FEDERAL TRADE COMMISSION DECISIONS

Findings, Opinions, and Orders

IN THE MATTER OF

AMERICA'S FAVORITE CHICKEN COMPANY

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3504. Complaint, July 5, 1994--Decision, July 5, 1994

This consent order prohibits, among other things, a Georgia-based fast-food corporation from misrepresenting the extent to which any product or package is capable of being recycled, or the extent to which recycling collection programs are available for such products, and from making claims about any environmental benefit of its products or packaging unless it possesses competent and reliable scientific evidence to substantiate the claims.

Appearances

For the Commission: *C. Steven Baker* and *Catherine R. Fuller.*
For the respondent: *Jane B. Long,* in-house counsel, Atlanta, GA.

COMPLAINT

The Federal Trade Commission, having reason to believe that America's Favorite Chicken Company, a corporation ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent America's Favorite Chicken Company ("A.F.C."), is a Minnesota corporation with its principal office or place of business at Six Concourse Parkway, Suite 1700, Atlanta, Georgia.

PAR. 2. Respondent has offered for sale, sold, advertised, labeled and distributed food products that are contained in disposable paper packaging to the public.

PAR. 3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

PAR. 4. Respondent has disseminated or has caused to be disseminated advertisements, including product labeling, for paper packaging it uses to contain its food products, including but not necessarily limited to the attached Exhibit 1.

The aforesaid product labeling (Exhibit 1) includes the following statement and depiction of a three chasing arrow symbol:

Recyclable Package

PAR. 5. Through the use of the statement and depiction contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisement attached as Exhibit 1, respondent has represented, directly or by implication, that A.F.C. paper packaging is recyclable after ordinary use.

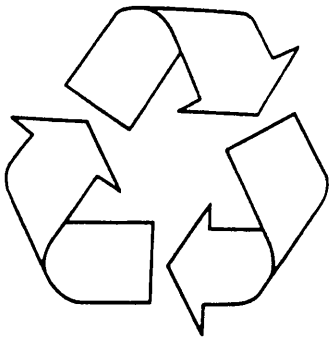
PAR. 6. In truth and in fact, while A.F.C. paper packaging is capable of being recycled, the vast majority of consumers cannot recycle the paper packaging because there are virtually no collection facilities that accept food contaminated paper for recycling. Therefore, the representation set forth in paragraph five was, and is, false and misleading.

PAR. 7. Through the use of the statement and depiction contained in the advertisements referred to in paragraph four, including but not necessarily limited to the attached Exhibit 1, respondent has represented, directly or by implication, that at the time it made the representation set forth in paragraph five, respondent possessed and relied upon a reasonable basis that substantiated such representation.

PAR. 8. In truth and in fact, at the time it made the representation set forth in paragraph five, respondent did not possess and rely upon a reasonable basis that substantiated such representation. Therefore, the representation set forth in paragraph seven was, and is, false and misleading.

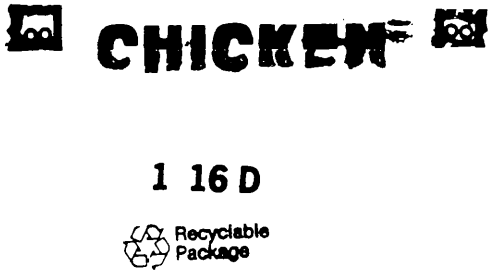
PAR. 9. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

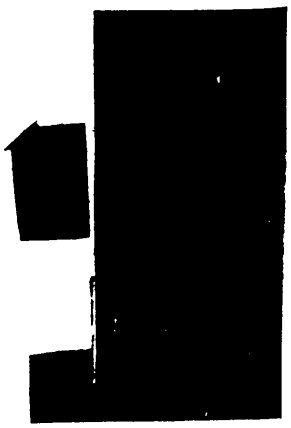
EXHIBIT 1



Recyclable
Package

CHURCH'S CHICKEN





POPEYES CHICKEN

EXHIBIT 1

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Chicago Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and no comments having been filed thereafter by interested parties pursuant to Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent America's Favorite Chicken Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota with its principal office or place of business at Six Concourse Parkway, Suite 1700, Atlanta, Georgia.

