

Statement of Commissioner Christine S. Wilson,
Joined by Commissioner Noah Joshua Phillips
In the Matter of Methodist Hospital/Tenet St. Francis Hospital

File No. 191-0189

November 13, 2020

We support the Commission’s unanimous decision to challenge this proposed transaction.

We write to note the broader context within which this transaction would occur, and to express concern about the barriers to robust hospital competition that exist in states with Certificate of Need (CON) laws. Specifically, the Tennessee CON law requires health care providers to obtain the prior approval of the state Health Services Development Agency, based on standards and criteria promulgated by the Division of Health Planning, before establishing or modifying a health care institution, facility, or service at a designated location.¹ According to the Complaint, “Tennessee’s CON regulations pose a significant barrier to entry. Tennessee’s CON regulations require anyone seeking to build a new hospital or modify an existing hospital or healthcare facility, as well as hospitals seeking to add licensed beds by more than 10 percent every three years per specific bed category, to undergo an extensive application process and justify the need for such additions. Obtaining CON approval is a time-consuming process and there is no guarantee such approval will be granted.”²

For decades, the FTC has advocated against CON laws – on the books in 35 states and the District of Columbia – because they prevent health care providers from responding quickly to meet market demand. Too often, that can mean too little or too expensive medical treatment and insurance payments. While state regulators rightly weigh a variety of interests, including public health, safety, and security, the FTC has sought to ensure that the benefits of competition remain a factor in the calculus. The FTC’s competition advocacy is premised on research indicating that displacing free market competition with CONs is associated with fewer hospitals, higher costs, lower quality of service, and increased mortality.³ Fresh illustrations arose during the COVID-19 pandemic: CONs threatened to stifle efforts to ensure a sufficient supply of hospital beds, prompting authorities in many states (including Tennessee) to repeal, waive, or suspend these

¹ TN Code § 68-11-1607 (2019).

² Complaint at ¶¶ 47-48.

³ See, e.g., Christopher Koopman & Thomas Stratmann, *Certificate-of-Need Laws and North Carolina: Rural Health Care, Medical Imaging, and Access* (May 17, 2016), <https://www.mercatus.org/publications/corporate-welfare/certificate-need-laws-and-north-carolina-rural-health-care-medical>; Matthew D. Mitchell, *Do Certificate-of-Need Laws Limit Spending?*, (Mercatus Working Paper, Mercatus Center at Geo. Mason Univ., Sept. 2016) (summarizing four decades of studies); Vivian Ho, Meei-Hsiang Ku-Goto & James G. Jollis, *Certificate of Need (CON) for Cardiac Care: Controversy over the Contributions of CON*, HSR: Health Services Research 44:2, Part I, Apr. 2009; Ho & Ku-Goto, *State Deregulation and Medicare Costs for Acute Cardiac Care*, MEDICAL CARE RESEARCH AND REVIEW (2013); Molly S. Myers & Kathleen M. Sheehan, *The Impact of Certificate of Need Laws on Emergency Department Wait Times*, 35 J. PRIV. ENTER. 59 (2020); James Bailey, *The Effect of Certificate of Need Laws on All-Cause Mortality*, HSR: Health Services Research 53:1 (Feb. 2018).

restrictions.⁴ We encourage the Commission, scholars, and others to study the results of these and other initiatives to expand access to care by removing regulatory barriers.⁵

Compounding the anticompetitive potential of CON laws, health care providers often lobby against competitors' CON applications.⁶ That is why the FTC previously has imposed relief that barred the parties under order from opposing CON applications.⁷

We encourage hospitals whose CONs are opposed — either directly or via proxies — to contact the Commission. The FTC has used its advocacy function to support CON applications

