PUBLIC VERSION

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of	)	
	)	
Phoebe Putney Health System, Inc.	)	**Docket No. 9348**
a corporation, and	)	**PUBLIC VERSION**
	)	
Phoebe Putney Memorial Hospital, Inc.	)	
a corporation, and	)	
	)	
Phoebe North, Inc.	)	
a corporation, and	)	
	)	
HCA Inc.	)	
a corporation, and	)	
	)	
Palmyra Park Hospital, Inc.	)	
a corporation, and	)	
	)	
Hospital Authority of Albany-Dougherty County	)	

RESPONDENTS' UNOPPOSED MOTION FOR TEMPORARY STAY AND MEMORANDUM IN SUPPORT THEREOF

Pursuant to Rule 3.22 of the Rules of Practice of the Federal Trade Commission, Respondents Phoebe Putney Health System, Inc. ("PPHS"), Phoebe Putney Memorial Hospital, Inc. ("PPMH"), and Hospital Authority of Albany-Dougherty County respectfully request a temporary stay pending a final Georgia Department of Community Health ("DCH") decision on whether Georgia Certificate of Need laws would effectively preclude the Commission's preferred remedy—separation of PPMH into two hospitals. A DCH Hearing Officer has already made such a determination, confirming the Commission's original conclusion that Georgia's Certificate of Need law would preclude a structural remedy. *See* Ex. 1. The Hearing Officer overturned every aspect of the initial DCH determination letter that led the Commission to reject

the previously proposed Consent Agreement and return the matter to adjudication. Based on rules and past practice, DCH will render its final agency decision within about 50 days (by or about December 1). Moreover, media reports reflect that DCH has issued a statement indicating that the DCH Commissioner – who possesses the authority to issue the final agency decision in that matter – "'is in support of and in agreement with the hearing officer decision.'"[1] A stay pending that final agency decision would avoid a waste of public and private resources, without prejudicing any party.

Respondents have met and conferred with Complaint Counsel. Complaint Counsel do not oppose this motion.

{[redacted]}

[1] *See* Ex. 2 ("Ga. Official Discourages Appeal in Phoebe Putney Fight," *Law 360*, Oct. 8, 2014) (quoting DCH statement).

I. Statement of Material Facts

In April 2011, the FTC commenced this administrative action, simultaneously filing a preliminary injunction action in the United States District Court for the Middle District of Georgia.

In June 2011, the district court held that the transaction was immune from federal antitrust laws under the state action doctrine. In July 2011, the Commission stayed this administrative proceeding to avoid wasting resources while the Eleventh Circuit ruled on the FTC's appeal. The Commission reasoned that, since the status quo would be preserved by the injunction pending appeal, no party would be prejudiced by a stay. *See* Order Granting Respondents' Unopposed Motion to Stay Proceeding (July 15, 2011).

In December 2011, the Eleventh Circuit affirmed the dismissal and dissolved the injunction, permitting the transaction to close. The transaction was consummated on December 15, 2011. Respondents subsequently applied to the Georgia DCH for a single license authorizing the operation of their legacy assets and the Palmyra assets as a single acute care hospital. DCH granted that request effective August 1, 2012, thereby revoking the separate licenses previously held by PPMH and the former Palmyra. PPMH has since operated all the assets it leases from the Hospital Authority, including the Palmyra assets, under a single license as one hospital with a Main and North Campus. *See* Ex. 1 at 1-4.

The Supreme Court granted *certiorari* and, on February 19, 2013, reversed and remanded the case for further proceedings. This matter was returned to administrative adjudication in March 2013 after being stayed for over a year and a half. *See* Order Granting Complaint Counsel's Motion to Lift Stay (Mar. 14, 2013).

In May 2013, Respondents and Complaint Counsel entered into confidential settlement negotiations. With Respondents' consent, the district court entered a preliminary injunction on June 4, 2013, maintaining the status quo and prohibiting any further integration of the former Palmyra assets. Ex. 3.

On June 24, 2013, the Commission withdrew this matter from adjudication to consider a consent agreement. *See* Order Withdrawing Matter from Adjudication Until August 8, 2013 (July 24, 2013). On August 22, 2013, the Commission publicly announced that it had entered into a Consent Agreement with Respondents, subject to a 30-day notice and comment period ending September 23, 2013. *See* Press Release, "Hospital Authority and Phoebe Putney Heath System Settle FTC Charges that Acquisition Violated U.S. Antitrust Laws" (Aug. 22, 2013).

In its August 22, 2013 Analysis of Proposed Agreement Containing Consent Order to Aid Public Comment ("Analysis to Aid Public Comment"), the Commission emphasized the centrality of Georgia CON laws to its decision to enter into the Consent Agreement. The Commission concluded that "Georgia's CON statutes and regulations effectively prevent the Commission from effectuating a divestiture of either hospital in this case." *Id.* at 4. Specifically:

> Georgia's CON laws preclude the Commission from re-establishing the former Palmyra assets as a second competing hospital in Albany, because such relief would require: (1) the re-division of the single state-licensed hospital into two separate hospitals; and (2) the transfer of one of those hospitals from the Hospital Authority to a new owner. Either one of these steps is independently sufficient to require CON approval from DCH, which…would not be forthcoming.

Id. at 4. The Commission also explained that it had not sought other remedies in the Consent Agreement because "[s]uch remedies are typically insufficient to replicate pre-merger competition, often involve monitoring costs, are unlikely to address significant harms from lost

quality competition, and may dampen incentives to maintain and improve healthcare quality." *Id.* at 1.

During the 30-day comment period, the FTC received and published eleven public comments. After the expiration of the public notice and comment period, North Albany Medical Center ("NAMC"), a third party organized in December 2013, expressed interest in acquiring the Palmyra assets. On March 12, 2014, NAMC submitted a Determination Request to DCH, seeking a determination that "CON and licensure is [*sic*] not a bar to the divestiture of Palmyra by PPHS and the acquisition of Palmyra." Ex. 4.

On March 28, 2014, Respondents sent a letter to DCH, objecting to the NAMC determination request in whole and also requesting that NAMC's request be dismissed as violating DCH rules against issuing determinations that are speculative or which relate to actions by third parties. Ex. 5.

On March 31, 2014, Bureau Director Feinstein sent a letter to DCH highlighting the importance of the CON issue to the FTC proceeding and noting NAMC's pending determination request. Ex. 6.[2] On May 20, 2014, Director Feinstein wrote DCH again, emphasizing that "the record is clear that the Commission's decision to accept the Proposed Consent was based on the Commission's understanding that Georgia's CON laws effectively barred a divestiture." Ex. 7 at 1. Director Feinstein also stated that, "we want to emphasize that we believe that a merits-based response by DCH to NAMC's determination request would be an integral factor in the Commission's decision whether to accept the proposed settlement or return the matter to

[2] Letter from Deborah Feinstein, FTC Director of the Bureau of Competition, to Roxana Tatman, Georgia Department of Community Health, Legal Director, Health Planning, dated March 31, 2014 ("FTC staff recently learned that North Albany is interested in acquiring the former Palmyra assets and has requested a Letter of Determination addressing whether a CON would be required under the circumstances outlined above").

litigation." *Id.* at 3. Director Feinstein also expressed deference to DCH's interpretations of Georgia CON law, noting that "[w]e take no position on the substantive question of whether a CON is required under Georgia law for the course of action NAMC proposes to take, as this is within DCH's purview." *Id.* at p.1, n.1.

On June 3, 2014, DCH issued an initial determination letter, finding that (1) NAMC's request was procedurally proper for determination and (2) NAMC's proposed acquisition of the North Campus would not require a CON review. Ex. 8. Because Respondents had mistakenly anticipated that DCH would either dismiss the request as procedurally improper or request merits arguments before making a decision, DCH issued this initial determination without the benefit of Respondents' merits arguments. Respondents promptly appealed this determination to a DCH Hearing Officer. All parties filed summary motions, and oral argument was scheduled for September 8, 2014.

On September 5, 2014, three days before the oral argument, the Commission announced that it was withdrawing its acceptance of the proposed Consent Agreement and was returning the matter to adjudication. Statement of the Commission (Sept 5, 2014). The Commission explained that it had originally accepted the proposed Consent Agreement "in light of the apparent unavailability of a practical and meaningful structural remedy." *Id.* at 2. Its understanding was "now different," because, "[a]s a result of public comments we received, as well as other information obtained by the Commission in response to the public comments, we became aware that the CON laws might not bar a structural remedy in this matter." *Id.* at 2. Specifically, the Commission cited the DCH's initial determination that NAMC's proposed acquisition of the North Campus would not require a CON review. *Id.* at 2. Again acknowledging the centrality of Georgia law to the resolution of this matter, the Commission

withdrew its approval of the Consent Agreement because it now believed that "Georgia CON laws may not be an impediment to structural relief" and thus, "that structural relief remains available." *Id.* at 2.

The DCH Hearing Officer heard oral argument on September 8, 2014, ruling from the bench and overturning the determination letter on almost all counts, not ruling only on several questions of fact, pending possible stipulation by the parties. *See* Ex. 9. The Hearing Officer subsequently confirmed his ruling and with a written decision that also overturned the determination letter on the remaining counts, issued on October 2, 2014. *See* Ex. 1.

The Hearing Officer determined that separation of the North Campus (*i.e.*, the former Palmyra assets) from PPMH would in fact require CON review. *Id.* The Hearing Officer's ruling confirms the Commission's original conclusion that both (1) the re-division of PPMH as a single state-licensed hospital into two separate hospitals, and (2) the transfer of one of those hospitals from the Hospital Authority to a new owner would independently require CON approval from DCH. *Id.* at 10-12, 14-27. And, under either scenario, issuance of a CON would require the bed need determination, adverse impact analysis, and other requirements found in the "service specific" DCH rule that governs general acute care hospitals. *Id.* at 27-30. The Hearing Officer's conclusion renders structural relief unavailable in this proceeding, confirming the Commission's earlier analysis of this issue.

II. Argument

Respondents respectfully submit that there is good cause for the Commission to stay this proceeding and that doing so is consistent with the Commission's decisions in this case to date. The Commission has made clear that the key purpose of going forward with administrative proceedings was the prospect of structural relief whereby the former Palmyra assets would

become a second Albany, Georgia hospital. The Commission has also recognized that the availability of that relief depends on Georgia CON law, as applied by the Georgia authorities. Moreover, the Commission has previously found a stay appropriate while a potentially case-resolving issue, such as state action immunity, is decided by another forum, particularly where a preliminary injunction preserves the underlying assets and neither party would suffer prejudice.

Those same principles warrant a stay while DCH renders its final CON decision. Conversely, continued litigation will potentially waste significant public resources of the parties, as well as the resources of various public and private third parties who must otherwise comply quickly with subpoenas for documents, data and depositions. If, as Respondents respectfully predict and press reports seem to portend, the DCH Commissioner affirms the Hearing Officer's ruling, then the significant litigation resources expended over the next 30 to 90 days could be for naught.

A. This Matter Should Be Stayed Pending A Final Agency Decision On The Georgia CON Issue Central to the Resolution of this Case.

The Hearing Officer decision makes clear that a CON is required for two independent reasons: (i) the re-establishment and operation of the former Palmyra assets as a second Dougherty County hospital; and (ii) the transfer of that hospital from the Authority to a private owner. *Id.* This confirms the FTC's original conclusion that "Georgia's CON statutes and regulations effectively prevent the Commission from effectuating a divestiture of either hospital in this case." Analysis to Aid Public Comment (Aug. 22, 2013), at 4.

Moreover, in approximately 50 days, there will likely be a final agency decision. Procedurally, the Georgia Administrative Procedure Act allows a final appeal from the Hearing Officer's decision to the DCH Commissioner. The DCH Commissioner's decision is the final agency action. The statutory time for the total appeal process, including decision, is 60 days

from the Hearing Officer's Order. *See* O.C.G.A. 50-13-17(a),(c). Parties must submit any objections to the Commissioner within 30 days of the Hearing Officer's decision. After that, the agency has 30 days to issue its final appeal. *Id*. So there should be a final agency ruling on or around December 1, 2014.[3] In this case, it may occur more quickly, given the DCH Commissioner's public announcement of agreement with the Hearing Officer Order.

NAMC could pursue an appeal of DCH's decision into the state court system. Yet the prospect of further appeal did not lead the Commission to reject a prior stay of this matter. The Commission stayed this matter following the district court's state action immunity determination, despite the pendency of an Eleventh Circuit appeal and the prospect of *certiorari*, and continued until after the Supreme Court issued its decision. *See* Order Granting Respondents' Unopposed Motion to Stay Proceeding (July 15, 2011).

{[redacted]}

[3] Recent experience confirms this time frame in practice. For example, in *In re: Dublin Endoscopy Center, LLC*, DET 2013-108, the Hearing Officer's decision was issued on April 11, 2014 and, after objections were filed, the Commissioner issued a final order on June 10, 2014. Respondents can supply such documentation of this matter and other examples as the Commission would find helpful in ruling on this motion.

In addition, Respondents make three observations regarding any judicial appeal. First, any appeal of the Commissioner's decision is taken in the Georgia trial court (superior court) and, under O.C.G.A. § 31-6-44.1(b), it must be ruled upon within 120 days of docketing or the DCH order is automatically affirmed. Second, any subsequent appeal beyond the superior court level is discretionary, requiring an application to the Georgia Court of Appeals.[4] Finally, divestiture would not be available unless the appellate court reverses *both* of the Hearing Officer's independent conclusions. The appellate court would have to conclude that the division of PPMH into two hospitals does not require a CON *and* a subsequent transfer to NAMC does not require a CON. If either step requires a CON, there could be no structural relief.

In sum, the DCH decision will determine an issue critical to this Part III proceeding, and it has a defined timeline that would produce a significantly shorter stay than what the Commission granted when it allowed a stay during the pendency of the federal action. The outcome will give both parties effective certainty about the status of Georgia CON laws and the ultimate availability of divestiture.

B. The Status Quo Will Be Preserved and Neither Party Will Be Prejudiced By a Stay.

Issuing a stay in this matter will not prejudice any party. As explained above, there will likely be a final DCH decision in approximately 60 days. In the interim, Respondents will continue to operate the hospital according to the Stipulated Preliminary Injunction entered by the federal court, and the status quo will be maintained. *See* Ex. 3. {[redacted]

[4] *See* O.C.G.A. § 5-6-35(a)(1) (covering "[a]ppeals from decisions of the superior courts reviewing decisions of … state and local administrative agencies") & (b)-(f) (detailing discretionary appeal procedures); *see, e.g., Prison Health Services, Inc. v. Georgia Dept. of Administrative Services*, 265 Ga. 810, 811, 462 S.E.2d 601, 603 (1995) (dismissing attempt to appeal, as of right, superior court order reviewing administrative agency decision).

[redacted]

[redacted]}

The FTC will not be prejudiced by the stay. No harm is caused by the at most three month delay requested. This matter has been ongoing for nearly four years and was paused twice, for over a year each time—once while the federal action was appealed and once while the FTC considered the proposed Consent Agreement. Respondents cannot think of any reason why the FTC would be prejudiced in waiting another 90 days to continue litigation, particularly in light of the posture of the DCH proceeding.

{[redacted]

[redacted]

[redacted]

[redacted]}

C. Allowing Litigation To Continue Will Waste Significant Resources And Harm The Citizens Of The Region.

The continued litigation of this case will cost Respondents significant resources and millions of dollars that could be used for the care of the residents of Southwest Georgia. It will also cause Complaint Counsel and numerous third parties to expend considerable resources in completing discovery and preparing for a trial that may never need to happen. A stay in this matter would allow DCH the opportunity to reach a final resolution of the dispositive issue, and preserve resources, enabling the community to benefit from PPMH resources that would otherwise finance administrative litigation. Importantly, it would also save resources for the numerous third parties that have been served discovery requests by both Respondents and Complaint Counsel.

Litigation expenses erode the same pool of dollars that PPMH uses to render uncompensated and under-compensated care to one of the poorest counties in the nation, along with the other community benefits summarized above. Forcing this proceeding to continue during the pendency of a final agency decision that may be dispositive of this case will harm the many residents of the region who greatly benefit from PPMH's charity care. No structural remedy can be obtained during DCH's final review and a federal injunction prohibits further integration and preserves assets. Just as the Commission has previously recognized, "staying these proceedings will avoid a waste of resources and will not prejudice either side." Order Granting Respondents' Unopposed Motion to Stay Proceeding (July 15, 2011).

III. Conclusion

For the foregoing reasons, Respondents respectfully submit that the Commission stay this proceeding pending a final ruling by the Georgia Department of Community Health.

Dated: October 21, 2014

Respectfully submitted,

By /s/ Lee K. Van Voorhis

Lee K. Van Voorhis, Esq.
Brian F. Burke
Jennifer Ancona Semko
Baker & McKenzie LLP
815 Connecticut Avenue, NW
Washington, DC 20006
Counsel For Phoebe Putney Memorial Hospital, Inc. and Phoebe Putney Health System, Inc.

Michael Caplan
Caplan Cobb
1447 Peachtree Street, N.E., Suite 880
Atlanta, Georgia 30309
Counsel For Hospital Authority of Albany-Dougherty County

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of	)	
	)	
Phoebe Putney Health System, Inc. a corporation, and	)	**Docket No. 9348**
	)	
Phoebe Putney Memorial Hospital, Inc. a corporation, and	)	
	)	
Phoebe North, Inc. a corporation, and	)	
	)	
HCA Inc. a corporation, and	)	
	)	
Palmyra Park Hospital, Inc. a corporation, and	)	
	)	
Hospital Authority of Albany-Dougherty County	)	

[PROPOSED] ORDER

Having reviewed Respondents' UNOPPOSED MOTION FOR TEMPORARY STAY, it is HEREBY

ORDERED that Respondents' motion is GRANTED.

_____
D. Michael Chappell
Chief Administrative Law Judge

Dated:

ATTACHMENT

REDACTED IN ENTIRETY

Exhibit 1

BEFORE THE GEORGIA DEPARTMENT OF COMMUNITY HEALTH
STATE OF GEORGIA

IN RE:	)	
	)	**PROJECT NO. GA DET 2014-033**
NORTH ALBANY MEDICAL CENTER, LLC	)	
	)	
	)	

ORDER GRANTING SUMMARY ADJUDICATION
TO THE HOSPITAL AUTHORITY OF ALBANY-DOUGHERTY COUNTY
AND THE PHOEBE ENTITIES

THIS matter, having come before the undersigned Administrative Hearing Officer, after Motions for Summary Adjudication and Partial Summary Adjudication, after having reviewed the parties' written submissions and having heard the parties' Oral Arguments on these issues on September 8, 2014, it is HEREBY ORDERED that Summary Adjudication is GRANTED in favor of Appellants, Hospital Authority of Albany-Dougherty County (the "Hospital Authority") and Phoebe Putney Memorial Hospital, Inc. and Phoebe Putney Health System, Inc. (collectively, the "Phoebe Entities"), and that the Georgia Department of Community Health's ("DCH") Motion for Partial Summary Adjudication and North Albany Medical Center, LLC's ("NAMC") Motion for Summary Adjudication are DENIED. Further, Appellants' Request for Written Discovery and DCH's pending Motion for Remand and Limited Reconsideration are MOOT.

I. BACKGROUND AND FINDINGS OF FACT

Phoebe Putney Memorial Hospital, Inc. ("PPMH, Inc.") currently leases from the Hospital Authority and operates a single licensed hospital, Phoebe Putney Memorial Hospital, on two nearby campuses in Albany, Dougherty County. This hospital consists of a main campus on the historical site of Phoebe Putney Memorial Hospital and a north campus (sometimes called "Phoebe North") on the site of the former Palmyra Park Hospital, which was once owned by a

subsidiary of HCA Inc. PPMH, Inc. is a wholly owned subsidiary of Phoebe Putney Health System, Inc. ("PPHS").

In December 2010, the Hospital Authority entered into an agreement with HCA Inc. to acquire Palmyra's assets for a purchase price of $195 million. On April 19, 2011, the Federal Trade Commission ("FTC") filed an administrative complaint, challenging the legality of the acquisition under federal antitrust laws. The FTC stayed the administrative action pending appeals related to the application of the state action immunity doctrine to the Hospital Authority's acquisition. While the FTC initially obtained a temporary restraining order ("TRO") in federal district court on April 21, 2011, the district court later dissolved the TRO and denied the FTC's request for a preliminary injunction after it concluded that the acquisition was protected by state action immunity. *FTC v. Phoebe Putney Health System, Inc.*, 793 F. Supp. 2d 1356, 1381 (M.D. Ga. 2011). The FTC then appealed to the Eleventh Circuit, which granted an injunction pending appeal. However, the Eleventh Circuit dissolved that injunction on December 15, 2011, shortly after affirming the district court's opinion that the acquisition was protected by state action immunity. *FTC v. Phoebe Putney Health System, Inc.*, 663 F.3d 1369 (11th Cir. 2011). The FTC did not seek a new injunction while it petitioned the United States Supreme Court for certiorari or after the Supreme Court granted certiorari.

On September 8, 2011, the Hospital Authority filed a Request for Determination with DCH (DET 2011-147) that its acquisition of Palmyra's assets would be exempt from prior CON review and approval under O.C.G.A. § 31-6-47(a)(9), as the acquisition of an existing, privately-owned health care facility. On October 20, 2011, DCH issued DET 2011-147 (Appellants' Motion for Summary Adjudication ("MSA"), Attachment B2, Ex. 5) confirming that the acquisition would be exempt from prior CON review and approval.

On December 15, 2011, the transaction closed, and the Hospital Authority acquired ownership of the former Palmyra assets, which then became known as Phoebe North. After the acquisition closed, the Authority applied for and obtained a new license to operate Phoebe North as a short stay general hospital with a capacity of 248 beds. In accordance with DCH Rule 111-8-40-.03(h), Palmyra's hospital license was terminated before DCH issued a license to the Hospital Authority for Phoebe North.

On May 25, 2012, the Hospital Authority, as owner of Phoebe North, filed a Request for Determination with DCH (DET 2012-096) in which it proposed to lease Phoebe North to PPMH, Inc. for operation with the main campus facility as a single hospital. Specifically, the Hospital Authority proposed to amend its existing long-term lease of Phoebe Putney Memorial Hospital to PPMH, Inc. in order to combine and operate all of those assets into a single hospital. On October 3, 2012, DCH issued DET 2012-096 confirming that the Hospital Authority's proposed lease of Phoebe North to PPMH, Inc. was a CON-exempt "restructuring" by a hospital authority under O.C.G.A. § 31-6-47(a)(9.1). (Appellants' MSA, Attachment B2, Ex. 1). DCH confirmed that the beds and services of the two, previously separate hospitals were now consolidated for health planning purposes and that, post-transaction, the movement and redistribution of beds and services among the two campuses would be analyzed under the "one facility, one license standard." DET 2012-096.

The Hospital Authority then amended its 1991 lease of Phoebe Putney Memorial Hospital to PPMH, Inc. to include the lease of the former Palmyra assets (Phoebe North) to PPMH, Inc. for operation as part of Phoebe Putney Memorial Hospital under a single hospital permit, issued by DCH effective August 1, 2012. As a result, the two campuses were combined into a single

hospital, under a single license, with a capacity of 691 beds, and have thereafter been operated as a single integrated hospital by PPMH, Inc. to this date.

On February 19, 2013, the United States Supreme Court held that the state action doctrine did not exempt the Hospital Authority's acquisition from federal antitrust laws, and remanded the case to the federal district court for further proceedings. *FTC v. Phoebe Putney Health System, Inc.*, 133 S. Ct. 1003 (2013). On May 15, 2013, the federal district court granted the FTC's request for a temporary restraining order, and on June 4, 2013, entered a preliminary injunction pursuant to a proposed order filed jointly by all parties to the case. By the time that the federal district court issued that injunction on June 4, 2013, the consolidation of Phoebe North with the main campus, as described above, had already taken place with DCH's approval.

Thereafter, on August 22, 2013, the FTC and Appellants entered into a proposed settlement of the FTC administrative litigation. At the time, it was the FTC's analysis that Georgia's Certificate of Need ("CON") statutes and regulations would effectively prevent the FTC from effectuating the Hospital Authority's divestiture of the former Palmyra assets as a remedy. The FTC published a proposed Consent Order that provided for other relief and restrictions, along with an Analysis in Aid of Public Comment. Pursuant to its rules, the FTC invited public comment on the proposed Consent Order during a thirty-day comment period commencing on August 29, 2013.

On March 12, 2014, NAMC, which had been formed as a for-profit limited liability company in December 2013, filed a Request for Letter of Determination (DET2014-033) with DCH. It requested a determination that, if the FTC ordered divestiture of Phoebe North from

PPHS,[1] Phoebe North could be decoupled from the license of Phoebe Putney Memorial Hospital and licensed as a separate hospital without prior CON review and approval, and that NAMC could then acquire Phoebe North and re-license and operate it without a CON. NAMC also requested a determination that, if it could not acquire Phoebe North by purchase, it could, as a potential alternative remedy, lease a decoupled Phoebe North from the Hospital Authority without a CON. Finally, NAMC also requested a determination that, if DCH concluded that a CON is required for the decoupling and its subsequent acquisition or lease of Phoebe North, DCH's service-specific rule considerations would not apply to the CON review process, and that only the general statutory and rule considerations would apply.

On March 28, 2014, the Appellants filed a timely written objection to NAMC's DET Request.

On March 31, 2014, the FTC filed a letter with DCH stating that the FTC and Appellants had entered into a settlement of the federal administrative litigation which was premised, in part, on the FTC's own analysis that the Georgia CON statutes and regulations would prevent the FTC from effectuating a divestiture of Phoebe North. The FTC noted that DCH's response to NAMC's determination request would likely play an important role in whether the FTC accepted the settlement.

On April 17, 2014, NAMC responded to Appellants' Letter of Objection. On April 25, 2014, the Appellants replied to NAMC's response.

On May 20, 2014, the FTC filed an additional letter with DCH, again stating that the FTC's decision to enter into a settlement agreement with Appellants was based on its

[1] While NAMC's determination request assumed a divestiture of the former Palmyra assets from PPHS, it is now undisputed that those assets are owned by the Hospital Authority and are operated by PPMH, Inc. under its Amended Lease with the Hospital Authority.

understanding that the Georgia CON statutes and regulations effectively bar a divestiture, and that if DCH determines that no CON is required, or that any CON review would be under the general considerations rather than the service-specific considerations for short-stay general hospitals, the FTC may not accept the settlement.

On June 3, 2014, DCH issued its determination letter in DET2014-033. DCH determined that a response to NAMC's request for determination was appropriate under DCH Rule 111-2-2-.10(2). DCH concluded that decoupling Phoebe North from Phoebe Putney Memorial Hospital and returning it to its prior status as a separately licensed hospital would not require prior CON review and approval. DCH also determined that, once decoupled from Phoebe Putney Memorial Hospital, Phoebe North would be considered an "existing health care facility," the acquisition of which would be exempt from CON review pursuant to O.C.G.A. § 31-6-47(a)(9). DCH based this conclusion on its assumption that Phoebe North is owned by and operated on behalf of PPMH, Inc., and not the Hospital Authority. Otherwise, that acquisition would not fall under O.C.G.A. § 31-6-47(a)(9), which exempts the acquisitions of existing facilities *not* owned by hospital authorities or other organs of local government. Finally, DCH determined that if Phoebe North was decoupled and separately licensed, it could be leased to NAMC by the Hospital Authority without a CON pursuant to the CON exemption prescribed in O.C.G.A. § 31-6-47(a)(9.1). In that regard, DCH stated that "[t]he Authority's lease to NAMC would be considered a restructuring of the Authority for CON purposes. The restructuring would be made by a hospital authority within the meaning of O.C.G.A. 31-6-47(a)(9.1)." (DET2014-033, p. 5).

Subsequent to DCH's issuance of its determination letter, on July 2, 2014, the Appellants timely requested an administrative appeal and hearing to contest DCH's determinations pursuant

to DCH Rule 111-2-2-.10(6) and Chapter 13 of Title 50 of the Georgia Administrative Procedure Act.

On August 8, 2014, Appellants and NAMC filed cross Motions for Summary Adjudication ("MSA"). Appellants contended in their MSA that the Hospital Authority owns Phoebe Putney Memorial Hospital (including the assets that make up the Phoebe North campus) and that prior CON review and approval (and specifically, review under the service-specific considerations governing short-stay general hospitals), would be required for NAMC to purchase Phoebe North from the Hospital Authority, even if Phoebe North could be decoupled from Phoebe Putney Memorial Hospital without a CON. In addition, Appellants contended that a CON would be required before Phoebe North could be decoupled from Phoebe Putney Memorial Hospital and licensed as a separate hospital, and that the service-specific considerations for short-stay general hospitals would apply. Appellants also contended that, based on the facts in NAMC's DET Request, any lease by the Hospital Authority of Phoebe North to NAMC would not be a CON-exempt "restructuring" by a hospital authority, contrary to the determination expressed in DCH's DET2014-033.

NAMC contended in its MSA that DCH had correctly determined that the decoupling of Phoebe North from Phoebe Putney Memorial Hospital; NAMC's proposed acquisition of Phoebe North; and NAMC's potential alternative remedy of leasing Phoebe North from the Hospital Authority would not require a CON. NAMC also contended that, pursuant to O.C.G.A. § 31-6-47.1, Appellants do not have the right to an appeal hearing, arguing that no CON exemption is at issue and that that is required for an appeal by a challenger to a DCH determination letter. Finally, NAMC argued that Appellants waived any right to raise substantive challenges to DCH's determination as to CON-related issues because they did not sufficiently argue those issues in

their written objection submitted to DCH. DCH did not agree with NAMC's procedural arguments that Appellants have no right to a hearing or as to waiver.

DCH also filed a Motion for Partial Summary Adjudication and a Motion for Remand and Limited Reconsideration on August 8, 2014. DCH argued for its determinations in DET 2014-033 to be upheld, except for its determination that NAMC's purchase of a decoupled Phoebe North would not require a CON because the hospital was not owned by or operated on behalf of the Hospital Authority. In its Motion for Remand, DCH sought permission to reconsider whether Phoebe North is a facility "owned by or operated on behalf of" a hospital authority pursuant to O.C.G.A. § 31-6-47(a)(9). DCH thereafter expressed the position in its response to Appellants' MSA and during Oral Argument that a CON would be required for a capital expenditure of more than $2.5 million (as statutorily adjusted) by NAMC to purchase a decoupled Phoebe North pursuant to O.C.G.A. § 31-6-47(a)(9). There is no dispute that a "capital expenditure" would be required for such a purchase.

On August 29, 2014, Appellants responded to DCH's Motion for Partial Summary Adjudication and NAMC's MSA. DCH and NAMC responded to Appellants' MSA.

A hearing on the parties' MSAs was held on September 8, 2014, at which they presented Oral Arguments. During the course of Oral Arguments, this Hearing Officer rejected NAMC's procedural challenges to Appellants' MSA, which were based on its "no right to a hearing" and "waiver" arguments. Further, this Hearing Officer expressed agreement with Appellants' position on all CON-related issues, except for the lease restructuring issue under O.C.G.A. § 31-6-47(a)(9.1), as to which Appellants contended there remained disputed facts. NAMC and DCH

counsel expressed their position during the hearing that there were no genuine issues of fact in dispute as to any issues.[2]

On September 12, 2014, Appellants and NAMC filed a Joint Stipulation of Facts relating to the lease restructuring issue. DCH filed an Objection to the relevance of that joint stipulation of facts on September 18, 2014, but stated therein that it does not dispute the stipulated facts themselves. Thus, there are no material facts in dispute. Accordingly, without objection from any party, an evidentiary hearing previously scheduled for September 24, 2014 was cancelled.

II. STANDARD OF REVIEW

The Hearing Officer's review of DCH's initial determination is *de novo*, and is not subject to, or otherwise limited by, a deferential standard of review. This review of DCH's determination is governed by the contested case provisions of the Georgia Administrative Procedure Act. *See Greene v. Dep't of Cmty. Health*, 293 Ga. App. 201, 203-06 (2008); *Longleaf Energy Assocs., LLC v. Friends of the Chattahoochee, Inc.*, 298 Ga. App. 753, 768 (2009); O.C.G.A. §§ 31-6-47.1, 50-13-13; DCH Rule 111-2-2-.10(6). Thus, the Hearing officer's review is constrained only by the governing statute and principles of due process. *Id.*; *see, e.g., In re Northside Hospital* at 4, DET 2011-133, Final Decision, April 27, 2012) ("The Administrative Hearing Officer correctly determined that the legal standard of review in this case is a *de novo* review which requires the hearing officer to make an independent determination of the facts and legal conclusions in the case.").

[2] *See* Moldovan, T. 6-7 ("We don't believe there are any factual disputes in the case."); Menk, T. 13 ("[T]here are not disputed factual issues").

III. LEGAL CONCLUSIONS

A. NAMC's Purchase of a Decoupled Phoebe North Hospital, as a Facility Owned by or Operated on Behalf of a Hospital Authority within the Meaning of O.C.G.A. § 31-6-47(a)(9), Would Require Prior CON Review and Approval.

In DET2014-033, DCH determined that, in the event that separate licensure is obtained for Phoebe North, NAMC's purchase of a decoupled, separately licensed Phoebe North would be CON-exempt pursuant to O.C.G.A. § 31-6-47(a)(9) because Phoebe North would be considered an "existing health care facility under the CON laws." DET2014-033, p. 4. In arriving at that conclusion, DCH relied on the assumption that NAMC would "acquir[e] Phoebe North by divestiture from PPMH, not the Authority." *Id.*

After issuing DET2014-033, DCH indicated in its filings in this matter that it has reconsidered its determination that NAMC's acquisition of a decoupled Phoebe North would be exempt from CON review. This was in light of additional evidence indicating that Phoebe North is owned by the Hospital Authority, not PPMH, Inc., and is operated on behalf of the Hospital Authority under the lease between the Hospital Authority and PPMH, Inc. (*See* DCH Motion for Remand and DCH's Response to Appellants' MSA, at pp. 7-9).

Any person seeking to develop or offer a "new institutional health service or health care facility" must first apply for and obtain a CON from DCH, unless the CON statute specifically excludes the activity in question from CON requirements. O.C.G.A. § 31-6-40(b). The CON statute generally exempts acquisitions of existing health care facilities from CON review. However, that general exemption does not apply to facilities that are "owned or operated by or on behalf of" a hospital authority (unless the acquirer is also a hospital authority, in which case the exemption applies). Section 31-6-47(a)(9) of the Code reads as follows:

"[T]his [CON] Chapter Shall Not Apply To":

(9) Expenditures for the acquisition of existing health care facilities by stock or asset purchase, merger, consolidation, or other lawful means *unless* the facilities are *owned or operated by or on behalf of a*:

(A) Political subdivision of this state;
(B) Combination of such political subdivisions; or
(C) *Hospital authority, as defined in Article 4 of Chapter 7 of this title* [*i.e.*, the Hospital Authorities Law].

Id. (emphasis added).

Thus, only a hospital authority (or other political subdivision of Georgia) can qualify for the CON exemption prescribed in O.C.G.A. § 31-6-47(a)(9) for the "acquisition of an existing health care facility" in order to purchase a facility that is owned or operated by or on behalf of a hospital authority.

Consistent with these statutes, DCH rules treat the acquisition of an existing health care facility that is owned or operated by or on behalf of a hospital authority as a "[n]ew institutional health service" subject to prior CON review and approval. DCH Rule 111-2-2-.01(39)(g) defines the term "new institutional health service" to include:

(g) the acquisition of an existing health care facility which is owned or operated by or on behalf of a political subdivision of this State; any combination of such political subdivisions; or by or on behalf of a hospital authority except as otherwise provided in these Rules.

Under DCH Rule 111-2-2-.01(1), the "[a]cquisition of an existing health care facility" means "to come into possession or control of a health care facility by purchase ... lease … or by any other legal means."

There is substantial and uncontroverted evidence in the record that Phoebe Putney Memorial Hospital, which includes Phoebe North on the same hospital license, is owned by the Hospital Authority. (*See, e.g.,* Exhibits 5, 6, 7, 8, 9, 10 and 11 of Attachment B2 to Appellants' MSA; Exhibits 22 and 23 of Attachment C to Appellants' MSA; and Attachments D1 and D2 to Appellants' MSA (Amended and Restated Lease and Transfer Agreement)). The fact that the

Hospital Authority owns Phoebe Putney Memorial Hospital is now undisputed. (*See* Menk, T. 62; NAMC MSA, p. 1).

Thus, it is clear that NAMC's acquisition by purchase of a decoupled Phoebe North hospital from the Hospital Authority would require a CON. O.C.G.A. § 31-6-47(a)(9).

Moreover, under O.C.G.A. § 31-6-40(a)(2), a "new institutional health service" includes:

> (2) any expenditure by or on behalf of a health care facility in excess of $2.5 million which, under generally accepted accounting principles consistently applied, is a capital expenditure, except expenditures for acquisition of an existing health care facility not owned or operated by or on behalf of a hospital authority, as defined in Article 4 of Chapter 7 of this title [the Hospital Authorities Law] . . . . The dollar amounts specified in this paragraph . . . shall be adjusted annually . . . . "

It is undisputed that NAMC's expenditure for the acquisition of Phoebe North would be in excess of the $2.5 million capital expenditure threshold set forth in O.C.G.A. § 31-6-40(a)(2). (*See* 2013 Application for Property Exemption Filed by the Hospital Authority of Albany-Dougherty County, Georgia, for 2000 Palmyra Road, Albany, Georgia (Phoebe North Hospital Facility) (showing fair market value of Phoebe North as $20,210,400), attached as Exhibit 10 in Attachment B2 to Appellants' MSA). NAMC conceded as much during Oral Argument. (Moldovan, T. 47). For that additional reason, NAMC's purchase of a decoupled Phoebe North Hospital would be subject to prior CON review and approval.[3]

[3] Furthermore, as discussed at pp. 27-30, *infra*, both the general review considerations (DCH Rule 111-2-2-.09) and the service-specific review considerations applicable to short-stay general hospitals (DCH Rule 111-2-2-20) would apply to the CON review of NAMC's purchase of Phoebe North from the Hospital Authority, whether such an acquisition were deemed to be reviewable under O.C.G.A. § 31-6-47(a)(9), O.C.G.A. § 31-6-40(a)(2), or both.

B. NAMC's Acquisition of a Decoupled Phoebe North Hospital Would Not Be CON-Exempt Based on NAMC's Theory That It Is Not Currently A "Health Care Facility."

NAMC argues that its acquisition of a decoupled Phoebe North would not require a CON under O.C.G.A. §§ 31-6-47(a)(9) or 31-6-40(a)(2) because NAMC itself is not currently a "health care facility." DCH disagrees with that position, and it is without merit. It was not a basis for DCH's determinations in DET 2014-033.

DCH has consistently determined that expenditures made directly to acquire, construct, or improve a facility that will be operated as a health care facility are expenditures "on behalf of" a health care facility, even if the entity expending the funds is not itself a "health care entity" either prior to or after the expenditure. (*See* July 23, 1997 letter to Stanley S. Jones, Jr., Esq. from DCH General Counsel Clyde L. Reese, III, Esq. re: "Agency Threshold Issues," attached as Exhibit A to Appellants' Response to NAMC's MSA). Capital expenditures to acquire or improve a health care facility are "on behalf of" a health care facility, even if the entity expending the funds is not itself a health care facility prior to (or after) the expenditure.

Here, NAMC purportedly proposes to acquire, own, and operate a decoupled and newly licensed hospital in Albany consisting of the former Palmyra assets for which the Hospital Authority paid $195 million. NAMC's expenditure would be for a health care facility, *i.e.*, a hospital to be operated by and related to NAMC, and thus would be made on behalf of a health care facility, even if NAMC is not currently operating a health care facility.

Moreover, pursuant to longstanding, consistent agency policy, the capital expenditure need not be made by a party related to the health care facility in order to be an expenditure under O.C.G.A. § 31-6-40(a)(2) if it is made directly with respect to a facility that will be operated as a health care facility. (*See In re: Development of Medical Office Building*, DET 2004-084

(Kennestone Physician Center II, LP) (July 7, 2004), attached as Exhibit B to Appellants' Response to NAMC's MSA).

Accordingly, NAMC's contention that it could purchase and operate Phoebe North without a CON because NAMC is not currently a "health care facility" is without merit. NAMC's expenditure to purchase Phoebe North would be CON reviewable under both O.C.G.A. § 31-6-47(a)(9) and § 31-6-40(a)(2).

C. Both Decoupling of the Hospital Authority's Single Licensed Hospital Into Two Hospitals and the Subsequent Sale of the Phoebe North Hospital to NAMC To Be Re-Licensed and Operated by the Unrelated Entity Would Be Subject to Prior CON Review and Approval.

1. The "Establishment" of a New Health Care Facility Is Subject to Prior CON Review and Approval.

Any "new institutional health service" is subject to prior CON review and approval. O.C.G.A. §§ 31-6-40(a) and (b). The term "new institutional health service" includes "[t]he construction, development, *or other establishment* of a new health care facility (O.C.G.A. § 31-6-40(a)(1) (emphasis added)), and a hospital is a health care facility (O.C.G.A. § 31-6-2(17)). The term "other establishment" in Code Section 31-6-40(a)(1) clearly means something other than "construction" or "development." "Establishment" is a broad term. "The word 'established' is defined in C.J. 898, as meaning to bring into being; to build; *to constitute;* to create; *to form; to found*; to found and regulate; *to institute*; to locate; to make; to model; *to organize*; to originate; to prepare; to set up." *Georgia PSC v. Georgia Power Co.,* 182 Ga. 706 (1936); *see also Iowa Service Co. v. City of Villesca*, 203 Iowa 610, 213 N.W. 401, 402 (1927) ("establishment" can be the legal equivalent of "purchased.").

