

IN THE MATTER OF

COLUMBIA HEALTHCARE CORPORATION, ET AL.

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

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

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

Appearances

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

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

COMPLAINT

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

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

DEFINITIONS

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

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

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

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

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

THE PARTIES

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

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

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

JURISDICTION

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

THE PROPOSED ACQUISITION

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

NATURE OF TRADE AND COMMERCE

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

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

MARKET STRUCTURE

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

ENTRY CONDITIONS

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

COMPETITION

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

EFFECTS

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

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

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

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

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

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

VIOLATIONS CHARGED

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

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

DECISION AND ORDER

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

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

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

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

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

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

ORDER

I.

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

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

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

C. “*Respondents*” means Columbia and HCA, collectively and individually.

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

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

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

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

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

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

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

K. “*Commission*” means the Federal Trade Commission.

II.

It is further ordered, That:

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

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

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

III.

It is further ordered, That:

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

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

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

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

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

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

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

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

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

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

commission arrangement contingent on divestiture through the trustee.

7. Respondents shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, or liabilities arising in any manner out of, or in connection with, the trustee's duties under this order.

8. Within thirty (30) days after appointment of the trustee, and subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the Court, respondents shall execute a trust agreement that transfers to the trustee all rights and powers necessary to permit the trustee to effect the divestiture required by this order.

9. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in paragraph III.A. of this order.

10. The Commission or, in the case of a court-appointed trustee, the Court may on its own initiative or at the request of the trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this order.

11. The trustee shall have no obligation or authority to operate or maintain HCA Aiken Regional Medical Centers.

12. The trustee shall report in writing to respondents and to the Commission every sixty (60) days concerning the trustee's efforts to accomplish the divestiture.

IV.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, no respondent shall, without the prior approval of the Commission, directly or indirectly, through subsidiaries, partnerships, or otherwise:

A. Acquire any acute care hospital in Augusta-Aiken; or

B. Permit any acute care hospital it operates in Augusta-Aiken to be acquired by any person that operates, or will operate immediately following such acquisition, any other acute care hospital in Augusta-Aiken.

Provided, however, that no acquisition shall be subject to this paragraph IV of this order if the fair market value of (or, in case of a

purchase acquisition, the consideration to be paid for) the acute care hospital or part thereof to be acquired does not exceed one million dollars (\$1,000,000).

V.

It is further ordered, That, for a period of ten (10) years from the date this order becomes final, respondents shall not permit all or any substantial part of any acute care hospital they operate in Augusta-Aiken to be acquired by any other person (except pursuant to the divestiture required by paragraph II of this order) unless the acquiring person files with the Commission, prior to the closing of such acquisition, a written agreement to be bound by the provisions of this order, which agreement respondents shall require as a condition precedent to the acquisition.

VI.

It is further ordered, That, for the purposes of determining or securing compliance with this order, and subject to any legally recognized privilege, upon written request and on reasonable notice to respondents made at their principal offices, respondents shall permit any duly authorized representatives of the Commission:

A. Access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in respondents' possession or control relating to any matter contained in this order; and

B. Upon five days' notice to respondents and without restraint or interference from respondents, to interview their officers or employees, who may have counsel present, regarding such matters.

VII.

It is further ordered, That:

A. Within sixty (60) days after the date this order becomes final and every sixty (60) days thereafter until respondents have fully satisfied the divestiture obligations of this order, respondents shall

submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with the order. Respondents shall include in their compliance reports, among other things that are required from time to time, a full description of all contacts or negotiations with prospective acquirers for the divestiture required by this order, including the identity of all parties contacted. Respondents also shall include in their compliance reports copies of all written communications to and from such parties, and all internal memoranda, reports, and recommendations concerning the required divestiture.

B. Annually, beginning on the first anniversary of the date this order becomes final, and continuing for nine (9) years thereafter, respondents shall submit a verified report demonstrating the manner in which they have complied and are complying with this order.

VIII.