2. The acts and practices of the respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

DEFINITIONS

For purposes of this order, the following definitions shall apply:

The term "*product or package*" means any product or package, including, but not limited to, any item used by respondent to contain, serve, or package goods, offered for sale, sold or distributed to the public by respondent, its successors and assigns, under any brand name of respondent, its successors and assigns; and also means any such product or package sold or distributed to the public by third parties under private labeling agreements with respondent, its successors and assigns.

The term "*competent and reliable scientific evidence*" means tests, analyses, research, studies or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

I.

It is ordered, That respondent, America's Favorite Chicken Company, a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, distribution, or use of any product or package in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, in any manner, directly or by implication, the extent to which any such product or package is capable of being recycled or the extent to which recycling collection programs for such product or package are available.

II.

It is further ordered, That respondent, America's Favorite Chicken Company, a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through

any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, distribution, or use of any product or package in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, that any product or package offers any environmental benefit, unless at the time of making such representation, respondent possesses and relies upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates such representation.

III.

It is further ordered, That for five (5) years after the last date of dissemination of any representation covered by this order, respondent, or its successors and assigns, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All materials that were relied upon in disseminating such representations; and

B. All tests, reports, studies, surveys, demonstrations, or other evidence in its possession or control that contradict, qualify, or call into question such representation, or the basis relied upon for such representation, including complaints from consumers.

IV.

It is further ordered, That the respondent shall distribute a copy of this order to each of its operating divisions and to each of its officers, agents, representatives, or employees engaged in the preparation and placement of advertisements, promotional materials, product labels or other such sales materials covered by this order.

V.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporation such as a dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of

subsidiaries, or any other change in the corporation which may affect compliance obligations under this order.

VI.

It is further ordered, That respondent shall, within sixty (60) days after service of this order upon it, and at such other times as the Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF

COLUMBIA HEALTHCARE CORPORATION, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3505. Complaint, July 5, 1994--Decision, July 5, 1994

This consent order requires, among other things, the respondents to operate the HCA Aiken Regional Medical Center, in South Carolina, as a separate, independent hospital until it is divested to a Commission-approved acquirer. In addition, for ten years, the order prohibits the respondents from acquiring, without prior Commission approval, any other hospital in the Augusta-Aiken area.

Appearances

For the Commission: *David M. Narrow, Mark Horoschak* and *Mary Lou Steptoe.*

For the respondents: *Ky Ewing, Vinson & Elkins*, Washington, D.C. *Judy Whalley, Howrey & Simon,* Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the respondents, Columbia Healthcare Corporation ("Columbia") and HCA-Hospital Corporation of America ("HCA"), corporations subject to the jurisdiction of the Commission, have entered into an agreement whereby Columbia will acquire 100 percent of the voting stock of HCA; that the acquisition agreement violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; that the proposed acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, the Commission hereby issues its complaint, pursuant to Section 11(b) of the Clayton Act, 15 U.S.C. 21(b), and Section

5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), stating its charges as follows:

DEFINITIONS

PARAGRAPH 1. For purposes of this complaint the following definitions shall apply:

a. "*Columbia*" means Columbia Healthcare Corporation, a corporation organized, existing, and doing business under and by virtue of the laws of Delaware, with its principal place of business at 201 West Main Street, Louisville, Kentucky .

b. "*HCA*" means HCA-Hospital Corporation of America, a corporation organized, existing, and doing business under and by virtue of the laws of Delaware, with its principal place of business at One Park Plaza, Nashville, Tennessee.

c. "*Acute care hospital*" means a health facility, other than a federally owned facility, having a duly organized governing body with overall administrative and professional responsibility, and an organized medical staff, that provides 24-hour inpatient care, as well as outpatient services, and having as a primary function the provision of inpatient services for medical diagnosis, treatment, and care of physically injured or sick persons with short-term or episodic health problems or infirmities.

d. "*Acute care inpatient hospital services*" means 24-hour inpatient health care, and related medical or surgical diagnostic and treatment services, for physically injured or sick persons with short-term or episodic health problems or infirmities. In Georgia and South Carolina, acute care inpatient hospital services are provided only by health care institutions licensed as hospitals and further licensed or certified to provide acute care (as opposed to other types of hospital care, such as psychiatric, substance abuse, rehabilitation or subacute skilled nursing care).