2. Phoebe Putney Memorial Hospital is a Single Licensed Hospital.

By virtue of the events recounted *supra* at pp. 2-4, PPMH, Inc. currently operates a single licensed hospital, Phoebe Putney Memorial Hospital. Phoebe Putney Memorial Hospital is the only licensed hospital in Dougherty County. It consists of a main campus on the historical site of Phoebe Putney Memorial Hospital and a north campus (sometimes still called "Phoebe North") on the site of the former Palmyra Park Hospital. PPMH, Inc. leases the assets that make up the main campus and the north campus from the Hospital Authority, which owns all of those assets.

In that regard, after the Hospital Authority's acquisition of the assets of Palmyra Park Hospital closed on December 15, 2011, the Hospital Authority applied for and obtained a new license from DCH to operate the former Palmyra assets as "Phoebe North," a short-stay general hospital with a capacity of 248 beds. Palmyra's previous hospital license terminated under DCH Rule 111-8-40-.03(h), when a subsidiary of HCA Inc. ceased to own Palmyra and DCH issued the Hospital Authority a new license.[4]

Thereafter, the Hospital Authority proposed to amend its existing long-term lease of Phoebe Putney Memorial Hospital to PPMH, Inc. in order to combine and operate all of those assets into a single hospital, with a main campus on the historical site of Phoebe Putney Memorial Hospital and a north campus on the site of the former Palmyra Park Hospital. DET 2012-096, issued by DCH on October 3, 2012, confirmed that the Hospital Authority's proposed lease of Phoebe North to PPMH, Inc. was a CON-exempt "restructuring" by a hospital authority under O.C.G.A. § 31-6-47(a)(9.1). DET 2012-096 confirmed "that, post-transaction [*i.e.*, the

[4] "A new permit … is required if the hospital … has a change in ownership … or has a change in the authorized bed capacity. The former permit shall be considered revoked upon the issue of a new permit and the former permit shall be returned to the Department." DCH Rule 111-8-40-.03(h).

lease and issuance of a single license], the movement and redistribution of beds and services among the two campuses of the combined facilities will be analyzed in the same manner, and in accordance with the same applicable rules, as the movement of beds and services *under the one facility, one license standard.*" *Id.* at 3 (emphasis added).

DCH subsequently granted PPMH, Inc.'s application to amend its hospital permit to include Phoebe North and its licensed beds and services on the same license as Phoebe's existing inpatient/outpatient hospital building on its main campus. DCH issued an amended hospital permit with a capacity of 691 beds to Phoebe Putney Memorial Hospital, effective as of August 1, 2012. By operation of DCH Rule 111-8-40-.03(h), the issuance of that single permit cancelled the two separate permits that had previously authorized the operation of subsets of these beds at the historic Phoebe Putney Memorial Hospital and the former Palmyra Park Hospital.

3. Each Newly Licensed Hospital Resulting First From a Division of the Hospital Authority's Current Hospital Into Two Hospitals, and Then From NAMC's Required New Licensing of a Phoebe North Hospital That It Might Acquire and Operate, Would "Establish" a New Health Care Facility.

Any person responsible for the operation of an "institutional" health care facility, which includes a hospital, must apply for and receive a permit from DCH. O.C.G.A. § 31-7-3. "A new permit . . . is required if the hospital . . . has a change of ownership . . . . The former permit shall be considered revoked upon the issue of a new permit and the former permit shall be returned to the Department." DCH Rule 111-8-40-.03(h).

DCH's licensure rules authorize the consolidation of separate hospital campuses in close proximity to each other under a single license. Rule 111-8-40-.03(a) (formerly Rule 290-9-7-.03(a)) provides as follows:

> (a) A permit is required for each hospital. Multi-building hospitals may request a single permit to include all buildings provided that the hospital buildings are in close proximity to each other, the facilities serve patients in the same

geographical area, and the facilities are operated under the same ownership, control, and bylaws.

In other words, a facility consisting of several campuses close enough to share ownership, control, and governance may be licensed as a single hospital by DCH. DCH exercised that authority in approving the consolidation of the 248 Phoebe North Hospital beds and services into Phoebe Putney Memorial Hospital's new, amended hospital license with a capacity of 691 beds. *See* DET 2012-096, pp. 2-3 (discussed *supra*). As a result of that DCH-approved consolidation, the Hospital Authority no longer owns – and DCH's health planning inventory no longer contains – one Albany, Georgia facility with the authority to operate 443 beds and another Albany, Georgia facility with the authority to operate 248 beds. Instead, there is one facility with a consolidated inventory of 691 beds, which the Hospital Authority owns and which PPMH, Inc. may operate either on only one of its campuses or across both of them in any combination.

In contrast, no licensure statute or rule authorizes a multi-campus hospital operating under a single hospital permit to request that a single hospital permit be split or divided into two or more separate hospital permits. Moreover, DCH Rule 11-8-40-.03(f) (Hospital Permit Requirement) provides that "[a] permit is not transferable from one governing body to another nor from one hospital location to another. . . ." In other words, a hospital permit cannot be split or divided into two separate permits, either for the existing permit owner or for any new owner.

4. CON Requirements Cannot Be Avoided by Dividing an Existing Licensed Health Care Facility Into Two Licensed Facilities.

Nothing in the CON statutes or DCH Rules authorizes the division of one existing hospital's CON authority, services, and/or beds into two or more separate hospitals without prior CON review and approval. "Decoupling" is not a statutory exception to the CON requirements – neither that term nor any synonym appears anywhere in the CON statutes, with one narrow

exception. Specifically, the CON statutes expressly grant DCH discretion to authorize certain nursing facilities to "divide" without CON review:

> A certificate of need shall be valid only for the defined scope, location, cost, service area, and person named in an application, as it may be amended, and as such scope, location, service area, cost, and person are approved by the department, unless such certificate of need owned by an existing health care facility is transferred to a person who acquires such existing facility. In such case, the certificate of need shall be valid for the person who acquires such a facility and for the scope, location, cost, and service area approved by the department. *However, in reviewing an application to relocate all or a portion of an existing skilled nursing facility, intermediate care facility, or intermingled nursing facility, the department may allow such facility to divide into two or more such facilities if the department determines that the proposed division is financially feasible and would be consistent with quality patient care.*

O.C.G.A. § 31-6-41(a) (emphasis added).

Thus, the legislature granted DCH the discretion in specified circumstances to allow the division of "an existing skilled nursing facility, intermediate care facility, or intermingled nursing facility" without a CON. *Id.* This last sentence of O.C.G.A.§ 31-6-41(a), emphasized above, was added to the CON Act in the 2008 Senate Bill 433 comprehensive amendments to the statute. 2008 Ga. Laws 12, § 1-1, eff. July 1, 2008. This is the only statutory authorization anywhere in the Georgia Code for DCH to approve the division of an existing facility into multiple ones without requiring prior CON review and approval for each of the resulting facilities. This explicit authorization for certain nursing facilities indicates that the legislature did not intend to allow splitting of any other sort of health care facility without full CON review. If the legislature meant to allow that sort of splitting for all facilities – particularly facilities as central to public health and health planning as short-stay general hospitals – it surely would have said so, rather than providing only a narrow exception for certain nursing facilities.

Under the well-established principles of *expressio unius est exclusio alterius* (the expression of one thing implies the exclusion of another) and *expressum facit cessare tacitum* (if

some things are expressly mentioned, the inference is stronger that those not mentioned were intended to be excluded), the inclusion in O.C.G.A.§ 31-6-41(a) of a facility-splitting provision for certain existing skilled nursing facilities, intermediate care facilities, or intermingled nursing facilities shows that, contrary to the determination in DET2014-033, facility splitting for other health care facilities (like hospitals) not mentioned in O.C.G.A. § 31-6-41(a) is not permitted under Georgia law.[5]

DCH cannot allow one short-stay general hospital to divide into two independent short-stay general hospitals without prior CON review and approval because that would not be authorized by any explicit statutory exemption, and DCH has no discretion to create new exceptions to the CON laws or broaden existing ones. Exemptions from regulatory statutes of general applicability, such as the CON law, must be specified by the legislature, strictly and narrowly construed, and consistent with the legislative intent underlying the stated regulatory objectives which, for CON purposes, are stated in O.C.G.A. § 31-6-1. Any doubts must be resolved against the grant of exemption. CON Cases: *Phoebe Putney Memorial Hospital v. Roach,* 267 Ga. 619, 621-21 (1997); *North Fulton Med. Ctr. v. Stephenson,* 269 Ga. 640, 542-44

---

[5] *See Chase v. State,* 285 Ga. 693, 695-96 (2009) (where the General Assembly intended to eliminate consent as a defense to three specific offenses in one subsection of a statute, it did so; its failure to do so in a second subsection of the same statute indicates intent not to eliminate consent as a defense to the offense set forth there: "Georgia law provides that the express mention of one thing in an act or statute implies the exclusion of all other things"); *Hogan v. Nagel*, 273 Ga. 577, 578 (2001) ("The failure of the legislature to craft an exception to the time requirement when it created an express exception to the notice requirement is strong evidence that it did not intend any exception"); *Morton v. Bell*, 264 Ga. 832, 833 (1995) ("[I]f some things (of many) are expressly mentioned [in a statute], the inference is stronger that those omitted are intended to be excluded than if none at all had been mentioned"). This is a universal principle of statutory construction. *See, e.g., Hillman v. Maretta*, 133 S. Ct. 1943, 1953 (2013) ("'[W]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.'") (quoting *Andrus v. Glover Constr. Co.,* 446 U.S. 608, 616–17 (1980)); *Warshauer v. Solis,* 577 F.3d 1330, 1335-36 (11th Cir. 2009).

(1998); *HCA Health Services v. Roach,* 263 Ga. 494, 497 (1994); Others: *Georgia Dep't of Revenue v. Owens Corning,* 283 Ga. 489, 493 (2008); *Sawnee Elec. Mem. Corp. v. Georgia PSC,* 273 Ga. 702, 705-06 (2001). The legislature saw fit to allow that sort of division only for a few types of nursing facilities, not including short-stay general hospitals.

5. Numerous DCH Precedents Have Precluded Splitting an Existing Short-Stay General Hospital or Other Existing Health Care Facility into a Separately Licensed Health Care Facility.

In multiple instances, DCH has precluded a health care facility from dividing into two licensed facilities that would offer the same service without prior CON review and approval.

In re: Northeast Georgia Medical Center, Inc., Project No. GA 2006-140, involved the proposed re-division of two, previously separate short-stay general hospitals, with no net increase in beds. This was a contested administrative proceeding. The applicant, Northeast Georgia Medical Center, had initially proposed building a "replacement" hospital in South Hall County by splitting off beds from the existing licensed capacity of its two-campus hospital in Gainesville and obtaining a new license for the "replacement" hospital campus. The beds to be split off were physically located on a separate campus in Gainesville that had previously been operated by HCA as a separate hospital (Lanier Park Hospital) before it was acquired and consolidated with the applicant's hospital under a single license. DCH declined to review the application for the proposed South Hall hospital as a "replacement hospital." Instead, DCH treated the proposal as the development of a "new" hospital for purposes of applying the appropriate service-specific "need" methodology in its review of the project.

In defending (and winning) its position at a contested hearing, DCH presented the sworn testimony of Robert Rozier, the former Executive Director of DCH's Division of Health

Planning, testifying as an expert health planning witness called by, and on behalf of, DCH. The following testimony of Mr. Rozier reflects DCH's position:

> Q At that [60-day] meeting what exactly did you tell Northeast Georgia?
>
> A At the 60-day meeting we told them, similar to Barrow's argument, *that the Lanier Park campus and the main campus are licensed as one single facility; therefore, parts of facilities can't break off and move to a different location and be considered a replacement facility because there was one facility before, and after this there will be two. . . . A replacement is having the same number of facilities you had before and afterwards.*
>
> Q And so it was suggested that they apply as a new hospital?
>
> A Yes.

In re: Northeast Georgia Medical Center, Inc.., Project No. GA 2006-140 (September 20, 2007 Testimony of Robert Rozier) (emphasis added). (Appellants' MSA, Attachment B2, Ex. 13).[6]

DCH's position, as presented through Mr. Rozier's testimony, reflected DCH's consistent approach of requiring CON review where a single licensed facility proposed to divide into two competing providers of the same service, subject to the same service-specific review considerations.

For example, in DET 2004-088, DCH rejected the request of a multi-specialty ambulatory surgery center ("ASC") (Atlanta Outpatient Surgery Center) to divide into two separately licensed ASCs:

> Two separately licensed ambulatory surgery centers would constitute two separately licensed health care facilities. Such a proposal would require prior CON review and approval for each new health care facility. *The component which received the new license would be a newly established health care facility. The establishment of a new health care facility requires prior CON review and approval.*

[6] The Court of Appeals affirmed the Department's review determinations in *Northeast Georgia Medical Center, Inc. v. Winder HMA, Inc.*, 303 Ga. App. 50 (2010), although the applicant did not continue to contest the "new hospital" issue.

(Appellants' Response to DCH's MSA, Ex. A (decoupling was not allowed notwithstanding the grandfathered status of the facility and services)).

In DET 2004-042 (University Health Care System) (Appellants' MSA, Attachment B2, Ex. 14), University Hospital in Augusta (Richmond County) had previously been issued a CON to develop and operate a new multi-specialty ASC in Columbia County. University Hospital later requested a determination that it could split that ASC into two separately-licensed ASCs. University asked DCH to confirm that this ownership transfer (which involved simply physically dividing an existing ASC and transferring ownership of the divided assets, with no net increase in operating rooms) would not require CON review. DCH denied that request, determining as follows:

> University Hospital may not split the current ambulatory surgery center into two separately licensed ambulatory surgery centers under the current CON. Such a proposal would require prior CON review and approval for each new joint venture. . . .
>
> Furthermore, the current Columbia County ASC is licensed as a part of the hospital and not as a freestanding ambulatory surgery center. O.C.G.A. § 31-6-41(a) requires that a CON be valid only for the person named on the CON and in the CON application. While this statutory provision allows a healthcare facility to be later acquired by another person or entity, it *does not allow a healthcare facility such as a hospital to sell components of itself, which would be akin to selling a CON or a portion thereof. Prior CON review and approval would be required in such a situation.*

Id. (emphasis added).

Similarly, in DET 2004-036 (Coliseum Park Medical Centers, Inc.) (*Id.*, Ex. 15), Coliseum Park Medical Centers in Macon proposed to split off four operating rooms from the hospital's license to create a separately-licensed, freestanding ASC on its campus. Coliseum asked DCH to confirm that this ownership transfer (which involved no net increase in operating rooms) would not be subject to CON review. DCH denied the request, determining that:

> . . . . Coliseum cannot "give" operating rooms, which were never subject to the need methodology, without prior CON review and approval to a freestanding facility, which would have had to obtain prior approval and review under the need methodology had it sought to add the operating rooms itself. Therefore, CON review and approval, including a review based on the service-specific ambulatory surgery center review considerations, is required prior to the addition of these ambulatory surgery operating rooms at [the ASC] regardless of cost.

Id.

In *In re: Pediatric Surgery Center, L.P.*, Project No. GA 2005-040 (Dec. 12, 2005) (*Id.*, Ex. 16), the applicant sought a CON to split an existing ASC into two separately licensed CONs. As DCH observed in its decision, "[i]mplementation of the proposed project would not involve any incremental increase in the number of operating rooms in the planning area", and "[t]here are no construction or renovation costs associated with the proposed project." *Id.* at 1. However, DCH applied the numerical need and aggregate utilization methodology of the ASC service-specific rules, found no need, and denied the CON. Moreover, in that matter, DCH refused the applicant's plea for some special exception to the need methodology prescribed in DCH's Rules, with the following explanation:

> Approving the division of [the existing ASC] into [two separately-licensed ASCs] through a legal and administrative process would allow the applicant to circumvent the Department's need methodology by creating an additional ASC in a service area where no calculated need exists. The Department's need methodology is a tool the Department uses to fulfill one of its key objectives, which is to prevent the unnecessary duplication of services. Justifying the creation of a second freestanding pediatric ASC in HPA 3 in this manner would erode the Department's need methodology.

Id., p. 10.

DCH has frequently required new facility CON review where an existing health care facility proposes to divide some of its assets into a separately licensed provider of the same services, even where there is no net increase in beds, operating rooms, or other regulated inventory items.

6. The "Decoupling" Determinations Cited by NAMC and DCH Are Inconsistent with Prior Precedents, Contrary to Statute, and Also Distinguishable.

NAMC and DCH cite several uncontested DCH determinations that have allowed facility splitting *only* where there would be no *service* splitting. Each of these determinations allowed a single licensed short-stay general hospital to decouple a specialty hospital that would provide a different category of specialty services than the short-stay general hospital facility that would remain.

The March 11, 2008 determination letter, DET2008013, issued to Southern Regional Medical Center, is a good example. (Appellants' MSA, Attachment B2, Ex. 17). In that determination, a short-stay general hospital that also owned and operated a psychiatric facility on its license became one short-stay general hospital (a type of facility governed by the service-specific review considerations in DCH Rule 111-2-2-.20) and one psychiatric hospital (a type of facility governed by the service-specific review considerations in DCH Rule 111-2-2-.26). It did not become two competing short-stay general hospitals or two competing psychiatric hospitals, thereby multiplying the number of providers without DCH having determined that there was a need for two facilities.

Similarly, by letter of February 22, 2008, DCH determined that a short-stay, general hospital (Gwinnett Medical Center) would not need a new CON in order to transfer from its license a freestanding psychiatric facility (Summit Ridge). *See* DET2008-008 (Gwinnett Hospital System, Inc. d/b/a Summit Ridge) (*Id.,* Ex. 18). Again, short-stay general hospitals and psychiatric facilities are different services subject to different service-specific review considerations. The result of that division and transfer would not have increased the number of

providers of any health care service, *i.e.*, Gwinnet Medical Center would not function as a psychiatric facility, and Summit Ridge would not function as a short-stay general hospital.

DCH reached the same conclusion in a determination letter involving South Georgia Medical Center (SGMC), issued on December 17, 2012. *See* DET2012-156 (South Georgia Medical Center) (*Id.*, Ex. 19). DCH confirmed that a short-stay general hospital (SGMC) could separately license a psychiatric hospital (Greenleaf Center) without obtaining a new CON for that facility. Separating that facility from SGMC did not result in there being more psychiatric hospitals or more short-stay general hospitals than the day before the separation. That fact was essential to DCH's reasoning: "If the licenses are decoupled, Greenleaf will retain CON authorization for psychiatric and substance abuse service with 50 beds as specified above. After the decoupling, SGMC will have 330 CON authorized beds but will not retain any CON authorization for psychiatric or substance abuse services." *Id.*

Finally, in DET2013-138 (Emory University Hospital/Center for Rehabilitation Medicine) (*Id.*, Ex. 20), issued on November 14, 2013, DCH allowed a facility that offered two separate services subject to different CON need and adverse impact requirements to separate those services. The Emory determination involved separation of a short-stay general hospital from a facility that provided comprehensive inpatient physical rehabilitation services. As in the psychiatric hospital matters above, rehab services are different services than short-stay general hospital services and are governed by different service-specific review considerations. As DCH specified in its Emory determination letter, "[i]f the CRM [Center for Rehabilitation Medicine] obtains a separate license, the CRM would have authorization for 56 CIPR [Comprehensive Inpatient Physical Rehabilitation] beds, and EUH [Emory University Hospital] would have authorization for 523 acute care beds." DET2013-138, p. 1. Thus, "[t]here will still only be one

CIPR service at the CRM location . . . ." *Id.* at 2. So in the Emory rehab matter, as in the SGMC psychiatric hospital matter, DCH required a clean break between different types of services governed by different CON need and impact requirements. It did not allow one provider of the same type of service to become two, without CON review. That sort of "splitting" would allow for the multiplication of independent providers of the same services without evaluation of their impact on existing institutions or any of the other limits imposed by CON laws. In the words of DCH in *In re: Pediatric Surgery Center*, "[j]ustifying the creation of a second freestanding [hospital] in this manner would erode the Department's need methodology." Project No. GA 2005-040 (*Id.*, Ex. 16) at 10.

Thus, prior to DET2014-033, DCH had authorized only a decoupling of a psychiatric or a rehab hospital from an existing short-stay general hospital, which does not change the number of providers of the same service in the health planning area. DCH had never allowed a single licensed short-stay general hospital to split into two separate short-stay general hospitals where the result would be an increase in the number of providers offering the same category of service. The uncontested determination letters relied upon by NAMC and DCH as "precedent" for excluding a health care facility decoupling from prior CON review and approval are distinguishable from the proposal in DET 2014-033 to divide one licensed short-stay general hospital into two such licensed hospitals. Moreover, those determination letters are inconsistent with the prior DCH testimony, CON decision, and determination letters discussed *supra*, and are, therefore, entitled to little weight. *Mann v. Hardaway,* 302 Ga. App. 673, 675 (2010); *INS v. Cardoza-Fouseca,* 480 U.S. 421, 447-48 n. 30 (1987). Most importantly, those uncontested DCH determination letters are contrary to the statutory requirement that new institutional health

services, including the "establishment" of a new health care facility, first secure a CON (O.C.G.A. §§ 31-6-40(a), (a)(1) and (b)), and are found to be defective as a matter of law.

D. The Service-Specific Considerations for Short-Stay General Hospitals Apply to CON Review of Both a Decoupling of the Hospital Authority's Single Licensed Hospital and a Subsequent NAMC Acquisition of a Decoupled Phoebe North Hospital.

In its determination request, NAMC proposed (1) the "decoupling" of Phoebe Putney Memorial Hospital into two short-stay general hospitals owned by the Hospital Authority, and (2) acquiring one of the two resulting hospitals, *i.e.,* the one that would be located on the former Palmyra campus. Each step would require CON review under the service-specific considerations for short-stay general hospitals. (DCH Rule 11-2-2-.20).

The service-specific considerations apply, *inter alia*, to "the *establishment* of a new hospital." DCH Rule 111-2-2-.20(1)(a) (emphasis added). As discussed *supra,* "establishment" is a broad term, and a "new institutional health service," requiring a CON, is defined as "[t]he construction, development, or *other establishment* of a new health care facility." O.C.G.A. § 31-6-40(a)(1) (emphasis added). A decoupled health care facility that secured a new license "would be a newly established health care facility." DET 2004-088 (Atlanta Outpatient Surgery Center), *supra* at 21.

Currently, PPMH is a single licensed health care facility. Converting some of the hospital's assets into a second, independent hospital with its own new license, governing structure, and all of the other features required by Georgia and federal law to constitute a hospital would, by definition and common usage, establish a new hospital. That conclusion is consistent

with DCH's "one facility, one license standard."[7] The number of licenses determines the number of hospitals, not the number of campuses or buildings. *Id.*; *accord* DCH Rule 111-8-40-.03(a) (providing for licensing of a multi-campus facility as a single hospital). Moving from one license to two means that a new hospital has been established. Likewise, moving from one governing structure, medical staff, and bylaws to two means that a new hospital has been established. *See generally* DCH Rules 111-8-40-.09 (requirement of a hospital-wide governing body and administrator or CEO); 111-8-40-.11 (requirement of hospital-wide medical staff and bylaws); 111-8-40.13 (requirement of hospital-wide quality program).

Allowing a single short-stay general hospital to divide into two short-stay general hospitals without prior CON review and approval would circumvent the health planning purposes of the CON laws. "The legislature created the CON requirements to avoid costly and unnecessary duplication of health-care services." *Georgia Dept. of Community Health v. Satilla Health Services, Inc.*, 266 Ga. App. 880, 886 (2004). Two hospitals require (and compete for) two medical staffs and personnel rosters, and they each incur the costs of acquiring, maintaining, and operating physical plants and all of the diagnostic, therapeutic, and rehabilitation equipment required to operate a hospital. Moreover, two hospitals compete for the same patients to cover all of these fixed costs. Even if the combined number of beds remains constant, an additional hospital incurs duplicative overhead and can draw patients, revenue, and qualified personnel away from existing "safety net" and "teaching" hospitals, which receive special protection under the adverse impact standard of the short-stay general hospital rule. *See* DCH Rule 111-2-2-.20(3)(d)(1)-(3).

---

[7] *See, e.g.*, DET 2012-096 (October 3, 2012) at 3 (recognizing that the legacy PPMH and Palmyra assets constituted a single facility once combined under a single license) (Appellants' MSA Attachment B2, Ex. 1).

Pursuant to the CON law and rules, Georgia regulates the number of competing hospitals, not merely the number of beds, and will not approve multiple hospitals unless there is a demonstrated need sufficient to sustain both facilities at the optimal occupancy levels and usage rates embodied in the regulations.[8] Accordingly, prior CON review and approval of the establishment of a new hospital under the service-specific considerations is required whenever a single licensed short stay general hospital seeks to become two such licensed health care facilities.

For the same reasons, NAMC's acquisition of one of the Hospital Authority-owned hospitals that would result from a "decoupling" would require service-specific review. In addition, NAMC's contrary claim that only general review considerations would apply ignores the substance of its proposal. NAMC does not propose to acquire a single existing hospital from a hospital authority, such that there would be the same number of hospitals serving the target population before and after the acquisition and no prospect of "adverse impact" on an existing facility.[9] This would not be a mere change of ownership. Instead, NAMC proposes to divide a single hospital authority-owned hospital into two hospitals, then acquire one of them and operate it in competition with the hospital that the Hospital Authority will retain. That transaction would squarely implicate all of the need and adverse impact requirements of the short-stay general hospital rule. It presents the prospect of a prohibited "adverse impact" on the hospital authority-owned "teaching" and "safety net" hospital that will remain (*i.e.*, the legacy PPMH campus). Ignoring the bed need and adverse impact requirements for the transaction that NAMC proposes

[8] *See, e.g.,* O.C.G.A. § 31-6-1 (statement of legislative purpose); Rule 111-2-2-.09(c)(1)-(3) (favoring regionalism of providers and economies of scale over multiplication of providers and duplication of service); Rule 111-2-2-.20(3)(b) & (d) (imposing specific need and adverse impact standards on the establishment of new hospitals).

[9] *See* DCH Rule 111-2-2-.20(3)(d) ("adverse impact" rules).

here would allow for the unnecessary duplication of services and adverse impact on an essential hospital facility that the CON statutes and DCH Rule 111-2-2-.20 were designed to prevent. Thus, NAMC's proposed acquisition cannot avoid service-specific CON review.

E. NAMC's Proposed Lease of a Decoupled Phoebe North Hospital Would Not Be CON-Exempt as a "Restructuring" by a Hospital Authority.

In its determination request, NAMC proposed, as a "potential alternative remedy," that the Hospital Authority could lease a decoupled Palmyra to NAMC without a CON. NAMC contends that such a lease would qualify as a CON-exempt "restructuring" by a hospital authority, rather than an "acquisition" of a hospital authority-owned hospital requiring a CON. (DET Request at 7; MF 0106). NAMC relies on the following Code provision, which exempts from CON requirements "[e]xpenditures for the restructuring of or for the acquisition by stock or asset purchase, merger, consolidation, or other lawful means of an existing health care facility which is owned or operated by or on behalf of [a hospital authority or other political subdivision] *only* if such restructuring or acquisition is made by [a hospital authority or other political subdivision]." O.C.G.A. § 31-6-47(a)(9.1) (emphasis added). NAMC asserts that its lease of a decoupled Phoebe North would be a restructuring by a hospital authority.[10]

As a general matter, the lease of a hospital authority-owned hospital is treated as an "acquisition," which requires a CON unless the acquirer is also a hospital authority (or some other political subdivision of Georgia). Specifically, DCH Rules define "a new institutional health service" (requiring a CON) to include "the acquisition of an existing health care facility which is owned or operated by or on behalf of . . . a hospital authority." DCH Rule 111-2-2-

[10] This "potential alternative remedy" assumes that Phoebe Putney Memorial Hospital could be decoupled into two short-stay general hospitals. It is noted that that decoupling would, for the reasons explained above, require CON review under the service-specific rule considerations quite aside from whether a subsequent lease of one of those hospitals would require a CON.

.01(39)(g). And "'[a]cquisition of an existing health care facility' means to come into possession or control of a health care facility by purchase, gift, merger of corporations, *lease*, purchase of stock, inheritance, *or by any other legal means*." DCH Rule 111-2-2-.01(1) (emphasis added). That reflects the general approach of Georgia laws governing the disposition of hospital authority-owned hospitals, which treat a "lease" that does not qualify as a restructuring by a hospital authority the same as a "sale."[11] Thus, unless NAMC's proposed lease of a decoupled Phoebe North would constitute an exempt "restructuring" made by a hospital authority, it would constitute an "acquisition" of a hospital authority-owned hospital requiring a CON.

The CON statutes do not define "restructuring." However, consistent with Appellants' MSA, NAMC itself has contended that "restructuring," as used in the CON statutes, has the same meaning as in closely related statutes. (NAMC DET Request at 7; MF 0106).

"Restructuring" is defined identically in two related statutes in Title 31 governing the sale and lease of hospital authority-owned hospitals. First, O.C.G.A. § 31-7-89.1(b), found in the Hospital Authorities Law, applies to "[t]he sale or lease of assets of a hospital owned or operated by a hospital authority." That statute distinguishes a "sale or lease" from the "restructuring of a hospital owned by a hospital authority." *Id.* Specifically, the statute requires that the lessee in such a restructuring must be an entity:

> which has a principal place of business located in the same county where the main campus of the hospital in question is located and which is not owned, in whole or in part, or controlled by any other for profit or not for profit entity whose principal place of business is located outside such county.

---

[11] *See, e.g.,* O.C.G.A. § 31-7-89.1(b) *et seq.* (governing "[t]he sale or lease of assets of a hospital owned or operated by a hospital authority" and treating "sale" and "lease" identically unless the transaction constitutes a "restructuring"); O.C.G.A. § 31-7-400 *et seq.* (defining "acquisition" of a hospital to include "purchase or lease," unless the transaction constitutes "the restructuring of a hospital owned by a hospital authority"); O.C.G.A. § 31-7-75.1 (governing the use of "proceeds from any sale or lease of a hospital owned by a hospital authority;" treating sale and lease the same but exempting a "reorganization or restructuring").

Id. (emphasis added). The Hospital Acquisition Act, which requires Attorney General review of acquisitions of hospital authority-owned and nonprofit hospitals, uses the identical definition of "restructuring." *See* O.C.G.A. § 31-7-400(2)(B) & (5)(B) (language following "provided, however").

In addition to these statutes, other provisions of the Hospital Authorities Law impose additional constraints on a lawful lease restructuring of a hospital authority-owned hospital. For example, such a lease must specify that the leased hospital cannot be operated for a profit. *See* O.C.G.A. §§ 31-7-75(7) & 31-7-77(a).[12] And a lease restructuring must be preceded by a finding by the hospital authority's governing board "that such lease will promote the public health needs of the community by making additional facilities available in the community or by lowering the cost of health care in the community." O.C.G.A. § 31-7-75(7).

The Hearing Officer agrees with NAMC and the Appellants that, since "restructuring" is not separately defined in the CON statutes, it must be presumed that the legislature intended the term to mean what it means in related statutes. The CON law cannot be applied in a vacuum to interpret a key term that is not defined in the CON statutes, but is defined in related statutes. The Georgia Supreme Court has repeatedly emphasized this principle of statutory construction:

> Where, as here, the term "report" is undefined and could have several meanings based on the manner in which it is used in O.C.G.A. § 53–12–307(a), "it becomes necessary to give proper consideration to other related statutes in order to ascertain the legislative intent in reference to the whole system of laws of which [that code section] is a part."

---

[12] There can be no lease of a hospital authority-owned facility unless "the authority shall have retained sufficient control over any project so leased so as to ensure that the lessee will not in any event obtain more than a reasonable rate of return on its investment in the project, which reasonable rate of return, if and when realized by such lessee, shall not contravene in any way the mandate set forth in Code Section 31-7-77 specifying that no authority shall operate or construct any project *for profit*." O.C.G.A. § 31-7-75(7) (emphasis added). A "project" includes a hospital. *See* O.C.G.A. § 31-7-71(5).

Hasty v. Castleberry, 293 Ga. 727, 731 (2013) (quoting *DeKalb County v. J & A Pipeline Co.*, 263 Ga. 645, 648 (1993)); *see also Chase v. State*, 285 Ga. 693, 695-96 (2009); *Gill v. Prehistoric Ponds, Inc.*, 280 Ga. App. 629, 632 (2006) ("It is an elementary rule of statutory construction that a statute *must* be construed in relation to other statutes of which it is a part ...," quoting *Mathis v. Cannon*, 276 Ga. 16, 26 (2002) (emphasis added)); *Perez v. Atlanta Check Cashers, Inc.*, 302 Ga. App. 864, 871-72 (2010) ("statutes addressing the same subject matter should be construed in harmony with one another"). Thus, "restructuring," as used in the section of the CON laws pertaining to the acquisition of hospital authority-owned hospitals, *must* be construed consistently with the "whole system of laws of which [that statute] is a part." *Hasty*, 293 Ga. at 731 (emphasis added).

In lieu of a fact-based hearing, NAMC and the Appellants stipulated in a Joint Stipulation of Facts (September 12, 2014) what the evidence would show as to the facts arguably relevant to the restructuring issue. In its Objection filed on September 18, 2014, DCH challenged the legal relevance of these stipulated facts, but responded that it did not dispute their factual accuracy. The Hearing Officer then invited and received supplemental briefing on the legal implications of the stipulated facts. Having considered those briefs, the Hearing Officer concludes that the stipulated facts establish that NAMC cannot be the lessee in any lawful lease restructuring of the Hospital Authority for purposes of the CON law.

First, NAMC stipulates that it is a for-profit entity with its principal place of business in Franklin, Tennessee (Joint Stipulation of Facts ¶¶ 2, 11), and that it "does not have a principal place of business located in Dougherty County, Georgia" (*Id.* ¶ 3). So NAMC is *not* "located in the same county where the main campus of the hospital in question is located," as required by related statutes in Title 31. O.C.G.A. §§ 31-7-89.1(b); 31-7-400(2). Second, NAMC stipulates

that it is wholly owned by a Tennessee resident – G. Edward Alexander, and that Mr. Alexander is also NAMC's President and CEO. (Joint Stipulation of Facts ¶¶ 5, 8, 11-13). So NAMC *is* "owned, in whole or in part" by an entity "whose principal place of business is located outside [Dougherty] county" and it *is* also "controlled by" an entity "whose principal place of business is located outside such county." O.C.G.A. §§ 31-7-89.1(b); 31-7-400(2). Each of the above stipulated facts is independently dispositive of the restructuring issue for CON purposes.

In addition to these stipulations, NAMC failed to affirmatively allege other facts in its determination request that would be required for a lawful restructuring. By way of background, DCH rules required NAMC to affirmatively state all of the facts on which the determination would be based. "A person requesting a determination . . . shall make such a request in writing and *shall specify in detail all relevant facts*, which relate to the proposed action or course of conduct." DCH Rule 111-2-2-.10(1)(c) (emphasis added); *see also* DCH Rule 111-2-2-.10(2)(b) ("a determination request *shall include* a concise and explicit iteration of *the facts on which the Department is expected to rely in granting the determination*") (emphasis added).

Despite these rules, NAMC failed to state certain facts that would be indispensable to any lawful restructuring. For example, NAMC – a for-profit entity – does not state that it proposes to operate the leased hospital for no profit, as strictly required by the Hospital Authorities Law. *See* O.C.G.A. §§ 31-7-75(7) & 31-7-77(a); *see* note 12 *infra*. Moreover, NAMC's determination request indicates that it does *not* propose to operate any hospital it leases in the way that the *Hospital Authority* deems appropriate "to promote the public health needs of the community," as also required for any lawful lease. O.C.G.A. § 31-7-71(5). Instead, NAMC proposes to use the hospital it leases from the Authority to compete with the Authority's remaining hospital, presumably in an effort to divert as many patients and as much revenue as possible from that

hospital. (*See* NAMC DET Request at 7, MF 0106: proposing to lease Palmyra to any entity willing to "compete with Phoebe Putney Memorial Hospital"). That is not a restructuring as contemplated by the Hospital Authorities Law. Instead, it is simply an "acquisition" by lease, which DCH Rules 111-2-2-.01(1) & (39)(g) and the CON statute (O.C.G.A. § 31-6-47(a)(9)) expressly treat as a form of "acquisition" requiring a CON where, as here, the hospital is owned by a hospital authority. *See supra* at pp. 10-12. For all of these reasons, NAMC was not entitled to a determination that its proposed alternative lease of decoupled Palmyra assets from the Hospital Authority would constitute a CON-exempt restructuring by a hospital authority.

Before the Hearing Officer, DCH has not contended that NAMC's proposed lease of the former Palmyra assets would qualify as a "restructuring" under related laws that define that term, *i.e.*, the Hospital Authorities Act and the Hospital Acquisition Act, and it does not contend that the term "restructuring" is defined in the CON statutes. Instead, DCH simply argues that such an adjudication would fall outside its determination letter process, since the Health Planning division does not administer those related Acts. Based on that reasoning, DCH essentially urges that the question of whether NAMC's proposed lease would constitute a "restructuring" is irrelevant to this appeal.

Contrary to DCH's contention in this appeal, DET2014-033 expressly purports on its face to determine that "[t]he Authority's lease to NAMC *would be* considered a restructuring of the Authority for CON purposes" and that "[t]he lease of Phoebe North by the Authority to NAMC *would not be* subject to prior CON review and approval." (DET2014-033 at 5, MF 0017 (emphasis added)). If NAMC is statutorily unqualified to be the lessee in a hospital authority restructuring, then those specific determinations in DET 2014-033 are wrong as a matter of law and fact.

Taken at face value, DET2014-033 does not conclude that *if* an NAMC lease was a lawful restructuring under the Hospital Authorities Law and the Hospital Acquisition Act, *then* the lease would be exempt under the CON law. Instead, the agency determined that "[t]he Authority's lease to NAMC *would be* considered a restructuring of the Authority for CON purposes." (DET2014-033 at 5, MF 0017 (emphasis added)). That determination is incorrect as a matter of law.

Further, DCH did not purport to determine in DET2014-033 whether some different, unknown entity could lease the former Palmyra assets as part of a lawful restructuring. Nor, presumably, would DCH have answered a question that involved some party other than the one requesting the determination. Instead, DCH rules limit determination requests to the parties and the facts before the Department:

> Determinations and Letters of Non-Reviewability are conclusions of the Department that are *based on specific facts and are limited to the specific issues addressed in the request for determination* or letter of non-reviewability, as applicable. Therefore, the conclusions of a specific determination or letter of non-reviewability shall have *no binding precedent in relation to parties not subject to the request and to other facts or factual situations that are not presented in the request.*

DCH Rule 111-2-2-.10(1)(a) (emphasis added); *see also* DCH Rule 111-2-2-.10(2)(a) ("No person shall be entitled to request a determination that relates to an actual or proposed action or course of conduct which has been taken or which would be taken by a third party."). And, in keeping with these rules, a review of DET2014-033 clearly reveals that DCH was addressing only *NAMC's* proposed lease of the former Palmyra asserts, not someone else's.[13]

---

[13] DET2014-033: "*North Albany Medical Center, LLC ("NAMC") proposes to purchase or lease* Phoebe North in the event divestiture is required or agreed upon as a remedy . . . . *NAMC* is requesting a determination regarding the application of the CON laws *to its proposed purchase or lease* pursuant to divestiture." (MF 0013); "*NAMC* also submits the applicability and interpretation of the CON law may directly affect or impact *its proposed course of action to*

Finally, even if the portion of DET2014-033 quoted above could be interpreted solely to mean that a lease would be CON-exempt *if* it qualified under other laws as a restructuring, that would be nothing more than a general recitation of the CON exemption in O.C.G.A. § 31-6-47(a)(9.1). That would not be a proper determination since DCH does not issue determination letters simply to state abstract propositions already found in statutes. "A determination request is distinguished from a general question as a determination does not address general issues relating to policy and procedure." DCH Rule 111-2-2-.10(2).

For all of these reasons, the Hearing Officer determines that the law and the stipulated facts compel reversal of the portion of DET2014-033 concluding that the "[t]he Authority's lease to NAMC would be considered a restructuring of the Authority for CON purposes" and that "[t]he lease of Phoebe North by the Authority to NAMC would not be subject to prior review and approval." (Id. at 5, MF 0017).

F. Appellants Are Entitled to a Hearing and Have Not Waived Their Right to Challenge DCH's Determination as to CON-Related Issues in This *De Novo* Appeal Proceeding.