⁴ Tenn. Exec. Order No. 15 (Mar. 19, 2020), <https://publications.tnsosfiles.com/pub/execorders/exec-orders-lee15.pdf>; see also Ala. Proclamation (Apr. 2, 2020), https://www.opelika-al.gov/DocumentCenter/View/2458/2020-04-02-Fifth-Supplemental-SOE_COVID-19; Conn. Exec. Order No. 7B (Mar. 14, 2020), <https://portal.ct.gov/Office-of-the-Governor/News/Press-Releases/2020/03-2020/Governor-Lamont-Coronavirus-Update-March-14-2020-5PM>; Ga. Exec. Order (Mar. 20, 2020), <https://gov.georgia.gov/document/2020-executive-order/03202002/download>; Ind. Exec. Order No. 20-05 (Mar. 19, 2020), https://www.coronavirus.in.gov/files/N%20-%20EO_20-05.pdf; Iowa Proclamation of Disaster Emergency (Mar. 17, 2020), <https://governor.iowa.gov/sites/default/files/documents/Public%20Health%20Proclamation%20-%202020.03.17.pdf>; Mich. Exec. Order No. 2020-49 (2020): Temporary enhancements to operational capacity and efficiency of health care facilities, https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-525889--,00.html; Minn. Exec. Order No. 20-32 (Apr. 8, 2020): Ensuring that Healthcare Providers Can Respond Quickly and Safely During the COVID-19 Peacetime Emergency, https://mn.gov/governor/assets/1a.%20EO%2020-32%20Final._tcm1055-427412.pdf; Neb. Exec. Order No. 20-12 (Mar. 31, 2020), <http://govdocs.nebraska.gov/docs/pilot/pubs/eofiles/20-12.pdf>; N.J. Temporary Operational Waivers during a State of Emergency (Mar. 13, 2020), https://www.nj.gov/health/healthfacilities/documents/CN/temp_waivers/03-13-2020_Memo-Licensed%20Inpatient%20Facility%20Administrators_Temp_Operational_Waiver.pdf; N.Y. Exec. Order 202.1 (Mar. 12, 2020), <https://www.governor.ny.gov/news/no-2021-continuing-temporary-suspension-and-modification-laws-relating-disasteremergency>; N.C. Exec. Order 130 (Apr. 8, 2020), <https://files.nc.gov/governor/documents/files/EO130-Meeting-North-Carolinas-Health-and-Human-Services-Needs.pdf>; S.C. Exec. Order 20-21 (Apr. 10, 2020), <https://governor.sc.gov/sites/default/files/Documents/Executive-Orders/2020-03-19%20FILED%20Executive%20Order%20No.%202020-11%20%20Additional%20Emergency%20Measures%20%26%20Regulatory%20Relief%20re%20COVID-19.pdf>; Va. Exec. Order 52 (Mar. 20, 2020), [https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-52-Increases-in-Hospital-Bed-Capacity-in-Response-to-Novel-Coronavirus-\(COVID-19\).pdf](https://www.governor.virginia.gov/media/governorvirginiagov/executive-actions/EO-52-Increases-in-Hospital-Bed-Capacity-in-Response-to-Novel-Coronavirus-(COVID-19).pdf); Wash. Proclamation 20-38 by the Governor amending Proclamation 20-05 (Mar. 30, 2020), <https://www.governor.wa.gov/sites/default/files/proclamations/20-38%20-%20COVID%2019%20DSHS%20Facilities%20%28tmp%29.pdf>.

⁵ For examples of these barriers, see e.g. Christine S. Wilson and Pallavi Guniganti, *Deregulating Health Care in a Pandemic—and Beyond*, ANTITRUST (Summer 2020).

⁶ According to the Complaint, Methodist and Saint Francis “regularly oppose each other’s certificate of need (‘CON’) applications, seeking to stifle competitively beneficial technology investments or facility expansions that might draw patients from one to the other.” Complaint at ¶35.

⁷ Decision and Order, *In the Matter of Phoebe Putney Health System*, Docket No. 9348, March 31, 2015, <https://www.ftc.gov/system/files/documents/cases/150331phoebeputneydo.pdf> (“It is further ordered that until the earlier of five (5) years from the date this Order becomes final or the issuance of a CON for a General Acute Care Hospital in the Six-County Region, Respondent Phoebe Putney and Respondent Hospital Authority shall not file, formally or informally, directly or indirectly, with the Georgia Department of Community Health, its members, the Attorney General or any person in the Georgia Attorney General’s office, objections to or negative comments about, an application by any person or entity for a CON filed with the Georgia Department of Community Health – or any successor department or organization – or any appeals therefrom, for a General Acute Care Hospital in the Six-County Region.”)

upon the request of entities seeking to build new facilities.⁸ Market participants and consumers are an invaluable resource to help the FTC focus its advocacy where it can do the most good. We also hope that state authorities in Tennessee and elsewhere also will monitor market developments and intervene, if necessary, to prevent the use of CONs as an anticompetitive exclusionary tool.

⁸ Letter from Tara I. Koslov, D. Bruce Hoffman & Michael G. Vita, Fed. Trade Comm'n to Frank W. Berry (Oct. 16, 2017), https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-georgia-department-community-health-regarding-certificate-need-application-filed/v180001gaconleecounty_and_attachments.pdf.