Statement of the Federal Trade Commission[1]
In the Matter of Phoebe Putney Health System, Inc. et al.
Docket No. 9348
March 31, 2015

Our challenge to this anticompetitive hospital acquisition resulted in an important Commission victory at the Supreme Court regarding the application of state action immunity. By reaffirming that state action immunity from the antitrust laws only applies where states have clearly intended to restrain competition, the Court's decision will benefit competition and consumers throughout the economy in the future. Regrettably, however, that victory did not alleviate the significant concerns we have about the anticompetitive effects of this merger on the citizens of Albany, Georgia.

Today we finalize a consent agreement with the Respondents[2] to settle the 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") that closely mirrors the consent agreement the Commission accepted for public comment in this matter in 2013. Notably, this final order, like the originally proposed version, does not require a divestiture. While it would have been the most appropriate and effective remedy to restore the lost competition in Albany and the surrounding six-county area from this merger to monopoly, Georgia's certificate of need ("CON") laws and regulations unfortunately render a divestiture in this case virtually impossible, leading us to accept this less-than-ideal remedy.

The Commission first challenged this Transaction in April 2011, alleging that the combination of Phoebe Putney with Palmyra, its only rival in Albany, would create a monopoly in the provision of inpatient general acute-care hospital services sold to commercial health plans in Albany and its surrounding six-county area, in violation of Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act. In addition to issuing an administrative complaint, the Commission authorized staff to file a complaint for temporary and preliminary relief in federal district court. In June 2011, the district court granted the defendants' motion to dismiss, holding that the state action doctrine immunized the Transaction from federal antitrust scrutiny.[3]

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, but agreed 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."[4] Following its ruling, the Eleventh Circuit dissolved the injunction pending appeal that had prevented the parties from merging, and the parties

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[1] This statement reflects the views of Chairwoman Ramirez and Commissioners Brill and Ohlhausen. Commissioners Wright and McSweeny did not participate in this vote.
[2] Respondents include Phoebe Putney Health System, Inc. ("PPHS"), Phoebe Putney Memorial Hospital ("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").
[3] *FTC v. Phoebe Putney Health Sys. Inc.*, 793 F. Supp. 2d 1356, 1381 (M.D. Ga. 2011).
[4] *FTC v. Phoebe Putney Health Sys. Inc.*, 663 F.3d 1369, 1375 (11th Cir. 2011).

consummated the Transaction in December 2011. The Commission filed a petition for certiorari, which the Supreme Court granted in June 2012.

In defending the challenged transaction, Respondents argued that the manner in which it was structured—whereby the Hospital Authority took title to Palmyra and then turned operational control over to PPHS—rendered it immune from the federal antitrust laws under the state action doctrine. Respondents contended that since the legislature gave hospital authorities broad general corporate powers, including the power to acquire hospitals, the challenged conduct was a foreseeable result of the law.

In February 2013, a unanimous Supreme Court ruled in favor of the Commission and reversed the dismissal of the complaint, holding that the state action doctrine did not bar the Commission from taking action.[5] Notably, the Court found that Respondents' interpretation of the state action doctrine was overbroad and inconsistent with the principle that "state-action immunity is disfavored."[6] We thereafter determined to proceed with the administrative action that had been stayed pending the collateral federal court appeals.

In August 2013, although we still had reason to believe the transaction created an unlawful monopoly, the Commission accepted for public comment a proposed non-structural remedy in light of the apparent unavailability of a practical and meaningful structural remedy. In particular, we provisionally accepted the consent based on an understanding that Georgia's CON laws likely would have prevented a divestiture of hospital assets, even assuming a finding of liability following a full merits trial and appeal.

In September 2014, we withdrew our provisional acceptance of the 2013 consent agreement in response to new information received, including through public comments, suggesting that the CON laws might not bar a structural remedy. Additionally, in March 2014, North Albany Medical Center, LLC ("North Albany"), a then newly formed health care entity, expressed an interest in acquiring Palmyra and operating it as a competing general acute-care hospital, believing it could do so consistent with Georgia's CON laws. Seeking clarification on whether those laws would impede such an acquisition, North Albany filed a "request for determination" with the Georgia Department of Community Health ("DCH") on the issue. DCH staff issued an initial determination in June 2014 finding, among other things, that "returning Phoebe North to its status as a separately licensed . . . hospital for divestiture would not require a prior CON review and approval."[7] The initial DCH staff determination was on appeal when we withdrew acceptance of the consent agreement. We believed that allowing the administrative

[5] *FTC v. Phoebe Putney Health Sys. Inc.*, 133 S. Ct. 1003, 1011 (2013).