NAMC argues that the Appellants do not have the right to a hearing under DCH's procedural rules because NAMC's determination request does not rely on a CON "exemption." That argument is without merit. DCH's determinations in DET2014-033 were based on its

---

acquire by sale or lease Palmyra (Phoebe North) in the event of divestiture." (MF 0014); "Furthermore, if the proposed anti-trust settlement is approved . . . *NAMC's right to pursue the purchase or lease* of Phoebe North, based on an anti-trust related divestiture, would be impacted." (MF 0015); "The Rule [111-2-2-.10(2)(a)] does not preclude a person from seeking a determination regarding *the requesting person's proposed course of action or conduct* under consideration. *NAMC* simply requests a determination regarding the applicable CON laws with respect to *its proposed purchase or lease* of Phoebe North in the event of divestiture." (MF 0015); "NAMC requests a determination regarding the following divestiture related matters: . . . 3) the CON consequences *in the event NAMC leases* Phoebe North from the Authority." (MF 0015); "The Department's response addresses only the CON issues raised regarding *NAMC's* proposed purchase or lease of Phoebe North in the event of divestiture.") (MF 0015). (All emphasis added).

conclusion that NAMC's purchase of a decoupled and separately licensed Phoebe North would not be reviewed based on the exemption in O.C.G.A. § 31-6-47(a)(9). Furthermore, DCH determined that a lease of Phoebe North to NAMC by the Authority would be exempt from review as a restructuring of the Hospital Authority under O.C.G.A. § 31-6-47(a)(9.1). Thus, the two main CON-related determinations by DCH in DET 2014-033 are based on statutory exemption provisions. Moreover, Rule 111-2-2-.10(6), along with its provisions for objection and appeal, is not limited to disputes over whether a statutory exemption applies, but instead applies to any determination that an activity does not require a CON. DCH Rule 111-2-2-.10(6).

Furthermore, NAMC's argument that Appellants waived their right to challenge the substantive CON issues addressed in DET2014-033 in this *de novo* appeal proceeding is without merit.[14] In support of that argument, NAMC cites O.C.G.A. § 31-6-47.1, which authorizes DCH to "establish timeframes, forms, and criteria relating to its certification that an activity is properly exempt or excluded" and requires DCH to "consider any filed objection when determining whether an activity is exempt." That statute says nothing about the nature of the administrative hearing that follows the issuance or denial of a determination letter, nor does it place any limits on what the hearing officer can or must consider. Although NAMC cites DCH Rule 111-2-2-.10(6), that rule also does not state any limitation on the hearing officer's review or the arguments that a party who timely objected to a determination request may raise in that review. It simply sets the time to "file a written objection." *Id.* The Appellants preserved their right to

[14] Appellants informed DCH in their Objection that they disagreed with NAMC regarding the substantive CON issues raised in its DET Request. In Appellants' March 28, 2014 Letter of Objection to Commissioner Clyde L. Reese, *et al.* at 5, Appellants stated: "The Hospital Authority and the Phoebe Entities disagree with NAMC's contention as to the substantive issues raised in its DET Request. However, in light of the obviously inappropriate nature of NAMC's request discussed above, DCH should dismiss the DET Request without delay."

the *de novo* hearing and independent hearing officer evaluation afforded by law by filing "a written objection" within the time limits required by the rule.

Moreover, as noted *supra*, the Hearing Officer in this appeal must conduct a *de novo* review of the agency's initial determination, which requires the Hearing Officer to make an independent determination of the facts and legal conclusions in the case. No statute or rule limits a hearing officer's review to matters that were raised, found, or resolved in DCH's initial determination letter process. Notably, DCH did not support NAMC's contrary argument.

IV. CONCLUSION

Based upon the foregoing, DCH's determinations in DET 2014-033 are REVERSED. Appellants' Motion for Summary Adjudication is GRANTED. NAMC's Motion for Summary Adjudication and DCH's Motion for Partial Summary Adjudication are DENIED. Appellants' Request for Written Discovery and DCH's Motion for Remand and Limited Reconsideration are MOOT.

SO ORDERED, this 2 day of October, 2014.

Ellwood F. Oakley, III
Administrative Hearing Officer
GA Department of Community Health

I have served a copy of this Order Granting Summary Adjudication this date to the following counsel of record:

Victor L. Moldovan, Esq. (NAMC)
John L. Parker, Jr., Esq. (Phoebe Entities)
Tandy Menk, Esq. (DCH)

Exhibit 2

Portfolio Media. Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Ga. Official Discourages Appeal In Phoebe Putney Fight

By **Melissa Lipman**

Law360, New York (October 08, 2014, 3:59 PM ET) -- A Georgia official with final say on whether the state's certificate of need laws would apply to a forced divestiture of one of Phoebe Putney Health System Inc.'s hospitals indicated Wednesday that any sale would require CON approval, further dampening the prospects of the Federal Trade Commission's antitrust challenge.

A day after the Georgia Department of Community Health **released a decision** from an administrative hearing officer reversing an initial staff determination that a new CON wouldn't be required if Phoebe were forced to divest the former Palmyra Park Hospital Inc., the agency said that its commissioner backed the decision. If the hearing officer's decision stands, the FTC would likely not be able to force the sale as the agency's staff had already concluded that the small population the hospitals serve means that a new buyer would not be able to win CON approval.

"Department of Community Health Commissioner Clyde L. Reese III is in support of and in agreement with the hearing officer decision," the agency said in an emailed statement Wednesday.

The commissioner would review any appeal from North Albany Medical Center LLC, which has expressed some interested in acquiring Palmyra and originally took the matter to DCH, and his decision would count as the final agency action in the case.

North Albany attorney Victor L. Moldovan of McGuireWoods LLP said Tuesday that his client planned to appeal, which it has 30 days from the date of the decision to file.

An attorney for Phoebe Putney and a spokeswoman for the FTC declined to comment on the matter. An attorney for North Albany was not immediately available for comment Wednesday.

The DCH statement further jeopardizes the FTC's efforts to force Phoebe to sell Palmyra, which is now operating as Phoebe North. The FTC has been **battling the deal**, which it described as a merger-to-monopoly, for years, but the transaction was allowed to go through after an appeals court decided it was immune from federal antitrust scrutiny under the state action doctrine.

The watchdog **won a complete, unanimous reversal** from the U.S. Supreme Court, but not before the Eleventh Circuit allowed Phoebe and Palmyra to close the transaction. That led the FTC to conclude that it couldn't actually force Phoebe to divest Palmyra because the two had already combined their authorizations under Georgia's CON law. And because of the small population of the Georgia region, the watchdog concluded that a new buyer

would be unable to get a certificate of need to operate Palmyra.

Under those "highly unusual" conditions, the FTC **agreed to a settlement** that would allow the merger to stand, putting the proposed deal out for public comment in August 2013. It received 11 comments, including four suggesting that the certificate of need issue might not be an insurmountable hurdle for a divestiture.

As the FTC was mulling the comments, North Albany petitioned DCH in March for a determination as to whether the certificate of need requirements would in fact block it from acquiring the former Palmyra assets. Despite the name, North Albany appears to be based in Tennessee and run by the president and CEO of a Tennessee surgical practice.

In June, the DCH sided with North Albany, concluding that Phoebe had never actually given up or invalidated Palmyra's original authorizations. As a result, divesting those assets wouldn't require a new CON review.

That led the FTC to **reverse course** in early September, rejecting the settlement and reopening its administrative proceedings.

But in his decision, hearing officer Ellwood F. Oakley III concluded that any new buyer would have to get a CON, the bar that the FTC had originally decided would be all but impossible to clear.

Oakley rejected all of the proposed avenues around the state's CON requirements, saying that whether the deal happened through a straight divestiture from the hospital authority that technically owns the facilities or by splitting the hospital system into two pieces, Palmyra would still have to be certified again.

North Albany is represented by Victor L. Moldovan of McGuireWoods LLP.

Phoebe Putney is represented in the FTC proceedings by Lee K. Van Voorhis, Brian F. Burke, Jennifer A. Semko, Teisha C. Johnson, John J. Fedele, Brian Rafkin and Jeremy W. Cline of Baker & McKenzie LLP. Phoebe and the hospital authority are represented by John H. Parker Jr. of Parker Hudson Rainer & Dobbs LLP in the DCH proceeding.

The FTC administrative case is In the Matter of Phoebe Putney Health System, Inc. et al., docket No. 9348, in the Federal Trade Commission. The DCH proceeding is North Albany Medical Center LLC, case number DET2014-033, in the Georgia Department of Community Health.

--Editing by Mark Lebetkin.

Exhibit 3

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
ALBANY DIVISION

FEDERAL TRADE COMMISSION, Plaintiff, v. PHOEBE PUTNEY HEALTH SYSTEM, INC., PHOEBE PUTNEY MEMORIAL HOSPITAL, INC., PHOEBE NORTH, INC., HCA, INC., PALMYRA PARK HOSPITAL, INC. and HOSPITAL AUTHORITY OF ALBANY-DOUGHERTY COUNTY, Defendants.	)	CIVIL ACTION FILE NO. 1-11-CV-00058-WLS

Filed at 8:00 A M
6/5, 2013
BCL
Deputy Clerk, U.S. District Court
Middle District of Georgia

~~[PROPOSED]~~ STIPULATED PRELIMINARY INJUNCTION ORDER

Plaintiff, the Federal Trade Commission (the "Commission" or "FTC"), by its designated attorneys, having filed an Amended Complaint for Temporary Restraining Order and Preliminary Injunction, pursuant to Section 13(b) of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 53(b), and Section 16 of the Clayton Act, 15 U.S.C. § 26 (2006), and

Whereas, the Court has entered on May 15, 2013 a Temporary Restraining Order ("TRO"), and

Whereas, Defendants have operated under the TRO since May 15, 2013, and have agreed with Plaintiff to continue to operate in accordance with that TRO, which includes, and is not limited to, what is more fully described below in this Order, it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

1. This Court has jurisdiction over the subject matter of this case and jurisdiction over the parties.

2. Venue and service of process are proper.

3. The Court approves and enters the order as stipulated by the parties.

I.

ASSET MAINTENANCE[1]

IT IS ORDERED that for the duration of this Order,

A. Defendants are hereby restrained and enjoined from:

1. further consolidating, integrating, or otherwise combining the former Palmyra Park Hospital, Inc., now "Phoebe North," into Defendants' hospital system;

2. transferring, except on a temporary basis as needed by Defendants for medical reasons, or selling of any assets of Phoebe North;

3. causing or permitting the destruction, removal, wasting, or deterioration, or otherwise impairing the viability or marketability of Phoebe North, except for ordinary wear and tear;

4. eliminating, transferring or consolidating any clinical service or department that is offered at Phoebe North, or otherwise changing the *Status Quo* at Phoebe North; unless required by circumstances not reasonably within the control of Defendants to protect patient safety or comply with state or federal law governing the operation of hospitals providing Medicare and Medicaid services;

5. modifying, changing, or canceling any physician privileges other than at the request of the physician, which request shall not be initiated,

[1] The definitions for the terms used herein are found in Appendix A, attached hereto.

suggested, or otherwise influenced by Defendants, *PROVIDED, HOWEVER*, that Defendants may revoke the privileges of any individual physician consistent with the practices and procedures currently in effect at Phoebe Putney Memorial Hospital;

6. terminating employees or reducing employee compensation levels currently in effect for employees working at Phoebe North, *PROVIDED, HOWEVER*, that Defendants may manage the staffing of their workforce consistent with the practices and procedures currently in effect at Phoebe Putney Memorial Hospital; and

7. making any price changes to, or terminating, or causing or allowing termination of any contract between any Health Plan and Defendants that includes Phoebe North. For any contract between a Health Plan and Defendants that includes Phoebe North which expires during the term of this Order, Defendants shall offer to continue to accept the same terms of the contract for the remaining term of this Order. *PROVIDED, HOWEVER,* that Defendants may change or set prices on newly entered Health Plan contracts that are not in existence as of the date of this Order.

B. Defendants shall:

1. provide sufficient funding, working capital, personnel, and administrative and professional services needed to maintain the *Status Quo* at Phoebe North.

2. maintain the viability and marketability of Phoebe North.

C. The terms of this Order are intended to more fully describe the obligations of the Defendant to continue to operate PPMH and Phoebe North in the manner in which they operated on May 15, 2013.

II.

DURATION OF ORDER

IT IS FURTHER ORDERED that this Order shall remain in effect until either (1) the latter of (i) the date the Commission issues its order upon completion of the Commission's administrative proceeding or (ii) entry of the final appellate order if an appeal is taken from the Commission's order; or (2) such time as further ordered by the Court, upon the request of either party.

III.

JURISDICTION

IT IS FURTHER ORDERED that this Court shall retain jurisdiction of this matter for all purposes and for the full duration of this Order.

SO ORDERED, this 4th day of June, 2013.

The Honorable W. Louis Sands
United States District Court Judge

APPENDIX A

The following definitions shall apply to this Order:

A. "Acute Care Hospital" means a health-care facility licensed as a hospital, other than a federally-owned facility, having a duly organized governing body with overall administrative and professional responsibility, and an organized professional staff, that provides 24-hour inpatient care, that may also provide outpatient services, and having as a primary function the provision of General Acute Care Inpatient Hospital Services.

B. "Defendants" means Phoebe Putney Health System, Inc. ("PPHS"), Phoebe Putney Memorial Hospital, Inc. ("PPMH") (collectively, "Phoebe Putney"); HCA Inc. ("HCA"); and the Hospital Authority of Albany Dougherty County (the "Authority"), including, but not limited to, their respective parents, directors, officers, employees, agents, attorneys, and representatives; its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by, and the respective directors, officers, employees, partners, agents, attorneys, and representatives of each.

C. "General Acute Care Inpatient Hospital Services" means a broad cluster of basic medical and surgical diagnostic and treatment services for the medical diagnosis, treatment, and care of physically injured or sick persons with short-term or episodic health problems or infirmities, that include an overnight stay in the hospital by the patient. General Acute Care Inpatient Hospital Services include what are commonly classified in the industry as primary, secondary, and tertiary services, but exclude: (i) services at hospitals that serve solely military and veterans; (ii) services at outpatient facilities that provide outpatient services only; (iii) those specialized services known in the industry as quaternary services; and (iv) psychiatric, substance abuse, and rehabilitation services.

D. "Health Plan" means any Person that pays, or arranges for payment, for all or any part of any General Acute Care Inpatient Hospital Services for itself or for any other Person. Health Plan includes any Person that develops, leases, or sells access to Acute Care Hospitals.

E. "Person" means any natural person, corporation, partnership, association, governmental organization, or other legal entity, including all officers, members, predecessors, assigns, divisions, affiliates and subsidiaries.

F. "Phoebe North" means the facility located at 2000 Palmyra Road, Albany, Georgia 31701, formerly Palmyra Park Hospital, Inc., owned and operated prior to the Transaction by HCA, its parents, directors, officers, employees, agents, attorneys, and representatives; its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by, and the respective directors, officers, employees, partners, agents, attorneys, and representatives of each. Phoebe North also means all activities relating to the provision of General Acute Care Inpatient Hospital Services and other related health-care services conducted by as of May 15, 2013, including, but not limited to, all health-care services, including outpatient services, offered at Phoebe North.

G. "*Status Quo*" refers to the state of Phoebe North as of May 15, 2013.

H. "Transaction" refers to the transaction whereby the Authority purchased Palmyra's assets from HCA on December 15, 2011, and then leased Palmyra to Phoebe Putney.

Exhibit 4

89pp

ORIGINAL

GEORGIA DEPARTMENT OF COMMUNITY HEALTH

Georgia
Certificate of Need
Request for Determination

FOR DIVISION OF HEALTH PLANNING USE ONLY	
LETTER NUMBER **DET** 2014-033-≡	*DATE STAMP* RECEIVED MAR 12 2014 MAR 12'14 4:58PM
Signed Original and 1 Copy _____	Fee Verified _____

GENERAL INFORMATION:

This Determination Request form is the required document that the Department reviews in the analysis and evaluation of determination requests in accordance with CON Administrative Rule 111-2-2-.10(2). A determination request is a request that provides a specific proposed action and asks the Department for an official ruling of how a specific regulation or law impacts that action.

1. Requesting Parties must submit a signed original and one (1) copy of the signed form and the appropriate fee.
2. The filing fee of $250 shall be made payable to the "Department of Community Health" and shall be remitted by Certified Check or Money Order.
3. Failure to submit the required fee and number of copies and the original will result in non-acceptance of the form.
4. The Department will make every attempt to review the information submitted and issue a determination within 60 days of acceptance.
5. **This form MUST NOT be used to request a determination that equipment below threshold does not require CON review or for a LNR request for a single-specialty or joint venture ambulatory surgical center.**

PLEASE COMPLETE THE FOLLOWING TABLE TO VERIFY PROPER SUBMISSION OF YOUR REQUEST	
REQUESTING PARTY NAME: **North Albany Medical Center, LLC**	
1. Have you submitted an original signed in blue ink and provided 1 copy of this signed Determination Request form?	☒ **Yes** ☐ **No**
2. Have you submitted a Certified Check or Money Order made payable to "Department of Community Health" in the amount of $250.00?	☒ **Yes** ☐ **No**

Submit the ***original and one (1) copy*** of this form and all additional documentation to:

Division of Health Planning
Determination Requests
Department of Community Health
2 Peachtree Street, NW, 5th Floor
Atlanta, Georgia 30303

Revised April 14, 2009

Bank of America

Cashier's Check

No. 0890600127

Notice to Purchaser - In the event that this check is lost, misplaced or stolen, a sworn statement and 90-day waiting period will be required prior to replacement. This check should be negotiated within 90 days.

Void After 90 Days

30-1/1140
NTX

Date 03/10/14 04:27:04 PM

RICHMOND CENTER
0003 1011178 0164

Pay BANK OF AMERICA TWO FIVE ZERO 25000 CTSCTS

***$250.00

To The Order Of DEPARTMENT OF COMMUNITY HEALTH
RE:LOD FILING FEE/ATL LOD REQUEST FEE

Remitter (Purchased By): MCGUIRE WOODS

Bank of America, N.A.
SAN ANTONIO, TX

AUTHORIZED SIGNATURE

00-53-3364B 11-2010

⑈0890600127⑈ ⑆111400019⑆ 00164100145 2⑈

THE ORIGINAL DOCUMENT HAS A REFLECTIVE WATERMARK ON THE BACK. HOLD AT AN ANGLE TO VIEW WHEN CHECKING THE ENDORSEMENTS.

Instructions

1. Please read all instructions and review this Determination Request form in its entirety before attempting to complete and submit it.

2. This Determination Request form **must** be typewritten or completed and printed in this MS Word format. Handwritten responses must not be submitted and will not be accepted.

3. Only one specific proposed action may be addressed in each request. If a Requesting Party has multiple proposed actions for which it seeks a determination, separate forms must be submitted for each such action.

4. Throughout this Determination Request form, the following symbols are utilized for emphasis:

   🗁 Emphasizes instances where supporting documentation is requested and required to be attached; and

   ☞ Emphasizes important instructions or notes that should be adhered to.

5. Any exhibits or appendices to this form should be submitted on one-sided, 8 ½ by 11-inch paper only. Such exhibits or appendices should not be tabbed or otherwise separated from this main application. If the Requesting Party wishes to label its exhibits or appendices when submitting multiple attachments, it should do so by numbering or lettering the exhibit or appendix on the first page of such attachment itself.

6. A signed original Determination Request and one (1) copy are required in addition to the appropriate fee of $250 for a Determination Request to be accepted by the Department. The fee shall be made payable by certified check or money order only to "Department of Community Health."

7. The signed original Determination Request form and the single copy must be submitted on loose leaf, one-sided 8 ½ by 11-inch paper only. These documents must **not** be hole-punched or bound by staple. The documents may be clipped or rubber banded to divide the original from the copy.

8. The original and the single copy must be submitted in a single envelope to the address indicated on the cover page of this form.

9. Faxed copies of documents and information are not official and must be followed-up with the original documents for inclusion in the file.

Section 1 – Requesting Party Identification

1. Please complete the following information identifying the party requesting this determination. The Contact Person should be an individual directly affiliated with the Requesting Party and not a consultant or attorney.

REQUESTING PARTY #1		
Legal Entity or Person: **North Albany Medical Center, LLC**		
Address 1: **201 Seaboard Lane**		
Address 2: **Suite 100**		
City: **Franklin**	State: **TN**	Zip: **37067**
County:		
CONTACT PERSON		
Name: **G. Edward Alexander**	Title: **President and CEO**	
Address 1: **same as above**		
Address 2:		
City:	State:	Zip:
Phone: **(615) 550-2600**	Fax: **(615) 550-2601**	
E-mail: **ealexander@surgicaldevelopmentpartners.com**		

2. If there is an additional party requesting this determination (there are co-requesting parties), please complete the following information identifying the second party. The Contact Person should be an individual directly affiliated with the Requesting Party and not a consultant or attorney.

REQUESTING PARTY #2 *(if applicable)*		
Legal Entity or Person:		
Address 1:		
Address 2:		
City:	State:	Zip:
County:		
CONTACT PERSON		
Name:	Title:	
Address 1:		
Address 2:		
City:	State:	Zip:
Phone:	Fax:	
E-mail:		

3. Does the Requesting Party(ies) have Legal Counsel to whom legal questions regarding this request may be addressed?

☒ **YES** ☐ **NO**

If **YES** → Identify the legal counsel below.

If **NO** → Continue to the next question.

LEGAL COUNSEL		
Name: Victor L Moldovan		
Firm: McGuireWoods LLP		
Address: 1230 Peachtree Street, Suite 2100		
City: Atlanta	State: GA	Zip: 30309
Phone: 404-443-5708	Fax: 404-443-5771	
E-mail: vmoldovan@mcguirewoods.com		

4. Did a Consultant prepare and/or provide information in this Determination Request? ☐ **YES** ☒ **NO**

If **YES** → Identify the Consultant below.

If **NO** → Continue to the next question.

CONSULTANT		
Name:		
Firm:		
Address:		
City:	State:	Zip:
Phone:	Fax:	
E-mail:		

5. Does the Requesting Party(ies) wish to designate and authorize an individual other than the Requesting Party Contact(s) listed in response to Question 1 to act as the representative of the Requesting Party(ies) for purposes of this request?

☒ **YES** ☐ **NO**

If **YES** → Please complete the information in the following table on the next page. By doing so, the Requesting Party(ies) authorizes the representative to submit this determination request; to provide the Department of Community Health with all information necessary for a determination on this request; to enter into agreements with the Department of Community Health in connection with this request; and to receive and respond, if applicable, to notices in matters relating to this request.

If **NO** → Continue to the next question.

AUTHORIZED REPRESENTATIVE		
Name: **Victor L. Moldovan**		
Firm: **McGuireWoods, LLP**		
Address: **1230 Peachtree Street, Suite 2100**		
City: **Atlanta**	State: **GA**	Zip: **30309**
Phone: **404-443-5708**	Fax: **404-443-5771**	
Email: **vmoldovan@mcguirewoods.com**		

☞ **NOTE:** *This authorization will remain in effect for this request until written notice of termination is sent to the Department of Community Health that references the specific request number. Any such termination must identify a new authorized representative. Also, if the authorized representative's contact information changes at any time, the Requesting Party(ies) must immediately notify the Department of Community Health of any such change.*

6. Does the Requesting Party(ies) have any lobbyist employed, retained, or affiliated with the Requesting Party(ies) directly or through its contact person(s) or authorized representative?

☐ **YES** ☒ **NO**

If **YES** → Please complete the information in the table below for each lobbyist employed, retained, or affiliated with the Requesting Party(ies). Be sure to check the box indicating that the Lobbyist has been registered with the State Ethics Commission. Executive Order 10.01.03.01 and Rule 111-1-2-.03(2) require such registration.

If **NO** → Continue to the next question.

LOBBYIST DISCLOSURE STATEMENT		
Name of Lobbyist	**Affiliation with Requesting Party(ies)**	**Registered with State Ethics Commission?**
	☐ Employed ☐ Other Affiliation	☐ Yes ☐ No
	☐ Employed ☐ Other Affiliation	☐ Yes ☐ No
	☐ Employed ☐ Other Affiliation	☐ Yes ☐ No
	☐ Employed ☐ Other Affiliation	☐ Yes ☐ No
	☐ Employed ☐ Other Affiliation	☐ Yes ☐ No
	☐ Employed ☐ Other Affiliation	☐ Yes ☐ No
	☐ Employed ☐ Other Affiliation	☐ Yes ☐ No
	☐ Employed ☐ Other Affiliation	☐ Yes ☐ No

Section 2 – General Information Regarding Proposed Action

7. Complete the following table to provide general information regarding the proposed action for which a determination is being sought. If you select an item in the "Nature of Request" row indicating that an Exhibit must be completed, complete the required Exhibit, which is included at the end of this form. Discard all Exhibits that are not required before submittal.

Title of Proposed Action	**Facility Decoupling and Acquisition** *(example: Replacement of Pharmacy Information System)*
Location of Proposed Action ☐ *Check if not applicable or if multiple locations*	*Address 1:* **417 3rd Ave West** *Address 2:* *City:* **Albany** *State:* **GA** *Zip:* **31701** *County:* **Dougherty**

Dates of Proposed Action	*Starting Date:* **TBD** *Completion Date:*
Nature of Request *(Only one type of request may be submitted per form)*	☐ Repair/Replacement of Physical Plant Equipment ☐ Expenditures to Eliminate Safety Hazards/Comply with Accreditation Standards ☐ Addition or Replacement of Computer or Information Systems ☐ Capital Expenditures Below Threshold ☐ Senate Bill 433 (2008) CON Exemption: Specify: ***Not to be used for LNR-ASC requests** ☒ Other: **Approval of Facility Decoupling and Subsequent Acquisition** The following require the completion of an additional Exhibit which is indicated below: ☐ Potential Non-Reviewable Cost Overrun *(Complete Exhibit 1)* ☐ 10% Increase in Bed Capacity *(Complete Exhibit 2)* ☐ Replacement of CON-approved Diagnostic or Therapeutic Equipment *(Complete Exhibit 3)* ☐ Transfer of Home Health Counties *(Complete Exhibit 4)* ☐ Therapeutic Cardiac Catheterization Statutory Exemption (Accepted only May 1 through May 15) *(Complete Exhibit 5)*

Section 3 – Proposal Description

8. Please provide a detailed description of the proposed action including a statement as to what determination is being sought. You may provide this description in the space provided below, or in lieu of using the space provided, attach separate 8.5" x 11" sheet(s) providing the information requested.

See Attached Letter

Section 4 – Certification

By signing below,

a) I hereby certify that the contained statements and all addenda, appendices, exhibits, or attachments hereto are true and complete to the best of my knowledge and belief and that I possess the authority to submit this request and bind the Requesting Party to promises made herein;

b) I understand that a representative of the Certificate of Need Program may make a direct request of me for additional information in order to issue a Determination; and

c) I further understand that if issued a Determination, the Requesting Party is bound to any representations that have been made within this Determination Request and any and all supplemental information and Exhibits.

REQUESTING PARTY #1 CERTIFICATION	
Signature of Authorized Signatory (BLUE INK ONLY):	
Name: **Victor L. Moldovan**	
Title: **Attorney**	*Date:* **03-12-2014**

REQUESTING PARTY #2 CERTIFICATION ***(if applicable)***	
Signature of Authorized Signatory (BLUE INK ONLY):	
Name:	
Title:	*Date:*

McGuireWoods LLP
1230 Peachtree Street, N.E.
Suite 2100
Atlanta, GA 30309-3534
Phone: 404.443.5500
Fax: 404.443.5599
www.mcguirewoods.com

Victor L. Moldovan
Direct: 404.443.5708

McGUIREWOODS

vmoldovan@mcguirewoods.com
Direct Fax: 404.443.5777

March 12, 2014

VIA HAND DELIVERY

Roxana Tatman, Esq.
Legal Director, Health Planning
Georgia Department of Community Health
5th Floor
2 Peachtree Street
Atlanta, Georgia 30303-3159

RE: Request for Letter of Determination for North Albany Medical Center, LLC

Dear Mrs. Tatman:

McGuireWoods LLP and the undersigned represent North Albany Medical Center, LLC (North Albany"). North Albany is a new entity and currently does not operate any health care facilities in Georgia or anywhere else. It will locate its primary office in Albany, Georgia.

I. BACKGROUND

A. Palmyra Park Hospital Acquisition

North Albany is interested in acquiring the hospital formerly operated by Palmyra Park Hospital, Inc. ("Palmyra") located in Albany, Georgia. As you know, Palmyra was acquired through an Asset Purchase Agreement by and among Palmyra, the Hospital Authority of Albany-Dougherty County (the "Authority"), Phoebe Putney Health System, Inc. ("PPHS") and Phoebe North, Inc. ("PN") dated December 21, 2010. Pursuant to the Agreement, the Authority acquired Palmyra on December 15, 2011, and then leased it to PPHS in August of 2012. (See DET 2012-96) PPHS merged the operations of Palmyra into PPHS which resulted in a single hospital license for PPHS and Palmyra. (Id.)

B. Federal Trade Commission Action

The merger of Palmyra and PPHS triggered a challenge by the Federal Trade Commission (the "FTC") on April 20, 2011. The FTC filed a complaint in federal court seeking an injunction (the "Federal Case") and also initiated an administrative proceeding asserting that the merger would create a monopoly (the "Administrative Proceeding"). (Federal Trade Commission et. al. v. Phoebe Putney Health Systems, Inc. et. al., Middle District of Georgia,

Case No. 111-cv-00058-WLS and In the Matter of Phoebe Putney Health Systems, Inc. et. al., FTC File Number 1110067, Docket No. 9348, respectively)

The Federal Case was eventually considered by the U.S. Supreme Court which issued an Opinion on February 19, 2013. The Opinion basically held that PPHS did not have state immunity for antitrust actions and that the FTC had jurisdiction to challenge the merger. As a result, the District Court entered a Temporary Restraining Order on April 15, 2013, prohibiting PPHS from taking any further steps to consolidate the merger. The District Court entered a Preliminary Injunction on June 6, 2013, barring any further integration of PPHS and Palmyra pending the outcome of the Administrative Proceeding.

The Administrative Proceeding was scheduled to begin August 1, 2013. The matter was to be held before an Administrative Law Judge on the issue of whether the merger created a virtual monopoly. A copy of the Administrative Complaint is attached hereto as Exhibit "A". The FTC alleged that PPHS structured the transaction to get antitrust immunity protection under the state action doctrine. (Id.) The FTC alleged that the use of the Authority by PPHS was a "straw man" where the Authority played no meaningful role in the transaction. (Id.) PPHS expected the Authority to rubber stamp the transaction which it eventually did. (Id.) The Complaint further alleged that the merger was only agreed to after Palmyra sued PPHS for antitrust violations and the merger effectively ended that case and removed the only remaining competition to PPHS in the area. In effect, PPHS (a private company) had a virtual monopoly in the relevant market.

C. FTC Proposed Settlement

The FTC announced on August 22, 2013, that it had reached a Proposed Agreement with PPHS to settle the Administrative Proceeding and the Federal Case. The Agreement is not considered final until the FTC Commission approves it. As part of the FTC's due diligence of the Proposed Settlement, the FTC issued an "Analysis of Proposed Agreement Containing Consent Order to Aid Public Comment". A copy of the Analysis is attached as Exhibit "B" and a copy of the Proposed Agreement is attached as Exhibit "C". A primary reason cited in the Analysis by FTC to consider the Proposed Agreement was the purported barrier to divestiture caused by Georgia's Certificate of Need ("CON") law. In other words, even if the FTC prevailed in the Administrative Proceeding, it could not order divestiture of Palmyra by PPHS because CON law would effectively prohibit it. The FTC wrote:

> [T]he Commission believes that, assuming a finding of liability following a full merits trial and appeals, legal and practical challenges presented by Georgia's certificate of need ('CON') laws and regulations would very likely prevent divestiture of hospital assets from being effectuated to restore competition.

(Analysis, p. 1)

The FTC explained that it understood that a new CON would be required for the following reasons:

> The Georgia DCH issued Phoebe Putney's new license and revoked the two separate licenses that previously covered PPHS and Palmyra. Georgia' CON laws preclude the Commission from re-establishing the former Palmyra assets as a second competing hospital in Albany, because such relief would require: (1) the re-division of the single state licensed hospital into two separate hospitals; and (2) the transfer of one of those hospitals from the Hospital Authority to a new owner. Either one of those steps is independently sufficient to require CON approval from DCH, which, as discussed further below, would not be forthcoming.

(Id., p. 4) Regarding the issuance of a new CON to a buyer of Palmyra, the FTC concluded that the buyer would have to meet the hospital service specific rules in addition to the general considerations. (Id., p. 5, fn. 8 and 9)

The FTC received public comment on the Proposed Agreement and is currently considering whether to adopt the Proposed Settlement. As noted, the primary reason that the FTC is considering the Proposed Agreement is because of it's understanding of Georgia law. Albany North believes that the FTC's analysis is incorrect. Georgia law does not prohibit divestiture by PPHS and a new CON is not required. Moreover, even if a CON was required, the service specific rules would not apply.

D. Request

Albany North seeks a determination from the Department of Community Health ("DCH") that CON and licensure is not a bar to the divestiture of Palmyra by PPHS and the acquisition of Palmyra by North Albany.

II. ANALYSIS

A. CON Statute and Rules

New institutional health services are required, pursuant to O.C.G.A. § 31-6-40(a) (1) and (2), to obtain a CON. The "golden rule" of statutory construction, requires courts to follow the literal language of a statute unless doing so produces contradiction, absurdity or such an inconvenience as to insure that the legislature meant something else.[1] Additionally, reviewing courts must give deference to an agency's interpretation of statutes it is charged with enforcing or administering and to the agency's own rules.[2]

---

[1] *GeorgiaCarry.Org, Inc. v. Coweta Cnty.*, 288 Ga. App. 748, 749, 655 S.E.2d 346, 347 (2007)
[2] *Surgery Center v. Hughston Surgical Institute*, 293 Ga. App. 879, 668 S.E.2d 326 (2008).

The CON generally law requires a CON for a "new institutional health service" which is defined as (i) new health care facility; and (ii) a capital expenditure by an existing health care facility of over 2.5 million dollars except where it uses the funds to acquire another health care facility (unless it owned or operated by or on behalf of a hospital authority). Section (2) effectively exempts the acquisition of Palmyra from any CON review by North Albany as fully explained below.

1. Health Care Facility May Acquire Palmyra without CON Review

The general rule is that an existing health care facility may be acquired without a new CON being issued. (O.C.G.A. 31-6-40(a)(2)) The buyer must notify DCH of the acquisition within 45 days but that is all that is required. (O.C.G.A. 31-6-40.1(a)) As a result, Palmyra as an existing health care facility may be acquired by buyer (including North Albany) without a new CON being issued.

The FTC Analysis suggest that because the licenses of Palmyra and Phoebe have been merged into one license that that creates a requirement that a new CON is required to decouple them. That is incorrect in this situation. Palmyra had the right to operate under grandfather rights before it was acquired by Phoebe and if it is decoupled from Phoebe those rights go to the buyer. DCH has applied this rule consistently in prior decisions.

In a letter of determination issued December 17, 2012,[3] DCH addressed whether Hospital Authority of Valdosta and Lowndes County d/b/a South Georgia Medical Center (SGMC) could decouple and sell a psychiatric hospital operated under its acute care hospital license without being subject to CON review. DCH agreed that it could.

The Greenleaf Center was originally established as a freestanding psychiatric hospital with no affiliation to SGMC. Greenleaf was acquired by SGMC in 1999 and permitted to operate under SGMC's hospital license. Acadia Healthcare Company, the parent company of existing healthcare facilities, sought to acquire Greenleaf Center from SGMC and reestablish it as a freestanding psychiatric hospital. Noting that the requested change in licensure status (separately licensing the psychiatric hospital) would not entail the addition of new beds and that no new institutional health services would be offered at either facility, DCH determined the CON granted to Greenleaf Center prior to its acquisition by SGMC would be retained subsequent to the separation and, for purposes of licensure, the separation was not subject to prior CON review.

Additionally, the subsequent sale of Greenleaf Center to Acadia Greenleaf, a subsidiary of Acadia Healthcare Company, was also not subject to CON review. DCH noted that the expenditures for the facility were made *on behalf of* Acadia Greenleaf, and that expenditures by a health care facility below the threshold are not subject to CON review. DCH determined that because the separation of the license and related acquisition expenditures were below the

[3] DET2012-156.

threshold, and no new beds would be added, the acquisition of the Greenleaf Center, a hospital authority-owned hospital, was not subject to CON review.

In DET 2013-138, DCH determined that Emory University d/b/a Emory University Hospital could sell its Center for Rehabilitation Medicine ("CRM") without CON review. DCH noted that the fact that CRM was operated under and as part of Emory's acute care hospital license was irrelevant. DCH stated that because CRM was not a new service, there would be no increase in the number of beds and Emory would make no capital expenditures to do the uncoupling it would not trigger a CON.

In DET 2008-013, DCH made a similar determination where Southern Regional Health System d/b/a Southern Regional Medical Center ("SRMC") wanted to decouple its psychiatric and substance abuse facility from its hospital. DCH determined that SRMC could decouple the psychiatric facility from its hospital license without triggering CON review. DCH stated that a CON was not required because there would be no new institutional health service, no bed increase and no capital expenditures to do it.

DCH has made the same determination repeatedly in other cases. (See DCH Determination 2001-001. University Hospital was permitted to decouple its surgery center from its hospital license without triggering a CON review); DET 2008-008 (Gwinnett Hospital System Inc.'s request to decouple its psychiatric facility from its hospital license was allowed because it was not a new institutional health service). As a result, the fact that Palmyra has been operated under the same license as Phoebe does not prohibit the decoupling of those facilities and the issuance of a separate license to Palmyra will not trigger a CON review. In all of the prior cases, the facility being decoupled had a CON or grandfather right to operate separate before it was acquired. The same set facts are present here. Palmyra had the right to operate its facility under grandfather and CONs and the fact it was merged under PPHS's license did not extinguish those rights.

In fact, DCH has already told counsel for PPHS that a CON would not be required to decouple Palmyra in communications in May of 2013. The decisions referenced above were provided by DCH to PPHS's counsel in emails from one of DCH's counsel. (A copy of the emails are attached as Exhibit "D") In addition, DCH's counsel clearly concluded that prior decisions on decoupling did not trigger CON review.

2. Hospital Authority Issue

The role of the Authority does not impact the outcome of this determination.

O.C.G.A. § 31-6-40(a) (2) defines a "new institutional health service" that requires CON review as:

> (2) Any expenditure *by or on behalf of a health care facility* in excess of $2.5 million which, under generally accepted accounting

> principles consistently applied, is a capital expenditure, except expenditures for acquisition of an existing health care facility not owned or operated by or on behalf of a political subdivision of this state, or any combination of such political subdivisions, or by or on behalf of a hospital authority, as defined in Article 4 of Chapter 7 of this title, or certificate of need owned by such facility in connection with its acquisition." (Emphasis added).

Pursuant to the literal language of the statute, acquisitions by a "health care facility" of an existing "health care facility" are exempt from CON review, unless the acquiring "health care facility" acquires an "existing health care facility" owned or operated by a hospital authority. If a "health care facility" acquires an "existing health care facility" owned or operated by a hospital authority it is the subject to CON review only if the expenditures exceed the financial threshold of 2.5 million dollars.

A "health care facility" is defined as including, among other things, a "hospital"[4] which, in turn, is defined, in part, as an "institution".[5] Institutions are required to be licensed by DCH.[6] Thus, pursuant to the literal language of the Georgia Code, only an existing "health care facility", licensed as may be required by DCH, is subject to CON review for the acquisition of a hospital authority-owned hospital. Again, the CON requirement is only if the amount paid is over 2.5 million. DCH has confirmed this interpretation of the statute DET 2012-156.

The exemption from CON review for acquisitions set forth in O.C.G.A. § 31-6-47(9), do not alter this analysis. The exemptions are for those that would otherwise be subject to CON review, but for the exemption. As O.C.G.A. § 31-6-40(a)(2) only applies to "health care facilities," an entity that is not a "health care facility" is not otherwise subject to CON review pursuant to that subsection. Since the statute facially does not apply to non-health care facilities, the exemptions are not relevant.

Any entity that does not satisfy the definition of "health care facility" is not subject to CON review for the acquisition of a hospital authority-owned hospital. Assuming Palmyra is owned or operated by or behalf of the Authority, it can be sold to any entity that is not an existing health care facility regardless of price. Thus, if the FTC ordered PPHS to divest Palmyra, the Authority could sell it to an entity that is not an existing health care facility. The transaction would not be considered the establishment of a new institutional health service and therefore a CON would not be required regardless of the amount of expenditures. As noted North Albany is not an existing health care facility and does not operate any such facilities.

The analysis above is based on the assumption that Palmyra is being operated by an Authority. The FTC has alleged in its Administrative Complaint that the Authority is merely a straw man for PPHS, a private company, and that PPHS is the real party interest. In fact, PPHS

---

[4] O.C.G.A. § 31-6-2(17)
[5] O.C.G.A. § 31-6-2(21)
[6] O.C.G.A. § 31-7-3(a)

added Palmyra to its lease agreement with the Authority and the license to operate Palmyra is the same license as to operate Phoebe. Thus, if PPHS is the real party, the Authority's role is not relevant to the analysis here.

Finally, the only way that the Authority is an issue at all is because PPHS consummated the transaction while the FTC was actively seeking to stop it and used the Authority to do it. If FTC is successful in showing that the merger violates federal antitrust law, the merger will deemed to be illegal and effectively reversed. See *Cal. v. Am. Stores Co.*, 495 U.S. 271, 280-281 (1990) (stating that "divestiture is the preferred remedy for an illegal merger or acquisition") Thus, anyone who argues that a CON is required because the Authority acquired Palmyra will effectively be arguing that an illegal agreement which put ownership in the Authority somehow requires a CON to sell it. That would mean that PPHS is being rewarded for violating the law.[7] Moreover, Georgia's CON laws cannot prevent the FTC from requiring divestiture in this case. To the extent that there is a determination that Georgia's CON laws do prevent divestiture, the Georgia CON law is preempted because the Georgia CON law would be in conflict with the FTC's power and authority.[8]

3. Potential Alternative Remedy

Even if DCH determined that the Authority could not sell Palmyra to any entity without a CON, it is clear that the Authority could lease it to a third party. As noted above, the Palmyra license can be decoupled from Phoebe and the Authority could lease Palmyra to an entity willing to compete with Phoebe Putney Memorial Hospital.