It is further ordered, That respondents shall notify the Commission at least thirty (30) days prior to any proposed change, such as dissolution, assignment, sale resulting in the emergence of a successor corporation or association, the creation or dissolution of subsidiaries or affiliates, or any other change in respondents which may affect compliance obligations arising out of this order.

APPENDIX I

AGREEMENT TO HOLD SEPARATE

This Agreement to Hold Separate (the "Agreement") is by and among Columbia Healthcare Corporation, a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business at 201 West Main Street, Louisville, Kentucky, and HCA-Hospital Corporation of America, a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business at One Park Plaza, Nashville, Tennessee (collectively and individually referred to as "respondents"); and the Federal Trade Commission (the "Commission"), an independent agency of the United States Government, established under the

Federal Trade Commission Act of 1914, 15 U.S.C. 41, *et seq.* (collectively, the “Parties”).

Whereas, on or about October 2, 1993, Columbia Healthcare Corporation entered into an agreement to acquire all of the voting stock of HCA-Hospital Corporation of America (hereinafter the “Acquisition”); and

Whereas, the Commission is now investigating the Acquisition to determine if it would violate any of the statutes enforced by the Commission; and

Whereas, if the Commission accepts the attached Agreement Containing Consent Order (“consent order”), which would require divestiture of HCA Aiken Regional Medical Center (“ARMC”) in Aiken, South Carolina, the Commission must place the consent order on the public record for a period of at least sixty (60) days and may subsequently withdraw such acceptance pursuant to the provisions of Section 2.34 of the Commission’s Rules; and

Whereas, the Commission is concerned that if an understanding is not reached, preserving the *status quo ante* of the assets and businesses of ARMC during the period prior to the issuance of the consent order by the Commission (after the 60-day public notice period), divestiture resulting from any proceeding challenging the legality of the Acquisition might not be possible, or might be less than an effective remedy; and

Whereas, the Commission is concerned that if the Acquisition is consummated, it will be necessary to preserve the Commission’s ability to require the divestiture of ARMC as described in paragraph II of the consent order, and the Commission’s right to seek to restore ARMC as a viable independent acute care hospital; and

Whereas, the purpose of this Agreement and the consent order is to:

- (i) Preserve ARMC as a viable independent acute care hospital pending its divestiture, and
- (ii) Remedy any anticompetitive effects of the Acquisition; and

Whereas, respondents’ entering into this Agreement shall in no way be construed as an admission by respondents that the Acquisition is illegal; and

Whereas, respondents understand that no act or transaction contemplated by this Agreement shall be deemed immune or exempt

from the provisions of the antitrust laws or the Federal Trade Commission Act by reason of anything contained in this Agreement.

Now, therefore, the parties agree, upon understanding that the Commission has not yet determined whether the Acquisition will be challenged, and in consideration of the Commission's agreement that, unless the Commission determines to reject the consent order, it will not seek further relief from respondents with respect to the Acquisition, except that the Commission may exercise any and all rights to enforce this Agreement and the consent order to which it is annexed and made a part thereof, and in the event the required divestiture is not accomplished, to seek divestiture of ARMC as held separate pursuant to this Agreement, as follows:

1. Respondents agree to execute and be bound by the attached consent order.

2. Respondents agree that from the date this Agreement is accepted until the earliest of the dates listed in subparagraphs 2.a - 2.c, they will comply with the provisions of paragraph 3 of this Agreement:

- a. Three business days after the Commission withdraws its acceptance of the consent order pursuant to the provisions of Section 2.34 of the Commission's Rules;

- b. 120 days after publication in the Federal Register of the consent order, unless by that date the Commission has issued such order; or

- c. The day after the divestiture required by the consent order has been completed.

3. Respondents will hold the assets and businesses of ARMC as they are presently constituted separate and apart on the following terms and conditions:

- a. ARMC, as it is presently constituted, shall be held separate and apart and shall be operated independent of respondents (meaning here and hereinafter, respondents excluding ARMC) except to the extent that respondents must exercise direction and control over ARMC to assure compliance with this Agreement.

