review the Report when it went through the record prior to the hearing. See Tr. 101.

GSSSI's statements are accurate, GSSSI offers no analytical framework that would permit a meaningful comparative analysis of the Applicants' post-acquisition financial condition and that of other Massachusetts health maintenance organizations.

Based on the evidence in the record, we conclude that no credible reason has been identified that would justify refusing to approve the proposed acquisition on the basis of G. L. c. 176G, §27(d)(1)(iii) and that there is no evidence that would indicate that the financial condition of the Applicants is such as might jeopardize the financial stability of CMI or prejudice the interests of its subscribers, policyholders or enrolled members.

G. L. c. 176G, §27(d)(1)(iv): Are the terms of the offer, request, invitation, agreement or acquisition unfair and unreasonable to the subscribers, policyholders or enrolled members of CMI?

Discussion:

Neither the Division, GSSSI nor any other person raised any issues about the subject of inquiry set out in G. L. c. 176G, §27(d)(1)(iv). We note the following in connection with this fourth inquiry set out in G. L. c. 176G, §27(d)(1).

Mr. McGowan and Mr. Fullwood asserted that the agreement for the proposed acquisition, including the amount of consideration, was the subject of extensive arm's length negotiations between HIP and ConnectiCare. Furthermore, Mr. Fullwood stated that HIP had the assistance of its investment bankers, including fairness opinions, and performed extensive due diligence and valuations in connection with the proposed acquisition. Mr. Fullwood testified that Goldman Sachs rendered an independent evaluation of the fairness of the proposed acquisition and Williams Capital also rendered a fairness opinion, both of which are in the exhibits to the Applicants' Statement. Mr. Fullwood stated that the conclusion of both banks was that the proposed acquisition was a fair transaction. Mr. Fullwood also stated that no rating agencies or any other financial analysts or other external bodies to whom HIP or ConnectiCare has submitted the details of the proposed acquisition and who have reviewed the proposed acquisition has commented negatively or critically on the amount of goodwill involved in the consideration. Mr. Fullwood stated that rating agencies have indicated that they believe the proposed acquisition to be a good transaction for HIP, even though two of them placed HIP on a negative outlook, which

Mr. Fullwood asserted is customary when a large acquisition takes place. However, he stated that when the acquiring company consummates the transaction and moves forward with whatever integration plans it may have, the rating agencies then revisit the outlook.

Mr. Fullwood asserted that the Applicants have no plans to liquidate ConnectiCare, sell its assets or any seat on its board of directors or consolidate or merge it with any person. The Applicants' Statement asserts that HIP, other than as stated elsewhere in the Statement, presently does not have, nor does it presently contemplate making, any plans or proposals (1) to cause CMI to declare any extraordinary dividends or make other distributions; (2) to liquidate CMI; (3) to sell any of the assets of CMI; (4) to merge or consolidate CMI with any person or persons; (5) to make any other material change in CMI's business operations, corporate structure or management; or (6) to cause CMI to enter into material contracts, agreements, arrangements, understandings or transactions of any kind with any party. On this last point, Mr. Fullwood testified at the public hearing that there would be no transfer of assets or cash from CMI or ConnectiCare to HIP as part of the proposed acquisition. However, he stated that, over time, he believes that there will be such interactions and there will be work done and services rendered for ConnectiCare by the Applicants, but that the Applicants understand and acknowledge that all the states with an interest in the proposed acquisition -- Massachusetts, Connecticut and New York -- require that when any intercorporate agreements of this type take place, that the cost of services must be reasonable. He noted that such future arrangements would be similar to arrangements that HIP and ConnectiCare already have in place with their sister companies; ConnectiCare with CMI, and HIP with Vytra. Moreover, Mr. Fullwood testified that these possible future intercorporate agreements would be between CMI and ConnectiCare; none will be directly between HIP and CMI. At present, however, Mr. Fullwood stated that there are no plans for HIP to provide services to CMI. On this point, Mr. McGowan observed that the Applicants, "of course," are thinking about future agreements for services such as those that the Applicants entered into with Vytra. These agreements for services, Mr. McGowan stated, had, in general, resulted in reducing costs to Vytra's policyholders compared to when such services were provided directly by Vytra.