Under O.C.G.A. § 31-6-40(a) (2), a capital expenditure includes an "acquisition", in excess of 2.5 million, if it involves the purchase of a hospital authority-owned hospital by a health care facility. Although Georgia's CON laws do not define "acquisition", the term is defined for purposes of Georgia's laws governing hospital acquisitions. That definition excludes the following as an acquisition:

> acquisition does not include the restructuring of a hospital owned by a hospital authority involving a lease of assets to any not for profit or for profit entity which has a principal place of business located in the same county where the main campus of the hospital in question is located and which is not owned, in whole or in part, or controlled by any other for profit or not for profit entity whose principal place of business is located outside such county;[9]

---

[7] Notably, Georgia law provides that "[a] contract to do an immoral or illegal thing is void." O.C.G.A. § 13-8-1.

[8] *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000) ("Preemption will be found where it is impossible for a private party to comply with both state and federal law, and where under the circumstances of a particular case, the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.").

[9] O.C.G.A. § 31-7-400(2).

Therefore, the lease of a hospital authority-owned hospital is not an "acquisition" and does not constitute a capital expenditure subject to prior CON review. As a result, an entity whose principal place of business is in the same county as the former Palmyra assets may lease such assets from the hospital authority, regardless of the amount, and not be subject to prior CON review as such a lease would not constitute a capital expenditure for purposes of establishing a new institutional health service.[10]

A rule of statutory construction is that all statutes relating to the same subject-matter are construed together, and harmonized wherever possible, so as to ascertain the legislative intent and give effect thereto. Additionally, a specific statute will prevail over a general statute, absent any indication of a contrary legislative intent, to resolve any inconsistency.[11]

Additionally, any expenditure associated with a restructuring of, or acquisition by stock or asset purchase, merger, consolidation, or other lawful means of a hospital authority-owned hospital is explicitly exempt from CON review provided the restructuring or acquisition is made by any hospital authority or political subdivision of the state.[12] Again, Phoebe Putney Memorial Hospital could decouple and separately license the former Palmyra assets without triggering CON review. The hospital authority could subsequently arrange for a restructuring or acquisition of the former Palmyra assets consistent with the exemption from CON review provided for in O.C.G.A. § 31-6-47(9.1).

4. CON Application

In the FTC Analysis, FTC wrote that the CON process was difficult because of the need calculations and adverse impact requirements. The FTC cites to the service specific criteria. If DCH concludes that CON is required because of the role of the Authority of for any other reason, only the general considerations would apply. The "service specific" considerations only apply to new or expanded services.[13] Because the Palmyra facility is an existing hospital providing only those services previously authorized, an entity acquiring the Palmyra assets would not have to satisfy the "service specific" criteria. The entity would then be subject to satisfying the less stringent requirements of the "general" considerations,[14] which is a less difficult hurdle to overcome. As a result, we believe a CON could be applied for and granted to any party that is required to satisfy only the general considerations.

---

[10] In most cases a new entity is formed to execute the lease.
[11] *Cobb County v. City of Smyrna*, 270 Ga. App. 471, 474-475 (2004).
[12] O.C.G.A. § 31-6-47(9.1)
[13] Ga. Comp. R. & Regs. 111-2-2-.20(1)(a)(Short stay hospital beds); 111-2-2-.21(3)(a) (Cardiac catheterization); 111-2-2-.22(1) (Open heart); 111-2-2-.23 (Pediatric cardiac catheterization and open heart); 111-2-2-.24(3) (Perinatal services); 111-2-2-.25(1) (Freestanding birthing center); 111-2-2-.26(1)(a) (Inpatient psychiatric and substance abuse).
[14] Ga. Comp. R. & Regs. 111-2-2-.09.

III. CONCLUSION

Based on the foregoing, we are asking DCH to confirm that a CON is not required for North Albany to purchase Palmyra.

Very truly yours,

Victor L. Moldovan

EXHIBIT A

111 0067

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Jon Leibowitz, Chairman**
William E. Kovacic
J. Thomas Rosch
Edith Ramirez
Julie Brill

In the Matter of Phoebe Putney Health System, Inc. a corporation, and	)	
Phoebe Putney Memorial Hospital, Inc. a corporation, and	)	Docket No. 9348
Phoebe North, Inc. a corporation, and	)	REDACTED PUBLIC VERSION
HCA Inc. a corporation, and	)	
Palmyra Park Hospital, Inc. a corporation, and	)	
Hospital Authority of Albany-Dougherty County.	)	

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 Respondents Phoebe Putney Health System, Inc. ("PPHS"), Phoebe Putney Memorial Hospital, Inc. ("PPMH"), Phoebe North, Inc. ("PNI") (collectively, "Phoebe Putney"); Respondents HCA Inc. ("HCA") and Palmyra Park Hospital, Inc. ("Palmyra"); and Respondent Hospital Authority of Albany-Dougherty County ("the Authority"), having entered into an agreement pursuant to which control of Palmyra shall be transferred to Phoebe Putney (the "Transaction"), in violation of Section 5 of the FTC Act, 15 U.S.C. § 45, and which if consummated would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, 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 FTC Act, 15 U.S.C. § 45(b), stating its charges as follows:

I.

NATURE OF THE CASE

1. The Transaction creates a virtual monopoly for inpatient general acute care services sold to commercial health plans and their customers in Albany, Georgia and its surrounding area. The Transaction will eliminate the robust competitive rivalry between Phoebe Putney and Palmyra – the only two hospitals in Albany and in Dougherty County – that has benefitted consumers for decades. The result will be significant increases in healthcare costs for local residents, many of whom are already struggling to keep up with rising medical expenses, and the stifling of beneficial quality improvements.

2. Phoebe Putney and Palmyra knew that creating a virtual monopoly would not pass muster with the antitrust authorities; indeed, Palmyra conditioned the deal on [redacted] So Phoebe Putney – without even informing the Authority that it was doing so – structured the Transaction in hopes of using the state action doctrine to shield the Transaction from potential antitrust challenges. The Transaction positions the Authority as a strawman to transfer control of Palmyra to Phoebe Putney in a three-step process: *first*, the Authority will purchase Palmyra's assets from HCA using PPHS's money; *second*, the Authority will immediately give control of Palmyra to Phoebe Putney under a management agreement; and *third*, Phoebe Putney will enter into a lease giving it control of the Palmyra assets for 40 years. In a nutshell, the Authority, using Phoebe Putney's money, would buy Palmyra, and then upon closing, immediately turn it over to Phoebe Putney.

3. Thus, the Authority is the acquirer of Palmyra on paper only. By using the Authority as a strawman, Phoebe Putney sought to shield this overtly anticompetitive Transaction from antitrust scrutiny. The Authority played no meaningful role in the Transaction. Phoebe Putney initiated and negotiated the deal. The Authority undertook no substantive analysis of the Transaction or its effect on the community and played no independent role in negotiating it. The parties included the Authority at the eleventh hour solely in an effort to avoid antitrust enforcement by having the Authority rubber-stamp this sale from one private party to another. Indeed, the entire Transaction is premised on the immediate handover of Palmyra's assets to Phoebe Putney; the Authority has considered no other options.

4. So certain was Phoebe Putney that the Authority would rubber-stamp the Transaction, that it [redacted] with Palmyra. Before the Transaction was even presented to the Authority, Phoebe Putney agreed with Palmyra that if the Authority failed to [redacted] Phoebe Putney would [redacted].

5. Phoebe Putney's confidence that the Authority would rubber-stamp the deal comes from years of operating without active supervision by the Authority under its long-term Lease and Management Agreement of the hospital's assets to Phoebe Putney's subsidiary,

PPMH ("the Lease"). As the [redacted] explained to a new Authority member and to Phoebe Putney's CEO, [redacted]." The [redacted] has similarly expressed that he did not consider hospital oversight a function of the Authority.

6. Phoebe Putney, a private hospital system determined to increase its already dominant market share, acted alone when it sought out the Transaction. And Phoebe Putney alone will benefit from it at the expense of area businesses and residents. There is no *bona fide* state action whatsoever associated with the Transaction. Even under a new prospective lease arrangement, the [redacted] expects it to be business as usual, as the Authority does not plan to engage in any meaningful additional oversight of the *de facto* monopoly, falling far short of the active state supervision required to satisfy the state action doctrine.

7. Following the Transaction, Phoebe Putney will control 100% of the licensed general acute care hospital beds in Dougherty County. Even in an expansive geographic market encompassing the six counties surrounding Albany, Phoebe Putney's pre-Transaction market share based on commercial patient discharges nears 75%. With the Transaction, this will jump to approximately 86%. The hospital with the next-largest share (of less than 4%) is located 40 miles from Albany. The Transaction dramatically increases concentration in an already highly concentrated market, giving rise to a presumption of unlawfulness by a wide margin under the relevant case law and the U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines ("Merger Guidelines").

8. Phoebe Putney and Palmyra are each other's closest competitors, and they are regarded as closest substitutes for one another by both health plans and their members. The two hospitals have battled fiercely for inclusion in health-plan networks and have gone to great lengths to increase their appeal to health-plan members. While Palmyra has [redacted] relative to Phoebe Putney, the latter has for years offered its deepest commercial payor discounts to health plans that exclude Palmyra from their networks.

9. The Transaction will end that beneficial competition. The CEO of Phoebe Putney stated publicly that the Transaction affords the opportunity to "get the rivalry behind us." A requirement of the Transaction is that Palmyra drop its pending monopolization lawsuit against Phoebe Putney.

10. Other southwest Georgia hospitals offer scant competition to Phoebe Putney and Palmyra. The nearest independent hospitals, located over 30 miles from Albany, are small and serve only their own local communities. Given health-plan members' unwillingness to travel significant distances for inpatient general acute care services, these hospitals are simply too distant to serve as practical substitutes for residents of the Albany area, even in the event of a small but significant price increase at the Albany hospitals. Health plans and local employers have testified that their networks must

include PPMH or Palmyra, or both, in order to be commercially viable for Albany-area employers and other groups.

11. The Transaction greatly enhances Phoebe Putney's bargaining position in negotiations with health plans, giving it the unfettered ability to raise reimbursement rates without fear of losing customers. Without Palmyra or any other independent competitive alternative to PPMH, health plans will be forced either to accept the higher rates or to exit the local marketplace. Higher hospital rates are ultimately borne by the health plans' customers – local employers that pay their employees' healthcare claims directly or pay premiums to health plans on their employees' behalf – and by the individual health-plan members themselves. Those increased costs impact local employers' ability to compete, expand, and remain vibrant.

12. The vigorous price and non-price competition eliminated by the Transaction will not be replaced by other hospitals in the next several years, if ever. Significant barriers to entry and expansion, including Certificate of Need ("CON") and funding requirements, prevent other hospitals from extending their reach into the Albany area. Even Palmyra has struggled mightily to expand into new service lines, such as obstetrics, due to stringent CON requirements and fierce opposition from Phoebe Putney. Phoebe Putney has stated it would take many years to construct a new facility comparable to Palmyra. Any purported efficiencies associated with the Transaction are insufficient to offset the great anticompetitive harm almost certain to result from the Transaction.

II.

BACKGROUND

A.

Respondents

13. All Phoebe Putney Respondents are not-for-profit corporations under Internal Revenue Code § 501(c)(3) and the Georgia Nonprofit Corporate Code, with their principal places of business at 417 Third Avenue, Albany, Georgia 31701. Respondent PPMH, directly or indirectly, is a Georgia corporation wholly-owned or controlled by PPHS, a Georgia corporation. PPHS is responsible for the operation of all Phoebe Putney hospital facilities in Albany, Georgia as well as the hospital in Sylvester, Georgia (in the Albany Metropolitan Area), where Phoebe Worth Medical Center, Inc. is located. Respondent Phoebe North, Inc. is an entity that was created by PPHS in connection with the Transaction, to manage and operate Palmyra, under the control of PPHS and PPMH.

14. PPMH is a 443-bed hospital located at 417 Third Avenue, Albany, Georgia 31701. Opened in 1911 at its current site, the hospital offers a full range of general acute care hospital services, as well as emergency care services, tertiary care services, and

outpatient services. PPMH serves its local community, but also draws tertiary-service referrals from a broader region.

15. Total annual patient revenues for Phoebe Putney for all services, at all facilities, are over $1.16 billion. Total discharges for all services are over 19,000. Phoebe Putney's annual net income or surplus is over $19 million. General acute care hospital services account for the majority of its services and revenues.

16. Phoebe Putney's reach extends beyond Dougherty County, operating, through its wholly-owned subsidiary Phoebe Worth Medical Center, Inc., a 25-bed critical access hospital located at 807 S. Isabella Street, Sylvester, Georgia 31791, and Phoebe Sumter Medical Center, a 76-bed general acute care hospital located in Americus, Georgia.

17. Respondent HCA is a for-profit health system that owns or operates 164 hospitals in 20 states and Great Britain. Founded in 1968, HCA is one of the nation's largest healthcare service providers with almost 40,000 licensed beds. Total annual revenues for HCA for all services and facilities are over $30.68 billion. HCA is incorporated in the State of Delaware. Its offices are located at One Park Plaza, Nashville, Tennessee 37203.

18. HCA owns and operates Respondent Palmyra Park Hospital, Inc., doing business as Palmyra Medical Center, a 248-bed acute care hospital incorporated in the State of Georgia, and located at 2000 Palmyra Road, Albany Georgia 31701. Palmyra was built in 1971 in response to requests by local physicians and community leaders to broaden the healthcare options available to residents of Dougherty County and the surrounding counties. Palmyra provides general acute care services, including but not limited to services in non-invasive cardiology, gastroenterology, general surgery, gynecology, oncology, pulmonary care, and urology.

19. Respondent Authority is organized and exists pursuant to the Georgia Hospital Authorities Law, O.C.G.A. §§ 31-7-70 *et seq.*, a statute which governs 159 counties over the entire state, where at least 92 hospital authorities currently exist. The Authority maintains its principal place of business at 417 Third Avenue, Albany, Georgia 31701, the same address as PPMH; it has no budget, no staff, and no employees. Phoebe Putney pays all the Authority's expenses. The Authority's nine unpaid/volunteer members are appointed to five-year terms by the Dougherty County Commission. The Authority holds title to the hospital's assets, but leased them in 1990 to PPMH for $1.00 per annum under the Lease, which has been extended several times and will expire in 2042. The Lease establishes certain contractual rights, duties, and responsibilities PPMH and the Authority owe with respect to one another. PPHS itself is not a party to the Lease and does not report to the Authority.

B.

Jurisdiction

20. Respondents, and each of their relevant operating subsidiaries and parent entities are, and at all relevant times have been, engaged in activities in or affecting "commerce" as defined in Section 4 of the FTC Act, 15 U.S.C. § 44, and Section 1 of the Clayton Act, 15 U.S.C. § 12.

21. The Transaction, including the Authority's acquisition of Palmyra and lease of Palmyra's assets to Phoebe Putney, constitutes an acquisition subject to Section 7 of the Clayton Act.

C.

Phoebe Putney's Private Interests

22. Under the terms of the Lease, the relationship between the Authority and PPMH is defined as and limited to that of landlord and tenant. Section 10.18 reads in pertinent part that "no provisions in this Agreement nor any acts of the parties hereto shall be deemed to create any relationship between Transferor and Transferor [sic] other than the relationship of landlord and tenant."

23. The Lease (and the attachments incorporated into the Lease as stipulated in Sections 4.02(h) and 4.15) provides that PPHS, through its Board of Directors, controls the assets and operations of PPMH. Under the terms of the December 3, 1990, *Contract Between Dougherty County, Georgia and the Authority of Albany-Dougherty County*, an attachment to the Lease, the Authority and Dougherty County stipulate in paragraph no. 4, on page five, that PPMH "has the sole discretion to establish its rate structure."

24. Since the Lease took effect in 1990, the Authority has not and does not countermand, approve, modify, revise, or in other respects actively supervise Phoebe Putney's actions regarding competitively significant matters. It is Phoebe Putney's executives, not the Authority, who control Phoebe Putney's revenues, expenditures, salaries, prices, contract negotiations with health insurance companies, available services, and other matters of competitive significance. At no time, from the date the Authority and PPMH entered into the Lease, has the Authority exercised management, control, or active supervision over the affairs of PPMH. Indeed, during all those years, the Authority never asked once for lower prices at PPMH.

25. As if to illustrate its deference to Phoebe Putney, the Authority waived its right to acquire Palmyra or any other hospital in Albany as a term of the Lease. Section 4.21 of the Lease, at page 26, stipulates that "[d]uring the term of this Agreement, Transferor [Authority] shall not own, manage, operate or control or be connected in any manner with the ownership, management, operation or control of any hospital or other health care

facility other than the [Phoebe Putney Memorial] Hospital in Albany, Georgia . . . ." Once the Authority rubber-stamped the Transaction and the Management Agreement that would put Phoebe Putney in control of its only Dougherty County competitor, however, PPMH agreed to waive this condition.

D.

The Transaction

26. In the Spring and Summer of 2010, two important events occurred: (1) in April, the Eleventh Circuit reinstated Palmyra's antitrust suit accusing Phoebe Putney of using its monopoly power in obstetrics, neonatal and cardiovascular care to foreclose competition; and (2) in July, Mr. Joel Wernick, PPHS's President and Chief Executive Officer, authorized Mr. Robert J. Baudino, a consultant and attorney engaged by PPHS, to begin discussions with HCA regarding the possible acquisition of Palmyra by Phoebe Putney.

27. Mr. Baudino played a number of roles in the Transaction. Through his Baudino Law Group, he provides legal counsel to PPHS with regard to the deal and other matters. He is also a member of the Sovereign Group which was engaged by PPHS to represent it in the Transaction in a non-legal capacity. The Sovereign Group is charging PPHS a fee of [redacted] percent of the $[redacted] million transaction value, plus expenses, the payment of which is contingent on closing the Transaction. More recently, Mr. Baudino has also claimed to represent the Authority as "special counsel" in the Transaction, although the Authority was unaware of his representation of PPHS or his nearly $[redacted] contingency fee.

28. Mr. Baudino and his Sovereign Group began negotiations on behalf of PPHS to acquire Palmyra in August 2010. At this point, Phoebe Putney had not notified the Authority that it was considering buying its rival. HCA, Palmyra's owner, did not intend to sell the hospital and informed Mr. Baudino that "[redacted]" Palmyra's business was improving, and HCA executives expected its financial performance to continue improving; they also expected to be successful in the battle with Phoebe Putney in both the antitrust lawsuit and in obtaining Palmyra's obstetrics CON.

29. HCA was open to hearing an offer for Palmyra, but it expected "[redacted]," "[redacted]," and "[redacted]." PPHS set out to meet those requirements and to acquire Palmyra.

30. The [redacted] was the easiest condition. Although it is a non-profit, PPHS operates the very lucrative PPMH, leased from the Authority for $1 per year. Phoebe Putney has cash reserves of over a quarter of a billion dollars.

31. As the negotiations progressed, HCA made clear that an [redacted] offer would have to meet or exceed [redacted] times Palmyra's annual net revenue. HCA's expectations were shared with PPHS's bankers who analyzed similar transactions and found that HCA's demand far exceeded [redacted]

[redacted] CA's demand presented an obvious obstacle: it would be difficult to find an independent investment bank to issue a fairness opinion to PPHS opining that the price to be paid for Palmyra is fair, as is often done in significant transactions. But Mr. Baudino had a ready solution: structure the deal so that the Authority would acquire Palmyra, likely eliminating the need for a fairness opinion. Mr. Baudino was right. When Phoebe Putney finally presented the Transaction and the sale price to the Authority, the Authority neither sought a fairness opinion nor asked a single question about the price, despite never before having reviewed a transaction of this magnitude.

32. Mr. Baudino believed he had an easy answer to the antitrust risk as well. In a purportedly "[redacted]" method, Phoebe Putney would not buy Palmyra directly. Rather, it would structure the Transaction so that the Authority would acquire Palmyra, with PPHS guaranteeing the purchase price and the Authority's performance under the purchase agreement. Once the Authority obtained title, it would simply lease Palmyra to PPHS for $1.00 per year for 40 years on terms similar to the PPMH lease. Subsequently, in an effort to head-off an antitrust enforcement action by the Commission and the State of Georgia, the Authority approved a term sheet prepared by Mr. Baudino for implementing the new lease with ostensibly more oversight than had been exercised in the past two decades under the original 1990 Lease. But [redacted] admitted that the term sheet is a wish list, to which Phoebe Putney has not agreed, and that the Authority's role after the Transaction will not differ meaningfully from its current one – *i.e.*, it will continue to let Phoebe Putney do "whatever it takes to make the wheels turn."

33. HCA's demand that there not be any [redacted] until the Transaction was signed also did not pose a problem. PPHS does not consider itself subject to Georgia's Open Meetings Act, and it strictly limited the knowledge of the Transaction to people with a "need to know." Although PPHS was negotiating an agreement that included the Authority as a key party, PPHS did not consider the Authority to be among those with a "need to know."

34. Unlike PPHS, the Authority must comply with Georgia's Open Meetings Act. But PPHS sidestepped that problem by not presenting the Transaction to the Authority until all of its terms were definitively determined and the vote was a "[redacted]" The Authority could then rubber-stamp the completed deal at an open meeting, thereby addressing all of HCA's antitrust and confidentiality concerns.

35. On October 7, 2010, PPHS's board approved management's recommendation that it make a formal offer to HCA for Palmyra.

36. PPHS's negotiations for Palmyra were well underway before PPHS even mentioned them to any of the Authority's nine members. On October 21, Mr. Wernick and Tommy Chambless, PPHS's General Counsel, held a 30-minute informational session with two of

the Authority's members, Ralph Rosenberg and Charles Lingle. The Authority had neither delegated responsibility for the Transaction to them nor designated them to speak on its behalf. Mr. Wernick informed them that PPHS intended to acquire Palmyra, but gave them no documents explaining the acquisition or justifying the substantial premium PPHS was contemplating. Rosenberg and Lingle signed confidentiality agreements, which they understood prevented them from discussing the Transaction with other Authority members.

37. Two weeks later, on November 4, 2010, the Authority had its regularly scheduled quarterly meeting. There was no discussion of the Transaction at that meeting.

38. On November 10, 2010, Mr. Baudino, acting as "counsel to Phoebe Putney Health System Inc.," explained to HCA in a six-page letter how PPHS would structure the Transaction to eliminate antitrust risks. He believed that, under the state action doctrine, having the Authority make the acquisition would insulate the deal from notice to, or antitrust law enforcement by, the Commission and the United States Department of Justice. Mr. Baudino went on to explain that "the Authority would acquire Palmyra and, after the acquisition, lease Palmyra to a non-profit corporation controlled by PPHS. That lease would be on substantially the same terms as the Authority's existing lease of Phoebe Putney Memorial Hospital Inc."

39. On November 16, 2010, PPHS made a formal offer to HCA for Palmyra for [redacted] its net patient revenue for the prior 12 months. The Authority did not review or approve the offer.

40. On December 2, the PPHS Board approved the final terms of the deal between PPHS and HCA. PPHS and HCA concluded their negotiations shortly thereafter. The Transaction had still not been presented to, or vetted by, the Authority. PPHS agreed to guarantee a $195 million payment, which according to reports generated by PPHS's advisors, was [redacted] The Authority played no role in negotiating that price, and the [redacted] prepared by PPHS's advisors was not shared with the Authority.

41. PPHS also agreed to pay a $[redacted] million break-up fee, representing nearly [redacted]% of the purchase price. In addition, under Section 10.1(a) of the Respondents' *Asset Purchase Agreement,* PPHS likewise agreed to pay HCA a $[redacted] million "rescission fee" if, after closing, there is a final court order rescinding the transaction. The Authority had no role in negotiating the break-up or rescission fees.

42. With the negotiations between PPHS and HCA concluded, it was time to present the Transaction to the Authority. But first, on December 20, 2010, the eve of the meeting at which it would be presented to the Authority, PPHS [redacted] would approve the Transaction without any changes. [redacted]

[redacted] If, once presented, the Authority failed to [redacted] PPHS would pay [redacted] within two business days' time. During the preceding week, Mr. Wernick had met in small groups with other Authority members without the knowledge of the Authority Chairman.

43. On December 21, 2010, at a special meeting, the Transaction was presented to the Authority for the first time. In a 94-minute meeting, PPHS's CEO and its advisor, Mr. Baudino (who appeared as special counsel to the Authority without addressing his work for Phoebe Putney or the Sovereign Group's financial interest in the Transaction), presented the terms of the Transaction and the related transactions using a PowerPoint presentation recycled from PPHS's December 2 Board meeting. [redacted] the Authority did just what PPHS expected it would do. The members did not seek to change a single term of the Transaction. Indeed, they asked no questions and sought no extra counsel or independent analysis. Having no reason to acquire Palmyra independent of PPHS's desire to do so, the Authority rubber-stamped the Asset Purchase Agreement *exactly* as PPHS had negotiated it.

44. At that meeting, the Authority also approved a 17-page Management Agreement that will give Phoebe Putney control over Palmyra's operations immediately upon closing the Transaction.

45. The Authority understood that the Transaction negotiated and entered into by PPHS was an integrated transaction which included the expected lease of Palmyra to Phoebe Putney.

46. On April 4, 2011, the Authority approved a lease term sheet prepared by Mr. Baudino that makes abundantly clear that the Authority's plan remains to lease Palmyra's and PPMH's assets to Phoebe Putney under a single lease. The term sheet is a wish list that has not even been presented to Phoebe Putney, let alone agreed upon. But even assuming Phoebe Putney were to agree to every single proposed term, [redacted] does not expect the Authority to make significant changes from its current activities, such as hiring staff to oversee Phoebe Putney's *de facto* monopoly or involving itself in Phoebe Putney's pricing or arrangements with commercial health-plan providers. In other words, Phoebe Putney will have free rein, just as it has for the last 20 years, only now it will operate as a virtual monopolist.

III.

THE RELEVANT SERVICE MARKET

47. The Transaction threatens substantial harm to competition in the relevant market for inpatient general acute-care hospital services sold to commercial health plans.

48. Inpatient general acute care hospital services encompasses a broad cluster of basic medical and surgical diagnostic and treatment services that include an overnight hospital stay. It is appropriate to evaluate the Transaction's likely effects across this cluster of services, rather than analyzing effects as to each service independently, because the group of services in the market is offered by Phoebe Putney and Palmyra under very similar competitive conditions. There are no practical alternatives to the cluster of inpatient general acute care hospital services.

49. The inpatient general acute care services market excludes outpatient services because health plans and patients cannot substitute them for inpatient care in response to a price increase. Similarly, the general acute care hospital services market does not include highly specialized tertiary or quaternary hospital services, such as those involving major surgeries and organ transplants, because they too are not practical substitutes for general acute care hospital services.

50. Phoebe Putney and Palmyra negotiate reimbursement-rate contracts with commercial health plans. These contracts set the reimbursement rates that the health plans (and their self-insured customers) will pay the hospital for the services provided to health-plan members.

IV.

THE RELEVANT GEOGRAPHIC MARKET

51. The relevant geographic market in which to analyze the effects of the Transaction is *no broader than* the six-county region consisting of Dougherty, Terrell, Lee, Worth, Baker, and Mitchell Counties in Georgia.

52. Health-plan members strongly prefer to obtain inpatient hospital services close to their homes. Members' physicians typically have admitting privileges at their local hospitals, but not more distant facilities. Close proximity provides convenience for patients and also their visiting family members. Members are generally unwilling to travel outside of their communities for inpatient general acute care services, unless a particular needed service is unavailable locally, or the quality offered by local facilities is perceived as insufficient.

53. The only hospitals available to health plans to serve residents of the Albany area are located in Dougherty County, in the City of Albany. Health plans *must have* either Phoebe Putney or Palmyra, or both, in their networks in order to offer commercially viable insurance products to residents of Albany and the six-county area.

54. The nearest independently owned hospitals located outside of Albany are Mitchell County Hospital (31 miles away), Crisp Regional Hospital (39 miles away), and Calhoun Memorial Hospital (39 miles away). Health plans and their members do not view these

hospitals, given their distance and limited service offerings, as practical substitutes for Phoebe Putney or Palmyra.

55. Health plans could not steer their members to hospitals outside the six-county area in response to a small but significant rate increase at the hospitals within the area. It would therefore be profitable for a hypothetical monopolist controlling all hospitals in the relevant geographic market to increase commercial reimbursement rates by a significant amount.

56. As reflected by their ordinary-course documents and their actions, Phoebe Putney and Palmyra focus their competitive efforts and attention on one another, to the exclusion of any hospitals located outside the six-county area. Phoebe Putney's longstanding contracting strategy was to require health plans to exclude Palmyra, *but no other hospitals*, from their provider networks.

57. Hospitals outside the six-county area do not regard themselves as, and are not, meaningful competitors of Phoebe Putney or Palmyra for inpatient general acute care services as defined herein.

V.

MARKET STRUCTURE AND PRESUMPTIVE ILLEGALITY

58. The Transaction is for all practical purposes a merger to monopoly, by any measure.

59. In addition to Phoebe Putney and Palmyra, there is only one other independently owned hospital located within the expansive six-county region set forth above. That is 25-bed Mitchell County Hospital, a very small limited care facility about 31 miles away. In addition, there are two hospitals located *outside* the six-county area – Tift Regional Medical Center and John D. Archbold Medical Center – which account for a small but nontrivial share of discharges for health-plan members residing within the six-county area. The two other hospitals mentioned above, Crisp Regional and Calhoun Memorial, are also located outside the six-county area and account for an insignificant share of the relevant market.

60. Under relevant case law and the Merger Guidelines, the Transaction is presumptively unlawful. PPHS's post-Transaction market share, based on discharges for commercial patients residing in the six-county area, is approximately 86%. This extraordinarily high market share easily exceeds levels that the United States Supreme Court has found presumptively unlawful.

61. The Merger Guidelines measure market concentration using the Herfindahl-Hirschman Index ("HHI"). A merger or acquisition is presumptively likely to create or enhance market power (and presumed illegal) when the post-merger HHI exceeds 2,500 points and the transaction increases the HHI by more than 200 points.

62. The market concentration levels here exceed these thresholds by a wide margin. The post-Transaction HHI will increase by 1,675 points to 7,453, as shown in the following table:

Hospital	Discharges	Pre-Transaction Share of Discharges	Post-Transaction Share of Discharges
PPHS	6,662	74.9%	86.1%
Palmyra	1,000	11.2%	
Tift Regional Medical Center	351	3.9%	3.9%
John D. Archbold Memorial Hospital	218	2.5%	2.5%
Others (each 1% or less)	659	7.4%	7.4%
Total	8,890		
		Pre-Transaction HHI:	5,778
		Delta:	1,675
		Post-Transaction HHI:	7,453

VI.

ANTICOMPETITIVE EFFECTS

A.

The Transaction Eliminates a Unique Pricing Constraint Upon Phoebe Putney

63. By eliminating vigorous competition between Phoebe Putney and Palmyra, the Transaction enhances Phoebe Putney's ability and incentive to increase reimbursement rates for commercial health plans and their membership.

64. In its actions, documents, testimony, and public statements, Phoebe Putney has acknowledged the intense competition between it and Palmyra. For example, Phoebe Putney had a longstanding contracting strategy in which it offered substantially more attractive reimbursement rates to commercial health plans, including Blue Cross Blue Shield of Georgia, that were willing to enter into an exclusive in-network relationship with Phoebe Putney *but not Palmyra*. In essence, Phoebe Putney recognized that its

financial success depended on keeping health-plan members away from Palmyra, its only true competitor.

65. Cognizant of Palmyra's competitive threat, Phoebe Putney has repeatedly challenged Palmyra's efforts to obtain a CON for obstetrics. Palmyra was initially granted a CON to build an obstetrics department, after which Phoebe Putney appealed the decision twice, and lost. Phoebe Putney then sued in state court to block Palmyra from going forward with its plans and was successful. Palmyra's appeal of that decision is currently pending. Palmyra is also prosecuting an antitrust lawsuit against Phoebe Putney, alleging monopolization and illegal tying.

66. Palmyra has demonstrated the ability to capture market share from Phoebe Putney. [redacted] testified that Palmyra's market share has increased during the last two years, while Phoebe Putney's share has declined by an equal amount. And Mr. Wernick's December 21, 2010 presentation to the Authority states that one of the strategic consequences to Phoebe Putney were it not to buy Palmyra is "[redacted]."

67. In a fact sheet prepared by Phoebe Putney, the Authority stated on December 21st:

[redacted]

68. The overt competitive rivalry between Phoebe Putney and Palmyra has yielded price benefits to health plans and their members. While Phoebe Putney has [redacted] Palmyra's competitive strategy in the marketplace has been to [redacted] versus Phoebe Putney. As the two hospitals will operate as a single entity under one lease, the Transaction eliminates incentives for either hospital to discount its rates in an effort to gain business from health plans and their members.

69. Following the Transaction, the combined Phoebe Putney/Palmyra will become an absolute "must-have" hospital for health plans, which will have no available practical alternative hospitals to offer their members. This significant change in the negotiating dynamic will enhance Phoebe Putney's ability and incentive to obtain rate increases for its own services, as well as for Palmyra's services. Health plans anticipate that Palmyra's rates will increase significantly, and that Phoebe Putney's rates will rise incrementally as well, due to the elimination of its only significant competitor.

70. Rate increases resulting from the Transaction ultimately will be shouldered by local employers and their employees. A significant percentage of the commercial health-plan

membership in the Albany area is self-insured. Self-insured employers rely on health plans to negotiate rates and provide administrative support, while directly paying the full cost of their employees' healthcare claims. As a result, self-insured employers and employees immediately and directly bear the full burden of higher rates, including higher premiums, co-pays, and out-of-pocket costs. Fully-insured employers also are inevitably harmed by higher rates, because health plans pass on at least a portion of hospital rate increases to these customers through premium increases and administrative fees. To avoid having to pay the higher prices, some Albany-area employers may opt no longer to provide healthcare coverage for their employees, and some Albany area residents may be forced to forego or delay healthcare services because of the higher prices.

71. Non-profit hospitals such as Phoebe Putney are no less likely than their for-profit counterparts to negotiate aggressively with health plans over reimbursement rates and to exercise market power gained through acquisition of a competitor.

C.

The Loss of Quality Competition

72. The Transaction will reduce the quality and breadth of services available in the Albany area.

73. Absent the Transaction, Phoebe Putney and Palmyra would continue to be close rivals with differentiated competitive offerings in the market for general acute care hospital services. Health plans perceive little quality difference between the two hospitals currently.

74. Competition between Phoebe Putney and Palmyra has spurred the two hospitals to offer additional services; it also has fostered other non-price benefits for residents of the Albany area. For example, in response to Palmyra advertising its real-time emergency room wait times on its website and electronic billboards, Phoebe Putney executives sought to improve their own services. After Palmyra was granted a CON for an obstetrics department, Phoebe Putney developed plans to increase the availability of private rooms to its obstetrics patients. If the Transaction moves forward, these benefits of competition will be lost.

VII.

ENTRY BARRIERS

75. Entry by new hospitals will not deter or counteract the Transaction's likely harm to competition in the relevant service market. There is little chance that other firms would be able to enter to counter Phoebe Putney's anticompetitive practices.

76. The regulatory environment in which hospitals are permitted to operate prevents other institutions from entering. Under Georgia law, GA. Code Ann. §§ 31-6-42 (a)(3), only specially licensed facilities are permitted to offer general acute care hospital services, and before they may do so, the State must issue a CON before a new facility may be built.

77. Even if a CON were obtained, the construction of a new general acute care hospital comparable to Palmyra would cost millions of dollars and take well over two years – indeed [redacted] years according to Phoebe Putney's counsel – from initial planning to opening doors to patients.

78. The construction of Palmyra in 1971 was the last example of new hospital entry in the Albany area. No other hospitals in southwest Georgia – the most likely candidates for new entry or expansion – have stated they will enter, or even are considering entering, the relevant geographic market.

VIII.

ANTICIPATED AFFIRMATIVE DEFENSES

A.

State Action

79. The Transaction was motivated and planned exclusively by Phoebe Putney, which acts in its independent, private, and pecuniary interests. Rather than acting in furtherance of the public interest, or even evaluating those interests, the Authority served only as a strawman to permit Phoebe Putney to attempt to shield this overtly anticompetitive Transaction from antitrust scrutiny.

80. The Authority engaged in no independent analysis to determine whether the Transaction would be in the public's interest. Having no reasons for acquiring Palmyra other than those advanced by Phoebe Putney, it authorized a $195 million purchase of Palmyra – using Phoebe Putney's money – without even considering: (i) the adverse effect this virtual merger to monopoly would have on healthcare pricing in the community; (ii) the valuation of Palmyra; (iii) alternatives to leasing Palmyra's to Phoebe Putney; or (iv) who specifically from Phoebe Putney would run Palmyra immediately after the Transaction.

81. Just as it played no supervisory role in the Transaction, since at least 1990 when the Lease became effective, the Authority has not actively supervised Phoebe Putney in any sense, including with respect to strategic planning, pricing, and other competitively sensitive affairs. Rather, the Authority's oversight is limited to conducting quarterly breakfast meetings (the minimum required by statute) lasting approximately one hour. The [redacted] testified that he cannot remember an instance in which a vote was less than unanimous, and he had never seen a price list for the services provided by

the hospital, despite serving on the Authority for over five years. The [redacted] believes pricing is a function of the hospital board, not the Authority. Consistent with that belief, the Authority made no effort to challenge, or even evaluate, PPMH's most recent price increases. The [redacted] testified that he was not aware of PPMH's price changes in the last several years or how much PPMH's prices have increased during his eight-plus years on the Authority. And, the Authority has no authority to oversee PPHS.

82. By contract, beginning immediately after the Transaction, Phoebe Putney will assume responsibility for setting prices for the services furnished at Phoebe North, the hiring and firing of Phoebe North employees, and other competitively significant decisions necessary for the operation of a hospital or hospital annex. The [redacted] does not expect any of that to change when it officially leases Palmyra's assets to Phoebe Putney.

83. In sum, there is no state action here. Rather, it is the private, self-interested Phoebe Putney that has agreed to purchase Palmyra and will exercise – unfettered and unchecked by the Authority or any hospital competitor – the extraordinary market power gained through the Transaction.

B.

Efficiencies

84. Extraordinary efficiencies that cannot be achieved absent the merger are necessary to justify the Transaction in light of its vast potential to harm competition. Such efficiencies are lacking here.

IX.

VIOLATION

85. The allegations of Paragraphs 1 through 84 above are incorporated by reference as though fully set forth.

86. The Transaction constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

87. The Transaction, if consummated, would substantially lessen competition in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. § 45.

NOTICE

Notice is hereby given to the Respondents that the 19th day of September, 2011, at 10:00 a.m. is hereby fixed as the time, and Federal Trade Commission offices, 600 Pennsylvania

Avenue, N.W., Room 532, Washington, D.C. 20580, as the place when and where an evidentiary hearing will be had before an Administrative Law Judge of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under the Federal Trade Commission Act and the Clayton Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in the complaint.

You are notified that the opportunity is afforded you to file with the Commission an answer to this complaint on or before the fourteenth (14th) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material facts to be true. Such an answer shall constitute a waiver of hearings as to the facts alleged in the complaint and, together with the complaint, will provide a record basis on which the Commission shall issue a final decision containing appropriate findings and conclusions and a final order disposing of the proceeding. In such answer, you may, however, reserve the right to submit proposed findings and conclusions under Rule 3.46 of the Commission's Rules of Practice for Adjudicative Proceedings.

Failure to file an answer within the time above provided shall be deemed to constitute a waiver of your right to appear and to contest the allegations of the complaint and shall authorize the Commission, without further notice to you, to find the facts to be as alleged in the complaint and to enter a final decision containing appropriate findings and conclusions, and a final order disposing of the proceeding.

The Administrative Law Judge shall hold a prehearing scheduling conference not later than ten (10) days after the answer is filed by the last answering respondent. Unless otherwise directed by the Administrative Law Judge, the scheduling conference and further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the pre-hearing scheduling conference (but in any event no later than five (5) days after the answer is filed by the last answering respondent). Rule 3.31(b) obligates counsel for each party, within five (5) days of receiving a respondent's answer, to make certain initial disclosures without awaiting a discovery request.

NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in any adjudicative proceedings in this matter that the Transaction challenged in this proceeding violates Section 7 of the Clayton Act, as amended, and Section 5 of the FTC Act, as amended, the Commission

may order such relief against Respondents as is supported by the record and is necessary and appropriate, including, but not limited to:

1. If the merger is consummated, (a) rescission of the Asset Purchase Agreement and/or (b) divestiture of Palmyra, and associated assets, in a manner that restores Palmyra as a viable, independent competitor in the relevant market, with the ability to offer such services as Palmyra was offering and planning to offer prior to the Transaction. Any ordered divestiture may be to, among other entities, Respondents HCA and/or Palmyra.

2. A ban, for a period of time, on any transaction involving Phoebe Putney, the Authority, or Palmyra through which Phoebe Putney would acquire, manage, or control the operations of Palmyra or which would combine Phoebe Putney's and Palmyra's businesses in the relevant market, except as may be approved by the Commission.