- b. Respondents shall not exercise direction or control over, or influence directly or indirectly, ARMC or any of its operations or

businesses; provided, however, that respondents may exercise only such direction and control over ARMC as is necessary to assure compliance with this Agreement.

c. Respondents shall maintain the viability and marketability of ARMC and shall not sell, transfer, encumber (other than in the normal course of business), or otherwise impair its marketability or viability.

d. Except for the single respondent director, officer, employee, or agent serving on the "New Board" or "Management Committee" (as defined in subparagraph 3.h), respondents shall not permit any director, officer, employee, or agent of respondents to also be a director, officer or employee of ARMC.

e. Except as required by law, and except to the extent that necessary information is exchanged in the course of evaluating the Acquisition, defending investigations or litigation, or negotiating agreements to dispose of assets, respondents shall not receive or have access to, or use or continue to use, any "material confidential information" of ARMC not in the public domain. Any such information that is obtained pursuant to this subparagraph shall only be used for the purpose set out in this subparagraph. ("Material confidential information," as used herein, means competitively sensitive or proprietary information not independently known to respondents from sources other than ARMC, and includes but is not limited to customer lists, price lists, marketing methods, patents, technologies, processes, or other trade secrets.)

f. Respondents shall not change the composition of the management of ARMC except that the directors or members serving on the New Board or Management Committee of ARMC (as defined in subparagraph 3.h) shall have the power to remove employees for cause.

g. All material transactions, out of the ordinary course of business and not precluded by subparagraphs 3.a-3.f hereof, shall be subject to a majority vote of the New Board or Management Committee (as defined in subparagraph 3.h).

h. Respondents shall either separately incorporate ARMC and adopt new Articles of Incorporation and By-laws that are not inconsistent with other provisions of this Agreement or establish separate business ventures with articles of agreement covering the conduct of ARMC in accordance with this Agreement. Respondents shall also elect a new three person board of directors ("New Board")

or Management Committee ("Management Committee") of ARMC. Respondents may elect the directors to the New Board or select the members of the Management Committee; provided, however, that such New Board or Management Committee shall include no more than one respondent director, officer, employee, or agent. Except as permitted by this Agreement, the director of the New Board or member of the Management Committee who is also a respondent director, officer, employee or agent, shall not receive in his or her capacity as a New Board director or Management Committee member material confidential information and shall not disclose any such information received under this Agreement to respondents or use it to obtain any advantage for respondents. Said director of the New Board or member of the Management Committee who is also a respondent director, officer, employee or agent, shall enter a confidentiality agreement prohibiting disclosure of material confidential information (as that term is defined in subparagraph 3.e.). Such New Board director or Management Committee member shall participate in matters which come before the New Board or Management Committee only for the limited purpose of considering a capital investment or other transaction exceeding \$1,000,000 and carrying out respondents' responsibility to assure that ARMC is maintained in such manner as will permit its divestiture as an ongoing, viable acute care hospital. Except as permitted by this Agreement, such New Board director or Management Committee member shall not participate in any matter, or attempt to influence the votes of the other directors or Management Committee members with respect to matters, that would involve a conflict of interest if respondents and ARMC were separate and independent entities. Meetings of the New Board or Management Committee during the term of this Agreement shall be stenographically transcribed and the transcripts retained for two (2) years after the termination of this Agreement.

i. All earnings and profits of ARMC shall be retained separately in ARMC if necessary, respondents shall provide ARMC with sufficient working capital to operate at its current rate of operation, and to carry out any capital improvement plans for ARMC which have already been approved.

j. Should the Federal Trade Commission seek in any proceeding to compel respondents (meaning here and hereinafter respondents including ARMC) to divest ARMC, or to seek any other injunctive

or equitable relief, respondents shall not raise any objection based upon the expiration of the applicable Hart-Scott-Rodino Antitrust Improvements Act waiting period or the fact that the Commission has permitted the Acquisition. Respondents also waive all rights to contest the validity of this Agreement.