THE PARTIES

PAR. 2. As of October 18, 1993, Columbia owned and operated, directly or through wholly-owned subsidiaries, 87 acute care hospitals in 17 states. In 1992, the predecessors of Columbia, which merged to form Columbia effective September 1, 1993, had

sales of more than $4.8 billion. Among the acute care hospitals respondent Columbia owns and operates is Augusta Regional Medical Center ("Augusta Regional"), in Augusta, Georgia.

PAR. 3. As of October 18, 1993, HCA owned and operated, directly or through wholly-owned subsidiaries, 72 acute care hospitals in 17 states. As of December 31, 1992, HCA's hospitals had sales of more than $5.1 billion. Among the acute care hospitals respondent HCA owns and operates is HCA Aiken Regional Medical Centers ("Aiken Regional") in Aiken, South Carolina, about 15 miles northeast of Augusta, Georgia.

JURISDICTION

PAR. 4. Columbia and HCA, at all times relevant herein, have been and are now engaged in or affecting commerce, as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12. The businesses of Columbia and HCA, at all times relevant herein, have been and are now in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

THE PROPOSED ACQUISITION

PAR. 5. On or about October 2, 1993, Columbia and HCA entered into an agreement whereby Columbia will acquire 100 percent of the voting stock of HCA, and HCA stockholders will receive in exchange Columbia voting stock. The total value of the HCA stock to be acquired by Columbia is about $4.006 billion.

NATURE OF TRADE AND COMMERCE

PAR. 6. The relevant line of commerce in which to analyze the proposed acquisition is the production and sale of acute care inpatient hospital services and/or any narrower group of services contained therein.

PAR. 7. The relevant section of the country is a three-county urban area including the cities of Augusta, Georgia, and Aiken, South Carolina, and consisting of Richmond County, Georgia, Columbia County, Georgia, and Aiken County, South Carolina ("Augusta-Aiken").

MARKET STRUCTURE

PAR. 8. The Augusta-Aiken relevant market is highly concentrated, whether measured by the Herfindahl-Hirschmann Index ("HHI") or by four-firm concentration ratios.

ENTRY CONDITIONS

PAR. 9. Entry into the Augusta-Aiken relevant market is difficult due to certificate-of-need regulation of entry by the States of Georgia and South Carolina, substantial lead times required to establish a new hospital, and other factors.

COMPETITION

PAR. 10. Augusta Regional and Aiken Regional are actual and potential competitors in the Augusta-Aiken relevant market.

EFFECTS

PAR. 11. The effects of the aforesaid acquisition, if consummated, may be substantially to lessen competition in the Augusta-Aiken relevant market in the following ways, among others:

(a) It would eliminate actual and potential competition between Augusta Regional and Aiken Regional, and between Aiken Regional and others;

(b) It would significantly increase the already high level of concentration in the market;

(c) It would eliminate Aiken Regional as a substantial independent competitive force;

(d) It may enhance the possibility of collusion or interdependent coordination by the remaining firms in the relevant market; and

(e) It may deny patients, physicians, third-party payers, and other consumers of hospital services in the relevant market the benefits of free and open competition based on price, quality, and service.

VIOLATIONS CHARGED

PAR. 12. The acquisition agreement described in paragraph five above violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

PAR. 13. The acquisition described in paragraph five, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation into the proposed acquisition of HCA-Hospital Corporation of America by Columbia Healthcare Corporation, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, as amended; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days (and having duly considered the comments received), now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Columbia Healthcare Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business at 201 West Main Street, Louisville, Kentucky.