3. A requirement that, for a period of time, Phoebe Putney provide prior notice to the Commission of acquisitions, mergers, consolidations, or any other combinations of its hospital or other health facilities in the relevant market with other hospitals or health facilities in the relevant market.

4. A requirement to file periodic compliance reports with the Commission.

5. Any other relief appropriate to correct or remedy the anticompetitive effects of the Transaction or to ensure the creation of one or more viable, competitive independent entities to compete against Phoebe Putney and Palmyra in the relevant market.

IN WITNESS WHEREOF, the Federal Trade Commission has caused this complaint to be signed by its Secretary and its official seal to be hereto affixed, at Washington, D.C., this 19th day of April, 2011.

By the Commission.

Richard J. Donohue
Acting Secretary

SEAL

EXHIBIT B

ANALYSIS OF PROPOSED AGREEMENT CONTAINING CONSENT ORDER TO AID PUBLIC COMMENT

In the Matter of Phoebe Putney Health System, Inc., et al., Docket No. 9348

I. Introduction

The Federal Trade Commission ("Commission") has accepted, subject to final approval, an Agreement Containing Consent Order ("Consent Agreement") from Respondents Phoebe Putney Health System, Inc. ("PPHS"), Phoebe Putney Memorial Hospital, Inc. ("PPMH"), Phoebe North, Inc. ("Phoebe North") (collectively "Phoebe Putney"), HCA Inc. ("HCA"), Palmyra Park Hospital, Inc. ("Palmyra"), and the Hospital Authority of Albany-Dougherty County ("Hospital Authority") in settlement of administrative litigation challenging the Hospital Authority's acquisition of Palmyra from HCA and subsequent transfer of all management control of Palmyra to Phoebe Putney under a long-term lease arrangement (the "Transaction").

The circumstances in this matter are highly unusual and the Commission's discontinuation of litigation and settlement of this case on the proposed terms are acceptable to the Commission only under the unique circumstances presented here. In particular, as described further below, the Commission believes that, assuming a finding of liability following a full merits trial and appeals, the legal and practical challenges presented by Georgia's certificate of need ("CON") laws and regulations would very likely prevent a divestiture of hospital assets from being effectuated to restore competition. The Commission has declined to seek price cap or other non-structural relief, as such remedies are typically insufficient to replicate pre-merger competition, often involve monitoring costs, are unlikely to address significant harms from lost quality competition, and may even dampen incentives to maintain and improve healthcare quality.

Accordingly, the proposed Consent Agreement, among other things, contains for settlement purposes a stipulation from Respondents Phoebe Putney and Hospital Authority that the effect of the consummated Transaction may be substantially to lessen competition within the relevant service and geographic markets alleged in the Administrative Complaint dated April 20, 2011 ("Complaint"). The Consent Agreement also requires Respondents Phoebe Putney and Hospital Authority to provide the Commission prior notice of any acquisition of certain healthcare providers in the six-county area around Albany, Georgia, including other general acute-care hospitals, inpatient and outpatient facilities, and physician practices with five (5) physicians or more. Finally, the Consent Agreement restricts Respondents Phoebe Putney and Hospital Authority from raising any objections to or negative comments about CON applications for general acute-care hospitals in the six-county area surrounding Albany, Georgia. Additionally, the Consent Agreement requires Phoebe Putney and the Hospital Authority to provide copies of any objections they file in connection with a CON application for an inpatient or outpatient clinic providing any of the services provided by Phoebe Putney or the Hospital Authority in the six-county area around Albany, Georgia within five (5) days of its submission to the Georgia Department of Community Health ("DCH").

The Consent Agreement has been placed on the public record for thirty (30) days to solicit comments from interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the proposed Consent Agreement and will decide whether it should withdraw from the proposed Consent Agreement, modify it, or make it final and issue its Decision and Order ("Order").

II. The Parties

PPHS is a non-profit Georgia corporation consisting of several hospitals and other health care facilities in southwest Georgia with its principal place of business located at 417 Third Avenue, Albany, Georgia 31701. In 2011, total annual patient revenues for PPHS at all of its facilities were over $1.6 billion. PPMH is a non-profit Georgia corporation, wholly-owned by PPHS, which operates a 443-bed general acute-care hospital with its principal place of business located at 417 Third Avenue, Albany, Georgia 31701. Opened in 1911, PPMH offers a full range of general acute-care hospital services, as well as emergency care services, tertiary care services, and outpatient services.

Respondent Hospital Authority is organized and exists pursuant to the Georgia Hospital Authorities Law, O.C.G.A. §§ 31-7-70 *et seq.*, and maintains its principal place of business at 417 Third Avenue, Albany, Georgia 31701. The Hospital Authority is composed of nine volunteer members appointed to five-year terms by the Dougherty County Commission, and has no employees, no staff, and no budget. Since 2012, the Hospital Authority holds title to both PPMH and the former Palmyra assets (now known as Phoebe North) and has entered into a single, long-term lease covering both of these facilities with PPMH at the rate of $1 per year.

HCA, a Delaware for-profit corporation, is one of the leading health care services companies in the United States with its principal place of business located at One Park Plaza, Nashville, Tennessee 37203. As of December 31, 2012, HCA operated 162 hospitals, comprised of 156 general acute-care hospitals; five psychiatric hospitals; and one rehabilitation hospital. In addition, HCA operates 112 freestanding surgery centers. HCA's facilities are located in 20 states and England. Prior to the acquisition, Palmyra, a 248-bed general acute-care hospital located 1.6 miles from PPMH, was owned and operated by HCA. Palmyra was a Georgia corporation with its principal place of business at 2000 Palmyra Road, Albany, Georgia 31701. Opened in 1971, Palmyra provided a wide range of general acute-care services.

III. The Acquisition

The Commission issued its Complaint in April 2011 charging that the Transaction violates 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, by lessening competition for the provision of inpatient general acute-care hospital services sold to commercial health plans in Albany and the surrounding six-county area. The Commission also filed a complaint for temporary and preliminary relief, pursuant to Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 53(b), and Section 16 of the Clayton Act, 15 U.S.C. § 26, in the U.S. District Court for the Middle District of Georgia. On June 27, 2011, U.S. District Court Judge W. Louis Sands granted the defendants' motion to dismiss, holding that the state action doctrine immunized the

Transaction from federal antitrust scrutiny.[1] On appeal by the Commission, the U.S. Court of Appeals for the Eleventh Circuit affirmed the district court's dismissal on state action grounds, although agreeing that, "on the facts alleged, the joint operation of [PPMH] and Palmyra would substantially lessen competition or tend to create, if not create, a monopoly."[2] The Court of Appeals dissolved its injunction pending appeal, and the Transaction was consummated on December 15, 2011. Subsequently, the Georgia DCH granted Phoebe Putney's request for a new, single license covering both Albany hospitals, PPMH and Palmyra, effective August 1, 2012.

Seeking judicial review of the Eleventh Circuit's ruling, the Commission filed a petition for certiorari, which the U.S. Supreme Court granted on June 25, 2012. On February 19, 2013, in a unanimous decision, the Court reversed the judgment of the Eleventh Circuit, holding that state action did not immunize the Transaction, and remanded the case for further proceedings below.[3] The Commission thereafter sought a stay of integration and other preliminary relief in the federal district court,[4] and also lifted its stay of administrative proceedings and scheduled a plenary hearing to commence on August 5, 2013, pursuant to which Complaint Counsel and Respondents engaged in discovery over the antitrust merits of the case. On June 10, 2013, the parties filed a joint motion to withdraw the matter from adjudication for settlement purposes, which was granted by the Commission on June 24, 2013.

IV. The Complaint

The Complaint alleges that the Transaction would reduce competition substantially in violation of 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, with the likely effect of decreasing quality of care and increasing prices for general acute-care hospital services charged to commercial health plans. The alleged relevant product market is general acute-care hospital services sold to commercial health plans. The alleged relevant geographic market is the six-county area surrounding Albany, Georgia.

The Complaint alleges that the Transaction was essentially a merger-to-monopoly. PPMH and Palmyra were the only general acute-care hospitals in Albany, Georgia. The only other hospital in the six-county area surrounding Albany, Georgia, is Mitchell County Hospital, a 25-bed critical-access hospital in Camilla, Georgia, about 31 miles away. The Complaint alleges

[1] *F.T.C. v. Phoebe Putney Health System, Inc.*, 793 F. Supp. 2d 1356, 1366 (M.D. Ga. 2011).

[2] *F.T.C. v. Phoebe Putney Health System, Inc.*, 663 F.3d 1369, 1375 (11th Cir. 2011).

[3] *F.T.C. v. Phoebe Putney Health System, Inc.*, 133 S. Ct. 1003, 1011 (2013).

[4] Following oral argument regarding the need for temporary injunctive relief, U.S. District Court Judge W. Louis Sands issued a temporary restraining order ("TRO") on May 15, 2013, halting further consolidation of the hospitals and prohibiting any price changes to existing health-plan contracts, pending the district court's consideration of the FTC's motion for preliminary injunction. The parties subsequently filed a joint motion for a stipulated preliminary injunction, which the district court granted on June 5, 2013. The stipulated preliminary injunction orders the Defendants to continue to operate the hospitals in the manner in which they were operated when the TRO was entered; to refrain from any further consolidation of Palmyra into Phoebe Putney's hospital system; and to refrain from making any price changes to, or terminating, any existing contracts with health plans.

that, through the Transaction, Phoebe Putney acquired a post-merger market share of approximately 86%, and that the post-merger HHI is 7,453, with a change from the pre-merger HHI of 1,675. This market concentration far exceeds the thresholds set forth in the *Horizontal Merger Guidelines* and creates a presumption that the Transaction created or enhanced market power. In addition, the Complaint alleges uniquely close, direct, and substantial pre-merger competition between Phoebe Putney and Palmyra, confirming the likelihood of adverse competitive effects resulting from the Transaction.

Entry into the relevant market is difficult. Not only is the construction of a new general acute-care hospital extremely expensive and time-consuming, but it is also subject to CON regulation in Georgia. Any person wishing to build a new hospital in the relevant geographic market would need approval from the Georgia DCH. Such an application would face opposition from any hospital in the relevant market, such as Phoebe Putney, and would likely be denied by DCH due to the lack of need as defined by DCH's strict criteria, as discussed further below. As a result, new entry sufficient to achieve a significant market impact within two years is highly unlikely.

V. The Proposed Consent Agreement

Georgia's CON statutes and regulations effectively prevent the Commission from effectuating a divestiture of either hospital in this case. As mentioned above, following the consummation of the Transaction, Phoebe Putney applied for and received a single license authorizing it to operate the formerly-separate hospitals as a single hospital with two campuses. The Georgia DCH issued Phoebe Putney's new license and revoked the two separate licenses that previously covered PPMH and Palmyra. Georgia's CON laws preclude the Commission from re-establishing the former Palmyra assets as a second competing hospital in Albany, because such relief would require: (1) the re-division of the single state-licensed hospital into two separate hospitals; and (2) the transfer of one of those hospitals from the Hospital Authority to a new owner. Either one of those steps is independently sufficient to require CON approval from DCH, which, as discussed further below, would not be forthcoming.

DCH has no statutory authority to revoke Phoebe Putney's current single-hospital license on the basis that its acquisition of Palmyra was anticompetitive. DCH may only revoke a health care facility's license if the facility "violates any of [DCH's] rules and regulations" or does not meet DCH's "quality standards" for "clinical service."[5] Such circumstances do not exist here.

Moreover, the divestiture of either hospital from the Hospital Authority to a proposed buyer would trigger the need for CON approval from DCH. A CON is required for "[a]ny expenditure by or on behalf of a health care facility in excess of $2.5 million . . . except expenditures for acquisition of an existing health facility not owned or operated . . . by or on behalf of a hospital authority."[6] To gain CON approval, the CON applicant must prove both that: (a) there is an "unmet area need" justifying a second Dougherty County hospital; and (b) establishing such a

[5] Ga. Code Ann. § 31-7-4.

[6] Ga. Code Ann. § 31-6-40(a)(2) (emphasis added).

facility would not have an adverse impact on the patient volume and revenue of other hospitals in the same state health planning area. Under Georgia's mandatory need formulas, there currently are hundreds of surplus hospital beds in Albany, Georgia.[7] As such, a new buyer could not prove unmet need in the Albany area as required by Georgia law to justify issuance of a CON.

An applicant seeking a CON for a hospital within the same state health planning area as an existing safety-net hospital, such as PPMH, must also prove that it will not have a detrimental market share or "payer mix" impact on that existing hospital. An adverse impact will be determined if, based on projected utilization, the applicant facility would reduce the utilization of the existing safety-net hospital by ten percent or more.[8] The CON rules are even more protective of teaching hospitals, such as PPMH, requiring as a precondition to issuance of a CON that the applicant demonstrate that an additional hospital will not reduce the utilization of an existing teaching hospital in the planning area by even five percent.[9]

Finally, Georgia courts have consistently construed exemptions to the CON requirements narrowly, and held that DCH lacks discretion to grant exemptions not clearly and expressly conferred by statute.[10]

The proposed Consent Agreement contains a stipulation by Phoebe Putney and the Hospital Authority that, solely for settling this matter, the effect of the Transaction may be substantially to lessen competition within the relevant service and geographic markets alleged in the Complaint. In addition to routine reporting and compliance requirements, the proposed Consent Agreement contemplates certain restrictions on Phoebe Putney and the Hospital Authority discussed below.

A. Prior Notice of Acquisitions

First, for the next ten (10) years, Phoebe Putney and the Hospital Authority must give the Commission prior notice for acquisitions of certain healthcare providers[11] in the six-county area surrounding Albany, Georgia. Under the Order, Phoebe Putney and the Hospital Authority are required to give the Commission thirty (30) days advance notice of a proposed acquisition that is covered by the Order but not subject to the Hart-Scott-Rodino Act ("HSR Act"). If, within this thirty-day period, the Commission staff makes a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Phoebe Putney and the Hospital Authority may not consummate the transaction until thirty (30) days after submitting

---

[7] PPMH and Palmyra both were grandfathered in when Georgia first enacted its CON law in 1976. Neither had ever independently received a CON.

[8] Ga. Comp. R. & Regs. 111-2-2-.20(3)(d)(2).

[9] Ga. Comp. R. & Regs. 111-2-2-.20(3)(d)(3).

[10] *See, e.g., North Fulton Med. Ctr. v. Stephenson*, 501 S.E.2d 798, 801 (Ga. 1998); *Phoebe Putney Mem'l Hosp., Inc. v. Roach*, 480 S.E.2d 595, 597 (Ga. 1997); *HCA Health Servs. of Ga., Inc. v. Roach*, 458 S.E.2d 118, 120-121 (Ga. 1995); *HCA Health Servs. of Ga., Inc. v. Roach*, 439 S.E.2d 494, 497 (Ga. 1994).

[11] The prior notice provision applies to the acquisition of: (1) any general acute-care hospital; (2) any inpatient or outpatient facility that provides any service provided by Phoebe Putney or the Hospital Authority; and (3) all or a controlling interest in a physician group practice of five (5) or more physicians.

such additional information or documentary material. This provision will prevent smaller, non-reportable transactions from taking place without notice to the Commission, and will provide the Commission with an opportunity to review such acquisitions prior to consummation.

B. CON Opposition Restrictions

Second, Phoebe Putney and the Hospital Authority have agreed to restrictions for a period of five (5) years prohibiting them from raising any objections to or providing negative comments about CON applications for general acute-care hospitals in the six-county area surrounding Albany, Georgia, which spans multiple state health planning areas for CON review purposes. This provision would allow a new entrant to apply for a CON without the potential additional cost and delay associated with opposition from Phoebe Putney or the Hospital Authority. Additionally, the Consent Agreement requires Phoebe Putney and the Hospital Authority to provide copies of any objections they file in connection with a CON application for an inpatient or outpatient clinic providing any of the services provided by Phoebe Putney or the Hospital Authority in the six-county area around Albany, Georgia within five (5) days of its submission to the Georgia DCH. The proposed Consent Agreement would, however, permit Phoebe Putney and the Hospital Authority to respond to questions or information requests received from DCH as part of a CON review process.

C. Dismissal as to HCA and Palmyra

Having accepted a settlement that imposes no further relief upon HCA or Palmyra, the Commission has determined to dismiss the Complaint as to them.

VI. Opportunity for Public Comment

The proposed Consent Agreement has been placed on the public record for thirty (30) days for receipt of comments from interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the proposed Consent Agreement, as well as the comments received, and will decide whether it should withdraw from the Consent Agreement or make final the Decision and Order.

The purpose of this analysis is to facilitate public comment on the proposed Consent Agreement and is not intended to constitute an official interpretation of the proposed Consent Agreement or to modify its terms in any way.

EXHIBIT C

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of	)	
Phoebe Putney Health System, Inc. **a corporation, and**	)	
Phoebe Putney Memorial Hospital, Inc. **a corporation, and**	)	**DOCKET NO. 9348**
Phoebe North, Inc. **a corporation, and**	)	
HCA Inc. **a corporation, and**	)	
Palmyra Park Hospital, Inc. **a corporation, and**	)	
Hospital Authority of Albany-Dougherty County.	)	

AGREEMENT CONTAINING CONSENT ORDER

The agreement herein ("Consent Agreement"), by and between Respondent Phoebe Putney Health System, Inc. ("PPHS"), a corporation, Respondent Phoebe Putney Memorial Hospital, Inc. ("PPMH"), a corporation, Respondent Phoebe North, Inc. ("PNI"), a corporation, (hereinafter collectively referred to as "Respondent Phoebe Putney"), Respondent HCA Inc. ("HCA"), a corporation; Respondent Palmyra Park Hospital, Inc. ("Palmyra"), a corporation, and Respondent Hospital Authority of Albany-Dougherty County ("Hospital Authority"), by their duly authorized officers, hereafter sometimes referred to as Respondents, and their attorneys, and counsel for the Federal Trade Commission, is entered into in accordance with the Commission's Rule governing consent order procedures. In accordance therewith the parties hereby agree that:

1. Respondent PPHS is a not-for-profit corporation organized, existing and doing business under and by virtue of the laws of the State of Georgia, with its headquarters address located at 417 Third Avenue, Albany, Georgia 31701.

2. Respondent PPMH is a not-for-profit corporation organized, existing and doing business under and by virtue of the laws of the State of Georgia, and is a 691-bed general acute-care hospital located at 417 Third Avenue, Albany, Georgia 31701.

3. Respondent PNI is a corporation organized, existing and doing business under and by virtue of the laws of the State of Georgia, and was created for the purpose of managing the Palmyra assets during the interim period after Respondent Hospital Authority acquired Respondent Palmyra, with its headquarters address located at 417 Third Avenue, Albany, Georgia 31701.

4. Respondent Hospital Authority is organized and exists pursuant to the Georgia Hospital Authorities Law, O.C.G.A. §§ 31-7-70 et seq., a statute that governs 159 counties over the entire state of Georgia, where at least 92 hospital authorities currently exist. Respondent Hospital Authority maintains its principal place of business at 417 Third Avenue, Albany, Georgia 31701.

5. Respondent HCA is a for-profit health system that owns or operates 164 hospitals in 20 states and Great Britain. HCA is incorporated in the State of Delaware. Its offices are located at One Park Plaza, Nashville, Tennessee 37203.

6. Respondent Palmyra was a corporation doing business as Palmyra Park Hospital, Inc., and was, prior to the acquisition by Respondent Hospital Authority, a 248-bed general acute care hospital owned by Respondent HCA, incorporated in the State of Georgia, and was located at 2000 Palmyra Road, Albany, Georgia 31701.

7. Respondent Hospital Authority proposed to acquire nearly all of the assets of Respondent Palmyra from Respondent HCA (the "Transaction").

8. At the time that the Transaction was entered into and consummated, Respondent Phoebe Putney and Respondent Hospital Authority believed in good faith that federal antitrust law did not apply to the Transaction by virtue of the United States Supreme Court's state-action doctrine, as then interpreted by the United States Court of Appeals for the Eleventh Circuit.

9. The Commission issued an administrative complaint in this matter on April 20, 2011 ("Complaint"), alleging, *inter alia*, that the proposed Transaction threatened substantial harm to competition in the relevant market for inpatient general acute-care hospital services paid for by commercial health plans (Paragraph 47 of the Complaint) in a geographic market no broader than the six-county region consisting of Dougherty, Terrell, Lee, Worth, Baker, and Mitchell Counties in Georgia (Paragraph 51 of the Complaint) in violation of Section 5 of the FTC Act, 15 U.S.C. § 45, and – if consummated – Section 7 of the Clayton Act, 15 U.S.C. § 18, and Section 5 of the FTC Act, 15 U.S.C. § 45. The Commission also alleged that the Transaction was for all practical purposes a merger to monopoly (Paragraph 58 of the Complaint).

10. Respondents were served with a copy of the Complaint and filed Answers denying the charges and asserting affirmative defenses.

11. On April 20, 2011, the Commission also filed in the U.S. District Court for the Middle District of Georgia a complaint for temporary restraining order and preliminary injunction. After first granting the Commission's requested temporary restraining order, the Court dismissed the action on grounds of state-action immunity.

The Commission appealed to the Court of Appeals, which affirmed the District Court and dissolved its injunction pending appeal. On December 15, 2011, Respondents consummated the Transaction.

12. The Commission petitioned the United States Supreme Court for a writ of certiorari, which was granted on June 25, 2012. On February 19, 2013, the Court ruled unanimously that the Transaction does not enjoy state-action immunity; accordingly, it reversed the Court of Appeals' decision and remanded the case for further proceedings in the District Court. On May 15, 2013, the District Court issued a Temporary Restraining Order, and on June 5, 2013, entered a Stipulated Preliminary Injunction Order.

13. On March 14, 2013, the Commission lifted its stay of the administrative proceedings and ordered that a hearing on the antitrust merits commence on or before August 5, 2013.

14. Respondents admit all of the jurisdictional facts set forth in the Complaint.

15. For the sole purpose of this proceeding and achieving compromise through this Consent Agreement, Respondent Phoebe Putney and Respondent Hospital Authority stipulate that the effect of the consummated Transaction may be substantially to lessen competition within the relevant service and geographic markets alleged in the Complaint.

16. Subject to the waivers in Paragraph 18, Respondents and Commission staff intend that the terms of this Consent Agreement in any other proceeding shall not be (i) given preclusive effect, (ii) treated as prima facie evidence, or (iii) admissible as evidence in any form for any reason.

17. For the sole purpose of this Consent Agreement, Respondent Phoebe Putney and Respondent Hospital Authority waive their defenses to the allegations of the Complaint, *PROVIDED, HOWEVER,* that in the event the Commission does not accept this Consent Agreement or withdraws its acceptance, as provided in Paragraph 21 below, the terms of this Consent Agreement shall be of no further force and effect. *PROVIDED FURTHER,* that, except for the waivers in Paragraph 18 below, Respondent Phoebe Putney and Respondent Hospital Authority reserve all rights to defend the Transaction as lawful in any other proceeding irrespective of whether the Commission finalizes the attached Decision and Order, terminating the administrative proceeding relating to this matter, Docket Number 9348.

18. Respondents waive:

    a. any further procedural steps in this proceeding;

    b. the requirement that the Commission's Decision and Order, attached hereto and made a part hereof, contain a statement of findings of fact and conclusions of law;

c. all rights to seek judicial review or otherwise to challenge or contest the validity of the Decision and Order entered pursuant to this Consent Agreement; and

d. any claim under the Equal Access to Justice Act.

19. This Consent Agreement does not constitute an admission by Respondent HCA and Respondent Palmyra that the law has been violated as alleged in the Complaint, or that the facts alleged in the Complaint, other than the jurisdictional facts, are true.

20. This Consent Agreement shall not become part of the public record of the proceeding unless and until the Consent Agreement is accepted by the Commission. If accepted by the Commission, this Consent Agreement will be placed on the public record for a period of thirty (30) days and information in respect thereto publicly released. The Commission thereafter may either issue and serve its Decision and Order in disposition of the proceeding or withdraw its acceptance of this Consent Agreement and so notify Respondents, in which event it will take such action as it may consider appropriate, including returning the matter to adjudication.

21. This Consent Agreement contemplates that, if it is accepted by the Commission, the Commission may make information public with respect thereto. If such acceptance is not subsequently withdrawn by the Commission pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission may, without further notice to Respondents, issue and serve the attached Decision and Order providing for relief in disposition of the proceeding.

22. When final, the Decision and Order shall have the same force and effect and may be altered, modified or set aside in the same manner and within the same time provided by statute for other orders. The Decision and Order shall become final upon service. Delivery of the Decision and Order to Respondents by any means provided in Commission Rule 4.4(a), 16 C.F.R. § 4.4(a) – including, but not limited to, delivery to any office within the United States of Lee K. Van Voorhis, Baker & McKenzie LLP, Frank M. Lowrey, Bondurant, Mixson & Elmore LLP, and Kevin J. Arquit, Simpson Thacher & Bartlett LLP, or of any other lawyer or law firm listed as Counsel for Respondents on this Consent Agreement – shall constitute service as to the Respondent. Respondents waive any right they may have to any other manner of service. Respondents also waive any right they may otherwise have to service of any Appendices incorporated by reference into the Decision and Order, and agree that they are bound to comply with and will comply with the Decision and Order to the same extent as if they had been served with copies of the Appendices, where Respondents are already in possession of copies of such Appendices.

23. The Complaint may be used in construing the terms of the Decision and Order, and no agreement, understanding, representation, or interpretation not contained in the Decision and Order, or the Consent Agreement may be used to limit or contradict the terms of the Decision and Order.

24. By signing this Consent Agreement, Respondent Phoebe Putney and Respondent Hospital Authority each represents and warrants that it can accomplish the full relief contemplated for it by the attached Decision and Order and that all parents, subsidiaries, affiliates, and successors necessary to effectuate the full relief contemplated by this Consent Agreement are within the control of the party to this Consent Agreement.

25. Respondent Phoebe Putney and Respondent Hospital Authority each has read the Complaint and the Decision and Order contained in this Consent Agreement. Respondent Phoebe Putney and Respondent Hospital Authority each understands that once the Decision and Order has been issued, each will be required to file one or more compliance reports showing that it has fully complied with the Decision and Order as applied to that Respondent.

26. Respondent Phoebe Putney and Respondent Hospital Authority each agrees to comply with the terms of the proposed Decision and Order applicable to it from the date it signs this Consent Agreement. Each further understands that it may be liable for civil penalties in the amount provided by law for each violation of the Decision and Order after it becomes final.

27. Respondent Palmyra and Respondent HCA each has read the Complaint and the Decision and Order contained in this Consent Agreement. Each understands that once the Decision and Order has been issued, they will be dismissed from this matter with prejudice and have no obligations under the Decision and Order. In the event that the Commission does not accept this Consent Agreement or the attached Decision and Order as to Respondent Palmyra or Respondent HCA, each such Respondent reserves all rights to defend the Transaction as lawful in any proceeding.

PHOEBE PUTNEY HEALTH SYSTEM, INC.

By: _____
Joel Wernick
Chief Executive Officer
Phoebe Putney Health System, Inc.
Dated: _____

PHOEBE PUTNEY MEMORIAL HOSPITAL, INC.

By: _____
Joel Wernick
Chief Executive Officer
Phoebe Putney Memorial Hospital, Inc.
Dated: _____

PHOEBE NORTH, INC.

By: _____
Joel Wernick
Chief Executive Officer
Phoebe North, Inc.
Dated: _____

_____
Lee K. Van Voorhis, Esq.
Baker & McKenzie LLP
Counsel for Phoebe Putney Health System, Inc.
Phoebe Putney Memorial Hospital, Inc., and
Phoebe North, Inc.
Dated: _____

HCA INC.

By: _____
Scott Noonan
Vice President, Operations
HCA Inc.
Dated: _____

_____
Kevin J. Arquit
Simpson Thacher & Bartlett LLP
Counsel for HCA Inc. and Palmyra Park Hospital, Inc.
Dated: _____

HOSPITAL AUTHORITY OF ALBANY-DOUGHERTY COUNTY

By: _____
Ralph S. Rosenberg
Chairman of the Board
Hospital Authority of Albany-Dougherty County
Dated: _____

_____
Frank M. Lowrey IV
Bondurant, Mixson & Elmore LLP
Counsel for Hospital Authority of Albany-Dougherty County
Dated: _____

FEDERAL TRADE COMMISSION

By: _____
Maria DiMoscato
Attorney
Bureau of Competition

APPROVED:

By: _____
Jeffrey H. Perry
Assistant Director
Bureau of Competition

_____
Sara Y. Razi
Deputy Assistant Director
Bureau of Competition

_____
Norman Armstrong, Jr.
Deputy Director
Bureau of Competition

_____
Deborah L. Feinstein
Director
Bureau of Competition

EXHIBIT D

Matt Jarrard

From: Tandy Menk
Sent: Friday, May 17, 2013 9:55 AM
To: alb@phrd.com
Cc: Roxana Tatman; Matt Jarrard; Brian Looby
Attachments: DET2001001 University Hospital Day Surgery Center.pdf; DET2008008 Determ Informational.pdf; DET2012156 Determ Response.pdf

Armando,

Please see attached. I think these outline DCH's position on decoupling.

Tandy

GEORGIA DEPARTMENT OF
COMMUNITY HEALTH

Roy E. Barnes, Governor

2 Peachtree Street, NW
Atlanta, GA 30303-3159
www.communityhealth.state.ga.us

Russ Toal
Commissioner
404.656.4507
404.651.6880 fax

Writer's Direct Dial
(404) 463-4013

March 12, 2001

Monique Walker, Esq.
University Health Care System
1350 Walton Way
Augusta, GA 30901-2629

Re: University Hospital Day Surgery Center - Columbia County

Dear Ms. Walker:

The Georgia Department of Community Health, Division of Health Planning is in receipt of your letter with regard to the University Hospital Day Surgery Center - Columbia County (the Surgery Center). Thank you for your inquiry and for your efforts to comply with the State's Certificate of Need (CON) laws.

It is the understanding of the Division that University Hospital in Augusta, Richmond County, Georgia intends to seek separate licensure of the above referenced facility. The Surgery Center received a CON on December 23, 1992 in Project No. GA 071-92. The University Ambulatory Surgery Center of Columbia County received the CON for a multi-specialty ambulatory surgery center. The facility was licensed as a part of the hospital.

University would like to separately license the Surgery Center while holding a majority ownership interest in the facility in partnership with several medical staff members. You have asked whether any CON issues are raised by this scenario.

Please be advised that the Division recognizes the CON authorization of the Surgery Center. Licensure or permit issues in the State of Georgia are handled by the Department of Human Resources, Office of Regulatory Services. The Division does not rule on licensure questions.

Please feel free to contact the Division if there are any further questions or concerns about this matter.

Sincerely,

Clyde L. Reese III

Clyde L. Reese, III
Deputy General Counsel

GEORGIA DEPARTMENT OF
COMMUNITY HEALTH

Rhonda M. Medows, MD, Commissioner

Sonny Perdue, Governor

2 Peachtree Street, NW
Atlanta, GA 30303-3159
www.dch.georgia.gov

Writer's Direct Dial
(404) 657-7198

February 22, 2008

Mr. Mark Mullin
Director of Planning
Gwinnett Hospital System, Inc. d/b/a SummitRidge
1000 Medical Center Blvd.
Lawrenceville, GA 30045

Re: DET2008008 - Request for Determination Regarding Separate Facility License - Gwinnett Hospital System, Inc. d/b/a SummitRidge

Dear Mr. Mullin:

The Georgia Department of Community Health, Division of Health Planning (the Department) received a request for determination on February 1, 2008 regarding the reviewability of decoupling a behavioral health facility from a general acute care hospital license or permit. The determination request was assigned the docket number of DET-2008-008. Thank you for your efforts to comply with the State's Certificate of Need (CON) laws.

It is the understanding of the Department that the Gwinnett Hospital System, Inc. (GHS) is comprised of Gwinnett Medical Center - Lawrenceville, Gwinnett Medical Center - Duluth, Gwinnett Extended Care Center on the Gwinnett Medical Center - Lawrenceville campus, and SummitRidge. SummitRidge is a behavioral health facility located approximately three miles from the Gwinnett Medical Center - Lawrenceville campus.

SummitRidge received initial CON approval for a free-standing, 76-bed behavioral health psychiatric facility, then known as Button Gwinnett, on November 5, 1990, pursuant to Project No. GA 118-88. SummitRidge held a separate state license or permit until April 14, 1999. At the request of GHS, effective April 15, 1999, the separate license of SummitRidge was consolidated with the license of Gwinnett Medical Center - Lawrenceville.

GHS would like to return SummitRidge to its original position of having a separate state license to operate as a behavioral health psychiatric facility. The change in licensure status for SummitRidge does not involve the addition of any new beds or institutional health services being offered at either SummitRidge or Gwinnett Medical Center - Lawrenceville. There will be no capital expenditure incurred above the current threshold for such expenditures.

Please be advised that the separation of the license of SummitRidge from Gwinnett Medical Center - Lawrenceville is not subject to prior CON review and approval. The proposed decoupling of the health care facility license does not involve any defined new institutional health service because there will be no bed increase, no new services offered, and no capital expenditure above the applicable threshold. O.C.G.A. § 31-6-2(14) et seq. CON Rule § 111-2-2-.01(33).

The Department does not administer the state's health care facility licensing program. The Department of Human Resources, Office of Regulatory Services, is in charge of that function. This

letter only answers the question of whether the acquisition of a separate license by SummitRidge would invoke prior CON review and approval. It does not answer any question with regard to the license(s) itself, the requirements for making the change, or the process for doing so.

I hope this letter has adequately addressed the question raised within the purview of the Department. If there are any further questions or concerns about this matter, please feel free to contact me at the Department.

Sincerely,

Clyde L. Reese, III
Executive Director
Division of Health Planning

cc: Determination Database/File
James Courtney, DHR/Office of Regulatory Services

GEORGIA DEPARTMENT
OF COMMUNITY HEALTH

David A. Cook, Commissioner

Nathan Deal, Governor

2 Peachtree Street, NW | Atlanta, GA 30303-3159 | 404-656-4507 | www.dch.georgia.gov

Writer's Direct Dial
(404) 656-0468

December 17, 2012

Mr. Randy Sauls
South Georgia Medical Center
2501 North Patterson St.
Valdosta, Ga. 31602

Mr. Chris Howard
830 Crescent Centre Dr., Suite 610
Franklin, TN. 37067

Re: DET2012-156 - Request for Letter of Determination Regarding Separate Licensure; Hospital Authority of Valdosta and Lowndes County, Georgia d/b/a South Georgia Medical Center

Dear Messrs. Sauls and Howard:

The Georgia Department of Community Health (the "Department") is in receipt of your letter with regard to separate licensure and the proposed acquisition of the Greenleaf Center. The Department received the request on September 14, 2012 and docketed the request as DET2012-156. Thank you for the information provided and for your efforts to comply with the State's Certificate of Need ("CON") laws.

It is the understanding of the Department that South Georgia Medical Center (SGMC) is a CON authorized general acute care hospital with 380 beds. SGMC is located at 2501 North Patterson St.; Valdosta, Ga. and currently operates the Greenleaf Center located at 2209 Pineview Drive; Valdosta, Ga. under its license. Greenleaf Center is located less than three miles from SGMC and has been treated as part of SGMC's primary campus for CON purposes. However, the Greenleaf Center was originally established as a freestanding psychiatric hospital with no affiliation to the Authority. In 1999, the Department approved SGMC's acquisition of the Greenleaf Center which was allowed to operate under SGMC's license. SGMC intends to return the Greenleaf Center back to a separately licensed freestanding psychiatric hospital.

Acadia Healthcare Company, Inc. is the parent company for several existing healthcare facilities. Acadia Greenleaf, LLC is a wholly owned subsidiary of Acadia Healthcare Company, Inc. Acadia plans to acquire and operate the Greenleaf Center as a freestanding psychiatric

hospital facility. Post transaction, SGMC will continue to be owned and operated by the Hospital Authority of Valdosta and Lowndes County.

You are requesting a determination on various issues regarding the Greenleaf Center. First, SGMC seeks confirmation that it may transfer and convert two (2) of its current med/surg beds, originally approved as part of Greenleaf's psychiatric service, back to adult psychiatric/ substance abuse beds at the Greenleaf Center. Second, you seek confirmation that the plan to decouple and return the Greenleaf Center to a separately licensed freestanding psychiatric hospital is exempt from CON review. Third, you seek confirmation that if separate licensure is obtained, the capital expenditure of less than $2.5 million for the Greenleaf Center is not subject to CON review.

First, SGMC proposes to convert two (2) of its med/surg beds, which were originally approved as part of Greenleaf's psychiatric service, back to two (2) adult psychiatric beds at the Greenleaf Center. The conversion of the two (2) med/surg beds back to two (2) adult psychiatric beds will not establish a new inpatient psychiatric and/or substance abuse service under Rule 111-2-2-.26(1)(a). The proposed conversion will not increase the total number of authorized beds and will not establish any new institutional health service. As such, converting two of the med/surg beds back to adult psychiatric beds is not subject to prior CON review. In accord with this determination and prior determinations, the Greenleaf Center will only retain authorization to operate fifty (50) psychiatric and substance abuse beds with 32 adult beds and 18 pediatric beds.

Second, the requestors intend to ask the licensure section to return the Greenleaf Center back to a separately licensed freestanding psychiatric and substance abuse hospital, distinct from SGMC's general acute care hospital. The Greenleaf Center was originally authorized as a separate freestanding psychiatric and substance abuse hospital. The change in licensure status for Greenleaf does not involve the addition of any new beds and there will be no new institutional health services offered at SGMC or Greenleaf. If the licenses are decoupled, Greenleaf will retain CON authorization for a psychiatric and substance abuse service with 50 beds as specified above. After the decoupling, SGMC will have 330 CON authorized beds but will not retain any CON authorization for psychiatric or substance abuse services.

Please be advised that the separation of the license for the Greenleaf Center from SGMC is not subject to prior CON review and approval. The proposed decoupling of the health care facility license and proposed sale does not involve any defined new institutional health service because there will be no bed increase, no new services offered, and no capital expenditure above the applicable threshold. O.C.G.A. § 31-6-2(14); O.C.G.A. § 31-6-40.

Third, Acadia seeks confirmation that expenditures for Greenleaf are not reviewable. Acadia notes the expenditures will be on behalf of the Greenleaf facility. A reviewable new institutional health service is defined, in part, as any expenditure by or on behalf of a health care facility in excess of $2,590,975, except expenditures for the acquisition of an existing health care facility not owned or operated by a political subdivision of this state, or any combination of a political subdivision of this state or a hospital authority. See O.C.G.A. § 31-6-40(a)(2). Although this transaction involves a facility currently operated by a hospital authority, the

separation of the license and related acquisition expenditures will be below the capital threshold and there will be no new beds or services. As such, the expenditures do not constitute a reviewable new institutional health service. Based on the information provided, the Greenleaf Center does not have any state grant obligations and would not have any additional associated costs related to such grants.

Please note that this determination is issued based on the facts of the transaction as described. This determination is also based on Greenleaf Center obtaining separate licensure as well as compliance with any other applicable state or federal regulatory requirements. The Health Planning Section does not make determinations regarding licensure. This determination addresses only the health planning issues raised.

I hope this reply is responsive to your request. Please feel free to contact me if you have any further questions or concerns.

Sincerely,

E. Tandy Menk, JD, LLM
Health Planning
Georgia Department of Community Health
Healthcare Facility Regulation Division

cc: Walter H. New, Esq.
Ross Burris, Esq.
Matthew Jarrard, MPA
Roxana Tatman, Esq.
DET File

Jarrard, Matt

From: Tandy Menk
Sent: Monday, May 06, 2013 3:00 PM
To: Matt Jarrard; Roxana Tatman
Attachments: DET2008013 Determ Additional Info.tif

Decoupling of license – not CON reviewable event per Clyde's DET.

GEORGIA DEPARTMENT OF
COMMUNITY HEALTH

Rhonda M. Medows, MD, Commissioner

Sonny Perdue, Governor

2 Peachtree Street, NW
Atlanta, GA 30303-3159
www.dch.georgia.gov

Writer's Direct Dial
(404) 657-7198

February 22, 2008

Mr. Mark Mullin
Director of Planning
Gwinnett Hospital System, Inc. d/b/a SummitRidge
1000 Medical Center Blvd.
Lawrenceville, GA 30045

Re: DET2008008 - Request for Determination Regarding Separate Facility License - Gwinnett Hospital System, Inc. d/b/a SummitRidge

Dear Mr. Mullin:

The Georgia Department of Community Health, Division of Health Planning (the Department) received a request for determination on February 1, 2008 regarding the reviewability of decoupling a behavioral health facility from a general acute care hospital license or permit. The determination request was assigned the docket number of DET-2008-008. Thank you for your efforts to comply with the State's Certificate of Need (CON) laws.

It is the understanding of the Department that the Gwinnett Hospital System, Inc. (GHS) is comprised of Gwinnett Medical Center - Lawrenceville, Gwinnett Medical Center - Duluth, Gwinnett Extended Care Center on the Gwinnett Medical Center - Lawrenceville campus, and SummitRidge. SummitRidge is a behavioral health facility located approximately three miles from the Gwinnett Medical Center - Lawrenceville campus.

SummitRidge received initial CON approval for a free-standing, 76-bed behavioral health psychiatric facility, then known as Button Gwinnett, on November 5, 1990, pursuant to Project No. GA 118-88. SummitRidge held a separate state license or permit until April 14, 1999. At the request of GHS, effective April 15, 1999, the separate license of SummitRidge was consolidated with the license of Gwinnett Medical Center - Lawrenceville.