4. For the purpose of determining or securing compliance with this Agreement, subject to any legally recognized privilege, and upon written request with reasonable notice to respondents made to their principal offices, respondents shall permit any duly authorized representative or representatives of the Commission:

a. Access during the office hours of respondents and in the presence of counsel to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of respondents relating to compliance with this Agreement;

b. Upon five (5) days' notice to respondents, and without restraint or interference from respondents, to interview officers or employees of respondents, who may have counsel present, regarding any such matters.

5. This agreement shall not be binding until approved by the Commission.

STATEMENT OF COMMISSIONER MARY L. AZCUENAGA
CONCURRING IN PART AND DISSENTING IN PART

Having reason to believe that the Columbia Healthcare Corporation's acquisition of HCA-Hospital Corporation of America may substantially lessen competition in the Augusta, Georgia-Aiken, South Carolina market, I concur in the decision to require divestiture of the Aiken Regional Medical Center. I dissent from the decision not to challenge the transaction with respect to the Chattanooga, Tennessee market.

In Chattanooga, the merger will combine HCA's Parkridge Medical Center and Columbia's East Ridge Hospital in an already highly concentrated market. In 1985, after a full administrative hearing, the Commission ordered HCA to divest certain assets, including North Park Hospital, which has considerable similarity to

East Ridge. *Hospital Corporation of America*, 106 FTC 361, *aff'd*, 807 F.2d 1381 (7th Cir. 1986). Although some characteristics of the Chattanooga hospital market may have changed since 1985, I am not persuaded that the competitive situation is so fundamentally different to justify abandonment of the Commission's earlier position.

DISSENTING STATEMENT OF COMMISSIONER DEBORAH K. OWEN

"Please listen to us.... We are the ones who live here."

Thus pled one of over 100 intensely interested residents of South Carolina who commented unfavorably on the Commission's proposal to require the sale of the Aiken Regional Medical Centers ("Aiken RMC"). Despite this outpouring of protest, the Commission has declined to reconsider its stance. I dissent from this decision for two reasons. First, and principally, I do not find reason to believe that, after the merger, anticompetitive effects are likely in the Augusta/Aiken geographic market. Second, the application of the DOJ/FTC hospital merger "safety zone" in another market affected by this merger creates, at the very least, an appearance of inconsistency in our enforcement, and perhaps has even permitted the consummation of an anticompetitive merger to monopoly.

Divestiture

Having read all of the comments submitted to the Commission, I believe that they provide ample support for the projection that anticompetitive effects stemming from common ownership of Augusta Regional Medical Center ("Augusta Regional") and Aiken RMC are unlikely. While the hospitals clearly have competitors in common, they are 25-30 miles apart. Several comments noted that a patient would pass several much larger hospitals, with more services, in driving from Aiken RMC to Augusta Regional.¹ Such travel is "inconvenient at best and impractical under many situations."² An Aiken doctor observed that he could "count

¹ See, e.g., Letter from Philip J. Lord, reporter, Aiken Standard (undated) ("going to Augusta Regional Medical Centers for care is plain dumb.... [Y]ou would pass several, much larger hospitals that offer more services and larger staffs. Passing these ... to get to another community hospital, like Aiken Regional, doesn't make sense."); Letter from Wade M. Brodie, Director, Aiken County National Bank (3/21/94).

² Letter from John A. Paulus, President, Medical Center of Aiken, Inc. (undated).

comfortably on one hand” the number of his patients who have gone to Augusta Regional in 17 years.³ One comment noted that few, if any, physicians have privileges at both hospitals.⁴ An Aiken family summed it up: “We... have never even seen August [sic] Regional Medical Center.... [W]e do not know anyone who has used Augusta Regional.”⁵

Not only is there little direct competition between the hospitals, but members of the community foresee competitive benefits from combining these two complementary facilities. Many comments voiced the opinion that common ownership of the two modestly sized hospitals, operating at opposite ends of the geographic market, would provide enhanced competition for the much larger University Hospital.⁶ Others noted that managed care providers and local employers would enjoy the efficiency of being able to deal with both hospitals through a single contract.⁷ The Governor of the State of South Carolina argued that joint ownership of the two hospitals would obviate the need for two open heart programs, where one would do, at considerable cost savings.⁸