2. Respondent HCA-Hospital Corporation of America is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business at One Park Plaza, Nashville, Tennessee.

3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

I.

It is ordered, That, as used in this order, the following definitions shall apply:

A. "*Columbia*" means Columbia Healthcare Corporation, a corporation organized, existing and doing business under and by virtue of the laws of Delaware, with its principal place of business at 201 West Main Street, Louisville, Kentucky, as well as its directors, officers, employees, agents, representatives, parents, divisions, subsidiaries, affiliates, and their respective successors and assigns, and the directors, officers, employees, agents, or representatives of Columbia's divisions, subsidiaries, affiliates, and their respective successors and assigns.

B. "*HCA*" means HCA-Hospital Corporation of America, a corporation organized, existing and doing business under and by virtue of the laws of Delaware, with its principal place of business at One Park Plaza, Nashville, Tennessee, as well as its directors, officers, employees, agents, representatives, parents, divisions, subsidiaries, affiliates, and their respective successors and assigns, and the directors, officers, employees, agents, or representatives of HCA's divisions, subsidiaries, affiliates, and their respective successors and assigns.

C. "*Respondents*" means Columbia and HCA, collectively and individually.

D. "*Acute care hospital*" means a health facility, other than a federally owned facility, having a duly organized governing body with overall administrative and professional responsibility, and an organized medical staff, that provides 24-hour inpatient care, as well as outpatient services, and having as a primary function the provision of inpatient services for medical diagnosis, treatment, and care of physically injured or sick persons with short-term or episodic health problems or infirmities.

E. To "*acquire an acute care hospital*" means to directly or indirectly acquire the whole or any part of the assets of an acute care hospital; to acquire the whole or any part of the stock or share capital of, the right to designate directly or indirectly directors or trustees of, or any equity or other interest in, any person which operates an acute care hospital; or to enter into any other arrangement to obtain direct or indirect ownership, management or control of an acute care hospital or any part thereof, including but not limited to a lease of or management contract for an acute care hospital.

F. To "*operate an acute care hospital*" means to own, lease, manage, or otherwise control or direct the operations of an acute care hospital, directly or indirectly.

G. "*Affiliate*" means any entity whose management and policies are controlled in any way, directly or indirectly, by the person with which it is affiliated.

H. "*Person*" means any natural person, partnership, corporation, company, association, trust, joint venture or other business or legal entity, including any governmental agency.

I. "*Augusta-Aiken*" means the three-county area consisting of the counties of Richmond and Columbia in Georgia and Aiken County in South Carolina.

J. "*HCA Aiken Regional Medical Centers*" means the general acute care hospital currently owned and operated by HCA at 202 University Parkway, Aiken, South Carolina, all of its title, properties, stock, rights, privileges, and other assets and interests, and all other related HCA assets and interests in Augusta-Aiken, of whatever nature, tangible and intangible, including without limitation all medical office buildings, other buildings, machinery, equipment, and other property of whatever description, except for accounts receivable and cash.

K. "*Commission*" means the Federal Trade Commission.

II.

It is further ordered, That:

A. Within twelve (12) months after the date this order becomes final, respondents shall divest, absolutely and in good faith, HCA Aiken Regional Medical Centers. HCA Aiken Regional Medical Centers shall be divested only to an acquirer or acquirers that receive the prior approval of the Commission, and only in a manner that receives the prior approval of the Commission. A condition of approval by the Commission of the divestiture shall be a written agreement by the party or parties acquiring HCA Aiken Regional Medical Centers that it will not sell for a period of ten (10) years from the date of the divestiture, directly or indirectly, through subsidiaries, partnerships or otherwise, without the prior approval of the Commission, HCA Aiken Regional Medical Centers to any other person who operates, or will operate immediately following such sale, any other acute care hospital in Augusta-Aiken. The purpose of the divestiture required by this order is to ensure the continuation of HCA Aiken Regional Medical Centers as an ongoing, viable acute care hospital and to remedy the lessening of competition alleged in the Commission's complaint.