GHS would like to return SummitRidge to its original position of having a separate state license to operate as a behavioral health psychiatric facility. The change in licensure status for SummitRidge does not involve the addition of any new beds or institutional health services being offered at either SummitRidge or Gwinnett Medical Center - Lawrenceville. There will be no capital expenditure incurred above the current threshold for such expenditures.

Please be advised that the separation of the license of SummitRidge from Gwinnett Medical Center - Lawrenceville is not subject to prior CON review and approval. The proposed decoupling of the health care facility license does not involve any defined new institutional health service because there will be no bed increase, no new services offered, and no capital expenditure above the applicable threshold. O.C.G.A. § 31-6-2(14) et seq. CON Rule § 111-2-2-.01(33).

The Department does not administer the state's health care facility licensing program. The Department of Human Resources, Office of Regulatory Services, is in charge of that function. This

letter only answers the question of whether the acquisition of a separate license by SummitRidge would invoke prior CON review and approval. It does not answer any question with regard to the license(s) itself, the requirements for making the change, or the process for doing so.

I hope this letter has adequately addressed the question raised within the purview of the Department. If there are any further questions or concerns about this matter, please feel free to contact me at the Department.

Sincerely,

Clyde L. Reese, III
Executive Director
Division of Health Planning

cc: Determination Database/File
James Courtney, DHR/Office of Regulatory Services

Jarrard, Matt

From: Tandy Menk
Sent: Monday, May 06, 2013 3:02 PM
To: Roxana Tatman
Cc: Matt Jarrard
Attachments: DET2008008 Determ Informational.tif

Decoupling license not subject to CON review.

GEORGIA DEPARTMENT OF
COMMUNITY HEALTH

Rhonda M. Medows, MD, Commissioner

Sonny Perdue, Governor

2 Peachtree Street, NW
Atlanta, GA 30303-3159
www.dch.georgia.gov

Writer's Direct Dial
(404) 657-7198

February 22, 2008

Mr. Mark Mullin
Director of Planning
Gwinnett Hospital System, Inc. d/b/a SummitRidge
1000 Medical Center Blvd.
Lawrenceville, GA 30045

Re: DET2008008 - Request for Determination Regarding Separate Facility License - Gwinnett Hospital System, Inc. d/b/a SummitRidge

Dear Mr. Mullin:

The Georgia Department of Community Health, Division of Health Planning (the Department) received a request for determination on February 1, 2008 regarding the reviewability of decoupling a behavioral health facility from a general acute care hospital license or permit. The determination request was assigned the docket number of DET-2008-008. Thank you for your efforts to comply with the State's Certificate of Need (CON) laws.

It is the understanding of the Department that the Gwinnett Hospital System, Inc. (GHS) is comprised of Gwinnett Medical Center - Lawrenceville, Gwinnett Medical Center - Duluth, Gwinnett Extended Care Center on the Gwinnett Medical Center - Lawrenceville campus, and SummitRidge. SummitRidge is a behavioral health facility located approximately three miles from the Gwinnett Medical Center - Lawrenceville campus.

SummitRidge received initial CON approval for a free-standing, 76-bed behavioral health psychiatric facility, then known as Button Gwinnett, on November 5, 1990, pursuant to Project No. GA 118-88. SummitRidge held a separate state license or permit until April 14, 1999. At the request of GHS, effective April 15, 1999, the separate license of SummitRidge was consolidated with the license of Gwinnett Medical Center - Lawrenceville.

GHS would like to return SummitRidge to its original position of having a separate state license to operate as a behavioral health psychiatric facility. The change in licensure status for SummitRidge does not involve the addition of any new beds or institutional health services being offered at either SummitRidge or Gwinnett Medical Center - Lawrenceville. There will be no capital expenditure incurred above the current threshold for such expenditures.

Please be advised that the separation of the license of SummitRidge from Gwinnett Medical Center - Lawrenceville is not subject to prior CON review and approval. The proposed decoupling of the health care facility license does not involve any defined new institutional health service because there will be no bed increase, no new services offered, and no capital expenditure above the applicable threshold. O.C.G.A. § 31-6-2(14) et seq. CON Rule § 111-2-2-.01(33).

The Department does not administer the state's health care facility licensing program. The Department of Human Resources, Office of Regulatory Services, is in charge of that function. This

letter only answers the question of whether the acquisition of a separate license by SummitRidge would invoke prior CON review and approval. It does not answer any question with regard to the license(s) itself, the requirements for making the change, or the process for doing so.

I hope this letter has adequately addressed the question raised within the purview of the Department. If there are any further questions or concerns about this matter, please feel free to contact me at the Department.

Sincerely,

Clyde L. Reese, III
Executive Director
Division of Health Planning

cc: Determination Database/File
James Courtney, DHR/Office of Regulatory Services

Jarrard, Matt

From: Tandy Menk
Sent: Monday, May 06, 2013 3:05 PM
To: Tandy Menk; Matt Jarrard; Roxana Tatman
Subject: RE:

The Greenleaf DET also touched on this point.

From: Tandy Menk
Sent: Monday, May 06, 2013 3:00 PM
To: Matt Jarrard; Roxana Tatman
Subject:

Decoupling of license – not CON reviewable event per Clyde's DET.

Jarrard, Matt

From: Tandy Menk
Sent: Monday, May 06, 2013 9:44 PM
To: Matt Jarrard
Cc: Roxana Tatman
Subject: FW: NA0519 (Letter# 519) Letter Attached
Attachments: Report.snp

I cannot find the CON decision referenced in this DET in the system. Do you think archives would have this file or would there be any other place to find the decision and the rules applied at the time.

Tandy

From: Tandy Menk
Sent: Monday, May 06, 2013 9:39 PM
To: Tandy Menk
Subject: NA0519 (Letter# 519) Letter Attached

If you can't open the attached snapshot file(s), you need to install the Snapshot Viewer. Download the viewer from the web site below:

www.microsoft.com/downloads/details.aspx?familyid=B73DF33F-6D74-423D-8274-8B7E6313EDFB&displaylang=en

Writer's Direct Dial
(404) 463-4012

March 12, 2001

Monique Walker, Esq.
University Health Care System
1350 Walton Way
Augusta, GA 30901-2629

Re: University Hospital Day Surgery Center - Columbia County

Dear Ms. Walker:

The Georgia Department of Community Health, Division of Health Planning is in receipt of your letter with regard to the University Hospital Day Surgery Center - Columbia County (the Surgery Center). Thank you for your inquiry and for your efforts to comply with the State's Certificate of Need (CON) laws.

It is the understanding of the Division that University Hospital in Augusta, Richmond County, Georgia intends to seek separate licensure of the above referenced facility. The Surgery Center received a CON on December 23, 1992 in Project No. GA 071-92. The University Ambulatory Surgery Center of Columbia County received the CON for a multi-specialty ambulatory surgery center. The facility was licensed as a part of the hospital.

University would like to separately license the Surgery Center while holding a majority ownership interest in the facility in partnership with several medical staff members. You have asked whether any CON issues are raised by this scenario.

Please be advised that the Division recognizes the CON authorization of the Surgery Center. Licensure or permit issues in the State of Georgia are handled by the Department of Human Resources, Office of Regulatory Services. The Division does not rule on licensure questions.

Please feel free to contact the Division if there are any further questions or concerns about this matter.

Sincerely,

Clyde L. Reese, III
Deputy General Counsel

Jarrard, Matt

From: Tandy Menk
Sent: Monday, May 13, 2013 12:57 PM
To: Roxana Tatman
Cc: Matt Jarrard
Subject: NA0519 (Letter# 519) Letter Attached
Attachments: Report.snp

University and its ASC in Evans eventually decoupled based on this DET.

The other DET cited by Armando did not involve obtaining a separate license first and I think also involved splitting into two ASCs. Notably, the ASC was approved as a freestanding ASC and was based on the SS rules in effect in 1992. It met the need methodology for SS. It was a SS review, not just general considerations. See 1992 CON.

Writer's Direct Dial
(404) 463-4012

March 12, 2001

Monique Walker, Esq.
University Health Care System
1350 Walton Way
Augusta, GA 30901-2629

Re: University Hospital Day Surgery Center - Columbia County

Dear Ms. Walker:

The Georgia Department of Community Health, Division of Health Planning is in receipt of your letter with regard to the University Hospital Day Surgery Center - Columbia County (the Surgery Center). Thank you for your inquiry and for your efforts to comply with the State's Certificate of Need (CON) laws.

It is the understanding of the Division that University Hospital in Augusta, Richmond County, Georgia intends to seek separate licensure of the above referenced facility. The Surgery Center received a CON on December 23, 1992 in Project No. GA 071-92. The University Ambulatory Surgery Center of Columbia County received the CON for a multi-specialty ambulatory surgery center. The facility was licensed as a part of the hospital.

University would like to separately license the Surgery Center while holding a majority ownership interest in the facility in partnership with several medical staff members. You have asked whether any CON issues are raised by this scenario.

Please be advised that the Division recognizes the CON authorization of the Surgery Center. Licensure or permit issues in the State of Georgia are handled by the Department of Human Resources, Office of Regulatory Services. The Division does not rule on licensure questions.

Please feel free to contact the Division if there are any further questions or concerns about this matter.

Sincerely,

Clyde L. Reese, III
Deputy General Counsel

Jarrard, Matt

From: Roxana Tatman
Sent: Wednesday, May 15, 2013 1:35 PM
To: 'Armando L. Basarrate'
Cc: Brian Looby; Matt Jarrard; Tandy Menk
Subject: RE: Phoebe

I will get with everybody and try to schedule a time for tomorrow.

Roxana D. Tatman
Legal Director, Health Planning
Georgia Department of Community Health
Healthcare Facility Regulation Division
2 Peachtree St. NW
5th Floor
Atlanta, GA 30303
(404) 463-0691

From: Armando L. Basarrate [mailto:ALB@phrd.com]
Sent: Wednesday, May 15, 2013 1:24 PM
To: Roxana Tatman
Cc: Brian Looby; Matt Jarrard; Tandy Menk
Subject: RE: Phoebe

I am not, but I am available any time tomorrow. Would that work for you?

Armando L. Basarrate, Esq.
Parker, Hudson, Rainer & Dobbs LLP
Main Phone: (404) 523-5300
Direct Dial: (404) 420-5534
Fax: (404) 522-8409
e-mail: abasarrate@phrd.com

> **From:** Roxana Tatman [mailto:rtatman@dch.ga.gov]
> **Sent:** Wednesday, May 15, 2013 12:59 PM
> **To:** Armando L. Basarrate
> **Cc:** Brian Looby; Matt Jarrard; Tandy Menk
> **Subject:** Phoebe
>
> Armando,
>
> Are you available for a call today at 2:00 regarding Phoebe with Brian, Tandy, Matt and me? If so, we will call you then. If that time is not convenient for you, please let us know when you are available.
>
> -Roxana
>
> **Roxana D. Tatman**
> Legal Director, Health Planning
> Georgia Department of Community Health
> Healthcare Facility Regulation Division

2 Peachtree St. NW
5th Floor
Atlanta, GA 30303
(404) 463-0691

Jarrard, Matt

From: Armando L. Basarrate [ALB@phrd.com]
Sent: Friday, May 17, 2013 9:59 AM
To: Tandy Menk
Cc: Roxana Tatman; Matt Jarrard; Brian Looby
Subject: Re:

Thank you.

Armando

From: Tandy Menk [mailto:tmenk@dch.ga.gov]
Sent: Friday, May 17, 2013 09:55 AM
To: Armando L. Basarrate
Cc: Roxana Tatman <rtatman@dch.ga.gov>; Matt Jarrard <mjarrard@dch.ga.gov>; Brian Looby <brlooby@dch.ga.gov>
Subject:

Armando,

Please see attached. I think these outline DCH's position on decoupling.

Tandy

From: Armando L. Basarrate [mailto:ALB@phrd.com]
Sent: Monday, May 20, 2013 1:51 PM
To: Tandy Menk
Subject: Phoebe Issues

Tandy,

I would like to ask you a question about the 2001 University decision that you sent following up on our conference call last week. I am a bit confused as it appears to pre-date the 2004 decision.

Would you have a couple of minutes at some point this afternoon?

Thanks.

Armando L. Basarrate, Esq.
Parker, Hudson, Rainer & Dobbs LLP
Main Phone: (404) 523-5300
Direct Dial: (404) 420-5534
Fax: (404) 522-8409
e-mail: abasarrate@phrd.com

Jarrard, Matt

From: Roxana Tatman
Sent: Wednesday, May 29, 2013 1:48 PM
To: 'Armando L. Basarrate'
Cc: Matt Jarrard; Tandy Menk
Subject: RE: Meeting this afternoon

Okay. See y'all soon.

Roxana D. Tatman
Legal Director, Health Planning
Georgia Department of Community Health
Healthcare Facility Regulation Division
2 Peachtree St. NW
5th Floor
Atlanta, GA 30303
(404) 463-0691

From: Armando L. Basarrate [mailto:ALB@phrd.com]
Sent: Wednesday, May 29, 2013 1:46 PM
To: Roxana Tatman; Tandy Menk
Subject: Meeting this afternoon

Just wanted to let you know that John Parker will be accompanying me to the meeting at 3:00 this afternoon. Thanks.

Armando L. Basarrate, Esq.
Parker, Hudson, Rainer & Dobbs LLP
Main Phone: (404) 523-5300
Direct Dial: (404) 420-5534
Fax: (404) 522-8409
e-mail: abasarrate@phrd.com

Jarrard, Matt

From: Daniel Walsh [dwalsh@law.ga.gov]
Sent: Friday, May 31, 2013 1:53 PM
To: Brian Looby
Cc: Matt Jarrard; Roxana Tatman; David Cook; Richard Greene - DCH; Sharon Dougherty
Subject: RE: Federal Trade Commission v. Phoebe Putney

That will work.

Thanks very much.

From: Brian Looby [mailto:brlooby@dch.ga.gov]
Sent: Friday, May 31, 2013 1:52 PM
To: Daniel Walsh
Cc: Matt Jarrard; Roxana Tatman; David Cook; Richard Greene - DCH; Sharon Dougherty
Subject: RE: Federal Trade Commission v. Phoebe Putney

10am works. Should we call you at the number below?

Brian Looby

From: Daniel Walsh [mailto:dwalsh@law.ga.gov]
Sent: Friday, May 31, 2013 12:11 PM
To: Brian Looby
Cc: Matt Jarrard; Roxana Tatman; David Cook; Richard Greene - DCH
Subject: RE: Federal Trade Commission v. Phoebe Putney

Yes. We can talk on Monday. Does 10am work?

Thanks,

Dan

From: Brian Looby [mailto:brlooby@dch.ga.gov]
Sent: Friday, May 31, 2013 11:51 AM
To: Daniel Walsh
Cc: Matt Jarrard; Roxana Tatman; David Cook; Richard Greene - DCH
Subject: RE: Federal Trade Commission v. Phoebe Putney
Importance: High

Mr. Walsh:

Matt Jarrard is out of the office today and he should be part of our discussion. If possible, can the call be delayed until Monday? If not, I'm available after 2:30pm today.

Brian Looby

From: Daniel Walsh [mailto:dwalsh@law.ga.gov]
Sent: Friday, May 31, 2013 10:53 AM
To: Brian Looby
Subject: FW: Federal Trade Commission v. Phoebe Putney

Mr. Looby,

Please see the email below. I sent the first email to the wrong address.

Thanks,

Dan Walsh

From: Daniel Walsh
Sent: Friday, May 31, 2013 10:32 AM
To: 'blooby@dch.ga.gov'; 'mjarrard@dch.ga.gov'; 'rtatman@dch.ga.gov'
Cc: Alex Sponseller; Marchell Charles
Subject: Federal Trade Commission v. Phoebe Putney

Mr. Looby, Ms. Tatman and Mr. Jarrard:

I am the Section Leader for the Consumer Section of the Attorney General's Office. As you may be aware, the Federal Trade Commission recently obtained a temporary restraining order enjoining Phoebe Putney from taking any additional steps to consolidate Palmyra and Phoebe until the Court rules on the FTC's preliminary injunction. If granted, the preliminary injunction would enjoin further integration pending a final non-appealable order from the FTC's ongoing administrative proceeding regarding whether the acquisition violates the Clayton Act and the FTC Act.

The State of Georgia is not a participant in the current proceeding. However, the FTC has asked that we provide responses to the questions that I've attached below. I would like the opportunity to discuss this matter with you today, if possible. The purpose of the phone call would not be to discuss the substantive answers to the question, but rather, whether to answer the questions.

I am available any time this morning for the call. I have a 1:30 call this afternoon, but should be available for a late afternoon call if that works for you.

I've copied Alex Sponseller, who you know, and Marchell Charles, who is in the Consumer Section of the Law Department.

Thanks,

Dan Walsh

Questions:

1. Could/would DCH revoke the August 1, 2012, single license that was granted to the Authority's subsidiary, and reinstate separate licenses for Hospital A and Hospital B - in order to effectuate the Commission's order of divestiture? If so:

i. What is the procedure for this to occur?

ii. What is the likelihood of such revocation?

iii. What role if any would the particular facts and circumstances surrounding the acquisition and licensure, and the prior legal proceedings, play in DCH's decision?

2. If DCH were to revoke the single license and reinstate the prior licensure status of Hospital A and Hospital B:

i. Could the Authority or its subsidiary challenge such determination?

ii. What appeal options are available?

iii. How long, on average, do such appeals take?

3. Could/would DCH allow the Commission-approved acquirer to own and operate the rescinded or divested hospitals under the previous, grandfathered-licenses without applying for a new license and/or CON?

4. In the event a new license and/or CON were required to be applied for by the Commission-approved acquirer:

i. How likely is it that the Commission-approved acquirer would receive a CON if Hospital B is the subject of divestiture?

ii. How likely is it that the Commission-approved acquirer would receive a CON if Hospital A is the subject of divestiture?

iii. How likely is it that the Commission-approved acquirer would receive a CON if the prior owner of Hospital B, through rescission, is itself required to divest the Hospital B assets?

iv. Approximately how long would it take for such a CON to be approved or disapproved, if all potential appeals are exhausted?

Daniel Walsh
Senior Assistant Attorney General
Department of Law
State of Georgia
40 Capitol Square, SW
Atlanta, Georgia 30334-1300
(404) 657-2204

Jarrard, Matt

From: Tandy Menk
Sent: Monday, June 03, 2013 3:50 PM
To: Matt Jarrard
Cc: Roxana Tatman
Attachments: DET2001001 University Hospital Day Surgery Center.pdf

This is the other DET to maybe attach for Alex.

GEORGIA DEPARTMENT OF
COMMUNITY HEALTH

Roy E. Barnes, Governor

2 Peachtree Street, NW
Atlanta, GA 30303-3159
www.communityhealth.state.ga.us

Russ Toal
Commissioner
404.656.4507
404.651.6880 fax

Writer's Direct Dial
(404) 463-4013

March 12, 2001

Monique Walker, Esq.
University Health Care System
1350 Walton Way
Augusta, GA 30901-2629

Re: University Hospital Day Surgery Center - Columbia County

Dear Ms. Walker:

The Georgia Department of Community Health, Division of Health Planning is in receipt of your letter with regard to the University Hospital Day Surgery Center - Columbia County (the Surgery Center). Thank you for your inquiry and for your efforts to comply with the State's Certificate of Need (CON) laws.

It is the understanding of the Division that University Hospital in Augusta, Richmond County, Georgia intends to seek separate licensure of the above referenced facility. The Surgery Center received a CON on December 23, 1992 in Project No. GA 071-92. The University Ambulatory Surgery Center of Columbia County received the CON for a multi-specialty ambulatory surgery center. The facility was licensed as a part of the hospital.

University would like to separately license the Surgery Center while holding a majority ownership interest in the facility in partnership with several medical staff members. You have asked whether any CON issues are raised by this scenario.

Please be advised that the Division recognizes the CON authorization of the Surgery Center. Licensure or permit issues in the State of Georgia are handled by the Department of Human Resources, Office of Regulatory Services. The Division does not rule on licensure questions.

Please feel free to contact the Division if there are any further questions or concerns about this matter.

Sincerely,

Clyde L. Reese III

Clyde L. Reese, III
Deputy General Counsel

Jarrard, Matt

From: Armando L. Basarrate [ALB@phrd.com]
Sent: Wednesday, May 15, 2013 5:48 PM
To: Matt Jarrard; Brian Looby; Roxana Tatman
Cc: Tandy Menk
Subject: RE: Phoebe

Thursday, May 16 at 2:00 p.m.

[redacted]

Access code: [redacted]

Thanks.

Armando L. Basarrate, Esq.
Parker, Hudson, Rainer & Dobbs LLP
Main Phone: (404) 523-5300
Direct Dial: (404) 420-5534
Fax: (404) 522-8409
e-mail: abasarrate@phrd.com

From: Matt Jarrard [mailto:mjarrard@dch.ga.gov]
Sent: Wednesday, May 15, 2013 5:44 PM
To: Armando L. Basarrate; Brian Looby; Roxana Tatman
Cc: Tandy Menk
Subject: Re: Phoebe

Armando: We can do 2 PM Thursday. Can you get us a call in number?

Thanks
MJ

From: Armando L. Basarrate [mailto:ALB@phrd.com]
Sent: Wednesday, May 15, 2013 05:26 PM Eastern Standard Time
To: Brian Looby; Roxana Tatman
Cc: Matt Jarrard; Tandy Menk
Subject: RE: Phoebe

If that time works for DCH, I will make it work on my end. Thanks.

Armando L. Basarrate, Esq.
Parker, Hudson, Rainer & Dobbs LLP
Main Phone: (404) 523-5300
Direct Dial: (404) 420-5534
Fax: (404) 522-8409
e-mail: abasarrate@phrd.com

From: Brian Looby [mailto:brlooby@dch.ga.gov]
Sent: Wednesday, May 15, 2013 3:29 PM

To: Roxana Tatman; Armando L. Basarrate
Cc: Matt Jarrard; Tandy Menk
Subject: RE: Phoebe

Between 2 and 3 is best for me.

Brian Looby

From: Roxana Tatman
Sent: Wednesday, May 15, 2013 1:35 PM
To: 'Armando L. Basarrate'
Cc: Brian Looby; Matt Jarrard; Tandy Menk
Subject: RE: Phoebe

I will get with everybody and try to schedule a time for tomorrow.

Roxana D. Tatman
Legal Director, Health Planning
Georgia Department of Community Health
Healthcare Facility Regulation Division
2 Peachtree St. NW
5th Floor
Atlanta, GA 30303
(404) 463-0691

From: Armando L. Basarrate [mailto:ALB@phrd.com]
Sent: Wednesday, May 15, 2013 1:24 PM
To: Roxana Tatman
Cc: Brian Looby; Matt Jarrard; Tandy Menk
Subject: RE: Phoebe

I am not, but I am available any time tomorrow. Would that work for you?

Armando L. Basarrate, Esq.
Parker, Hudson, Rainer & Dobbs LLP
Main Phone: (404) 523-5300
Direct Dial: (404) 420-5534
Fax: (404) 522-8409
e-mail: abasarrate@phrd.com

From: Roxana Tatman [mailto:rtatman@dch.ga.gov]
Sent: Wednesday, May 15, 2013 12:59 PM
To: Armando L. Basarrate
Cc: Brian Looby; Matt Jarrard; Tandy Menk
Subject: Phoebe

Armando,

Are you available for a call today at 2:00 regarding Phoebe with Brian, Tandy, Matt and me? If so, we will call you then. If that time is not convenient for you, please let us know when you are available.

-Roxana

Roxana D. Tatman
Legal Director, Health Planning
Georgia Department of Community Health
Healthcare Facility Regulation Division
2 Peachtree St. NW
5th Floor
Atlanta, GA 30303
(404) 463-0691

Matt Jarrard

From: Tandy Menk
Sent: Friday, May 31, 2013 2:02 PM
To: Matt Jarrard; Brian Looby; Roxana Tatman
Subject: Phoebe

Armado conveyed yesterday that Phoebe has provided the FTC with copies of the DETs that we sent his office on "decoupling." They were not aware of that history when they prepared the memo that was provided to DCH.

One thought I had was it would seem that the party or healthcare system who wants to acquire Phoebe North would want to seek a DET on "decoupling" for a subsequent sale.

Menk, Tandy

From: Tandy Menk
Sent: Tuesday, February 11, 2014 2:42 PM
To: Matt Jarrard
Subject: Re: Phoebe Issues

Matt,

The 2004 letter did not involve decoupling. They just wanted to sell off part without decoupling license first. Have to decouple before sell and licensure determines if it will license. Any decoupling has to be within scope and location of underlying CON authorization. Not splitting service.

Sent from my iPad

On Feb 11, 2014, at 2:07 PM, "Tandy Menk" <tmenk@dch.ga.gov> wrote:

> There is a 2001 University decision. Let me find it.
>
> ---
>
> **From:** Armando L. Basarrate [mailto:ALB@phrd.com]
> **Sent:** Monday, May 20, 2013 1:51 PM
> **To:** Tandy Menk
> **Subject:** Phoebe Issues
>
> Tandy,
>
> I would like to ask you a question about the 2001 University decision that you sent following up on our conference call last week. I am a bit confused as it appears to pre-date the 2004 decision.
>
> Would you have a couple of minutes at some point this afternoon?
>
> Thanks.
>
> Armando L. Basarrate, Esq.
> Parker, Hudson, Rainer & Dobbs LLP
> Main Phone: (404) 523-5300
> Direct Dial: (404) 420-5534
> Fax: (404) 522-8409
> e-mail: abasarrate@phrd.com
>

Exhibit 5

JOHN H. PARKER, JR.

DIRECT DIAL
(404) 420-5532
TELECOPIER
(678) 533-7776
jparker@phrd.com

PARKER HUDSON
RAINER & DOBBS

LIMITED LIABILITY PARTNERSHIP
ATTORNEYS AT LAW

OFFICES IN:
ATLANTA, GEORGIA
TALLAHASSEE, FLORIDA
SOUTH GEORGIA

March 28, 2014

VIA HAND DELIVERY

Clyde L. Reese, III, Esq.
Commissioner
Department of Community Health
2 Peachtree Street, NW, 40th Floor
Atlanta, Georgia 30303

Marial Ellis, Esq.
General Counsel
Office of General Counsel
Department of Community Health
2 Peachtree Street, NW, 40th Floor
Atlanta, Georgia 30303

Mr. Matthew Jarrard, MPA
Deputy Division Chief, Health Planning Director
Health Facility Regulation Division
Department of Community Health
2 Peachtree Street, NW, 5th Floor
Atlanta, Georgia 30303

Re: DET 2014-033 (North Albany Medical Center, LLC)
Objections of the Hospital Authority of Albany-Dougherty County,
Phoebe Putney Health System, Inc., and Phoebe Putney Memorial Hospital, Inc.

Dear Mr. Reese, Ms. Ellis, and Mr. Jarrard:

We represent the Hospital Authority of Albany-Dougherty County, which owns Phoebe Putney Memorial Hospital ("PPMH"); and the Phoebe Entities: Phoebe Putney Health System, Inc. and Phoebe Putney Memorial Hospital, Inc., the lessee of PPMH. We respectfully submit this letter on behalf of the Hospital Authority and the Phoebe Entities, as approved by General Counsel for each, pursuant to Rule 111-2-2-.10(6), in opposition to the Request for Letter of Determination by North Albany Medical Center, LLC (DET 2014-033). North Albany Medical Center, LLC ("NAMC") is an entity that claims to own no healthcare assets and, apparently, was created by the Tennessee-based Surgical Development Partners for the purpose of posing its

determination request to the Department of Community Health.[1]

The Hospital Authority acquired the assets of the former Palmyra Medical Center in 2011, following a ruling by the United States Court of Appeals for the Eleventh Circuit lifting a temporary stay of the transaction pending appeal, without objection from the Federal Trade Commission (FTC), the plaintiff in that proceeding. The Hospital Authority, as owner, leases the former Palmyra assets (known as Phoebe North) to Phoebe Putney Memorial Hospital, Inc. for operation as part of PPMH under a single hospital permit, issued by DCH effective August 1, 2012. That single permit covers all beds and services previously licensed to PPMH and Palmyra.

NAMC asks this Department to issue determinations regarding the potential application of the CON laws to two hypothetical transactions involving the Hospital Authority and PPMH. Specifically, NAMC seeks determinations (1) that, without obtaining a CON, the Hospital Authority and PPMH could separate the former Palmyra assets from the legacy assets of PPMH, thereby creating two separate short stay general hospitals out of the single hospital currently licensed by DCH; and (2) that, presuming such a separation could occur, NAMC could then purchase or perhaps lease the newly separated Palmyra assets from the Hospital Authority, again without having to obtain a CON.

NAMC's request for these determinations should be dismissed and denied. Its request violates DCH Rule 111-2-2-.10(2)(a), which prohibits requests relating to actual or proposed actions by a third party. In addition, the request is unripe and premature because it asks this Department to address a hypothetical situation that may or may not arise in the future, depending on proceedings and circumstances beyond the control of NAMC or DCH.

(1) NAMC's Request Violates Rule 111-2-2-.10(2)(a) Because It Relates to an Action That Would Be Taken by Third Parties.

"No person shall be entitled to request a determination that relates to an actual or proposed action or course of action which has been taken or which would be taken by a third party." Rule 111-2-2-.10(2)(a). Yet that is exactly what NAMC seeks to do here. NAMC itself cannot "decouple" PPMH's single hospital permit into two permits or divide PPMH's assets into two separate hospitals. Whatever combination of government and private actors might be permitted to initiate that separation under some speculative future scenario, NAMC is certainly not among them.

---

[1] NAMC's address, as shown on the DET Request, is the address of Surgical Development Partners (201 Seaboard Lane, Suite 100, Franklin, TN 37067) and the President and CEO listed for NAMC is the President and CEO of Surgical Development Partners. *See* www.surgicaldevelopmentpartners.com.

Unlike any of the determination letters cited in its request, NAMC is not asking whether NAMC can divide its own facilities or decouple its own license; it is asking instead whether third parties – the Hospital Authority and Phoebe Putney Memorial Hospital, Inc. - may do so. NAMC's request for a determination of how the CON requirements would apply to a hypothetical separation of PPMH that NAMC cannot itself initiate unquestionably "relates to an actual or proposed action or course of action ... ***which would be taken by a third party.***" Rule 111-2-2-.10(2)(a) (emphasis added). Neither of the third parties is proposing the course of action about which NAMC wants to speculate. Thus, NAMC's request is improper under Rule 111-2-2-.10(2)(a).

The second component of NAMC's request for a determination, *i.e.*, that it could buy a decoupled Palmyra from the Hospital Authority without a CON, is also improper. There is no decoupled Palmyra. Indeed, Palmyra no longer exists. And even speculating, as NAMC wishes this Department to do, that the FTC were to abandon its pending settlement with the Authority and the Phoebe Entities; restart administrative proceedings; obtain an administrative law judge (ALJ) ruling in its favor; succeed in upholding that ruling through the appellate judicial process; and order divestiture after the years-long process described below, any prospective buyer of the divested assets would have to be approved by the FTC. Even in that hypothetical world, which speculates that PPMH would be divided into two hospitals and that the Hospital Authority would be required to sell the former Palmyra assets to someone approved by the FTC, no one knows whether NAMC would be the chosen and approved buyer.

(2) NAMC Asks DCH to Address a Hypothetical Situation That Is Not Ripe for Determination.

Compounding the third-party nature of its request, NAMC asks this Department to address a situation that would not happen under the proposed settlement with the FTC. Even if the FTC were to abandon the settlement, the administrative and judicial process that would follow would take years, with no assurance that it would culminate in divestiture.

Specifically, NAMC asks DCH to issue a determination that the Hospital Authority and Phoebe Putney Memorial Hospital, Inc. could divide PPMH into two separate short stay general hospitals, without obtaining a CON, and then be forced to sell one of them specifically to NAMC, again without obtaining a CON. But those situations could not arise until and unless the following series of events – each uncertain – were hypothetically to occur.

First, the FTC would have to abandon the proposed settlement that it released for public comment. The agreed settlement does not order the Hospital Authority to divest the former Palmyra assets. Instead, it provides for other remedies, including restrictions on the actions of the Hospital Authority and the Phoebe Entities.

Even if the FTC were to abandon the settlement, the FTC would have to resume and conclude its administrative proceedings in a way that would find the Palmyra acquisition to have been unlawful *and* also specify divestiture of those assets as the appropriate remedy.

Resolution of any restarted FTC administrative proceedings would be a lengthy process, requiring (a) completion of pre-hearing discovery;[2] (b) submission and resolution of pre-hearing motions;[3] (c) a lengthy merits hearing before an administrative law judge (ALJ);[4] (d) post-hearing briefing;[5] (e) issuance of the ALJ's decision within 100 days of the close of post-hearing briefing;[6] and (f) an appeal by one side or the other or both to the full Commission, which "may adopt, modify or set aside" the ALJ's initial decision.[7] Moreover, divestiture is a discretionary remedy. Even if the FTC were to find a violation, and even if the Commission were to order divestiture, the scope of such an order is unknown.[8] For example, sometimes the Commission orders a divesture of only some assets of the post-merger entity.[9]

Additionally, any divestiture order would trigger an Eleventh Circuit appeal, entailing full briefing, argument and only at some point thereafter, a decision.[10] In sum, even if the FTC were to reverse its current course accepting the consolidation of the PPMH and former Palmyra assets into a single hospital, the FTC proceedings would still have a very long course to run, potentially taking several years. Until those proceedings were concluded, no one can possibly know whether there would ever be a compelled divesture, or what assets would be subject to divestiture if there were.

---

[2] Fact discovery (16 C.F.R. § 3.31) is not complete and expert discovery (16 C.F.R. § 3.31A) has not started.

[3] *See* 16 C.F.R. § 3.22 (providing for pre-hearing dispositive and *in limine* motions).

[4] *See* 16 C.F.R. § 3.41 (providing for hearing of up to 210 hours, which may be extended).

[5] *See* 16 C.F.R. §3.46(a).

[6] *See* 16 C.F.R. §3.51.

[7] *See* 16 C.F.R. § 3.54(c).

[8] *See In the Matter of Evanston Northwestern Healthcare Corporation and ENH Medical Group, Inc.*, FTC Docket No. 9315, Opinion of the Commission, Aug. 6, 2007. On appeal, the Commission affirmed the ALJ's liability decision, but rejected its staff's recommendation and the ALJ's decision to order a full divestiture of the acquired hospital. Instead of divestiture, the full Commission required the establishment of separate contract negotiating teams for the original and the acquired facilities, but permitted retention of the acquired hospital.

[9] *See* FTC Frequently Asked Questions About Merger Consent Order Provisions, available at http://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers/merger-faq ("The Commission has issued orders that require a divestiture of less than the entire business operating in, or producing for, the relevant market").

[10] *See* 15 U.S.C. § 45(c).

Unlike the determination letters regularly entertained by DCH, this is not a situation where the requester can initiate some transaction within its power, depending on the Department's answer. For good reason, this Department does not expend its time and resources ruling on hypothetical situations in which there are no parties, with no agreement in place or proposed, with no agreed or proposed terms, and which require pure speculation as to whether and when they would ever occur.

DCH should not set a precedent for ruling on speculative requests for determination that pertain to hypothetical situations, rather than transactions that could and are planned to be initiated by the requesting party upon receipt of a favorable answer.

Beyond wasting Department time and resources, that practice would be rife with opportunities for misuse by the requesting parties, such as damaging the reputation of a competitor. For example, a party could request an official determination that it could purchase a competitor that has no interest in selling. The issuance of an official DCH determination on such a hypothetical transaction could materially impact public perception of the non-consenting competitor, thus impairing its ability to recruit physicians, maintain staff, negotiate managed care contracts, and otherwise conduct its business without inappropriate interference.

Moreover, determination letters should not address any question that would not be sufficiently ripe for full administrative hearing and review and ultimately judicial review, since those are the steps that follow issuance of a determination letter that is adverse either to the requesting party or to an objector. *See* Rule 111-2-2-.10(6) & O.C.G.A. § 31-6-44.1. Declaratory rulings are not appropriate to address "a possible or probable future contingency,"[11] which is all that is present here. DCH should not issue a determination letter, triggering administrative and judicial review, based on a possible future contingency that is beyond the control of the requesting party and that the entities which would be integral to the proposed action have no interest in pursuing.

The Hospital Authority and the Phoebe Entities disagree with NAMC's contention as to the substantive issues raised in its DET Request. However, in view of the obviously inappropriate nature of NAMC's request discussed above, DCH should dismiss the DET Request without delay.

* * * *

[11] *See, e.g., Board of Natural Resources v. Monroe County*, 252 Ga. App. 555, 557-58 (2001) (court would not entertain challenge to an administrative agency rule "based [upon] a possible or probable future contingency"); *Building Block Enterprises, LLC v. State Bank and Trust Co.*, 314 Ga. App. 147, 152 (2012) (court could not rule whether a party was required to comply with requirement to file a confirmation petition "based on a possible or probable future contingency").

In conclusion, the Hospital Authority and the Phoebe Entities respectfully submit that the Department should dismiss and reject NAMC's request on the grounds that it "relates to an actual or proposed action or course of action … which would be taken by a third party" (Rule 111-2-2-.10(2)(a)), and that it relates to a hypothetical situation beyond NAMC's control.

Respectfully submitted,

John H. Parker, Jr./Armando L. Basarrate

cc: James E. Reynolds, Jr., Esq.
General Counsel for the Hospital Authority

Thomas S. Chambless, Esq.
General Counsel for the Phoebe Entities

Exhibit 6

UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Deborah L. Feinstein
Director, Bureau of Competition
Phone: (202) 326-3630
Email: dfeinstein@ftc.gov

March 31, 2014

Roxana Tatman, Esq.
Legal Director, Health Planning
Georgia Department of Community Health
2 Peachtree Street NW, 5th Floor
Atlanta, GA 30303

Re: FTC Comments Concerning North Albany Medical Center, LLC's Request for Determination (DET 2014-033)

Dear Ms. Tatman:

Federal Trade Commission ("FTC" or "Commission") staff has prepared these comments in response to a Request for Determination filed by North Albany Medical Center, LLC ("North Albany") on March 12, 2014. DCH's response to this Request may help determine the outcome of a pending FTC enforcement action.

On April 19, 2011, FTC staff filed an administrative complaint (Docket No. 9348) challenging the legality of Phoebe Putney Memorial Hospital's ("PPMH") proposed acquisition of Palmyra Park Hospital, Inc. ("Palmyra"). Shortly thereafter, the FTC filed a complaint for preliminary injunction against the same transaction in the U.S. District Court for the Middle District of Georgia. On June 27, 2011, the district court granted the defendants' motion to dismiss the complaint, holding that state-action immunity shielded the transaction from federal antitrust scrutiny. The Commission then issued a stay of the administrative litigation and appealed the district court's ruling to the Eleventh Circuit. On December 9, 2011, the Eleventh Circuit affirmed. The merger was consummated several days later. The merged hospitals received a single license effective August 1, 2012. On February 19, 2013, the U.S. Supreme Court unanimously held that state-action immunity did not apply to the PPMH/Palmyra transaction, and it remanded the case for further proceedings.

In light of the Supreme Court's decision, the Commission on March 14, 2013, lifted its stay on the administrative litigation challenging PPMH's acquisition of Palmyra. On June 5, 2013, the district court entered a Stipulated Preliminary Injunction that, *inter alia*, prevents the parties from (i) taking any further steps to consolidate PPMH and Palmyra; (ii) selling or destroying Palmyra assets; (iii) eliminating any services offered at the former Palmyra facility; or (iv) making any price changes to health plans involving the former Palmyra facility.

On August 22, 2013, the Commission and the parties entered into a proposed settlement of this litigation. The proposed settlement was premised, in part, on the Commission's understanding that "Georgia's CON [Certificate of Need] statutes and regulations effectively prevent the Commission from effectuating a divestiture of either hospital in this case."[1] The Commission is now considering whether to accept the proposed settlement. The question of whether a Certificate of Need would be required for PPMH's single hospital permit with Palmyra to be decoupled (along with Palmyra's former CON regulated short stay acute care beds and other CON regulated services) in the event that PPMH is ordered to, or agrees to, rescind the merger or divest or lease the former Palmyra assets to a Commission-approved acquirer or lessor is an important factor in that consideration. FTC staff recently learned that North Albany is interested in acquiring the former Palmyra assets and has requested a Letter of Determination addressing whether a CON would be required under the circumstances outlined above. DCH's response to North Albany's request is likely to play an important role in whether the Commission accepts the proposed settlement. We would be pleased to respond to any questions DCH may have.

Sincerely,

Deborah L. Feinstein

Deborah L. Feinstein
Director, Bureau of Competition

CC: Mary Scruggs, Division Chief, Healthcare Facility Regulation Division
Matthew Jarrard, Deputy Division Chief/Health Planning Director, Healthcare Facility Regulation Division
E. Tandy Menk, Esq., Department of Community Health

[1] *See* Phoebe Putney Health System, Inc., et al., Analysis of Proposed Agreement Containing Consent Order to Aid Public Comment, 78 Fed. Reg. 53,457, 53,460 (Aug. 29, 2013).