Finally, I note that the Commission’s action has already had its costs. It has caused “unnecessary anxiety,” according to one letter.⁹ Several comments, including one lengthy, painstakingly handwritten letter, complained that the Commission’s decision has severely disrupted the recruitment and retention of both medical and non-medical staff, and particularly physicians.¹⁰ Perhaps some will merely shrug this off, but I believe that action such as the Commission takes today fosters unnecessary, and otherwise avoidable, resentment toward the federal government in the soul of America that lies outside our Beltway. Three letters to the commission illustrate. An Aiken resident comments: “[T]his is an

³ Letter from Jack L. Ratliff, M.D. (4/21/94).

⁴ Letter from Ronald Paolini, D.O. (2/17/94).

⁵ Letter from Marilyn G. Swanson and J. Lars Swanson (4/16/94).

⁶ See, e.g., Letter from Victoria M. Stoepler, M.D. and Victoria C. Mosteller, M.D. (2/21/94).

⁷ See, e.g., Letter from Georganne Franklin, Employment Coordinator, Aiken Regional Medical Centers (4/13/94).

⁸ Letter from The Honorable Carroll A. Campbell, Jr. (3/3/94).

⁹ Letter from Deidre Collins (4/27/94).

¹⁰ See, e.g., Letter from George A. Poda, M.D. (2/9/94).

excellent example of the kind of 'help' we do not need from Washington with medical care."¹¹ Another citizen of South Carolina writes: "It is this type of governmental decision-making that so angers and baffles the public."¹² One commentator in particular reflects the local dissatisfaction with what is apparently perceived as unnecessary intrusion by the federal government. His message to the FTC: "Get out of my face."¹³

Merger to Monopoly

While I continue to believe that the Columbia/HCA merger does not pose a competitive problem in the Augusta/Aiken area, I cannot, however, conclude with reasonable confidence that the merger has no anticompetitive effects in any hospital market across the country. There is evidence (although incomplete) that in one market, the consolidation of the Columbia and HCA hospitals may create a monopoly that could injure consumers.

In that market, one of the hospitals satisfies the statistical criteria for the hospital merger "safety zone" as set forth in the Statements of Enforcement Policy in the Health Care Area, adopted in September 1993 by the Department of Justice and the Federal Trade Commission (over my dissent).¹⁴ Based on its size alone, the acquisition of this hospital has been declared by the federal enforcement agencies to be immune from antitrust review.¹⁵

¹¹ Letter from Jay D. Bilyeu (undated).

¹² Letter from Sandra F. Hobbs (4/27/94).

¹³ Letter from George P. Fitzgerald (3/20/94).

¹⁴ Department of Justice and Federal Trade Commission Antitrust Enforcement Policy Statements in the Health Care Area, 4 Trade Reg. Rep. (CCH) paragraph 13,150; Dissenting Statement of Commissioner Deborah K. Owen on DOJ/FTC Antitrust Enforcement Policy Statements in the Health Care Area (September 14, 1993).

¹⁵ Department of Justice and Federal Trade Commission Antitrust Enforcement Policy Statements in the Health Care Area, 4 Trade Reg. Rep. (CCH) paragraph 13,150 at 20,757:

The Agencies will not challenge any merger between two general acute-care hospitals where one of the hospitals (1) has an average of fewer than 100 licensed beds over the three most recent years, and (2) has an average daily inpatient census of fewer than 40 patients over the three most recent years, absent extraordinary circumstances. This antitrust safety zone will not apply if that hospital is less than 5 years old.

It is not clear what constitutes "extraordinary circumstances" within the contemplation of the Policy Statement. The Commission's action in this matter may, however, be viewed as implicit support for the proposition that a merger to monopoly does not qualify as an "extraordinary circumstance."

