

restrictions on their personal conduct for a period of 20 years.

CAC submitted timely and extensive comments to the FTC's complaint and proposed settlement. CAC offered four principal arguments: First, OGM's alleged collective bargaining did not violate the FTC Act, 15 U.S.C. 45, *et seq.*; second, the FTC's action against OGM was *per se* unconstitutional under the Privileges and Immunities Clause<sup>40</sup> and the Fourteenth Amendment; third, the forced dissolution of OGM would actually harm competition; and finally, that the proposed settlement itself was contrary to the public interest. CAC's comments offered extensive analysis and proof in support of its arguments, and consequently expected the FTC to seriously consider the comments prior to entering its final order against OGM.

That did not happen. Not only did the FTC fail to seriously consider CAC's comments, they effectively failed to acknowledge or consider them at all. On May 17, 2002, the FTC announced the adoption of a final consent order against OGM after a comment period elapsed in which "no comments were received" or considered by the Commission. This despite the fact CAC's comments were submitted to the FTC four days before the stated deadline. Upon further inquiry, FTC officials admitted their error in neglecting to consider CAC's comments. However, FTC officials then proceeded to lie to both CAC officials and OGM's counsel, falsely claiming CAC's comments were both considered and taken into account in formulating the final order.

In documents obtained by CVT through the Freedom of Information Act (FOIA), FTC officials acknowledge they failed to initially consider CAC's comments, but prior to service of the final order on OGM, the Commission belatedly considered and voted on a reply to CAC's comments. This is inconsistent with the statements of OGM counsel, however, who addressed the issue to FTC counsel in a letter dated two months after the settlement was approved:

The final Order, however, does not reflect the receipt of [CAC's] comments, nor does it address any of the substantive points that the Center made in the comments. If the facts are as a representative of the Center has described them to use, we believe that, at a minimum, our clients' procedural due process rights have been violated and, potentially, their substantive due process rights.<sup>41</sup>

According to the FOIA documents received, the FTC denied that any violation of OGM's rights occurred, yet the Commission has never fully explained the discrepancy between the public statement that no comments were received and the contrary representations made to CAC. CVT and CAC are currently pursuing a FOIA appeal to obtain additional information on this issue.

Procedural shenanigans aside, the substantive problem was that the reply CAC finally received from the FTC contained little substantive refutation of CAC's comments. The government made no attempt to seriously address the constitutional, practical, and ethical arguments raised. Instead, the FTC cited a broad disagreement with CAC's philosophy opposing antitrust. While that disagreement was already understood by CAC, the comments at issue addressed the government's specific conduct in prosecuting OGM and physician groups generally. To that argument, the FTC could only muster a broad evasion.

The analysis that the Commission issued when it accepted the consent agreement for public comment provides a detailed basis for this determination, through its extensive discussion of both the complaint and the consent order. Moreover, with respect to [CAC's] concerns about the complaint allegations, it is important to note the consent order is the product of a negotiated settlement between the Commission and the respondents.<sup>42</sup>

As is the case with Mountain, the FTC's complaint and analysis of their settlement with OGM provided little useful information for the public to disseminate in analyzing the proposed order. Instead, the FTC offered a series of unproven assertions against the defendants, and expected the public to accept them at face value without even minimal scrutiny. Furthermore, the government's argument that the settlement was the product of "negotiation" with OGM is disingenuous at best. As is the case here, the settlement forced the network's dissolution. In general, one rarely finds a party to a negotiation committing suicide as part of a mutual exchange. Indeed, as we will discuss below, the process used by the government in obtaining consent orders from physician groups is anything but a genuine "negotiation."

#### B. The Colorado Cases

Following on their triumph in Napa Valley, the FTC's attention next turned

to three settlements with physician groups in the Denver area. While nobody was forced to dissolve, FTC officials did manage to substantially hamper several small businessmen in the greater Denver area in the name of protecting competition.

The FTC's chief target in the Denver cases was Marcia Brauchler, the president of Physician's Ally, Inc., a healthcare management consulting firm. Brauchler is an unusual monopolist, as her annual income is approximately \$33,000, less than most government employees earn. Physician's Ally is run out of Brauchler's home, and consists of herself and a single part-time assistant.<sup>43</sup>

Despite her modest operation, the government considered Brauchler a dangerous threat to competition because of her work consulting two physician groups, Aurora Associated Primary Care Physicians (AAPCP) and Physician Integrated Services of Denver (PISD), which each consisted of about 40 physician-owners.

AAPCP and PISD both operated under the federal government's "messenger model" requirements, with Brauchler as the third-party messenger. As far as she, the doctors, and her attorneys were concerned, their operation was perfectly consistent with the DOJ-FTC guidelines. Then one day in June 2001, Brauchler received a letter from the FTC announcing they had launched an investigation of her, AAPCP, and PISD. FTC staff immediately demanded more than 13,000 pages of documents, most of which Brauchler produced using a rented photocopier in her living room.

Four months after submitting these documents, the FTC informed Brauchler that she had the option of settling immediately or facing a full-scale investigation and administrative trial. Brauchler was not informed of the actual charges against her, and the FTC said no complaint had been prepared. Nevertheless, the FTC would push for a consent order in the absence of any formal charges.

Despite the government's repeated characterization of the consent order process as a "negotiation," Brauchler's experience provides a more accurate picture. In November 2001, Brauchler was told the FTC would prepare a proposed settlement, send it to her counsel for review, and then expect her approval. Brauchler was repeatedly promised an opportunity to see the actual complaint against her, but the

<sup>40</sup> U.S. Const., art. IV, 2.

<sup>41</sup> Letter from Glenn Stover to Jeffrey Klurfeld, Director, FTC Western Regional Office 1-2 (July 17, 2002).

<sup>42</sup> Letter from Benjamin I. Berman, FTC acting secretary, to S.M. Oliva 2 (May 30, 2002).

<sup>43</sup> Unless noted otherwise, all information regarding the case against Marcia Brauchler can be attributed to a series of telephone and e-mail interviews CVT conducted with Ms. Brauchler.