Conclusions Pertaining to G. L. c. 176G, §27(d)(1)(iv):

After carefully considering the record in this docket, we conclude that no credible reason has been identified that would justify refusing to approve the proposed acquisition on the basis of G. L. c. 176G, §27(d)(1)(iv) and that there is no evidence that would indicate that the terms of the proposed acquisition are unfair and unreasonable to the subscribers, policyholders or enrolled members of CMI.

> **G. L. c. 176G, §27(d)(1)(v): Are the plans or proposals which the Applicants have to liquidate CMI, sell its assets or any seat on its board of directors, or consolidate or merge it with any person, or to make any other material change in its business or corporate structure or management, unfair and unreasonable to the subscribers, policyholders or enrolled members of CMI and not in the public interest?**

Discussion:

GSSSI raised some issues about the subject of inquiry set out in G. L. c. 176G, §27(d)(1)(v). Neither the Division nor any other person raised any issues about this fifth topic of inquiry.

GSSSI in its Post-hearing Memorandum expressed concern about the possibility that HIP-NY might convert to for-profit status if New York enacts appropriate enabling legislation. However, GSSSI did not argue that this possibility means that the Commissioner should not approve the proposed acquisition. Rather, GSSSI argues that the Commissioner should condition her order on the submission of any future restructuring plan affecting CMI and its policyholders to the Division "for full review and prior approval."

In their Post-hearing Response, the Applicants asserted that GSSSI has offered no evidence or argument that a conversion of HIP-NY would be unfair or unreasonable. Furthermore, the Applicants quoted Mr. McGowan's testimony that conversion of HIP-NY to a for-profit entity would have no impact on CMI since CMI after the proposed acquisition will be owned and operated by ConnectiCare, which already is a for-profit entity. Accordingly, the Applicants foresee no changes in either the operation of ConnectiCare or its subsidiary, CMI. The Applicants stated that HIP anticipates that ConnectiCare will continue to operate as an autonomous business unit following the closing of the proposed acquisition, that HIP-NY will

not directly own the stock of CMI, and that at the conclusion of the proposed acquisition HIP-NY will not hold a Massachusetts health maintenance organization license. In conclusion, the Applicants asserted that there was nothing about the potential conversion of HIP-NY at some unspecified future date to a for-profit entity that has been shown to have any potential material effect on CMI's business or operations.

In addition to the above, we note the following in connection with the inquiry pursuant to G. L. c. 176G, §27(d)(1)(v), some of which has already been noted in the discussion of the fourth inquiry pursuant to §27(d)(1).

With respect to the possible future conversion of HIP-NY to a for-profit entity, Mr. McGowan observed that ConnectiCare after the proposed acquisition still will be the controller of CMI, and ConnectiCare will not be changing its status even if HIP-NY were to do so, following a change in New York law.

Mr. Fullwood asserted that the Applicants have no plans to liquidate ConnectiCare, sell its assets or any seat on its board of directors or consolidate or merge it with any person. The Applicants' Statement asserts that HIP, other than as stated elsewhere in the Statement, presently does not have, nor does it presently contemplate making, any plans or proposals (1) to cause CMI to declare any extraordinary dividends or make other distributions; (2) to liquidate CMI; (3) to sell any of the assets of CMI; (4) to merge or consolidate CMI with any person or persons; (5) to make any other material change in CMI's business operations, corporate structure or management; or (6) to cause CMI to enter into material contracts, agreements, arrangements, understandings or transactions of any kind with any party. On this last point, Mr. Fullwood testified at the public hearing that there would be no transfer of assets or cash from CMI or ConnectiCare to HIP as part of the proposed acquisition. However, he stated that, over time, he believes that there will be such interactions and there will be work done and services rendered for ConnectiCare by the Applicants, but that the Applicants understand and acknowledge that all the states with an interest in the proposed acquisition -- Massachusetts, Connecticut and New York -- require that when any intercorporate agreements of this type take place, that the cost of services must be reasonable. He noted that such future arrangements would be similar to arrangements that HIP and ConnectiCare already have in place with their sister companies; ConnectiCare with CMI, and HIP with Vytra. Moreover, Mr. Fullwood testified that these possible future