This is not to suggest that the Commission is indifferent to the monopolization of all hospital markets. In January of this year, the Commission voted unanimously to authorize staff to file a preliminary injunction to prevent the merger to monopoly of the only two acute care hospitals in Pueblo, Colorado.¹⁶ In Pueblo, the requirements of the hospital merger “safety zone” were not satisfied, so a full investigation and analysis of the likely competitive effects of the merger were undertaken, in accordance with the 1992 Horizontal Merger Guidelines.¹⁷ In such a traditional analysis, the Commission considers whether the merging hospitals are economically viable, whether significant efficiencies may be achieved by combining the hospitals, whether these efficiencies are merger-specific, and whether cost savings are likely to be passed on to consumers in the form of lower prices or higher quality. Most critically, the Commission also evaluates whether the anticipated efficiency benefits outweigh the substantial anticompetitive risks associated with the creation of a monopoly. Under a Guidelines analysis, the Commission’s action in the Pueblo merger suggests a conclusion that the likely anticompetitive effects outweigh the possible efficiencies stemming from the merger.

The Commission did not, however, conduct a thorough investigation of the market in which the merger of Columbia and HCA may have created a monopoly. The Commission abandoned its traditional approach to merger analysis upon determining that the HCA hospital falls within the “antitrust safety zone.”¹⁸

¹⁶ Parkview Episcopal Medical Center, FTC File No. 931-0125.

¹⁷ U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines, reprinted in 4 Trade Reg. Rep. (CCH) paragraph 13,104 (Apr. 2, 1992).

¹⁸ The Commission’s inconsistent application of the antitrust laws to hospital mergers has apparently not escaped public attention. See Letter from Clark D. Moore, M.D. (3/1/94) (“I note in the recent issue of *Modern Health Care*, that Columbia HCA was awarded a three hospital monopoly in the Florida Panhandle, and it simply amazes me that our hospital [Aiken RMC] has been ordered to be divested when monopolies such as this have been allowed to proceed unhindered. In the interests of fairness, I would think that the Federal Trade Commission should reconsider their order to divest our hospital.”); Letter from William R. Marshall, M.D. (3/15/94) (“Please explain the rationale for your approval of the Columbia Health Care merger with Hospital Corporation of America particularly as it applies to Northwest Florida where our medical community has no other alternative for hospital services. This hospital monopoly encompasses Ft. Walton Beach, Niceville and Destin metropolitan areas affecting the lives of 200,000 people.”); Letter from Richard A. Philipp (undated) (inquiring why mergers were allowed in Florida and elsewhere “that created a higher market share of beds” than in Augusta/Aiken).

In sum, the Antitrust Enforcement Policy Statements in the Health Care Area may have claimed their first casualty. Perhaps a full investigation would have demonstrated that the merger, though creating a monopoly, posed no anticompetitive problem. But we will never know at the level of confidence that consumers have a right to expect of us. For this reason, and for the reasons voiced by the anguished health care consumers in Aiken, South Carolina, I dissent.

IN THE MATTER OF

LEPAGE'S, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3506. Complaint, July 19, 1994--Decision, July 19, 1994*

This consent order prohibits, among other things, the Pennsylvania manufacturers of adhesive tapes from misrepresenting that any product or package is capable of being recycled, or the extent to which recycling collection programs are available for such products, and from making unsubstantiated claims that its products or packages are degradable, biodegradable or photodegradable, or that their degradability offers any environmental benefit when disposed of as trash in a sanitary landfill.

Appearances

For the Commission: *Michael Dershowitz, Kevin Bank and C. Lee Peeler.*

For the respondents: *Nancy Bryson, Crowell & Moring, Washington, D.C.*

COMPLAINT

The Federal Trade Commission, having reason to believe that LePage's, Inc., a corporation, and LP Holdings, Inc., a corporation ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent LePage's, Inc. ("LePage's"), is a Pennsylvania corporation. Respondent LP Holdings, Inc. is a Delaware corporation. It dominated and controlled the acts and practices of its then wholly-owned subsidiary, LePage's, Inc. Respondents have their principal offices or places of business at 120 Delta Drive, Pittsburgh, Pennsylvania.

PAR. 2. Respondents have advertised, labeled, offered for sale, sold, and distributed adhesive tapes, including LePage's Biodegradable Transparent Tape, and other products to the public.