

## IN THE MATTER OF

## COLUMBIA/HCA HEALTHCARE CORPORATION

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

*Docket C-3619. Consent Order, Oct. 3, 1995--Modifying Order, May 15, 1996*

This order reopens a 1995 consent order -- that permitted Columbia/HCA and Healthtrust, Inc., to merge, required the respondent to terminate its participation in a joint venture with the Orlando Regional Health System, and contained a prior-notice provision -- and this order modifies the termination provisions of the agreement to hold separate regarding the Utah Healthtrust Assets by releasing Columbia/HCA from the provision requiring it to operate the Utah assets separately from its other hospital operations in Utah once it completes the divestiture of Pioneer Valley Hospital and Davis Hospital to Paracelsus Healthcare Corporation.

## ORDER REOPENING AND MODIFYING ORDER

On December 15, 1995, Columbia/HCA Healthcare Corporation ("Columbia") filed its Petition To Reopen And Modify Order Containing Agreement To Hold Separate ("Petition") in this matter. Respondent asks that the Commission reopen this 1995 consent order pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), and Section 2.51 of the Commission's Rules of Practice and Procedure, 16 CFR 2.51. The Petition request that the Commission reopen the order and modify the termination provisions in paragraph 2(b) of the April 21, 1995, Agreement to Hold Separate regarding the Utah Healthtrust Assets ("Utah Hold Separate"), which is attached to the order and made a part thereof. The Petition was subject to a ten-day public comment period that expired on January 22, 1996, and no comments were received. For the reasons discussed below, the Commission has determined to grant Columbia's Petition.

Columbia's Petition seeks to change the termination of the Utah Hold Separate from the date that all Schedule B Assets, as identified in the order, are divested until the date that all of the hospitals identified in Part I of Schedule B are divested. The modification is necessary because of an asset identified as Schedule B, Part II, Item 6: "Lease of 7,134 sq. ft., 150 Wright Bros. Drive, Suite 540, Salt

Lake City, Utah 84116" ("Suite 540"). The space is used by Infusamed, a home health care company providing infusion and pharmacy services that was owned by Healthtrust, Inc. when it was acquired by Columbia. The order does not require Columbia to divest the Infusamed business, and the lease is not a part of the business of Pioneer Valley.

The requested modification merely changes the date for the termination of the Utah Hold Separate. Under the order in this matter, Columbia is obligated to hold separate all of Healthtrust Utah, which includes a number of hospitals and businesses it is not required to divest, pending divestiture of three hospitals and related assets in Utah. The hospitals to be divested are identified in Part I of Schedule B and the related assets are identified in Part II of Schedule B.<sup>1</sup> Columbia seeks to have the Hold Separate terminate upon completion of the divestitures of the three hospitals.

Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), provides that the Commission shall reopen an order to consider whether it should be modified if the respondent "makes a satisfactory showing that changed conditions of law or fact" require such modification. A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of it inequitable or harmful to competition. S. Rep. No. 96-500, 96th cong., 2d Sess. 9 (1979) (significant changes or changes causing unfair disadvantage); Louisiana-Pacific Corp., Docket No. C-2956, Letter to John C. Hart (June 5, 1986), at 4 (unpublished) ("Hart Letter").<sup>2</sup>

Section 5(b) also provides that the Commission may modify an order when, although changed circumstances would not require reopening, the Commission determines that the public interest so requires. Respondents are therefore invited in petitions to reopen to show how the public interest warrants the requested modification.<sup>3</sup> In such a case, the respondent must demonstrate as a threshold matter

---

<sup>1</sup> At present, the only distinction that the order makes between the Part I and Part II assets is that the acquirer of a divested Part I hospital need not give the Commission prior notification of the sale of a Part II asset to anyone who also owns a hospital in the Three County Area. *See* Order, paragraph IV.F.

<sup>2</sup> *See also United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1376-77 (9th Cir. 1992) ("A decision to reopen does not necessarily entail a decision to modify the order. Reopening may occur even where the petition itself does not plead facts requiring modification.")

<sup>3</sup> Hart Letter at 5; 16 CFR 2.51.

some affirmative need to reopen and modify the order.<sup>4</sup> For example, it may be in the public interest to modify an order "to relieve any impediment to effective competition that may result from the order."<sup>5</sup> Once such a showing of need is made, the Commission will balance the reasons favoring the requested modification against any reasons not to make the modification.<sup>6</sup> The Commission also will consider whether the particular modification sought is appropriate to remedy the identified harm.<sup>7</sup>

The language of Section 5(b) plainly anticipates that the burden is on the petitioner to make a "satisfactory showing" of changed conditions to obtain reopening of the order. The legislative history also makes clear that the petitioner has the burden of showing, other than by conclusory statements, why an order should be modified. The Commission "may properly decline to reopen an order if a request is merely conclusory or otherwise fails to set forth specific facts demonstrating in detail the nature of the changed conditions and the reasons why these changed conditions require the requested modification of the order." S. Rep. No. 96-500, 96th Cong., 1st Sess. 9-10 (1979); *see also* Rule 2.51(b) (requiring affidavits in support of petitions to reopen and modify). If the Commission determines that the petitioner has made the necessary showing, the Commission must reopen the order to consider whether modification is required and, if so, the nature and extent of the modification. The Commission is not required to reopen the order, however, if the petitioner fails to meet its burden of making the satisfactory showing required by the statute. The petitioner's burden is not a light one in view of the public interest in repose and the finality of Commission orders. *See Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

Columbia has met its burden of showing an affirmative need to reopen the order in that the continued operation of the order is causing competitive injury. Having to hold the remaining Healthtrust Utah assets separate pending a determination on the obligation to divest the lease is unnecessary to accomplish the purposes of the order and would impose significant and unforeseen costs on

---

<sup>4</sup> Damon Corp., Docket No. C-2916, Letter to Joel E. Hoffman, Esq. (March 29, 1983), at 2 ("Damon Letter"), reprinted in [1979-1983 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 22,207.

