

FEDERAL TRADE COMMISSION DECISIONS

Findings, Opinions, and Orders

IN THE MATTER OF

THE HOSPITAL BOARD OF DIRECTORS OF LEE COUNTY

Docket 9265. Interlocutory Order, July 7, 1995

ORDER SUA SPONTE DISMISSING PROCEEDING

On April 29, 1994, the Commission filed an action in federal district court under Section 13(b) of the FTC Act, 15 U.S.C. 53(b), for a preliminary injunction, pending completion of an administrative proceeding, to prevent respondent, The Hospital Board of Directors of Lee County d/b/a/ Lee Memorial Hospital ("The Hospital Board"), from acquiring the assets of Cape Coral Hospital from West Coast Health System, Inc. and Cape Coral Medical Center, Inc. (collectively "Cape Coral"). *FTC v. Hospital Board of Directors of Lee County*, 1994-1 Trade Cas. (CCH) ¶ 70,593 (M.D. Fla. 1994). Shortly thereafter, on May 6, 1994, the Commission issued an administrative complaint charging that the acquisition was likely substantially to lessen competition among acute care hospitals in Lee County, Florida, in violation of Section 7 of the Clayton Act, 15 U.S.C. 18.

Although the district court initially granted the Commission's request for a temporary restraining order, the court subsequently dissolved the restraining order and dismissed the Commission's complaint for preliminary relief on state action grounds, finding that The Hospital Board's acquisition of its competitor was pursuant to a clearly articulated state policy expressed in The Hospital Board's enabling legislation. 1994-1 Trade Cas. at 72,220. Acting in response to an emergency motion by the Commission, the United States Court of Appeals for the Eleventh Circuit stayed the district court's order dissolving the temporary restraining order pending an expedited appeal. On November 30, 1994, the appellate court affirmed the district court's decision, finding the requisite clearly articulated state policy in The Hospital Board's special enabling legislation and in the unique historical facts surrounding 1987 amendments to the enabling legislation. *FTC v. Hospital Board of Directors of Lee County*, 38 F.3d 1184, 1191-92 (11th Cir. 1994).

The Commission concluded there were substantial errors in the appellate court's analysis and application of the state action doctrine, and therefore immediately filed a petition for rehearing and suggestion for rehearing *en banc*. In February 1995, while the petition was pending, Cape Coral terminated its acquisition agreement with The Hospital Board and entered into a definitive asset acquisition agreement with Health Management Associates, Inc., a corporation that did not at that time own or operate any hospital in the Lee County market alleged in the Commission's complaint. On or about February 17, 1995, the Commission brought this development to the attention of the appellate court, noting that the change in circumstances effectively rendered the Commission's action for a preliminary injunction moot. The Commission observed that no court could any longer properly enjoin The Hospital Board from acquiring Cape Coral, since Cape Coral had terminated its agreement with The Hospital Board and had agreed to be acquired by another party. The Commission advised the court that the proper course of action was to dismiss the Commission's appeal and vacate the prior decisions because the Commission, through no fault of its own, was being denied an opportunity to pursue its appellate remedies. *Anderson v. Green*, 115 S. Ct. 1059 (1995); *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 115 S. Ct. 386, 391 (1994); *United States v. Munsingwear, Inc.*, 340 U.S. 36, 40 (1950). On March 9, 1995, the court denied the Commission's petition for rehearing and suggestion for rehearing *en banc*. On March 15, 1995, the court, without comment, rejected the Commission's motion to dismiss and vacate.

The Commission has determined that it is not in the public interest either to seek *certiorari* from the Eleventh Circuit's denial of vacation or to continue this proceeding through hearings before the Administrative Law Judge and any possible subsequent appeals.¹ The Commission undertook both the court action and this proceeding to protect competition in the provision of hospital services in Lee

¹ In dismissing this proceeding on public interest grounds, the Commission does not express any opinion on whether principles of collateral estoppel would bar prosecution of the administrative proceeding. While "[t]he doctrine of collateral estoppel prohibits relitigation of an issue of fact or law that has been decided in earlier litigation," *SEC v. Bilzerian*, 29 F.3d 689, 693 (D.C. Cir. 1994), it is a doctrine that may not always be applied rigidly and blindly. See *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 350 (1971). Here, the Commission was precluded from pursuing its appeals through no fault of its own, and the Commission undertook every reasonably available step to preserve its appeal rights. See e.g., *United States v. Munsingwear, Inc.*, 340 U.S. at 40; 1B James W. Moore, *Moore's Federal Practice* ¶ 0.416 [6], at III-349-50 (2d ed. 1995).

County, Florida. Had the Commission ultimately found the transaction unlawful, the best possible relief for consumers in Lee County would have been the sale of Cape Coral to a third party. Since that is precisely what has happened, further proceedings cannot better accomplish the Commission's principal law enforcement objective. Thus, the Commission does not think there is adequate reason to continue additional adjudicative proceedings against The Hospital Board.

Because application of the "clear articulation" prong of the state action doctrine necessarily turns upon the specific statutory scheme applicable to each case, any determination by the Commission about the conduct of future cases must and will be made on an individual basis.

For these reasons, the Commission believes that the public interest would not be served by additional proceedings. Although the Commission continues to disagree with the appellate court's analysis and application of the state action doctrine, the Commission will neither seek *certiorari* in the court proceeding nor pursue an administrative trial. The Commission believes that the public interest would be best served by the Commission's waiting for some future opportunity to advance its position on the state action issue.

Accordingly, *It is hereby ordered*, That this matter be dismissed.

Commissioner Azcuenaga concurring in the result.

CONCURRING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

I have voted against authorizing the action to seek a preliminary injunction to block the subject transaction, against authorizing the appeal from the district court decision, against petitioning the Court of Appeals for rehearing, and against the issuance of the administrative complaint. I concur in the Commission's decision now to dismiss the complaint, but do not join the Commission's order.

IN THE MATTER OF

NEW BALANCE ATHLETIC SHOES, INC.

*Docket 9268. Interlocutory Order, July 10, 1995*ORDER TO STAY PROCEEDINGS
AND SHOW CAUSE

In view of both the Commission's determination to conduct public proceedings respecting its "Made in USA" enforcement standard and the Commission's action of today's date in Hyde Athletic Industries, Inc., File No. 922-3236, the Commission is considering whether the public interest warrants amendment or dismissal of the complaint and notice of contemplated relief in this matter.

Accordingly, *It is hereby ordered*, That all proceedings in this matter, other than those contemplated herein, are hereby stayed pending further order of the Commission.

It is further ordered, That the parties shall show cause why the complaint and notice of contemplated relief in this matter should not be amended in accordance with the attached form of complaint, or dismissed. The parties shall, on or before August 9, 1995, serve and file a responsive brief to this order. Complaint counsel shall, within fifteen (15) days of service of respondent's brief, file a response to respondent's submission. Respondent shall, within fifteen (15) days of service of complaint counsel's responsive brief, file a reply brief. Respondent may, at any time on or before August 9, 1995, file a motion to withdraw this matter from adjudication for purposes of discussing resolution of this matter, in which event the Secretary shall issue an order withdrawing this matter from adjudication and the application of Commission Rule of Practice 4.7, 16 CFR 4.7, shall thereby be suspended.

Commissioner Starek dissenting.

COMPLAINT

The Federal Trade Commission, having reason to believe that New Balance Athletic Shoe, Inc., a corporation ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it