intercorporate agreements would be between CMI and ConnectiCare; none will be directly between HIP and CMI. At present, however, Mr. Fullwood stated that there are no plans for HIP to provide services to CMI. On this point, Mr. McGowan observed that the Applicants, "of course," are thinking about future agreements for services such as those that the Applicants entered into with Vytra. These agreements for services, Mr. McGowan stated, had, in general, resulted in reducing costs to Vytra's policyholders compared to when such services were provided directly by Vytra.

Mr. McGowan stated that HIP anticipates that ConnectiCare will continue to operate as an autonomous business unit following the closing of the proposed acquisition. Thus, HIP has no current plans to make any material changes to either the executive level or nonexecutive level of employees of ConnectiCare and does not intend to advise management of ConnectiCare as to appropriate staffing levels following the closing. Mr. McGowan also reported that all members of ConnectiCare's senior management team have agree to remain with ConnectiCare for periods ranging from six months to two years following the proposed acquisition, as was reported in an amendment to the Applicants' Statement. Further, he asserted that ConnectiCare will continue to have its headquarters in Farmington, Connecticut, and that ConnectiCare will continue to provide all management, administrative and operational support services to CMI. He noted that CMI has no employees of its own except for one sales representative located in Massachusetts. In conclusion, Mr. McGowan stated that HIP has no present intention of making any material changes to ConnectiCare's management or nonmanagement employees that will adversely affect the ability of ConnectiCare to service its customers' needs in Hampshire, Hampden and Franklin Counties.

Conclusions Pertaining to G. L. c. 176G, §27(d)(1)(v):

After carefully considering the arguments of GSSI and the Applicants and the record in this docket, we reach the following conclusions.

GSSSI's concern about what hypothetically could or might happen in the future with regard to a possible future conversion of HIP-NY to for-profit status is too speculative a basis upon which to deny approval of the proposed acquisition. The legislatively mandated inquiry pursuant to §27(d)(1)(v) does not encompass a consideration of what might happen at some

indeterminate point in the future, especially not something that depends upon legislation by another state.

GSSSI argues that the Commissioner should condition her order on the submission of any future restructuring plan affecting CMI and its policyholders to the Division "for full review and prior approval." However, as Robert Dynan, CPA, AFE, the Division's Director of Financial Analysis, stated during the public hearing, if the hypothetical future conversion by HIP-NY were to occur, the Division would review such a conversion in the normal course of its regulatory activities as a potential change of control of CMI. Mr. Dynan explained that a conversion of HIP-NY to for-profit status would not be a nonprofit conversion for CMI, which already is a for-profit company.

Based on the above, we find that there is no need for the action recommended by GSSSI. The statutory framework for Division oversight and review already is in place. Furthermore, it would be an unwise precedent to mandate that a particular company submit to a unique particular review if something occurs in the future. It is better practice simply to treat the Applicants in the future with respect to their future actions as the Division would treat any other entity of similar nature that engaged in similar actions.

We conclude that no credible reason has been identified that would justify refusing to approve the proposed acquisition on the basis of G. L. c. 176G, §27(d)(1)(v) and that there is no evidence that there are any plans or proposals which the Applicants have with regard to CMI that are unfair and unreasonable to the subscribers, policyholders or enrolled members of CMI and not in the public interest.

G. L. c. 176G, §27(d)(1)(vi): Are the competence, experience and integrity of those persons who would control the operation of CMI such that it would not be in the interest of the subscribers, policyholders or enrolled members of CMI or of the public to permit the merger or other acquisition of control?

Discussion:

Neither the Division, GSSSI nor any other person raised any issues about the subject of inquiry set out in G. L. c. 176G, §27(d)(1)(vi). We note the following in connection with this sixth inquiry set out in G. L. c. 176G, §27(d)(1).