<sup>5</sup> *Damon Corp.*, Docket No. C-2916, 101 FTC 689, 692 (1983).

<sup>6</sup> Damon Letter at 2.

<sup>7</sup> Damon Letter at 4.

Columbia. Where the potential harm to the respondent outweighs any further need for the order, the Commission may modify the order in the public interest to allow the respondent to retain the relevant assets. Since the lease of Suite 540 appears to have no competitive significance in connection with the operation of the to-be-divested Pioneer Valley Hospital in the acute care hospital market in Utah, there is no need for the Commission to require Columbia to continue to hold the Utah Healthtrust Assets separate upon completion of the divestitures of Jordan Valley, Davis and Pioneer Valley hospitals. Thus, the modification sought by Columbia is in the public interest.

Accordingly, *It is ordered*, That this matter be, and it hereby is, reopened; and

*It is further ordered*, That the Agreement to Hold Separate Regarding The Utah Healthtrust Assets, attached to the order in Docket No. C-3619, be, and it hereby is, modified to read as follows:

2. Respondent agrees that from the date this Agreement is accepted until the earlier of the dates listed in subparagraphs 2.a or 2.b, it will comply with the provisions of paragraph three of this Agreement:

a. Three (3) 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; or

b. The day after the last of the divestitures of the Schedule B, Part I Assets or the Utah Healthtrust Assets, as required by the consent order, is completed.

Commissioner Azcuenaga dissenting on the ground that the petitioner has not made a showing sufficient to satisfy the Commission's standard for reopening and modifying an order, and Commissioner Starek concurring in the result only.

STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III,  
CONCURRING IN THE RESULT

I have no difficulty concluding that the public interest warrants granting the relief requested by respondent -- a change in the termination date for the Utah Hold Separate -- in light of how transparently unreasonable it would be to withhold that relief in the

circumstances presented here. On that basis, I agree with the Commission majority that the Utah Hold Separate should be reopened and modified. Nevertheless, I concur only in that result, and not in the reasoning employed to reach it. Once again my colleagues have found it necessary to articulate -- and then find satisfied on very shaky grounds -- an "affirmative need threshold" as part of the standard for order modifications under a "public interest" standard.<sup>1</sup>

The Commission has articulated its affirmative need threshold -- with some puzzling lapses in consistency -- in more than a decade's worth of competition cases, and last year the Commission suddenly took the unfortunate step of importing the concept into the consumer protection field.<sup>2</sup> Not only does the threshold serve no discernible purpose, except perhaps to dissuade some parties from filing potentially meritorious petitions; it also imposes needless burdens on the Commission. For example, rather than simply weigh the overall costs and benefits of a requested order modification under the "public interest" rubric of Commission Rule 2.51,<sup>3</sup> the Commission and its staff must search high and low -- and occasionally engage in evidentiary prestidigitation -- to come up with the "competitive harm" that will carry a petitioner across the affirmative need threshold.<sup>4</sup> A case such as this one -- in which the affirmative need "evidence" is paltry, but the requested relief fairly cries out to be granted -- demonstrates why the Commission should summon the will to jettison the "affirmative need" concept and embrace explicitly a simple cost/benefit balancing approach to order modifications pursuant to the "public interest" standard of Rule 2.51.

---

<sup>1</sup> The Commission makes the following conclusory statement: "Columbia has met its burden of showing an affirmative need to reopen the order in that the continued operation of the order is causing competitive injury. Having to hold the remaining Healthtrust Utah assets separate pending a determination on the obligation to divest the lease is unnecessary to accomplish the purposes of the order and would impose significant and unforeseen costs on Columbia." Order Reopening and Modifying Order at 3 (May 15, 1996). It would be difficult to conjure up a less substantial foundation on which to rest the determination that a respondent had crossed the mythical "affirmative need threshold."

<sup>2</sup> California and Hawaiian Sugar Co., Docket No. C-2858 (Order Reopening the Proceeding and Modifying Cease and Desist order, Jan. 17, 1995).

<sup>3</sup> 16 CFR 2.51.

<sup>4</sup> See Concurring Statement of Commissioner Roscoe B. Starek, III, in California and Hawaiian Sugar Co., Docket No. C-2858 (Jan. 19, 1995); Concurring Statement of Commissioner Roscoe B. Starek, III, in Service Corporation International, Docket No. 9071 (May 17, 1994).

Complaint

121 F.T.C.

IN THE MATTER OF

## DELL COMPUTER CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF  
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3658. Complaint, May 20, 1996--Decision, May 20, 1996*

This consent order prohibits, among other things, a Texas-based personal computer manufacturer from enforcing its patent rights against computer manufacturers using the VL-bus, a mechanism to transfer instructions between the computer's central processing unit and its peripherals.

*Appearances*

For the Commission: *Michael E. Antalics* and *William J. Baer*.

For the respondent: *Raymond Jacobsen* and *Kirin Corcoran*,  
*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 respondent, Dell Computer Corporation, a corporation, has violated the provisions of said 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, stating its charges as follows:

PARAGRAPH 1. Respondent Dell Computer Corporation ("Dell") is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business at 2214 West Braker Lane, Texas.

PAR. 2. Respondent is a publicly traded for-profit corporation engaged in the innovation, development, manufacture, and sale of personal computer systems throughout the United States. By virtue of its purposes and activities, respondent is a corporation within the meaning of Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.