[6] *Id.* at 1010 (citing *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992)). The Supreme Court reiterated this principle in its recent *North Carolina Dental* decision, in which the Court affirmed the Commission's ruling that state regulatory boards comprised of individuals participating in the market they are regulating must demonstrate active supervision by the state to enjoy state action immunity. *See N.C. State Bd. of Dental Exam'rs v. FTC*, No. 13-534, slip op. at 7 (U.S. Feb. 25, 2015) ("[G]iven the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws, 'state action immunity is disfavored, much as are repeals by implication.'") (citations omitted).

[7] *See* Letter from Matthew Jarrad, Deputy Division Chief/Health Planning Dir., Healthcare Facility Regulation Div., Ga. Dep't of Cmty. Health, to G. Edward Alexander, President and CEO, North Albany Medical Ctr. 4 (June 3, 2014).

and DCH proceedings to continue in parallel would avoid further delay in restoring competition to Albany if the Commission found liability on the merits and DCH determined that Georgia CON laws would not bar divestiture.

Unfortunately, developments occurring since we returned this matter to administrative litigation now appear to preclude structural relief. In October 2014, following review of the June DCH staff determination, a DCH Hearing Officer issued a written finding that the CON laws would apply to the proposed sale of Phoebe North. Shortly after this ruling, DCH Commissioner Clyde L. Reese III, who would have decided any appeal from the Hearing Officer's ruling, stated publicly that he was "in full support of and in agreement with the Hearing Officer decision."[8] Neither North Albany nor DCH staff chose to appeal the decision, rendering the Hearing Officer's ruling final.

While we continue to have reason to believe that Phoebe Putney's acquisition of Palmyra violated Section 7 of the Clayton Act and Section 5 of the FTC Act, any relief attempting to restore the competition lost as a result of the merger is precluded by Georgia's strict CON requirements. Specifically, the fact that the Albany region is deemed "over-bedded" makes it unlikely that any divestiture buyer could obtain the necessary CON approval to operate an independent hospital. Indeed, the Hearing Officer's ruling effectively ensures any prospective buyer intending to operate a competing hospital would have to endure a lengthy legal battle with, at best, an uncertain outcome. Thus, divestiture—the Commission's preferred remedy to restore competition—is simply unavailable.

In light of these developments, we believe it is unlikely that continuing with the administrative proceeding, even after a finding of liability, would yield a substantially different outcome than is available through this consent. For this reason, we now make final the consent agreement settling the administrative litigation in this matter.

Under the final consent agreement, Phoebe Putney and the Hospital Authority will be required to give the FTC prior notice of certain future transactions and will be barred from opposing certain applications by potential competitors seeking state certification to enter local health care markets. The order also includes a stipulation by Phoebe Putney and the Hospital Authority that the Transaction was anticompetitive.

The outcome in this case underscores the importance of obtaining preliminary injunctive relief prior to the consummation of a transaction. By maintaining the status quo, injunctive relief prevents the possibility of competitive harm—sometimes, as in this case, irremediable harm—from occurring during the Commission's administrative proceedings and any appeals. Moreover, this case also illustrates how state CON laws, despite their original and laudable goal of reducing health care facility costs, often act as a barrier to entry to the detriment of competition and healthcare consumers.[9]

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[8] *See* Complaint Counsel's Memorandum Relating to Respondent's Unopposed Motion for Temporary Stay, Ex. 1, *Georgia Health Commissioner Agrees Certificate Needed For Phoebe Putney Breakup*, MLEX MARKET INSIGHT, Oct. 8, 2014, *In re Phoebe Putney Health System, Inc.*, Docket No. 9348.

[9] The Commission has long advocated that states consider the costs that CON laws may impose on consumers. *See, e.g.*, Joint Statement of the Antitrust Division of the U.S. Department of Justice and the Federal Trade Commission

As noted above, notwithstanding the unsatisfactory remedial outcome in this case, the Commission nevertheless achieved a significant victory in the Supreme Court with respect to the state action doctrine. By ensuring that state action immunity remains true to its doctrinal foundation of protecting the *deliberate* policy choices of sovereign states and is applied in a manner that promotes competition and enhances consumer welfare, this important win will unquestionably benefit competition and consumers going forward.

Before the Illinois Task Force on Health Planning Reform 1-2 (Sept. 15, 2008), *available at* https://www.ftc.gov/policy/policy-actions/advocacy-filings/2008/09/ftc-and-department-justice-written-testimony-illinois ("The Agencies' experience and expertise has taught us that Certificate-of-Need laws impede the efficient performance of health care markets. . . . Together, we support the repeal of such laws, as well as steps that reduce their scope."); Fed. Trade Comm'n & U.S. Dep't of Justice, IMPROVING HEALTH CARE: A DOSE OF COMPETITION Ch. 8, p. 6 (July 2004), *available at* https://www.ftc.gov/reports/improving-health-care-dose-competition-report-federal-trade-commission-department-justice ("[T]he Agencies urge states with CON programs to reconsider whether they are best serving their citizens' health care needs by allowing those programs to continue.").