Mr. McGowan admitted that HIP-NY experienced some problems in the past, but he asserted that it is a very different company from what it was in the mid 1990's, has learned from its mistakes, has rebuilt its infrastructure, has a completely new management team and is a much stronger company financially.

Mr. Fullwood asserted that the Applicants believe that they have the competence, experience and integrity necessary to acquire control of ConnectiCare and that it is in the interests of subscribers, enrolled members and policyholders of ConnectiCare and of the public to permit the merger since HIP's management team possesses all of the qualities required by statute. Anthony Watson, Chairman and Chief Executive Officer of HIP-NY, has been with HIP-NY since 1985 and has almost 30 years of experience in the insurance and health care industries. Mr. McGowan has been with HIP-NY since 1996 and Mr. Fullwood stated that he has 34 years of experience in the insurance and health care industries. We note in particular that Mr. McGowan worked as a health system regulator for the State of Wisconsin when he served as Director of the Bureau of Health Planning and that he is a past President of the American Health Planning Association. Mr. Fullwood has been with HIP-NY for over six years.

The record contains the biographical details, including educational attainments, professional credentials, relevant occupational experience and employment histories of the people who will serve as members of the Board and as Officers of the Applicants, ConnectiCare and CMI after the proposed acquisition is completed. In addition, the Applicants have certified that none of the proposed directors or officers of the Applicants, ConnectiCare or CMI during the past ten (10) years have been convicted in a criminal proceeding, excluding minor traffic violations, or have been enjoined, either temporarily or permanently, by a court of competent jurisdiction from violating any federal or state law regulating the securities, banking or insurance businesses. Furthermore, the Applicants' Statement asserts that no proposed director or officer of the Applicants has been the subject of any proceedings under the Federal Bankruptcy Code of the United States during the past ten (10) years or has been affiliated during this time with a business or organization that has been subject to such a Bankruptcy proceeding.

Mr. McGowan reported that all members of ConnectiCare's senior management team have agree to remain with ConnectiCare for periods ranging from six months to two years following the proposed acquisition, as was reported in an amendment to the Applicants'

Statement. He made the additional observation that the current owner of ConnectiCare is solely a financial investor, whereas HIP, as a 57-year-old managed care entity, is interested in ConnectiCare and CMI as strategic partners moving forward, and not simply as an investment.

Conclusions Pertaining to G. L. c. 176G, §27(d)(1)(vi):

After carefully considering the record in this docket, we reach the following conclusions.

The evidence in the record regarding the people who will serve as members of the Board and as Officers of the Applicants attests to the significant experience in the insurance and health care industries and the competence and integrity of the individuals who will be responsible for the governance and operations of CMI. These personnel should insure the safe and expert operation of CMI following the proposed acquisition, if it is approved. Furthermore, the Applicants have no present intention to change the direct executive or nonexecutive management of CMI, but, to the contrary, have taken steps to encourage the retention of CMI's current management team.

We conclude that no credible reason has been identified that would justify refusing to approve the proposed acquisition on the basis set out in G. L. c. 176G, §27(d)(1)(vi). We conclude that the evidence contained in the record supports a finding that the competence, experience and integrity of those persons who will control the operation of CMI are not such that it would not be in the interest of the subscribers, policyholders or enrolled members of CMI or of the public to permit the proposed acquisition of control.

G. L. c. 176G, §27(d)(1)(vii): Is the acquisition likely to be hazardous or prejudicial to the health insurance buying public or to the actual enrollees under health insurance plans in the Commonwealth?

Discussion:

GSSSI raised some issues about this inquiry set out in G. L. c. 176G, §27(d)(1)(vii).[10] Neither the Division nor any other person raised any issues about this seventh inquiry pursuant to G. L. c. 176G, §27(d)(1).