B. Respondents shall comply with all terms of the Agreement to Hold Separate, attached hereto and made a part hereof as Appendix I. Said Agreement shall continue in effect until such time as respondents have divested HCA Aiken Regional Medical Centers or until such other time provided in the Agreement to Hold Separate.

C. Pending divestiture, respondents shall take such action as is necessary to maintain the viability and marketability of HCA Aiken Regional Medical Centers and shall not cause or permit the destruction, removal or impairment of any assets or businesses of HCA Aiken Regional Medical Centers, except in the ordinary course of business and except for ordinary wear and tear.

III.

It is further ordered, That:

A. If respondents have not divested, absolutely and in good faith and with the prior approval of the Commission, HCA Aiken Regional

Medical Centers as required by paragraph II of this order within twelve (12) months after the date this order becomes final, the Commission may appoint a trustee and respondents shall consent to the appointment of a trustee by the Commission to effect the divestiture required by paragraph II of this order. In the event the Commission or the Attorney General brings an action pursuant to Section 5(l) of the Federal Trade Commission Act, 15 U.S.C. 45(1), or any other statute enforced by the Commission, respondents shall similarly consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to Section 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the respondents to comply with this order.

B. If a trustee is appointed by the Commission or a court pursuant to paragraph III.A. of this order, respondents shall consent to the following terms and conditions regarding the trustee's powers, authorities, duties and responsibilities:

1. The Commission shall select the trustee, subject to the consent of respondents, which consent shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures of acute care hospitals. If respondents have not opposed, in writing, the selection of any trustee within ten (10) days after notice by the staff of the Commission to respondents of the identity of any proposed trustee, respondents shall be deemed to have consented to the selection of the proposed trustee.

2. The trustee shall have the exclusive power and authority, subject to the prior approval of the Commission, to divest HCA Aiken Regional Medical Centers.

3. The trustee shall have eighteen (18) months from the date of approval of the trust agreement described in paragraph III.B.8 of this order to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the eighteen-month period the trustee has submitted a plan of divestiture or believes that divestiture can be accomplished within a reasonable time, the divestiture period may be extended by the Commission, or

by the Court for a court-appointed trustee; provided, however, that the divestiture period may only be extended two (2) times.

4. The trustee shall have full and complete access to the personnel, books, records and facilities relating to HCA Aiken Regional Medical Centers, or any other relevant information, as the trustee may reasonably request. Respondents shall develop such financial or other information as such trustee may reasonably request and shall cooperate with any reasonable request of the trustee. Respondents shall take no action to interfere with or impede the trustee's accomplishment of the divestiture. Any delays in divestiture caused by respondents shall extend the time for the divestiture under this paragraph III in an amount equal to the delay, as determined by the Commission or the Court for a court-appointed trustee.

5. Subject to respondents, absolute and unconditional obligation to divest at no minimum price and the purpose of the divestiture as stated in paragraph II of this order, the trustee shall use his or her best efforts to negotiate the most favorable price and terms available with each acquiring entity for the divestiture of HCA Aiken Regional Medical Centers. The divestiture shall be made in the manner set out in paragraph II of this order; provided, however, that if the trustee receives bona fide offers from more than one acquiring entity, and if the Commission determines to approve more than one such acquiring entity, the trustee shall divest to the acquiring entity or entities selected by respondents from among those approved by the Commission.

6. The trustee shall serve, without bond or other security, at the cost and expense of respondents, on such reasonable and customary terms and conditions as the Commission or a Court may set. The trustee shall have authority to employ, at the cost and expense of respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, or other representatives and assistants as are reasonably necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all monies derived from the sale and all expenses incurred. After approval by the Commission and, in the case of a court-appointed trustee, by the Court, of the account of the trustee, including fees for his or her services, all remaining monies shall be paid at the direction of respondents and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a