Exhibit 7

UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

MAY 22 2014

Deborah L. Feinstein
Director, Bureau of Competition
Phone: (202) 326-3630
Email: dfeinstein@ftc.gov

May 20, 2014

MAY 22 2014

Roxana Tatman, Esq.
Legal Director, Health Planning
Georgia Department of Community Health
2 Peachtree Street NW, 5th Floor
Atlanta, GA 30303

Re: North Albany Medical Center, LLC's Request for Determination (DET 2014-033)

Dear Ms. Tatman:

In light of the opposition and supplemental opposition filed by the Hospital Authority of Albany-Dougherty County ("Authority"), Phoebe Putney Health System, Inc. ("PPHS"), and Phoebe Putney Memorial Hospital ("PPMH") on March 28, 2014, and April 25, 2014, Federal Trade Commission ("FTC" or "Commission") staff submits this letter to provide DCH with additional information regarding (1) the Commission's basis for accepting the proposed settlement for public comment and (2) the potential implications of a DCH determination for any future Commission action.[1]

First, the record is clear that the Commission's decision to accept the Proposed Consent was based on the Commission's understanding that Georgia's CON laws effectively barred a divestiture. As the Commission's Analysis of Proposed Agreement Containing Consent Order to Aid Public Comment ("AAPC") unambiguously indicates:

> The circumstances in this matter are highly unusual and the Commission's discontinuation of litigation and *settlement of this case on the proposed terms are acceptable to the Commission only under the unique circumstances presented here. In particular*, as described further below, *the Commission believes that*, assuming a finding of liability following a full merits trial and appeals, *the legal and practical challenges presented by Georgia's certificate of need ("CON")*

[1] We take no position on the substantive question of whether a CON is required under Georgia law for the course of action NAMC proposes to take, as this is within DCH's purview. Staff, however, disagrees with the Authority and Phoebe's odd contention that Palmyra is "a former hospital that no longer exists." Of course the name of Palmyra Hospital has been changed to Phoebe North, but the hospital surely exists. Indeed, its continued maintenance and operation is compelled by the Stipulated Preliminary Injunction Order issued by the District Court for the Middle District of Georgia. We assume and expect that the Authority and Phoebe have complied and will continue to comply with the court's order.

laws and regulations would very likely prevent a divestiture of hospital assets from being effectuated to restore competition.[2] (emphasis added)

Contrary to the Authority and Phoebe's suggestions, the Commission's decision to enter into the proposed consent agreement was not based on the "time, effort, litigation hazards and uncertainties" concerning that litigation.

Second, after receiving additional information, staff now understands that there is a possibility that DCH could determine that a CON is not required to decouple the Phoebe/Palmyra license and to divest Palmyra (Phoebe North). The Commission accepted the Proposed Consent on the representation that a CON would be required to decouple the license and divest Palmyra. Therefore, if DCH determines that no CON is required or that any required CON review would be under the general considerations rather than the service specific considerations for short stay hospitals, the Authority and Phoebe have no basis to claim that the Commission would agree to the settlement rather than consider other options. Indeed, if DCH determines that no CON is required or that any required CON review would be under the general considerations, FTC staff would ask the Commission to reject the proposed settlement, return the matter to administrative litigation, and ultimately order divestiture. While Phoebe indicates it may appeal any DCH Determination, staff would likely recommend that the administrative litigation resume and proceed during the pendency of any appeal of the Determination.

Moreover, if the litigation challenging the acquisition were to proceed, Commission staff would seek – and if successful, almost certainly obtain – a divestiture. While FTC staff cannot guarantee that it will succeed in litigation, on appeal of the question of "state action" immunity, the Eleventh Circuit stated, "[w]e agree with the Commission that, on the facts alleged, the joint operation of [PPMH] and Palmyra would substantially lessen competition or tend to create, if not create, a monopoly."[3] If the merger is found illegal, it is likely that a divestiture will be ordered. Section 11(b) of the Clayton Act states that, upon finding a person has violated Section 7 of the Clayton Act, the Commission "*shall* issue and cause to be served upon such person an order requiring such person to cease and desist from such violations, *and divest itself of the stock, or other share capital, or assets, held* ... contrary to the provisions of" Section 7 of the Clayton Act.[4] Under the case law, complete divestitures are generally the preferred and most appropriate method to restore the competition eliminated by Section 7 violations.[5] Although the Authority

---

[2] *See* Phoebe Putney Health System, Inc., et al., Analysis of Proposed Agreement Containing Consent Order to Aid Public Comment, 78 Fed. Reg. 53,457, 53,458 (Aug. 29, 2013).

[3] *FTC v. Phoebe Putney Health Sys., Inc.*, 663 F.3d 1369, 1375 (11th Cir. 2011).

[4] 15 U.S.C. § 21(b) (emphasis added).

[5] *See United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 329-31 (1961). *See also ProMedica Health Sys., Inc. v. FTC*, 2014 WL 1584835, *12 (6th Cir. Apr. 22, 2014) ("Once a merger is found illegal, 'an undoing of the acquisition is a natural remedy.' * * * Here, the Commission found that divestiture would be the best means to preserve competition in the relevant markets. The Commission also found that ProMedica's suggested 'conduct remedy'—which would establish, among other things, separate negotiation teams for ProMedica and St. Luke's—was disfavored because 'there are usually greater long term costs associated with monitoring the efficacy of a conduct remedy than with imposing a structural solution.' And the Commission found no circumstances warranting such a remedy here. We have no basis to dispute any of those findings."); FTC Press Release "Hospital Authority

and Phoebe could appeal a divestiture order, where "the Government has successfully borne the considerable burden of establishing a violation of the law, all doubts as to the remedy are to be resolved in its favor."[6] The divestiture would be of the entire hospital and associated assets.[7]

In short, we want to emphasize that we believe that a merits-based response by DCH to NAMC's determination request would be an integral factor in the Commission's decision whether to accept the proposed settlement or return the matter to litigation. If the matter is returned to litigation there is a significant chance that Palmyra will ultimately be the subject of a divestiture. Once again, we would be pleased to respond to any questions DCH may have.

Sincerely,

Deborah L. Feinstein
Director, Bureau of Competition

cc: Mary Scruggs, Division Chief, Healthcare Facility Regulation Division
Matthew Jarrard, Deputy Division Chief/Health Planning Director, Healthcare Facility Regulation Division
E. Tandy Menk, Esq., Department of Community Health

---

and Phoebe Putney Health System Settle FTC Charges That Acquisition of Palmyra Park Hospital Violated U.S. Antitrust Laws," *available at* www.ftc.gov/news-events/press-releases/2013/08/hospital-authority-and-phoebe-putney-health-system-settle-ftc ("Divestiture [is] the Commission's preferred remedy to restore competition lost due to an illegal merger . . . .").

[6] *E.I. du Pont de Nemours*, 366 U.S. at 334.

[7] The Commission has ordered something other than a divestiture in a hospital case only once, under unique circumstances, about seven years ago. *See In re* Evanston Nw. Healthcare Corp., No. 9315 (F.T.C. Aug. 6, 2007).

From: (202) 326-2546
Deborah Feinstein
Federal Trade Commission
600 Pennsylvania Avenue, NW
Suite 374
Washington, DC 20580

Origin ID: RDVA

FedEx Express

J14101402070326

Ship Date: 21MAY14
ActWgt: 0.5 LB
CAD: 102577200/INET3490

Delivery Address Bar Code

SHIP TO: (202) 326-2546 BILL SENDER

Raxana Tatman, Esq.
Georgia Dpt. of Community Health
2 Peachtree Street NW
5th Floor
ATLANTA, GA 30303

Ref # 600 Pennsylvania Ave, NW
Invoice # 1041
PO # 1041
Dept #

THU - 22 MAY AA
STANDARD OVERNIGHT

TRK# 7700 4956 4814
0201

XH QFEA

30303
GA-US
ATL

522G1/62D3/F220

After printing this label:
1. Use the 'Print' button on this page to print your label to your laser or inkjet printer.
2. Fold the printed page along the horizontal line.
3. Place label in shipping pouch and affix it to your shipment so that the barcode portion of the label can be read and scanned.

Warning: Use only the printed original label for shipping. Using a photocopy of this label for shipping purposes is fraudulent and could result in additional billing charges, along with the cancellation of your FedEx account number.
Use of this system constitutes your agreement to the service conditions in the current FedEx Service Guide, available on fedex.com.FedEx will not be responsible for any claim in excess of $100 per package, whether the result of loss, damage, delay, non-delivery,misdelivery,or misinformation, unless you declare a higher value, pay an additional charge, document your actual loss and file a timely claim.Limitations found in the current FedEx Service Guide apply. Your right to recover from FedEx for any loss, including intrinsic value of the package, loss of sales, income interest, profit, attorney's fees, costs, and other forms of damage whether direct, incidental,consequential, or special is limited to the greater of $100 or the authorized declared value. Recovery cannot exceed actual documented loss.Maximum for items of extraordinary value is $1,000, e.g. jewelry, precious metals, negotiable instruments and other items listed in our ServiceGuide. Written claims must be filed within strict time limits, see current FedEx Service Guide.

MAY 22 2014

Exhibit 8

GEORGIA DEPARTMENT
OF COMMUNITY HEALTH

Nathan Deal, Governor **Clyde L. Reese III, Esq., Commissioner**

2 Peachtree Street, NW | Atlanta, GA 30303-3159 | 404-656-4507 | www.dch.georgia.gov

June 3, 2014

Mr. G. Edward Alexander
President and Chief Executive Officer
North Albany Medical Center, LLC
201 Seaboard Lane; Suite 100
Franklin, Tennessee 37067

Re: DET2014-033—Request for Letter of Determination Regarding Facility Divestiture – North Albany Medical Center, LLC – Albany, Dougherty County, Georgia

Dear Mr. Alexander:

The Georgia Department of Community Health (the "Department") is in receipt of your request regarding the reviewability of a proposed purchase or lease of the hospital formerly operated by Palmyra Park Hospital, Inc. ("Palmyra") pursuant to divestiture. The Department received the request on March 12, 2014 and docketed the request as DET2014-033. Thank you for the information provided and for your efforts to comply with the State's Certificate of Need ("CON") laws.

It is the understanding of the Department that the Hospital Authority of Albany-Dougherty County ("Authority") acquired Palmyra's assets, including its grandfather and CON authorizations. The former Palmyra hospital was renamed Phoebe North. The Authority leased Phoebe North, a 248-bed hospital located at 2000 Palmyra Road, Albany, Dougherty County, Georgia, to Phoebe Putney Memorial Hospital, Inc. ("PPMH"). PPMH is a wholly owned subsidiary of Phoebe Putney Health System, Inc. ("PPHS"). The operations of Phoebe North were later combined with PPMH resulting in a single hospital license. PPMH did not seek a new CON to combine the licenses of PPMH and Phoebe North but relied on the existing grandfather and CON authorizations for the beds and services of the two hospitals. See DET2012-096.

North Albany Medical Center, LLC ("NAMC") proposes to purchase or lease Phoebe North in the event divestiture is required or agreed upon as a remedy in the pending anti-trust litigation filed by the Federal Trade Commission ("FTC") with respect to the Palmyra transaction. NAMC is requesting a determination regarding the application of the CON laws to its proposed purchase or lease pursuant to divestiture.

The FTC filed letters of interest dated March 31, 2014 and May 20, 2014, regarding NAMC's request. By way of background, on April 19, 2011, FTC staff filed an administrative complaint challenging the legality of the acquisition of Palmyra by the Authority and the related Phoebe entities. In the event the transaction was consummated, the Complaint requested divestiture as a potential remedy. See DET2014-033 Request, Ex. A, at 19. The FTC stayed the administrative action pending appeals related to the application of the state immunity doctrine. The FTC noted that, on February 19, 2013, the U.S. Supreme Court unanimously held that state-action immunity did not apply to exempt the Palmyra transaction from the anti-trust laws, and remanded the case for further proceedings.[1] Letter from Deborah L. Feinstein, Director, Bureau of Competition, FTC, to Roxana Tatman, Legal Director of Health Planning, DCH (March 31, 2014) (DCH file, DET2014-033).

In light of the Supreme Court's decision, the FTC, on March 14, 2013, lifted its stay on the administrative litigation challenging the acquisition of Palmyra. On June 5, 2013, the district court entered a Stipulated Preliminary Injunction against further consolidation of the two hospitals. On August 22, 2013, the FTC and the parties entered into a proposed settlement of this litigation which did not require divestiture. At the time, it was the FTC's understanding that "Georgia's CON [Certificate of Need] statutes and regulations effectively prevent the Commission from effectuating a divestiture of either hospital in this case." Feinstein Letter dated March 31, 2014. The FTC is now considering whether to accept the proposed settlement of the litigation and file dismissal documents related to the Preliminary Injunction referenced above. The FTC also filed a motion to extend the time for dismissal in federal district court stating that the "Commission's consideration of this settlement may be informed by DCH's response to NAMC's request [for determination]." NAMC's response letter dated April 16, 2014. Ex. 2, at 2. The Authority, PPMH and PPHS did not oppose the motion and the Court granted the FTC's extension request.

The Authority, PPMH and PPHS filed a letter of opposition contending that NAMC's determination request violates DCH Rule 111-2-2-.10(2)(a) regarding actual or proposed actions or conduct by a third party. The opposition also submits that the request is premature as there are numerous factors which play into a possible divestiture of the former Palmyra assets and any sale or lease related to divestiture. The opposition filed supplemental information reiterating their position that the Department should not address the substantive issues raised in the request.

In response to opposition, NAMC asserts that the FTC's proposed settlement relies on an erroneous interpretation of the CON laws that would effectively prevent divestiture. NAMC also submits the applicability and interpretation of the CON laws may directly affect or impact its proposed course of action to acquire by sale or lease Palmyra (Phoebe North) in the event of divestiture. NAMC further states that if CON is a barrier to divestiture, it will be required to seek another course of action to operate a hospital in the Albany area. NAMC contends that simply because the opposition may be forced to sell or lease the hospital, rather than voluntarily agreeing to divest by sale or lease, does not change the fact that the CON laws may directly affect or impact its

[1] In DET2012-096, the Department stated that the determination regarding combined licensure of Phoebe North and PPMH did not address compliance with any other state or federal regulatory requirements. The Department also noted that the determination was based on the requirement that PPMH satisfy any other applicable regulatory provisions.

proposed course of conduct. NAMC further submits that the request is not premature. NAMC notes that a determination does not set time limits for a proposed course of conduct.

DCH Rule 111-2-2-.10(2) provides:

> Pursuant to O.C.G.A. § 31-6-47(c), if a person believes or has reason to believe that the application of a Department Rule or statutory provision may directly affect or impair the legal rights of that person as to some proposed action or course of conduct being considered by that person, including, but not limited to, determinations regarding reviewability, grandfathering decisions, and relocation or replacement determinations, such person may request a written determination from the Department regarding the application of such Department rule or statutory provision upon that person's proposed action or course of conduct. A determination request is distinguished from a general question as a determination does not address general issues relating to policy and procedure.

DCH Rule 111-2-2-.10(2).

DCH Rule 111-2-2-.10(2) does not set a time limit for a proposed course of conduct being considered by a person in a determination request. Furthermore, if the proposed anti-trust settlement is approved as the result of a misunderstanding regarding the applicable CON laws, NAMC's right to pursue the purchase or lease of Phoebe North, based on an anti-trust related divestiture, would be impacted. DCH Rule 111-2-2-.10(2)(a) provides that a person may not request a determination related to "an actual or proposed action or course of conduct which has been or will be taken by a third party." Id. The Rule does not preclude a person from seeking a determination regarding the requesting person's proposed course of action or conduct under consideration. NAMC simply requests a determination regarding the applicable CON laws with respect to its proposed purchase or lease of Phoebe North in the event of divestiture.

The Department determines that the application of the CON laws may directly affect or impact NAMC's proposed action or course of conduct within the meaning of DCH Rule 111-2-2-.10(2). Accordingly, a substantive response to NAMC's request is appropriate under the applicable CON rules and statutory provisions. The Department's response addresses only the CON issues raised regarding NAMC's proposed purchase or lease of Phoebe North in the event of divestiture. This determination does not address the licensure requirements related to separate licensure for divestiture or the applicable anti-trust laws. Hospital licensure is under the jurisdiction of the Healthcare Facility Regulation Division, Licensure Section, not the Health Planning Section.

NAMC requests a determination regarding the following divestiture related matters: 1) the CON consequences in the event Phoebe North is licensed as a separate hospital for purposes of divestiture, by sale or lease, to NAMC; 2) the CON consequences in the event NAMC purchases Phoebe North from PPMH; and 3) the CON consequences in the event NAMC leases Phoebe North from the Authority.

First, when PPMH included Phoebe North's beds and services on its hospital license, it did not relinquish or invalidate the grandfather and CON authorizations for the beds and services of Phoebe North. PPMH did not seek a new CON for a consolidated hospital inpatient site. Rather, the combined license was simply a paper function of licensure. The coupling (and subsequent decoupling) of grandfathered and CON authorized hospitals for purposes of licensure is not CON reviewable in and of itself. Please be advised that returning Phoebe North to its status as a separately licensed 248-bed hospital for divestiture would not require prior CON review and approval; provided the decoupling is within the scope and location of the hospital's previously grandfathered and CON authorized beds and services and any capital costs are below the threshold.[2] As noted above, this determination does not address the licensure requirements for separate licensure of the two hospitals or the anti-trust laws related to divestiture.

Second, in the event separate licensure is obtained for divestiture, Phoebe North would be considered an existing health care facility under the CON laws. O.C.G.A. § 31-6-47(a)(9) exempts:

> Expenditures for the acquisition of existing health care facilities by stock or asset purchase, merger, consolidation, or other lawful means unless the facilities are owned or operated by or on behalf of a:
>
> (A) Political subdivision of this state;
>
> (B) Combination of such political subdivisions; or
>
> (C) Hospital authority, as defined in Article 4 of Chapter 7 of this title.

O.C.G.A. § 31-6-47(a)(9); see also DCH Rule 111-2-2-.03(10).

A reviewable acquisition of an existing healthcare facility from a hospital authority would be subject to review under the general considerations, not the service specific rules. However, in this instance, NAMC proposes acquiring Phoebe North by divestiture from PPMH, not the Authority. In DET2008-111, the Department determined that hospitals operated by an Internal Revenue Service § 501(c)(3) not-for-profit entity are not considered to be a facility owned by or operated on behalf of a defined Georgia hospital authority. See O.C.G.A. § 31-7-70 et seq. PPMH is an Internal Revenue Service § 501(c)(3) not-for-profit entity which operates and controls Phoebe North and Phoebe Putney Memorial Health Hospital as part of a corporate restructuring. Please be advised the proposed acquisition by NAMC of Phoebe North from PPMH pursuant to divestiture would not be subject to prior CON review and approval. The acquisition fits within the parameters of O.C.G.A. §31-6-47(a)(9).

Finally, it is the understanding of the Department that divestiture could involve a change in the lease arrangement and the lessee of Phoebe North. In the event separate licensure is obtained, the Authority could lease Phoebe North to NAMC. O.C.G.A. § 31-6-47(a)(9.1) states that:

---

[2] Pursuant to DET2012-096, any beds and services, moved as a result of the merger, may be returned to the original campus prior to decoupling for divestiture.

> (9.1) Expenditures for the restructuring of or for the acquisition by stock or asset purchase, merger, consolidation, or other lawful means of an existing health care facility which is owned or operated by or on behalf of any entity described in subparagraph (A), (B), or (C) of paragraph (9) of this subsection only if such restructuring or acquisition is made by any entity described in subparagraph (A), (B), or (C) of paragraph (9) of this subsection.

O.C.G.A. § 31-6-47(a)(9.1); see also Rule 111-2-2-.03(11).

The Authority's lease to NAMC would be considered a restructuring of the Authority for CON purposes. The restructuring would be made by a hospital authority within the meaning of O.C.G.A. § 31-6-47(a)(9.1). Please be advised that the lease of Phoebe North by the Authority to NAMC would not be subject to prior CON review and approval.

Please note that this determination is issued based on the unique facts and circumstances of NAMC's request. If Phoebe North does not obtain a separate hospital license for divestiture in accord with the licensure regulations or if any other facts or circumstances material to this determination change, this determination would not apply. The Department reserves the right to analyze each situation presented on its own merits at any particular time.

I hope this reply is responsive to your request. Please feel free to contact me if you have any further questions or concerns.

Sincerely,

Matthew Jarrard
Deputy Division Chief/Health Planning Director
Healthcare Facility Regulation Division
Georgia Department of Community Health

cc: John H. Parker, Esq.
Armando L. Basarrate, Esq.
Victor L. Moldovan, Esq.
Marsha A. Hopkins, Esq.
Roxana D. Tatman, Esq.
DET File

Exhibit 9

BEFORE THE GEORGIA DEPARTMENT OF COMMUNITY HEALTH
STATE OF GEORGIA

IN RE:	:	
	:	PROJECT NO.
NORTH ALBANY MEDICAL CENTER, LLC	:	GA DET 2014-033
	:	
	:	
	:	

PROCEEDINGS BEFORE
ELLWOOD F. OAKLEY III, JD

Monday, September 8, 2014

10:05 a.m.

Fifth Floor
2 Peachtree Street
Atlanta, Georgia

Carole E. Poss, RDR, CRR, CCR-B-1182

REGENCY-BRENTANO, INC.
Certified Court Reporters
13 Corporate Square
Suite 140
Atlanta, Georgia 30329
(404) 321-3333

Page 2

APPEARANCES OF COUNSEL:
On behalf of the Appellants, the Hospital Authority of Albany-Dougherty County and Phoebe Putney Memorial Hospital, Inc., and Phoebe Putney Health System, Inc.:

JOHN H. PARKER, ESQ.
ASHLEY HOFFMAN, ESQ.
Parker Hudson Rainer & Dobbs
1500 Marquis Two Tower
285 Peachtree Center Avenue, NE
Atlanta, Georgia 30303

On behalf of North Albany Medical Center, LLC:

VICTOR L. MOLDOVAN, ESQ.
McGuireWoods LLP
Promenade II
1230 Peachtree Street, NE
Suite 2100
Atlanta, Georgia 30309

On behalf of the Department of Community Health:

E. TANDY MENK, ESQ.
Georgia Department of Community Health
2 Peachtree Street, NW
Fifth Floor
Atlanta, Georgia 30303

Also Present:

Roxana D. Tatman

Page 3

MR. OAKLEY: Good morning, ladies and gentlemen. This is the scheduled summary judgment motion oral arguments in North Albany Medical Center, DET 2014-033. I'm Ellwood Oakley, the administrative law judge appointed. This matter is not a CON. The appeal is subject to the rules of the Georgia Administrative Procedures Act. And I'm going to do this a little bit differently than a normal summary judgment motion. I'm going to talk just a little bit at the beginning and, since we have a court reporter here, try to get on the record some of my thoughts and how it relates to your thoughts.

Initially, the first and most important thing in a summary judgment motion is are there any factual disputes. And in that all three parties, Phoebe, North Albany, and DCH, have moved for either full or partial summary judgments, I have spent a lot of time on these files, probably not as much as you all have but a lot of time, and I see no factual disputes raised by anybody, any of the three of you in this case.

So I would like to start with -- before I

Page 4

make that ruling on the record that there are no factual disputes, give all three of you an opportunity, if you disagree with that or agree with it, to state on the record. Start with Mr. Parker, on behalf of the appellants, and then Mr. Moldovan and then the state.

MR. PARKER: Thank you. I don't think so, but I may be corrected. There are a couple of areas where there could be factual disputes. One is as to a restructuring by lease of a hospital decoupled from Phoebe. The definition of restructuring, which is not in the CON statute but is in the Hospital Authorities Law --

MR. OAKLEY: Right.

MR. PARKER: -- allows a restructuring only to an entity whose principal place of business is within the same county and which is not owned or controlled by anyone with a place of business outside of the county. Now, I believe this probably would be stipulated, that NAMC does not have a principal place of business in Dougherty County. There may be disputes as to who controls it. So you have to meet both tests. So that's one possibility.

Page 5

Secondly --

MR. OAKLEY: Is there any -- Mr. Parker, is there any evidence of the control question on NAMC that's in the file?

MR. PARKER: The --

MR. OAKLEY: Other than the material that you've put on -- the Tennessee incorporation materials?

MR. PARKER: The other thing is that the determination request itself from NAMC comes from -- the contact person for NAMC, G. Edward Alexander, has an e-mail address of surgicaldevelopmentpartners.com, which is the address of the requester. So I think there's probably -- and this was part of our discovery request. I'm sure there's some control relationship there since NAMC, to our knowledge, is nothing but a shell corporation.

MR. OAKLEY: Let's look at the negative side of this. Is there anything in the record that you could point to or Mr. Moldovan could point to that relates to ownership in Dougherty County by NAMC?

MR. PARKER: I'm not aware of any.

MR. OAKLEY: Okay. Anything else on

Page 6

factual -- possible factual disputes?
MR. PARKER: Also, the term "restructuring" -- I think this is key. I believe the department in these proceedings usually takes the position that they're only issuing determination letters as to facts presented in the request. It's our position that a, quote, restructuring is not a fact. It's a term of art defined by statute. If somebody argues that it is a fact, then we would have disputes. But that's -- now, one of the procedural issues we've raised is whether this is really a request from -- on behalf of NAMC or some other third party. That relates to the procedural issue of whether the request should have been reviewed in the first place, which we argued at length in the initial process, but we're here, so I'll argue now the substantive issues, and our argument on that is what it was.
MR. OAKLEY: Okay.
Mr. Moldovan?
MR. MOLDOVAN: We don't believe there are any factual disputes in the case. I think the record is what it is.

Page 7

On the restructuring and the lease issue, the request was if we or somebody else meets the restructuring lease requirements, being that you have to be based in Dougherty County, and lots of other things that would apply to that, not just -- that's one thing that would have to be met. There are other things that would have to happen with the facility. The request was would that be exempt.
What the state ruled on was, yes, it would be exempt, but you'd have to meet -- and it's not within their purview to rule on that. You have to meet all these other requirements. So the fact that we are not in Dougherty County, it doesn't really matter to the outcome of what the state determined here, but if and when we get to that point, we would have to meet those requirements to do that, and that would be something we would have to deal with at that time. So, no, we don't believe there are any factual disputes.
MR. OAKLEY: Ms. Menk?
MR. PARKER: In that regard, that raises another factual dispute. The request does not say that NAMC itself proposes to restructure by

Page 8

lease. It has a footnote. It first says a restructuring can be done to an entity within the county. What it doesn't say is that entity can't be controlled by someone outside the county. But then it drops a footnote where it says new entities are often created for leases. The rules require the exact identification of any person to whom a request relates. We have no idea who this undisclosed possible future lessee is, so I guess there's a factual dispute there. How can you rule that this is a restructuring under the statutes if you don't even know who it's to, where they're based, who controls them or who owns them. It's a purely hypothetical --
MR. OAKLEY: Mr. Moldovan, you're suggesting that that's not before us yet.
MR. MOLDOVAN: Correct.
MR. OAKLEY: And it would only be before us if we ruled at this stage of things that the matter can move forward.
MR. MOLDOVAN: Right. So the way the state ruled -- and I'll let Ms. Menk speak for herself, obviously, but the way the state ruled is that, and the request was, we have to meet

Page 9

the requirements to restructure. Assuming that those were met, could we, North Albany, lease that facility. And the answer was leases are not subject to CON review.
And the state says -- and you can look at their own material -- when and if you apply for that restructuring, get that done -- and, of course, you're talking about FTC ordering divestiture. We decide, we being North Albany, decide not to try to acquire it, instead to lease it, and so -- but it says -- the state basically -- and all their purview is, is a CON required to restructure and lease it. The answer is no.
And obviously that would be something that at some point, if we get to that point and decide to lease as opposed to buy and do all those other things that we could do, that would be something that we would have to deal with, obviously, but the only thing that was asked of the state, which is what they ruled on, is is a lease under this restructuring a CON event, and the answer was no. So that's our response.
MR. OAKLEY: So as a matter of law, if I hold contrary to what the state says, then it

Page 10

would be summary judgmentable, if I rule against the state on that matter.
MR. MOLDOVAN: Correct.
MR. OAKLEY: And subject to appeal and all of that.
MR. MOLDOVAN: That's true.
MR. PARKER: Your Honor, I think a very important point is the state did rule for -- it said for CON purposes, that what was requested was a restructuring by lease. Number one, as I indicated earlier, that is not what was requested by NAMC. So factually that statement was incorrect.
Secondly, though, by making that determination, even if the other facts would have to be determined later, you necessarily are having to determine that there's been a restructuring. A restructuring is a term of art that you cannot make a determination has occurred or will occur until you know what the facts are.
MR. OAKLEY: I understand.
MR. PARKER: And so it's misleading to the FTC and to others to say for CON or any other purposes there's been a restructuring.

Page 11

MR. OAKLEY: Ms. Menk, clarify all of this for us.
MS. MENK: I will try to the best of my ability.
The way the department looks at determinations is they're based on proposed transaction, proposed activity. The restructuring we've historically looked at similar to licensure. If it's a restructuring under the Hospital Authority Act or under the Hospital Acquisition Act, that's an issue for another set of statutes, another regulatory process.
So what we concluded was not that it was, per se, a restructuring under the Hospital Authority Act or under the Hospital Acquisition Act but that based on the representation that it would be a restructuring, then it would be exempt from CON authorization and approval, just as the determination states it does not -- it does not find that the facility could be licensed separately. It's just -- it addresses the CON issues.
Similarly, it does not find that Phoebe North could enter into a lease under the

Page 12

Hospital Authority Act or address the Hospital Acquisition Act. It's simply relying on the facts as presented, which are limited. The determination is to the person requesting, or -- and that definition of person includes related persons.
So from the state's perspective, it does not address the Hospital Authority Act or the Hospital Acquisition Act. It would just -- it would be similar to the licensure statute and regulations. It's just not an issue that we reach in the determination process.
MR. OAKLEY: If this moves forward, when would the state take a position on that issue?
MS. MENK: The Hospital Authority Act and the Hospital Acquisition Act don't come under the purview of the state health planning. It would be up to -- as those are administered. And if Phoebe cannot enter into the lease, then the issue is just moot. We have a lot of times determinations the activity can't be completed because there are other state regulatory requirements. For instance, this determination is based on separate licensure. If they can't obtain separate licensure, then they can't meet

Page 13

the requirements of the determination. If the material facts as represented in the determination can't be met, then the determination does not apply.
MR. OAKLEY: Okay.
MR. PARKER: Mr. Oakley --
MR. OAKLEY: Wait. Let's make sure she's finished.
Anything else on the question of are there factual issues that would preclude me from granting summary judgment today?
MS. MENK: The department does not think there are factual issues to be -- there are not disputed factual issues. They are all matters of law. And, again, the department does not reach issues related to statutes over which it does not -- does not rec -- or the health -- excuse me. Let me correct myself. The health planning section of the department does not address in its determinations statutes over which it has no purview. However, the determination would not apply if the entities cannot obtain separate licensures or cannot enter into a restructuring lease. If Phoebe North cannot enter into a restructuring lease

Page 14

with North Albany or related parties of North Albany, then the premise for the determination would not be met.

MR. PARKER: Your Honor, the important issues are there is -- again, there has been no representation that NAMC would restructure. More importantly, restructuring is not a fact, even if they said they're going to restructure it. It's a determination you have to make legally as to whether -- and in this de novo hearing I submit that it is your role to determine the facts and the legal conclusions that are relevant to this determination letter, and it would be highly misleading -- it has been to the FTC, which is thinking about forcing the sale of the hospital that costs 195 million. A forced sale could be for much less, a huge loss.

They need clear direction of where we are, and to make a hypothetical determination that if somebody restructured -- and we don't know how you define restructuring because CON statute does not define it. And we've cited case law that says when you have a term like that, a key term that is not an ordinary term,

Page 15

you look to related statutes for a definition. I'll go through those in my presentation. That needs to be done now because you cannot determine for CON purposes that there's restructuring until you determine there is one under the facts that are presented in this proceeding.

And the way you do that, if it's not defined in the CON statute you look to related Hospital Authorities Law, Hospital Acquisition Act. You look at what facts have been presented as to who is located within the county, who controls NAMC, and then you determine for CON purposes is there a restructuring by lease, which cannot be determined here. And it would be highly mis --

MR. OAKLEY: Where would it be appropriate to determine that?

MR. PARKER: It would be -- it's appropriate to determine it right now, based on the record -- I think it would be very appropriate, in this de novo hearing, if you've made a determination consistent with the usual statutory construction principles laid out by the Georgia Supreme Court in recent cases, that

Page 16

when you have a term, a key term like "restructuring" that's not defined in the statute, you look to related statutes and look at the legislative intent, and that's how you determine. So I think you can determine it.

MR. OAKLEY: As a matter of law?

MR. PARKER: As a matter of law in this proceeding.

MR. OAKLEY: Let's assume that I do make a determination. And I'm very comfortable looking at the Hospital Authority Law and the other law that's there. Somebody has got to decide this. Let's assume that I do make a determination as to what the appropriate definition is. Don't we then have to have a factual hearing as to what is the nature of this restructuring? Isn't that -- isn't that outside -- I can make a legal ruling, but since we don't have the specifics of a restructuring, can I make a factual ruling without an evidentiary hearing on restructuring?

MR. PARKER: You only can if there's no dispute as to the facts. Now, as I've stated earlier, my understanding is NAMC does not have a principal place of business in Dougherty

Page 17

County, and it is only controlled by someone outside Dougherty County. Unless facts are presented by NAMC or DCH that are contrary to that, we don't have any dispute as to the facts and you can make the determination.

MR. OAKLEY: And Mr. Moldovan is saying that's premature to determine the framework for the issue and that he --

MR. PARKER: But he's the one that submitted the request, and the rules require specificity. And he -- to make that restructuring determination we got to have some facts now to make it.

MR. PARKER: Mr. Moldovan, do you agree that I can make a legal ruling on restructuring and that then there needs to be a factual hearing as to whether your client fits within that framework or not?

MR. MOLDOVAN: I think so, and I think that the issue that you've got is the -- when you look at the CON statute that grants the exemption for leasing, it says leasing and restructuring for a hospital authority is exempt from CON. The Hospital Authorities Act law and the Hospital Acquisition Law is

Page 18

different than the CON law, and it does sort of fall outside the purview of the health planning department. If you determine that what we would want to do here is a restructuring, and that would be basically the hospital authority terminating the lease with Phoebe North and then leasing it to North Albany and that would be a restructuring, then that argument would fall under CON exemption.

We would have to, obviously, meet all the other requirements of the Hospital Acquisition Act and the Hospital Authorities Law, which requires being domiciled in Dougherty County, and there's lots -- and there's other things besides that, as well. But until we actually are allowed to do that, and that means the FTC actually does require divestiture and does require the authority to do something, you can't even structure that at this point or know what that would look like.

So the question we posed to DCH was simply if we get to this point -- and we have to start somewhere, if we just start with all these transactions. You got to start with CON, is it a CON event. So that was the point of the

Page 19

question, is are there exemptions to the CON law that would allow us to move forward so we can make a determination as to which way we want to go with this. And that was the question.

I don't think it's all that complicated, really. It's if we meet these requirements, can we move forward. And that's the entire question. So I think the answer is you could look at restructuring. You could say, yes, I think that is -- what they're proposing is a restructuring. And then at some point if we decide that's what we're going to do and are allowed to do and if FTC says we can actually do that, which we don't know yet, we would have to come back then, obviously, and meet all those requirements. So -- but, again, you've got to start somewhere, and this is where you start.

MR. PARKER: Your Honor --

MR. OAKLEY: The FTC is looking to the state of Georgia and its processes for guidance, and they have basically put this ball in our court to give them guidance as to whether a CON is required or not. If -- at the

Page 20

risk of being too practical, if at the end of this I determine, as you're suggesting, that it's possible but that you're going to have to go through a lot of hoops to get there and one of those hoops is getting approval of the board and that's not likely to happen, if I were to put all of that in the order, then I start speculating about the future, that makes me feel uncomfortable because we don't know what the board would do. We think it's highly unlikely that the board would approve a lease as part of a restructuring, but I'm trying to look at the black and white of the law, and I'm trying to reach a determination that can give clarity to the FTC as soon as possible.

Now, Mr. Parker, you had something else to say.

MR. PARKER: I was going to say that what it sounds like they're now asking for is an advisory opinion. Just like the Georgia Supreme Court has refused to take questions, certify questions and issue advisory opinions, they're sort of saying, well, what if we come up with some facts we don't have today that might meet restructuring, would it be exempt?

Page 21

We're here today to look at this very determination letter where the state has determined there has been a restructuring. And the only facts we have in this record today that are pertinent to that issue are that NAMC is an out-of-state corporation. It is -- does not have a principal place of business in Albany, and it is owned or controlled by somebody out of the state. So it cannot be a restructuring. And if you look again at the rules for determination letters, they require specificity as to the facts.

MR. OAKLEY: So you're saying factually the clock has run, and we need to rule based on what the facts are in the record, right?

MR. PARKER: And, for instance, if two years from now they come back that they have some entity that's in Dougherty County that is not owned or controlled by anyone outside Dougherty County, they can come back with another determination request, saying, okay, based on these facts, can we restructure by lease.

MR. OAKLEY: Okay. Ms. Menk?

MS. MENK: Well, the department would just

Page 22

like to make one point. The Federal Trade Commission is not a party to this act. This is about the CON laws of the state of Georgia, and the department is very concerned about stretching the purview of its jurisdiction to accommodate any federal agency. So I do hope that we'll look at this in the context -- in the manner in which we normally deal with determinations and not with regard to any time issue or any matter related -- an issue related to what the FTC wants. They didn't ask for a determination. That is not the issue. North Albany asked for a determination based on CON laws of this state.

MR. OAKLEY: FTC did, however, ask for guidance.

MS. MENK: They did express a letter of interest, did not intervene in this appeal, and so -- and the department is speaking only with respect to the CON issues raised. Back to the restructuring that -- it's another one of those factors that happens after the fact, just like licensing. And we don't have jurisdiction of the Hospital Authority Act or the Hospital Acquisition Act. Generally if a term is not

Page 23

defined, you look to the dictionary definitions. They did state --

MR. OAKLEY: Let's defer the restructure question for a moment. Okay. I am as clear as I can be, as I can get on the summary judgmentable status of this. I'm going to make one preliminary ruling and then let you all argue the rest of the case, and that's the preliminary ruling that Mr. Parker's client, Phoebe, is correct, and its argument that the finding, in 2014-033, that Phoebe North is not owned or operated by or on behalf of the hospital authority is both factually incorrect and legally unsupportable. So I am concurring with Mr. Parker as to the beginning of the analysis of the key statute, O.C.G.A. 31-6-47(a)(9).

And with that in mind and with that ruling on the record, I will then let you all argue the remaining legal issues. And you can come back to the restructuring if you want in your arguments, but I think that's fairly clear. The banana being up here is symbolic of the fact that I'll let you all talk as long as you want to talk today to look at the other issues

Page 24

that are before us.

Mr. Parker? You're the appellant.

MR. PARKER: Your Honor, we have put together an outline of my presentation, which we're going to hand out here.

MR. OAKLEY: You can probably eliminate those first five pages.

MR. PARKER: Probably about half of them.

I'm going to -- this starts with the background. I think you probably read all the papers. You have the background. So let me move right to page 3 first. Can NAMC -- can North Albany acquire a hospital authority-related facility by purchase? And I think you've just ruled that based on 31-6-47(a)(9), that a CON would be required.

MR. OAKLEY: That's correct.

MR. PARKER: And pages 5 and 6 were to address the issue.

Now, if that is the case, then, secondarily, the discussion which has been in the determination letter, the arguments by North Albany and by DCH that there could be a decoupling of Phoebe North from Phoebe Putney Memorial Hospital, Inc., which operates

Page 25

Consolidated Hospitals, really is not necessary either because, again, that purchase is going to be subject to review.

MR. OAKLEY: So you're suggesting that the decoupling would only occur with the purchase?

MR. PARKER: No. It could happen with a lease first. I'm talking about the purchase situation.

MR. OAKLEY: Oh, okay.

MR. PARKER: And even if you decoupled the facility, it's still owned by the hospital authority. So the existing healthcare facility that would be purchased, still 31-6-47(a)(9) applies. That's starting on page 7.

I believe the department -- and I'll let them argue this point later -- I believe pursuant to their motion to remand, pursuant to their response to the appellants' motion for summary adjudication, has reconsidered its position that a purchase of a decoupled facility owned by the hospital authority would be -- would not be subject to CON. I think they now take the position, based on some prior decisions they have found, that indeed such a purchase would be -- obviously involve more

Page 26

than 2.5 million dollars, would be a capital expenditure, and is therefore reviewable under O.C.G.A. section 31-6-40(a)(2), which is --

MR. OAKLEY: Mr. Parker, real quick, on the record here, I was looking for confirmation of value in excess of the threshold, and I found, in looking through there, what I think is current, at least is current enough to be valid and probably could be stipulated, anyway, that the value is in excess of two and a half million dollars.

Exhibit 10 to your motion, to Attachment B2, is the application for property exemption of Phoebe showing fair market value to the county of 20 million dollars, 20,210,400. I think that's a current enough value that even if Mr. Moldovan doesn't stipulate, that we've got the value issue put to bed, that it's over two and a half million dollars.

MR. PARKER: I might add, too, your Honor, there is a rule which I'm looking for -- oh, page 6, Rule 111-2-2-.01(39)(g), which treats as a new institutional health service the acquisition of an existing healthcare facility which is owned or operated by or on behalf of a

Page 27

hospital authority, except as otherwise provided in these rules. That particular rule doesn't even require to have an expenditure, so that further supports the point.

I'm going through this trying to shortcut this.