[10] In footnote number 17 in its Post-hearing Memorandum, GSSSI speculates that New York authorities, including the New York Attorney General, "might have concern with a transaction such as this in which a substantial portion of the accumulated cash and assets of a N. Y. not-for-profit corporation are being used to finance the acquisition -- through a plan of merger -- of for-profit Connecticut and Massachusetts HMOs." In response to this speculation, I note that the New York Department of Insurance has approved the transaction and no proof has been offered that the

GSSSI in its Post-hearing Memorandum pointed to the experience of HIP-NY and its 2001 acquisition of Vytra as reason for concern with regard to the proposed acquisition that is the subject of this proceeding. GSSSI argued that during the immediate post-acquisition phase of the Vytra transaction, only a small portion of total revenue growth at either Vytra or HIP was attributable to an increase in enrollment, with the lions' share, "almost all," of revenue growth coming from an increase in monthly premiums.

In their Post-hearing Response, the Applicants argue that comparison of Vytra (a plan with approximately 200,000 members) and CMI (a plan with 12,500 members) is not valid. They also point out that the evidence in the record shows that Vytra's acquisition by HIP-NY has resulted in significantly lower administrative costs per member per month. In conclusion, the Applicants argue that there is no credible evidence that HIP-NY's acquisition of control of CMI will do anything other than benefit CMI subscribers, policyholders or enrolled members.

In addition to the above, we note the following in connection with the inquiry pursuant to G. L. c. 176G, §27(d)(1)(vii).

Mr. Fullwood asserted that the Applicants believe that the proposed acquisition will benefit Massachusetts residents both because it will promote the viability and future growth of the health care business of CMI through strong, financially secure companies and because it will enable CMI to continue to be a viable and contributing health maintenance organization in the Commonwealth.

With regard in particular to the issue that GSSSI raises with respect to Vytra, we note that Mr. McGowan admitted that HIP has had some problems in the past, but he asserted that HIP is a very different company from what it was in the mid 1990's, has learned from its mistakes, has rebuilt its infrastructure, and has a completely new management team.

Conclusions Pertaining to G. L. c. 176G, §27(d)(1)(vii):

After carefully considering the arguments of GSSI and the Applicants, the record in this docket, and based upon the subsidiary conclusions that we have reached above, we conclude that no credible reason has been identified that would justify refusing to approve the proposed acquisition on the basis of G. L. c. 176G, §27(d)(1)(vii) and that there is no evidence that the

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New York Attorney General has manifested any interest in this transaction. I also note that this concern voiced by GSSSI does not appear under any rubric of §27, unless it is covered by subsection 7.

proposed acquisition likely will be hazardous or prejudicial to the health insurance buying public or to the actual enrollees under health insurance plans in the Commonwealth.

Final Conclusion:

The Massachusetts statute governing the acquisition or merger of a Massachusetts Health Maintenance Organization requires the Commissioner of Insurance to approve the proposed acquisition of control of ConnectiCare of Massachusetts, the HMO, unless, after a public hearing on the merger or other acquisition, she finds that any of seven stated conditions exists or will exist after the closing of the proposed acquisition. Based on the foregoing, we conclude that no credible reason has been identified that would justify refusing to approve the proposed acquisition on any of the seven bases set out in G. L. c. 176G, §27.

WHEREFORE, in accordance with the foregoing, we issue the following orders:

1. The Application by Health Insurance Plan of Greater New York, a New York, not-for-profit, corporation; HIP Holdings, a Delaware corporation; and Hydrogen Subsidiary, Inc., a Connecticut corporation, requesting the Insurance Commissioner's approval of its proposed acquisition of control of ConnectiCare of Massachusetts, Inc., a Massachusetts domiciled stock corporation is hereby approved.

2. The Applicants shall provide the Division with written confirmation of the consummation of the acquisition of control by the end of the month in which the proposed acquisition takes place.

3. If the proposed acquisition is not consummated within three (3) months of the date of this Order, and the Applicants nevertheless continue to intend to consummate the proposed acquisition, the Applicants shall submit to the Commissioner a statement that shall include the following: (a) the reason for the inability of the Applicants to consummate the proposed acquisition as of yet, (b) any material changes in the information provided to the Division as of

the date of the public hearing on January 19, 2005 and (c) the current financial statements of the Applicants, ConnectiCare and CMI.

March 9, 2005

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Stephen M. Sumner, Esq.
Presiding Officer

Affirmed:

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Julianne M. Bowler
Commissioner of Insurance