

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



ORIGINAL

Docket No. 9348

In the Matter of)
)
Phoebe Putney Health System, Inc.)
a corporation, and)
)
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)

**COMPLAINT COUNSEL’S MEMORANDUM RELATING TO
RESPONDENTS’ UNOPPOSED MOTION FOR TEMPORARY STAY**

On September 4, 2014, the Commission voted to return this matter to administrative litigation and scheduled a hearing to begin on February 4, 2015. On September 15, 2014, Chief Administrative Law Judge Chappell issued a Revised Scheduling Order pursuant to which the parties have been undertaking discovery. The parties issued renewed discovery requests in early October, including a number of subpoenas served on third parties. The close of fact discovery is on November 17, 2014.

Concurrently, in a proceeding before the Georgia Department of Community Health (“DCH”), Phoebe Putney Health System, Inc., Phoebe Putney Memorial Hospital, Inc., (collectively “Phoebe Putney”), and the Hospital Authority of Albany-Dougherty County (“the

Authority”) appealed DCH staff’s June 2014 determination letter which concluded that (1) returning Phoebe North to its status as a separately licensed 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) the acquisition of Phoebe North from the Hospital Authority would only be subject to CON review under the “general considerations,” not the “service specific” rules; and (3) the lease of Phoebe North by the Authority to North Albany would not be subject to prior CON review and approval.

On September 8, 2014, Hearing Officer Ellwood F. Oakley, III, heard oral argument relating to cross motions for summary determination. Hearing Officer Oakley granted summary determination in favor of Phoebe Putney and the Authority on October 2, 2014. DCH staff, North Albany, or both may appeal Hearing Officer Oakley’s ruling to the DCH Commissioner, Clyde L. Reese, III, on or before November 3, 2014. Nevertheless, in an unusual turn of events, shortly after Hearing Officer Oakley issued his ruling, on October 8, 2014, Commissioner Reese issued a statement to the press stating “Department of Community Health Commissioner Clyde L. Reese III is in support of and in agreement with the Hearing Officer decision.”¹

Respondents Phoebe Putney and the Authority now move the Commission for a temporary stay of these administrative proceedings under Commission Rule 3.22. Respondents contend that: (1) this matter should be stayed pending DCH’s final agency decision regarding the applicability of Georgia’s CON laws to the re-establishment of Palmyra as a second Dougherty County hospital and the transfer of Palmyra from the Authority to a private owner; (2) the status quo will be preserved and neither party will be prejudiced by a stay; and (3)

¹ See Exhibit 1, “Georgia Health Commissioner Agrees Certificate Needed For Phoebe Putney Breakup,” MLex Market Insight, Oct. 8, 2014.

allowing litigation to continue will waste significant resources and harm the citizens of the region.

In light of the uncertainty generated by Hearing Officer Oakley's ruling and Commissioner Reese's public statement, as well as the additional commitments made by Phoebe Putney and the Authority, Complaint Counsel has agreed not to oppose Respondents' motion for a temporary stay of the administrative proceedings for two reasons. First, Complaint Counsel believes that its case would not be prejudiced by a limited stay of the administrative proceedings. Despite Commissioner Reese's public statement, an appeal to the DCH Commissioner may yet be noticed by NAMC, DCH staff, or both. In this and other circumstances, Complaint Counsel will still be able to pursue effective relief because the duration of the stay is short and a number of protections are in place through additional commitments from Phoebe Putney and the Authority. Additionally, the injunction imposed by the district court remains in effect.

Second, Complaint Counsel is mindful that third parties have expressed concern that Complaint Counsel's and Respondents' discovery requests impose significant burdens, which they view as particularly burdensome in light of their uncertainty as to meaningful relief in this proceeding. Complaint Counsel believes that a temporary stay would address the concerns articulated by third parties pending any appeal to Commissioner Reese.

Accordingly, in light of the posture of the concurrent DCH proceeding and additional commitments made by Phoebe Putney and the Authority, Complaint Counsel has agreed not to oppose Respondents' motion for a stay.

Respectfully submitted,

s/ Alexis J. Gilman
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Counsel Supporting the Complaint

EXHIBIT 1



Georgia health commissioner agrees certificate needed for Phoebe Putney breakup

Jurisdiction : North America

8 Oct 14 | 14:44 ET

Author: Jeff Bliss

IN BRIEF

The head of Georgia's Department of Community Health backs a decision by an agency hearing officer that a certificate would be necessary to separate Phoebe Putney and Palmyra Park, a department spokeswoman said Wednesday. The view puts in doubt an appeal to be filed with the head by an opponent of the hospital merger.

The head of Georgia's Department of Community Health backs a decision by an agency hearing officer that a certificate would be necessary to separate Phoebe Putney and Palmyra Park hospitals, a department spokeswoman said Wednesday.

"Department of Community Health Commissioner Clyde L. Reese III is in support of and in agreement with the Hearing Officer decision," Pamela Keene, a DCH spokeswoman, said in an email Wednesday.

The department on Tuesday made public a decision by Administrative Hearing Officer Ellwood F. Oakley III that a "certificate of need" will be required for Palmyra Park Hospital to be spun off from Phoebe Putney Health System and sold to another hospital (see here).

Victor Moldovan, a counsel for North Albany Medical Center, a hospital seeking to buy Palmyra Park that is critical of the Phoebe Putney merger, said Tuesday he plans to appeal Oakley's decision to Reese.

On Wednesday, Moldovan said he hadn't formally filed an appeal and still planned to do so despite the statement from DCH.

If Reese rules against North Albany, Moldovan could still appeal to the Superior Courts of Georgia.

The ultimate decision on whether a certificate is needed will weigh on the US Federal Trade Commission's efforts to break up Phoebe Putney-Palmyra Park, a merger that the agency said violates antitrust law. Last year the FTC proposed letting the deal stand because the agency thought it would be difficult to obtain the certificate, which is the state's method of

coordinating healthcare and managing costs in a region.

But the FTC reconsidered its decision after a state health department official in June told North Albany Medical Center that a certificate wouldn't be needed. Last month, the FTC revived its effort to split up Phoebe Putney-Palmyra Park in a case before an administrative law judge (see here).

An FTC spokeswoman didn't immediately return a phone call seeking comment.

Linked Case File(s)

Phoebe Putney Health System - Palmyra Park Hospital

Subjects : Mergers & Acquisitions

Industries : Health, Healthcare, Pharmaceutical

Regulators / Courts : FTC, US Courts

Jurisdiction : North America

CERTIFICATE OF SERVICE

I hereby certify that on October 21, 2014 I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-113
Washington, DC 20580

I also certify that I delivered via electronic mail a copy of the foregoing document to:

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-110
Washington, DC 20580

I further certify that I delivered via electronic mail a copy of the foregoing document to:

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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/ Maria DiMoscato
Attorney