I would make the point, starting on page 10, that the position of North Albany has been that because it is not currently a healthcare facility, then there would be no acquisition by a healthcare facility that would trigger 31-6-47(a)(9).

The department has disagreed with that position all along, and we have included in our pleadings, in our response to the motions for summary adjudication of the other parties, several policy statements where the department has expressed a consistent position that even -- when an expenditure is made by any entity, a developer, a parent company, for the purchase or construction of a facility that will be operated as a healthcare facility, then even if the party making the expenditure is not a healthcare facility, the expenditure is on behalf of a healthcare facility. And I believe

Page 28

that's been the department's position all along. So in that regard North Albany's position is incorrect.

Also -- and I'm sure you've seen this, but I think one very important provision, your Honor, if you look at page 14 -- this goes to the decoupling issue. Could there be a decoupling in the first place here? Can you divide a single-license hospital into two licensed hospitals without a CON? The legislature in 2008, in the major CON amendments, amended section 31-6-41(a) of the statute to allow the division -- if the department decided to allow it, to allow the division of certain relocating nursing facilities into two licensed facilities.

As we indicate, based on principles of statutory construction, and we cited a couple of Supreme Court cases, that is a clear indication by -- that by that being the only provision in the CON statute that allows the division of a single facility into two, and it doesn't apply to hospitals, that indicates the legislature did not intend to allow the division of hospitals without the CON.

Page 29

Let me address the issue of service specific versus general considerations, and we start that at page 19.

MR. OAKLEY: Before you get there, I'm not positive that this is the portion of your argument that I've got some questions on, but I think it is.

How do you address those two agency decisions relating to the splitting off of the psych hospitals, the psych units?

MR. PARKER: Two ways.

MR. OAKLEY: That is in this area, right?

MR. PARKER: Right. That's the issue I just raised.

First of all, we think they're wrong. That's number one. They weren't contested.

Secondly, prior to this one, the only time they had allowed psychiatric and rehab hospitals --

MR. OAKLEY: But you're taking the position that there's no statutory authority for the agency --

MR. PARKER: To divide.

MR. OAKLEY: -- to do that at all.

MR. PARKER: That's correct.

Page 30

MR. OAKLEY: And you're just saying factually it's different, but legally it was a bad decision.
MR. PARKER: I think it was a bad decision based -- and not only was it a bad decision. It is inconsistent with numerous prior determination letters, decisions of the agency that we have cited and quoted. And the rule of law -- and we've cited the case law that says, both federal courts and Georgia courts, that when you're going to have inconsistent agency decisions, particularly as to the most recent ones being inconsistent with prior ones, then they're entitled to little, if any, weight. So that's yet another consideration. So I can distinguish those cases on the facts.
Any other questions on that?
MR. OAKLEY: No, go ahead.
MR. PARKER: Page 20, service specific versus general considerations. The department has acknowledged in its response to the appellants' motion for summary adjudication that a purchase of a decoupled Phoebe North by North Albany would be subject to the filing of a CON application and review under the general

Page 31

considerations, but the department takes the position the service-specific considerations would not apply. That position I believe is based on an interpretation of the short stay general hospital bed rule which applies to new -- actually, let me get you the actual language.
Looking on page 20, item 2, first bullet point, it applies to, quote, the establishment of a new hospital, DCH Rule 111-2-2-20(1)(a). However, as discussed in here, to get to the point of a decoupling, you would have to terminate license, new licenses be issued. Then for NAMC to come in and purchase the facility, they would have to get yet a third license. You're establishing new healthcare facilities every time you do that.
MR. OAKLEY: What difference does it make, Mr. Parker, as to whether it's service specific or general if the fundamental issue that's being asked to address in this determination letter is whether a CON is applicable, not what is required under the CON?
MR. PARKER: The determination letter did make that determination, and I think the reason

Page 32

that -- well, first of all, the requester asked for that determination, and the reason it did is because it had obviously been talking with the FTC. And FTC in their letter said, we want to see not only is a CON not required, but if it is --
MR. OAKLEY: What would be the --
MR. PARKER: The service-specific considerations. That's what I'm trying to --
MR. OAKLEY: That's the tie-in.
MR. PARKER: That's the tie-in.
MR. OAKLEY: And we have that letter from the spring in the file somewhere, right?
MR. PARKER: That's correct.
Your Honor, the first O.C.G.A. section 31-6-40(a) states -- defines a new institutional service to include the construction, development, or other establishment of a new healthcare facility. So the question becomes what is the other establishment? Because under the service-specific rule, it uses the word "establishment." Obviously it's something beyond construction. Obviously it's something other than development, which is also defined

Page 33

in the statute. It appears on its face to be a very broad term.
And we have cited, at the bottom of page 20, DET2004-088, in which the department itself, in looking at the -- in denying the division of an ambulatory surgery center into two licensed facilities, stated that the decoupled ambulatory surgery center, quote, which received the new license would be a newly established healthcare facility, using that term "established."
Moreover, we have found two admittedly not recent, but they're the only two we could find that give guidance, two recent court decisions that have determined -- have defined the term "establish" very broadly, if I can find those right quick.
Yes. Go to page 12, item number 3, at the bottom of page 12. And, by the way, item number 2 is the section of the statute at issue. And in a 1936 Georgia Supreme Court case involving the Georgia PSC and Georgia Power Company --
MR. OAKLEY: That predates even our birth.
MR. PARKER: But it still -- nothing else

Page 34

I've seen has changed this. It has an extremely broad -- it goes on and on -- definition of what established could be. For instance, it could be to form something. It doesn't -- it's not restricted to construction or whatever. It's a very broad term.

And then we found an Iowa Supreme Court case, which actually even said establish could mean to purchase. So it is -- clearly it is a very broad term that goes beyond construction or development.

We therefore believe that under the service-specific rule the purchase or lease of a decoupled Phoebe North would constitute the establishment of a new hospital and would therefore be subject to review under the service-specific considerations, in addition to the general considerations.

Finally, your Honor, back to the lease issue -- and let me see what we have to address that needs to be addressed. This starts at page 21.

Oh, one point I think is important to make here, and it's inconsistent with the argument that Mr. Moldovan made earlier. If you look at

Page 35

the top of page 23, in their own motion for summary judgment, at page 18, in talking about a possible lease, North Albany itself quoted the statutory principle that all statutes relating to the same subject matter are construed together and harmonize wherever possible so as to ascertain the legislative intent and give effect thereto. Cases like Chase v. State have made that point. So I think that supports the argument we were making earlier that in making -- in determining summary judgment here for CON purposes, those other statutes need to be considered.

And I think that summarizes our argument.

MR. OAKLEY: Mr. Moldovan, the floor is yours.

MR. MOLDOVAN: The -- just sort of preliminarily, and I realize we're talking about the substance at this point, but one of the points we did make in our briefs is that Phoebe didn't raise any of the substantive issues at all before the 30-day deadline or even after the 30-day deadline, and the focus was simply on standing and rightness issues. We think this is a legitimate point of concern

Page 36

we have, Mr. Oakley, that there was not an opportunity before the department for us to address those arguments or for the department to consider them. I realize they're now being considered by you.

MR. OAKLEY: Which I guess I need to formally rule that the waiver argument I don't find persuasive.

MR. MOLDOVAN: Okay.

MR. OAKLEY: So that perfects your appeal rights on that one.

MR. MOLDOVAN: All right. I just want to put that on the record.

And then going to the substance, the request, as you know, was pretty narrow. It simply asked if NAMC has the opportunity to acquire Phoebe North, or formerly Palmyra, what are the CON ramifications? First, it would have to be decoupled, which is basically meaning that you take the facilities that are now linked by virtue of the acquisition, and you take them apart.

All the prior decisions that we have cited are directly on point, and these are actually fairly recent. You've got all within the past

Page 37

three or four years that we cite where basically you have an entity like Palmyra, or Phoebe North, that has the right to operate separately, whether by CON or grandfather rights, gets acquired by a facility that is separately licensed or CON'ed, and it's operated under a single license. Those are the exact same facts that are in the prior cases we've cited and directly on point.

And what happens is, what the state has ruled repeatedly, is that because the right to operate the CON or the grandfather rights continue to go with the facility, if the owner of those facilities decides to break them back apart for whatever reason, decouple them is what we're using, there's no -- it's not a CON event. You're not asking for a CON to create a new hospital, a new facility. You're not adding capacity. You're simply breaking them back apart, and then you're selling them or leasing them to a third party.

MR. OAKLEY: Which of those cases do you think is the most persuasive, the most on point, of those recent cases?

MR. MOLDOVAN: Yeah. Greenfield is

Page 38

directly on point. Emory University is on point. South Georgia is on point. Those all specifically deal with the same exact situation. The cases that Mr. Parker cites are situations where you have a single entity and it wants to break apart, and that's where you have, for example, the surgery center cases he talks about. If I have a surgery center that has eight ORs and I want to take four of those ORs and move them across town, that would be a CON event because those four rooms were not previously CON'ed or grandfathered before they were created. So all the cases he cites is truly dealing with a single entity that's being split apart into two, and that's always been a CON event because you're creating a new entity or a new facility that didn't exist previously.

MR. OAKLEY: And the critical issue there is whether or not they were grandfathered?

MR. MOLDOVAN: Correct, or had a CON previously. In this case it's grandfathered since Palmyra has been around for so long. That's exactly right. That's the critical fact in all those cases, and that's the critical fact here. So we would think that -- and it's

Page 39

clear from the cases that we cite that I think are directly on point, unlike Mr. Parker's cases, where you have basically the CON or grandfather rights here continue to go with the facility, and all that's happening in the decoupling is you're taking them back apart and then you're selling them or leasing them out to a third party. So we think that's not a CON event, and the cases that we cite post 2008, by the way, specifically deal with that situation.

I would note that the 2008 statute that Mr. Parker cites to specifically talks about the breaking up of a single entity. It doesn't deal with the situation we have here, which is the decoupling of two hospitals that have the right to operate separately, have always had the right to operate separately.

MR. OAKLEY: What happens as a matter of law when they come together and operate under one license?

MR. MOLDOVAN: Yeah. So under -- they're allowed to do that, and what happens is that when they decouple it -- and this is discussed in the other cases that we cite, is Palmyra or Phoebe North would go back and get a license to

Page 40

operate independently. And, by the way, we don't think it has to be done in steps. Assuming that divestiture is happening, it could be done all simultaneously, which what would happen is that they would be decoupled. Buyers, hopefully North Albany, would have the right to acquire that facility, and then it would go get a license to operate that facility. It could be done in steps where you get a license first for Phoebe North or Palmyra, and then a license then is issued to the buyer, North Albany, but we think it could be done all simultaneously.

MR. OAKLEY: And the cases that you cite, how do they address the grandfathering and whether or not that's ever lost?

MR. MOLDOVAN: Basically it's never lost. As long as you continue to operate that facility, you don't lose it. And I think the distinction -- one of the distinctions I think that I've seen come up in the cases is that if Palmyra -- Phoebe decided to relocate Palmyra, say we're not even involved in this case, and tomorrow they say, look, we're going to take Palmyra, we're going to relocate it across

Page 41

town, that would be a CON event.

But here, because it stays in the exact same place, continues to operate, continues to function as a hospital, it's continued to be licensed as a hospital, it retains its grandfather rights. You don't lose that. You continue to have that right to continue to operate it, whether it's part of Phoebe or whether it's separately. If it wanted to decouple it tomorrow and just continue to operate itself, it could. It would not be a CON event.

And that's what those cases and the proposition of those cases stand for. I do think that's a critical fact, that really it's undisputed here that it is grandfathered. It has been operated as a hospital. It continues to be operated as a hospital. And the fact it has a nursing home license doesn't change anything.

In the cases we cite it was the same scenario, where a facility was acquired, put under a single license, the hospital license, and then the hospital, for whatever reason, decided to sell it or decouple it.

Page 42

Once you get past --
MR. OAKLEY: Hold on one second, please.
Go ahead.
MR. MOLDOVAN: Once you get past the decoupling, then, of course, the issue is what happens then? North Albany -- and I think you've already ruled that because it's a hospital authority hospital, a CON -- we agree that if it's a hospital authority hospital, that a CON would have to be obtained by the buyer, which in this case would be North Albany.
And if you look at the decision that DCH made in this case, they actually addressed that possibility, which is one of the reasons we opposed a remand. They've already addressed it. They said if a CON is required under any circumstances, it would simply be a general consideration CON. And that's -- and I think you asked Mr. Parker why is that important. Well, it's important because the service-specific rules, one, were relied upon by the FTC to determine that CON would be a problem, and the reason that they're a problem is that they're much more cumbersome to me.

Page 43

You've got a need methodology. You've got lots of other requirements that are very, very difficult to meet if you apply for a certificate of need. If you're just having to meet the general considerations, you get a CON but apply for the general considerations, frankly, it's easier to meet, not that it's a guarantee.
MR. OAKLEY: And isn't it accurate that the service-specific requirements more directly relate to the antitrust concerns that the FTC had?
MR. MOLDOVAN: Yes, sir, they do, and that's why it was important in our determination to ask that question. And when you look at the service-specific rules -- I think Mr. Parker alluded to it to some extent -- it really deals with the establishment of a new hospital. Obviously Palmyra North, Palmyra Phoebe North, has been around for a very, very long time. It is not a new facility. Therefore, the service-specific rules do not apply.
There simply are no rules, when you look at those rules, that deal with a situation

Page 44

where you're taking a facility that's been around for 30, 40 years and saying, okay, somehow it's a new facility, regardless of the fact that it's operated now at this point or owned by the hospital authority. That doesn't change the analysis. If it's a preexisting facility and a buyer has to get a CON, the CON would simply be the general considerations.
And so the state was correct in that ruling, and the state is correct, if that's their position today, and I think it is, the state is correct on that, is that any CON event that would occur as a result of the acquisition by purchase would be under the general considerations because the specific-service rules on their face do not apply.
I don't want to talk too much about the lease restructuring, but just quickly, because it did come up again, is that, you know, again, the only question we asked is that under the statute, the CON statute that talks about an exemption, if you meet that exemption, then you're exempt from a CON. So if we could -- if we are in an opportunity that we could lease the facility from the authority -- which might

Page 45

be a viable alternative, frankly, because it would be a lease as opposed to a purchase. The question asked of DCH was if we meet that, would a CON be required. And, again, it was a very simple question, and the very simple answer is, well, if you meet it, you don't need to get a CON.
The term "restructuring," Mr. Parker points out, is not really defined anywhere, which is true, but when you look at the provisions that he actually cites in his own presentation dealing with the Hospital Authorities Law and the Hospital Acquisition Act, it simply says a lease by a hospital authority to a for-profit or a not-for-profit entity is basically -- would be considered a restructuring so that a lease itself -- and there are other requirements that we've discussed today about being domiciled, and lots of other things, but that on its face would be -- that's a viable alternative, and a CON would not be required.
Under any scenario that we're talking about, if we get to the point where the FTC does require divestiture or other remedies,

Page 46

obviously we would have to come back to DCH and say, okay, now that we have this ruling, FTC is requiring divestiture. North Albany hopefully would be the party acquiring it. This is what the plan is. We're going to apply for a CON to acquire it or we've got the right to lease it. Here is what we're going to do. And then at that point we would have to obviously meet licensure requirements, as well, but the declaratory rule here is very broad and encourages people to come to the agency if they have a belief -- it's a very broad rule. It's actually broader than even the declaratory judgment statute in Georgia. If you believe that the CON could impact your -- what you want to do, come to us and ask and we'll try and give you some guidance.

And that's basically what we did here, is we said, okay, we need some guidance from DCH about how we can proceed here. We don't want to do all of this if we can't get some idea of what our rights are. And so that was the point of the request, is to simply ask the question. If it's decoupled, do we need a CON? Not we, but do they. Is it a CON event? No. If we

Page 47

acquire it by acquiring and paying -- and I believe you're right. It would probably be over 2.5 million. Do we need a CON? The answer today, I think based upon the department's position, is you need it, but it would be general considerations. That's correct. The service-specific rules on their face don't apply. Or if we lease it and can meet the other requirements outside of the CON environment, would that be a CON event? The answer is no. And we think that's correct.

So, again, we don't think there are any factual disputes. This is a typical declaratory judgment type ruling where somebody comes in and asks questions and gets guidance. There's no obligation and the state doesn't make you do anything after you get it. It gives you an opportunity to decide how you want to proceed. There is no time limit or deadline. Obviously if the facts change over time, and what the state has ruled upon today, the facts are different, it wouldn't apply. But this is typical. This is the way the process works. So we would ask you to grant summary judgment for us. Thank you.

Page 48

MR. OAKLEY: Okay.

MR. PARKER: May I respond to a couple of points?

MR. OAKLEY: Wait -- no, go ahead. Go ahead and respond.

MR. PARKER: The key thing that Mr. Moldovan just said is fundamentally wrong. First of all, he tried to distinguish the earlier rulings that we've cited by the department from, like, the psych, the rehab, by saying grandfathering somehow makes a difference. We've cited on the bottom of page 15 the determination letter, Atlanta Outpatient Surgery Center, where a grandfathered AmSurg center was told it could not divide into two parts. The second part would be a newly established healthcare facility. Several of these other rulings involve grandfathered facilities.

Secondly, the cases he said he relied on, the first one he mentioned was Greenleaf. Greenleaf was a psychiatric unit of South Georgia Medical Center. The department ruled it could be decoupled, but then the reason they were decoupling was a third party, Acadia,

Page 49

wanted to buy it, and the department then determined, yes, you can buy it without a CON but made it clear that the only reason they reached that determination was because it was not a capital expenditure. It was less than two and a half million dollars. So even Greenleaf, that sale would not have been approved.

Third, Mr. Moldovan says, well, Phoebe North and main campus were put together, consolidated, and can be decoupled tomorrow. There is absolutely no statutory or rule provision that allows the decoupling of a healthcare facility. Right now Phoebe Putney Memorial Hospital is a single license healthcare facility. And as I indicated earlier, the only statutory authority for dividing any kind of healthcare facility is for relocated nursing homes pursuant to the 2008 amendments.

And one final thing to remember, and we cite this in our presentation, what we're talking about here is several exemptions or exclusions from review being sought by North Albany. You've heard me argue it before and

Page 50

you're well aware of the numerous Georgia Supreme Court cases that have said you strictly construe exemptions from statutes of general applicability, particularly regulatory statutes, you strictly construe them and you make -- if there's any doubt, the decision is not to grant an exemption. They're trying to get all of these exemptions based on facts that don't even exist, based on arguments that have absolutely no support in a statute or rule.

And this is a very important case. They have been talking with the FTC. We've made that point. The FTC staff made that point. And these issues are going -- have -- whether -- I understand DCH's point, but the fact is the FTC staff inserted itself into this case, DCH allowed it to, twice. There was a settlement agreement entered in good faith when this complaint was pending in early 2013, negotiated at great length, where remedies were included, where, okay, there was an antitrust violation, but here are the remedies. It went to the public comment. Under the rules of the FTC, they had a set public comment period. NAMC did not submit any comments. It didn't

Page 51

even exist. The normal process and the only thing allowed in the rules is then for the FTC commissioners to vote. They had already sent out a proposed consent order to agree to that settlement.

Nothing changed after that except suddenly, three or four months later, where no ex parte communications are allowed by FTC rules, we found out there had been a bunch of ex parte communications, admitted by Dr. Stubbs, admitted by the FTC staff, and we put the evidence in the record.

This, whether DCH -- I understand they want to limit this, but the FTC and North Albany inserted the FTC right in the middle of this. This is a very key proceeding. This is the most important, by far, CON proceeding I've ever been involved in.

MR. MOLDOVAN: May I respond?

MR. OAKLEY: (Nodding head.)

MR. MOLDOVAN: Every single case, the ones on page 15 that Mr. Parker cites, those entities that were grandfathered, was a single entity. So Atlanta Outpatient Surgery Center, when he talks about the fact that

Page 52

grandfathering doesn't make it so, that entity was, in fact, grandfathered as a whole and was trying to split into two.

MR. OAKLEY: And what is the rational, logical difference between that fact pattern and the one we have here?

MR. MOLDOVAN: Because in the Atlanta Outpatient Surgery Center case and the others that Mr. Parker cites it was always a single entity, from the time -- the time of the beginning. So the grandfather rights accrue to that single entity, in that location going forward, up to the point that it wanted to split into two. So for purposes of state inventory, state capacity, capacity in the community, the number of beds or ORs it had in the surgery center remained exactly the same. There was one facility.

In the cases I cite, and the one we have pending before you, you have two facilities, two separate hospitals, with rights going way back to operate separately, Phoebe and Phoebe North, Palmyra, operating separately. The grandfather rights attached to Palmyra continue to exist today. The fact that it was acquired

Page 53

by Palmyra and put under a single license doesn't change those grandfather rights. That's the single -- that's the most important fact that distinguishes these cases.

In terms of the -- and I'm not sure I need to respond to a bunch of stuff that's really not in the record about what the FTC has or hasn't done.

MR. OAKLEY: I don't think that's critical today.

MR. MOLDOVAN: Obviously there's a response to that, and I would note that there's been lots of communications we're aware of where Phoebe is running around up there with congressmen, lots of other people, trying to do things. So that's not in the record, but I think it's -- I want to point out that the comments made by Mr. Parker are probably inaccurate, and, in fact, if we look at exactly what they've been doing, it's probably inappropriate but --

MR. OAKLEY: Both of you have made your comments, and I don't find them relevant to what we're trying to do today, but the record will speak for itself.

Page 54

MR. MOLDOVAN: Thank you. That's all I have.
MR. OAKLEY: Okay. Ms. Menk, your turn.
MS. MENK: I don't want to spend too long on this, but I do want to start with the restructuring to let you know that under the Hospital Acquisition Act there is a process before the attorney general's office to get a letter --
MR. OAKLEY: Right.
MS. MENK: -- stating that you comply with the restructuring. Sometimes in the determination process we have that letter in advance, sometimes we don't, because it's a proposed activity. But that would be another state statute that has a process for which they could go through for that determination. So to the extent there may be multiple state statutes impacting this litigation in other venues, in other jurisdictions, not the CON laws, but this issue is the CON laws of the state of Georgia.
Then, second -- and, oh, the Hospital Acquisition Act was represented by North Albany that they would meet the restructuring, that they cited to it. So that if they're not able

Page 55

to obtain that letter that we've seen -- we don't administer the acquisition act, so I can't speak to that at all, other than -- maybe in my role as an attorney, but in my role as the -- representing the agency and this proceeding, it's not the CON laws.
So -- and if they could not obtain one of those letters, NAMC or a related person under the determination, then this particular determination would not apply on that, on that basis, on that third point, if it's not a restructuring, as they represented. And that happens sometimes, for instance, when we have a capital expenditure and people represent that it's going to be under the threshold, under 2.5 as adjusted. If it goes over, they stop and they come in and get a CON. Sometimes the material facts change. So that letter would be relevant. Their ability to obtain that would be relevant, and that would be the jurisdiction in which to decide that issue, not the CON jurisdiction, would be the department's position, because it does not apply the Hospital Acquisition Act.
And so the department would urge that we

Page 56

not speak on more state laws than come within this jurisdiction. Even if other state laws may have some impact on other pending litigations, that would be a matter for those parties to realize in their other litigation.
As to the decoupling issue, the department references its motion for partial summary adjudication and its response to the Phoebe entities and the authority's motion. The department allowed the coupling. There's no express statute or rule on coupling. It stands on the CON, grandfather, and -- excuse me, the grandfather status and the CON authorizations of the two hospitals. And the department recognized that it doesn't administer the licensure statutes, and that's a function of a licensure. It did not require Phoebe or Phoebe North to obtain a new CON. If they closed Phoebe North, wanted to physically consolidate two sites, there is a process to go through and get a new CON for that one physical hospital. But that was not their proposal. So we're here on -- they relied -- to gain coupling, they relied on existing CONs and grandfather authorizations. So all we're saying is from a

Page 57

CON perspective, with the decoupling, within those existing grandfather and CON authorizations, it would not be CON reviewable.
MR. OAKLEY: You are agreeing with Mr. Moldovan's position on that point?
MS. MENK: Yes, sir.
MR. OAKLEY: Okay.
MS. MENK: And that is stated more specifically in our responses to the Phoebe entity, and we cite some additional decisions which are also cited by Mr. Moldovan on decoupling and again with reference to the initial decision allowing the coupling. The department relied on -- Phoebe North today operates on its existing grandfather and CON authorizations. These are existing for two new hospitals. The coupling did not invalidate them. They didn't lose authority for all those beds at Phoebe North. So decoupling --
MR. OAKLEY: What was the statutory authority that the department had to allow the decoupling of those -- the psych hospital in those two recent cases?
MS. MENK: The psych and the Emory -- there was about four recent cases, but the

Page 58

statutory authority is that they already have CON authorization. And they have CON authorization, the licensure, both the coupling -- there's no statute that says you can couple because it's a function of licensure. So both the coupling and the decoupling are based on the existing CON authorizations and grandfathers for two facilities.

MR. OAKLEY: How do you address Mr. Parker's concerns that the statute that addresses decoupling only references the ability of certain nursing homes to do that?

MS. MENK: And the department addressed that in its responses to the Phoebe entities and the authority and would reference that, but that statute is where -- that applies where you only -- you have a nursing home that only has authorization for one facility. This is where we get back to you didn't lose your authorization for two hospitals. Those beds for Phoebe North are still relying on the grandfather and CON authorization. Otherwise, Phoebe wouldn't have CON authorization for those beds over there if they had lost it

Page 59

because they combined the license. So combining and decoupling the license didn't impact the CON authorization. 31-6-41(a) speaks to nursing home facilities that only have authorization for one facility and they want to divide and relocate. That's not the issue here today.

MR. OAKLEY: Well, what about the rest of that statute that says here is the one exception to the general rule?

MS. MENK: Well, it's under the relocation provisions, and it doesn't say it's an exception to the -- there's nothing that says you can't decouple. There's nothing that says that. It says -- 41(a) is speaking to relocations and says that you have to relocate an existing -- a whole entire existing healthcare facility. And so this is saying where you can relocate part of it. And this is where they only have CON authorization. This isn't talking about North -- nursing homes that have coupled or decoupling. They only have CON authorization for one facility. And this decision would never apply to something that only has grand -- the underlying grandfather

Page 60

CON authorization if it doesn't have underlying authority for two facilities or separate services. You're talking about within the scope of the CON authorization. Now, while it's licensed together, the department will allow reporting on one and will treat it as a licensed facility, but that does not invalidate the underlying authorization for CON -- for grandfather and CON authorization as two facilities. So we'll just --

MR. OAKLEY: Look at page 7 of Mr. Parker's handout --

MS. MENK: Yes.

MR. OAKLEY: -- the heading at the top of that page. Do you agree or disagree with that statement as to the department?

MS. MENK: That it would require -- since it's owned by a hospital authority, it would require CON review and approval not to -- not to decouple --

MR. OAKLEY: Of a decoupled.

MS. MENK: Once it's decoupled, separate -- once we've gone through the decoupling, and that's not CON reviewable, but then it needs to obtain -- prove that it can be

Page 61

separately licensed to meet that and prove that it can be decoupled, and then to purchase it NAMC would need a CON if it's a hospital -- as a hospital authority. As you ruled, it's a hospital authority hospital.

MR. OAKLEY: So you agree with this position.

MS. MENK: Yes.

MR. OAKLEY: Okay.

MS. MENK: Yes. And I would like to point out, just for the record, that the department provided the decisions that it found and attached to its motion for remand independently of any parties, and the department provided those to the court as it could not distinguish it. And, of course, you've already -- you've ruled on that. However, a remand in this case would still be helpful to the department if it's helpful to the court so that it could speak more directly on the CON review of a hospital authority-owned hospital, to address more directly the issue of Mr. Moldovan. The department didn't speak on that directly because it reached another conclusion based on a determination, which now appears to be

Page 62

distinguished, but it does dis -- it does not agree with that position of Mr. Moldovan but if it could speak more clearly would allow a more -- a fuller response to that.

As far as the review criteria that are applicable to the CON review of a hospital authority-owned hospital, the department did mention that it is reviewed, in the current law under a general consideration, how the final analysis and evaluation of the exact criteria that apply, as we footnoted in our response, is based on the CON laws at the time an application is filed. So that would be -- I don't know if there would be additional criteria, considerations, rules, et cetera.

So I want to make that clear now that we have moved into the ruling that it is a hospital authority-owned hospital but would renew, again, the request for a remand so that the department could speak a little more directly and clearly to some of these issues. However, we defer to the hearing officer. If he would prefer to handle that on de novo review, that's acceptable. But since the issue of the hearing officer's authority to remand

Page 63

was raised by Mr. Moldovan, we would like to point the court to -- the Office of State Administrative Hearings also operates under the APA, and OSA has adopted Rule 616-1-2-.2(a) --

MR. OAKLEY: I'm familiar with that rule.

MS. MENK: -- which interprets the APA. Rules are adopted in accord with the governing statute, and it interprets the APA to allow the hearing officer to remand, but, of course, that's at your discretion. If it would be helpful for the department to speak more directly, we would be glad to do so.

MR. OAKLEY: I think it's discretionary.

MS. MENK: Yes, and we -- the department is available to speak more directly if that would be helpful to the hearing officer, would help the record as far as an initial decision, actually speaking to the review of hospital authority-owned hospitals. And that's all the department has. The department would stand on its motion for summary adjudication and its response to the Phoebe entities on the decoupling and is available for any other questions on that.

MR. OAKLEY: Okay. Response, Mr. Parker?

Page 64

MR. PARKER: Just a couple of points. And I think -- on the decoupling, I think both Ms. Menk and Mr. Moldovan have suggested, well, if Phoebe, Phoebe North, were allowed to come together based on a grandfather and CON, they could be taken apart the same way. That's not what happened. The determination letter was sought and issued by the department, which allowed the hospital authority, which already owned and leased the main campus of Phoebe, allowed it pursuant to 31-6-47(a)(9).1, the restructuring provision --

MR. OAKLEY: Right.

MR. PARKER: -- to acquire Phoebe North because it was a hospital authority making the restructuring and Phoebe North was within the same county, so all the tests apply. Then you also have a specific licensure provision that we have cited -- it's also in our handout -- which licensure allows the division, allows multi-campus facilities within close proximity, if they have the same governance, to get a single license. So what happened in Phoebe's case was done pursuant to a specific CON statute and a specific licensure rule. On the

Page 65

other hand, there is absolutely nothing in the statute or in the rules based on grandfather, and CON, or any other reason, that allows decoupling. And regardless of what the nursing home relocation was all about, the fact is, that is the only place the legislature has specifically provided for any sort of division of facility.

And I might add I think Mr. Moldovan said the general considerations are easy to meet. I have a stack of decisions, three free-standing emergency center applications, your Green Acres decision --

MR. OAKLEY: That always comes out, doesn't it?

MR. PARKER: I had to do that. The Henry County Cancer Center case. And that one, even though they had a service-specific rule for radiation therapy, the analysis by the hearing officer based it on the general need, the general need analysis, not on the specific. So there are plenty of considerations that -- on which projects are being -- I don't think that's pertinent here. It's pertinent for the FTC.

Page 66

MS. MENK: Could I speak briefly to that? The department in the determination that Mr. Parker referenced, the initial acquisition -- well, actually, there's a separate determination by the hospital authority to acquire Phoebe North, and Mr. Basarrate filed another determination for the lease and restructuring of Phoebe North. And I may be wrong, but I believe Mr. Basarrate actually provided one of the letters from the AG's office, but I'd have to check if that's incorrect.

And so the 9.1 applied to the restructuring there, but then another related issue raised in that determination was the decoupling. The department did not rely on 9.1 -- I mean, excuse me, the coupling. The department did not rely on 9.1 and, in fact, had to specifically distinguish a rule under the service-specific rules that requires a CON when you consolidate two inpatient sites and specifically distinguish that Phoebe and Phoebe North were not asking to combine two inpatient sites.

And the department -- so it distinguished

Page 67

one CON, but it did not rely on the licensure provision for the coupling, but it specifically stated that we don't reach issues of licensure. Just as here. If there were a licensure provision that did not allow the decoupling, then they would -- they couldn't be decoupled. Similar to the restructuring issue. If that separate process under the acquisition -- if they don't have a letter, it just doesn't apply, if they can't get separately licensed. So it's a similar process. We don't apply those statutes. And this is here -- we're here today only to address the CON issues for the proposed activity.

MR. OAKLEY: Mr. Moldovan?

MR. MOLDOVAN: Nothing further.

MR. OAKLEY: Let me have just two or three minutes to get my thoughts together. Take a short break.

(Recess taken.)

MR. OAKLEY: Let's go back on the record. This is a complex file. It's taken a lot of thought by a lot of folks, so I don't make these rulings in a haphazard fashion. I rule that the issue that's reflected on page 7 of

Page 68

Mr. Parker's handout today -- I agree with his contention that it would require prior CON review and approval of North Albany's purchase of a decoupled Phoebe North Hospital. I also agree with the position of Phoebe, as expressed on page 10, that the acquisition of a decoupled Phoebe North Hospital would not be CON exempt.

I also agree with Phoebe that the statement on page 12, the heading on page 12 of Mr. Parker's handout, that the decoupling of the authority's single licensed hospital and subsequent sale to be relicensed and operated by an unrelated entity would be subject to prior CON review and approval.

I am deferring -- oh, I also rule that the statement on page 20 of Mr. Parker's handout, the service-specific considerations for short stay general hospitals is applicable and must be applied in this case.

I am deferring for a little further thought on my part on the issue of a lease and restructuring as expressed on page 22 of Mr. Parker's handout and subsequent pages.

Let's look at the practical requirements of these rulings. And let's assume that I deny

Page 69

the portion of the summary judgment that relates to the lease and restructuring issue and we have a fact-based hearing on this on the scheduled date, which is the end of this month? We have a date, but, I'm sorry, I don't have that date.

MR. PARKER: 24th, 25th.

MR. OAKLEY: Somewhere at the end of -- what would that hearing look like?

Mr. Moldovan?

MR. MOLDOVAN: I don't know. I don't think we have any witnesses or anything. I don't know.

MR. OAKLEY: Mr. Parker?

MR. PARKER: I think we would need to call Mr. -- was it Edwards? Whoever the request -- the determination was issued to, who is the CEO of North Albany. And that was part of our discovery.

MR. OAKLEY: And the part of that discovery relates to what? I've not ruled on any of --

MR. PARKER: Who owns it, where is it located, does anybody else control it, those issues that are pertinent to restructuring.

Page 70

MR. OAKLEY: And those issues could be addressed by the CEO. If they couldn't be addressed by him, there wouldn't be any other witnesses that would rationally be able to answer those.
MR. PARKER: I don't know of anybody else associated with that entity.
MR. OAKLEY: So if we issued a subpoena for his attendance at a hearing, that would satisfy your concerns?
MR. PARKER: If -- also there were a couple of document requests for financials. I think that would show, too, whether they had the ability to acquire, which was part of their statement in their request. They said they will be able to acquire it, or to lease it.
MR. OAKLEY: So if you have a subpoena with a document request attached to bring to the hearing, that would suffice, correct?
MR. PARKER: Correct.
MR. MOLDOVAN: Mr. Oakley, I can tell you that there's -- it's a new entity, as Mr. Parker points out. So there's going to be no financials. And Mr. Alexander is in Tennessee. So if those are the facts you need

Page 71

to rule, then have at it.
MR. PARKER: Your Honor, I may -- I'm glad to work with Mr. Moldovan to try to stipulate.
MR. OAKLEY: That would be helpful. I know rationally that ought to be done, but I also know that practically we almost never get stipulations. So we will -- let's do this. We will hold that hearing date open. To the extent that we can get a stipulation, that would be great and we probably won't have to have a hearing.
Is there anything that the state would like to present, if we were to have the hearing, that you would need other than those issues?
MS. MENK: No. The state would just like clarification. The service specific, you're ruling that they apply because that would apply to the decoupling or because it's an acquisition by a hospital? A straight hospital authority acquisition has historically been the general considerations, and the decoupling has obviously been allowed without any review, so I'm assuming that's the decoupling, but I'm not clear on that. We would like clarity on that.

Page 72

MR. OAKLEY: I'm going to have Mr. Parker draft and then I'm going to look at that before I put the reasoning behind this. I've got it somewhere in my files, the logic of this ruling, and I will clarify it from a draft standpoint -- once I get it in draft standpoint.
MS. MENK: And I guess one more clarification that the state would like, is this related -- at one point Mr. Parker had distinguished this as two general hospitals. He had attempted to distinguish that from the service -- the psych services, et cetera, that have been decoupled in the past, but is that related to that argument or are you, in essence, overruling the six or seven other determinations -- or five or six other determinations on decoupling?
MR. OAKLEY: Would you send an e-mail to everyone asking for clarification on that issue promptly --
MS. MENK: Yes, sir.
MR. OAKLEY: -- by the end of the day today?
MS. MENK: Yes, sir.

Page 73

MR. OAKLEY: I am denying the motion for remand. I'm denying the discovery motions. Is there anything else that's left hanging that needs to be addressed at this hearing today?
MR. PARKER: The -- your request for a draft from the reasoning as to the service-specific consideration determination, I assume you want something from me just on that issue?
MR. OAKLEY: Yes.
MS. MENK: And if they stipulate with regard to the entity, then there's no issue on the -- there would be no reason for a hearing on the restructuring? Is that what we're talking about?
MR. PARKER: We'll try. He's right. I've yet to ever get anybody to stipulate.
MR. OAKLEY: But if we can, we can.
MR. PARKER: We'll try it.
MR. OAKLEY: We'll try, and it will be helpful if we can.
Is there anything else that we need to address today by either party?
MR. PARKER: If we do have a hearing, what time would you like to start?

MR. OAKLEY: Whatever you all prefer. Nine is fine with me.
MR. PARKER: I think it would be short. If we have someone coming in, 10 o'clock?
MR. OAKLEY: Ten?
MR. PARKER: Ten?
MR. OAKLEY: That's fine. And it's up to you to prepare a subpoena promptly that we can serve on Mr. Moldovan on behalf of his client.
MR. PARKER: Okay.
MR. OAKLEY: Anything else?
MR. PARKER: No, sir.
MR. OAKLEY: Any other details?
Thank you, everyone.
MR. PARKER: Thank you.
MS. MENK: Thank you. And I'll send that e-mail by the end of today.
(Adjourned at 11:50 a.m.)

C E R T I F I C A T E

STATE OF GEORGIA:
DEKALB COUNTY:

I hereby certify that the foregoing proceedings were reported, as stated i nthe caption, and reduced to the written page under my direction; that the foregoing pages 1 through 74 represent a true and correct transcript of the proceedings.
This the 10th day of September, 2014.

CAROLE E. POSS, RDR, CRR
GA CCR B-1182

CERTIFICATE OF SERVICE

I hereby certify that this 21st day of October, 2014 a true and correct copy of the foregoing PUBLIC document was filed via FTC e-file, which will send notification of such filing to:

Donald S. Clark
Secretary
Federal Trade Commission
Room H113
600 Pennsylvania Avenue, NW
Washington, DC 20580

I also certify that I delivered via electronic mail a copy of the foregoing PUBLIC document to:

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
Room H110
600 Pennsylvania Avenue, NW
Washington, DC 20580

and by electronic mail to the following:

Alexis Gilman
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Avenue, NW
Washington, DC 20580
agilman@ftc.gov

Maria DiMoscato
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Avenue, NW
Washington, DC 20580
mdimoscato@ftc.gov

Christopher Abbott
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Avenue, NW
Washington, DC 20580
cabbott@ftc.gov

Joshua Smith
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Avenue, NW
Washington, DC 20580
jsmith3@ftc.gov

Amanda Lewis
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Avenue, NW
Washington, DC 20580
alewis1@ftc.gov

Jennifer Schwab
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Avenue, NW
Washington, DC 20580
jschwab@ftc.gov

Mark Seidman
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Avenue, NW
Washington, DC 20580
mseidman@ftc.gov

Kevin J. Arquit, Esq.
karquit@stblaw.com
Peter Thomas, Esq.
pthomas@stblaw.com
Jayma Meyer
jmeyer@stblaw.com
Abram J. Ellis, Esq.
Aellis@stblaw.com
Simpson Thacher and Bartlett, LLP
425 Lexington Avenue
New York, New York 10017

Stelios Xenakis
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Avenue, NW
Washington, DC 20580
sxenakis@ftc.gov

Lucas Ballet
Federal Trade Commission
Bureau of Competition
600 Pennsylvania Avenue, NW
Washington, DC 20580
lballet@ftc.gov

Emmet J. Bondurant, Esq.
Bondurant@bmelaw.com
Ronan A. Doherty, Esq.
doherty@bmelaw.com
Frank M. Lowrey, Esq.
lowrey@bmelaw.com
Bondurant, Mixson & Elmore, LLP
1201 West Peachtree St. N.W., Suite 3900
Atlanta, GA 30309

Michael A. Caplan, Esq.
Caplan Cobb
1447 Peachtree Street, N.E., Suite 880
Atlanta, Georgia 30309
mcaplan@caplancobb.com

This 21st day of October, 2014.

/s/ Jeremy W. Cline
Jeremy W. Cline, Esq.
Counsel for Phoebe Putney Memorial Hospital, Inc. and Phoebe Putney Health System, Inc.

CERTIFICATE FOR ELECTRONIC FILING

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

October 21, 2014

By:

/s/ Jeremy W. Cline
Jeremy W. Cline, Esq.
Counsel for Phoebe Putney Memorial Hospital, Inc., Phoebe Putney Health System, Inc., and Phoebe North, Inc.