INTERLOCUTORY, MODIFYING, VACATING, AND MISCELLANEOUS ORDERS

PHOEBE PUTNEY HEALTH SYSTEM, INC., PHOEBE PUTNEY MEMORIAL HOSPITAL, INC., PHOEBE NORTH, INC., HCA INC., PALMYRA PARK HOSPITAL, INC.,
AND
HOSPITAL AUTHORITY OF ALBANY-DOUGHERTY COUNTY

Docket No. D-9348. Order, March 14, 2013

Order granting Complaint Counsel's motion to lift the stay of the administrative proceedings and reset the hearing schedule, in light of the Supreme Court's decision in a collateral federal court action.

ORDER GRANTING COMPLAINT COUNSEL'S MOTION TO LIFT STAY

On July 15, 2011, on Respondents' unopposed motion and pursuant to Rule 3.41(f) of the Commission's Rules of Practice, 16 C.F.R. § 3.41(f), the Commission stayed the administrative proceeding in this matter pending the appellate resolution of a collateral federal court action. On February 19, 2013, the Supreme Court of the United States issued its decision in that collateral action, in view of which Complaint Counsel now moves the Commission to lift the administrative stay and to order the resetting of the administrative hearing schedule. For the reasons noted below, the Commission has determined to grant the motion, and to direct the Chief Administrative Law Judge to hold a scheduling conference in this matter promptly to reset the necessary scheduling deadlines, including a new hearing, which should begin as soon as is practicable but no later than July 15, 2013.

The Commission issued the administrative complaint in this matter on April 19, 2011, alleging that the then-proposed acquisition of Palmyra Park Hospital, Inc. (Palmyra) by Phoebe Putney Health System, Inc. ("PPHS"), Phoebe Putney Memorial Hospital, Inc. ("PPMH"), Phoebe North, Inc. ("PNI") and the Hospital Authority of Albany-Dougherty County from HCA Inc.

would reduce competition substantially and allow the combined entity to raise prices for general acute-care hospital services charged to commercial health plans in Albany, Georgia, and the surrounding region, in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and – if consummated – Section 7 of the Clayton Act, 15 U.S.C. § 18. Administrative proceedings began under Chief Administrative Law Judge Chappell, and a hearing was scheduled to begin on September 19, 2011.

On April 20, 2011, the Commission filed in the United States District Court for the Middle District of Georgia a complaint for a preliminary injunction pending resolution of the Commission's administrative proceeding. The defendants there (Respondents here) did not contest the antitrust merits of the Commission's complaint, but moved the district court to dismiss the collateral action on the ground that the state action doctrine exempts the challenged acquisition of Palmyra from federal antitrust law. The District Court agreed with the defendants and dismissed the complaint for failure to state a claim. The Commission appealed that ruling to the United States Court of Appeals for the Eleventh Circuit and, as noted above, stayed its administrative proceeding pending appellate resolution of the collateral court action.

Following the Eleventh Circuit's affirmance of the district court's ruling,[1] the Supreme Court granted certiorari to hear the case and, on February 19, 2013, unanimously reversed the judgment of the court of appeals, adopting instead the standard for state action antitrust exemption advocated by the Commission. *FTC v. Phoebe Putney Health Sys., Inc.*, No. 11-1160, Slip Op. (U.S. Feb. 19, 2013). The Court held that the challenged transaction was not exempt from federal antitrust law: "respondents' claim for state-action immunity fails because there is no evidence the State affirmatively contemplated that hospital authorities would displace competition by consolidating hospital ownership." Slip Op. 9. Accordingly, the Court remanded the case to the Eleventh Circuit for further proceedings in light of its decision.

[1] The court of appeals had issued a stay pending appeal to block the consummation of the challenged transaction, but following its appellate decision, it lifted that stay, and Phoebe Putney concluded its acquisition of Palmyra on December 15, 2011.

With the only ground for the administrative stay now resolved, Complaint Counsel moves for lifting the stay on the administrative proceeding, noting that time is of the essence because "this is now a consummated acquisition in which significant integration of hospital assets and operations—and likely, interim harm to competition—may have taken place." (Motion at 4.) We agree. "To the extent practicable and consistent with requirements of law, the Commission's policy is to conduct [adjudicative] proceedings expeditiously." 16 C.F.R. § 3.1; *see also id*. § 3.41(b) ("Hearings shall proceed with all reasonable expedition . . .").

The sole ground for Respondents' opposition to lifting the stay—that it would be premature because the Supreme Court's decision is not yet final—does not withstand scrutiny. The Supreme Court's decision concerns a separate (albeit related) action. The Commission's stay order was discretionary, and it remains entirely proper, therefore, for the Commission to restart its own administrative proceeding. *See* Rule 3.41(f), 16 C.F.R. § 3.41(f) ("The pendency of a collateral federal court action that relates to the administrative adjudication shall not stay the proceeding unless a court of competent jurisdiction, or the Commission for good cause, so directs."). Moreover, although Respondents argue that the Supreme Court's decision would not be final until the 25-day period for a motion for reconsideration has elapsed, they have not indicated that they intend to file such a motion—nor indeed provided any grounds for the Court's reconsideration of its unanimous decision. In light of these circumstances, we are unwilling to delay resolution of this matter any further.

Accordingly,

IT IS ORDERED THAT Complaint Counsel's Motion to Lift Stay be, and it hereby is, **GRANTED**; and

IT IS FURTHER ORDERED THAT the Chief Administrative Law Judge is hereby directed to hold a scheduling conference in this matter promptly to reset the hearing schedule and set a new hearing date, with the new hearing date to be as

soon as is practicable, but in no circumstance later than July 15, 2013.

By the Commission.

AEA INVESTORS 2006 FUND L.P., HHI HOLDING CORPORATION, AND HOUGHTON INTERNATIONAL, INC.

Docket No. C-4297. Order, April 30, 2013

Order reopening and setting aside the consent order with respect to AEA Investors 2006 Fund L.P. ("AEA"), in light of the fact that AEA sold its interest in the assets that raised the competitive concerns addressed by the consent order.

ORDER REOPENING AND MODIFYING FINAL ORDER

AEA Investors 2006 Fund L.P. ("AEA") filed its Petition of Respondent AEA Investors 2006 Fund L.P. to Reopen and Modify Decision and Order ("Petition") in this matter on January 3, 2013. AEA was named as a respondent in the consent order issued by the Commission in *AEA Investors 2006 Fund L.P., et al.*, Docket No. C-4297 ("Order") because at the time it was the ultimate parent entity of HHI Holding Corporation and Houghton International, Inc. AEA has now sold its interest in HHI Holding Corporation and Houghton International, Inc. to Gulf Oil Corporation, and is requesting that the Commission reopen and modify the Order to set it aside as it applies to AEA. HHI and Houghton remain respondents to the Order, and Gulf has become a successor to AEA's obligations under the Order. AEA bases its request to reopen and modify the Order on both changed facts and public interest grounds. For the reasons stated below, the Commission has determined to grant the Petition to reopen and modify the Order as requested.