

Interlocutory Orders, Etc.

IN THE MATTER OF

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. 9348. Order, September 4, 2014

Order returning Matter to adjudication.

ORDER RETURNING MATTER TO ADJUDICATION

On June 24, 2013, the Commission issued an Order withdrawing this matter from adjudication for the purpose of considering a consent proposal. Thereafter, the Commission accepted a proposed consent agreement for public comment. As authorized by Commission Rule 3.25(f), 16 C.F.R. § 3.25(f), and as explained in the attached Statement, the Commission has now determined to withdraw its acceptance of the proposed consent agreement, to so notify the parties, and to return this matter to adjudication.

The Commission has also determined that the evidentiary hearing should commence on February 4, 2015. After consulting with the parties, the Administrative Law Judge should promptly issue a scheduling order consistent with this hearing date. Accordingly,

IT IS ORDERED THAT this matter in its entirety be, and it hereby is, returned to adjudication for further proceedings before the Administrative Law Judge under Part 3 of the Commission Rules of Practice, 16 C.F.R. §§ 3.1 *et seq.*; and

IT IS FURTHER ORDERED THAT the evidentiary hearing shall commence on February 4, 2015.

Statement of the Commission

By the Commission, Commissioner Wright and Commissioner McSweeney not participating.

Statement of the Federal Trade Commission

We have decided to withdraw our acceptance of the proposed consent agreement with Respondents Phoebe Putney Health System, Inc. (“PPHS”), Phoebe Putney Memorial Hospital, Inc. (“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”) and return this matter to administrative litigation.¹

The Commission first challenged the Hospital Authority’s acquisition of Palmyra Park Hospital from HCA and subsequent transfer of all management control of Palmyra to Phoebe Putney under a long-term lease arrangement (the “transaction”) in April 2011. The Commission alleged that Phoebe Putney’s acquisition of Palmyra, its only rival in Albany, Georgia, 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.² In addition to authorizing an administrative complaint, the Commission filed a complaint for temporary and preliminary relief in federal court in the Middle District of Georgia. In June 2011, U.S. District Court Judge W. Louis Sands granted the defendants’ motion to dismiss, holding that the state action

1 This statement reflects the views of Chairwoman Ramirez and Commissioners Brill and Ohlhausen. Commissioners Wright and McSweeney did not participate in this vote.

2 The Commission alleged that Phoebe Putney intentionally structured the deal using the Hospital Authority in an attempt to shield the acquisition from federal antitrust scrutiny under the state action doctrine. Compl. ¶ 3.

Statement of the Commission

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, although it 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 The transaction was consummated on December 15, 2011, following the Eleventh Circuit's ruling. The Commission filed a petition for certiorari, which the U.S. Supreme Court granted on June 25, 2012. 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 We thereafter determined to proceed with the administrative action that had been stayed pending the collateral federal court appeals.

In August 2013, the Commission accepted for public comment a proposed consent to resolve this matter, which did not require a divestiture of Palmyra, the most appropriate and effective remedy to restore competition in Albany and the surrounding six-county area. At the time, we explained our understanding that, because Phoebe Putney had combined its hospital permit with Palmyra's following the acquisition, the legal and practical challenges presented by Georgia's certificate of need ("CON") laws and regulations would very likely prevent a divestiture of hospital assets from being effectuated to restore competition, even assuming a finding of liability following a full merits trial and appeals.⁶ While we still had reason to believe that the transaction created an unlawful monopoly, the Commission accepted a

3 *FTC v. Phoebe Putney Health Sys., Inc.*, 793 F. Supp. 2d 1356, 1366 (M.D. Ga. 2011).

4 *FTC v. Phoebe Putney Health Sys., Inc.*, 663 F.3d 1369, 1375 (11th Cir. 2011).

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

6 See *In re Phoebe Putney Health Sys., Inc.*, Analysis of Proposed Agreement Containing Consent Order to Aid Public Comment, 78 Fed. Reg. 53,457, 53,460 (Aug. 29, 2013).

Statement of the Commission

proposed non-structural remedy for comment, in light of the apparent unavailability of a practical and meaningful structural remedy.

Our understanding is now different. As a result of public comments we received, as well as other information obtained by the Commission in response to the public comments, we became aware that the CON laws might not bar a structural remedy in this matter. Additionally, in March 2014, North Albany Medical Center, LLC, a newly-formed healthcare entity, expressed an interest in acquiring Palmyra and operating it as a competing general acute care hospital. Seeking clarification on whether Georgia's CON laws would impede such an acquisition, North Albany filed a "request for a determination" with the Georgia Department of Community Health ("DCH") on the issue. On June 3, 2014, DCH staff issued an initial determination that, among other things, "returning Phoebe North to its status as a separately licensed . . . hospital for divestiture would not require prior CON review and approval."⁷ That initial determination is currently on appeal, but we believe that Georgia CON laws may not be an impediment to structural relief.

While we regret that we accepted a proposed settlement based on a potentially erroneous understanding of Georgia's CON requirements, the public comment period served its intended purpose. We received important information from members of the public about which we had not previously been aware that led us to reconsider, and ultimately withdraw, our acceptance of the proposed settlement. Under these circumstances, the Commission is authorized to withdraw acceptance of the proposed consent agreement with the parties and return the matter to administrative litigation for further proceedings and adjudication.⁸ We do so

⁷ See Letter from Matthew Jarrard, 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).

⁸ See Commission Rule 3.25(f), 16 C.F.R. § 3.25(f) (providing that, following the public comment period, the Commission may "decide[], based on comments received or otherwise, to withdraw its acceptance of the agreement, . . . [and] return to adjudication any portions of the matter previously withdrawn from adjudication for further proceedings"); *see also* Agreement Containing

Statement of the Commission

now because 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 and now also believe that structural relief remains available.

Consent Order ¶ 20, *available at*
<http://www.ftc.gov/sites/default/files/documents/cases/2013/08/130822phoebeputneyorder.pdf> ("The Commission . . . may . . . withdraw its acceptance of this Consent Agreement and so notify Respondents, in which event it will take such action as it may consider appropriate, including returning the matter to adjudication.").

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IN THE MATTER OF

**SERVICE CORPORATION INTERNATIONAL
AND
STEWART ENTERPRISES, INC.**

Docket No. C-4423. Order, September 18, 2014

Letter approving application to divest the Cole & Garrett Funeral Home in the Nashville, Tennessee area to William Gregory.

LETTER ORDER APPROVING DIVESTITURE OF CERTAIN ASSETS

Amanda Wait, Esq.
Hunton & Williams LLP

*Re: In the Matter of Service Corporation International and
Stewart Enterprises, Inc., Docket No. C-4423*

Dear Ms. Wait:

This is in reference to the Petition For Approval of Proposed Divestiture filed by Service Corporation International (“SCI”) and received on March 24, 2014 (“Petition”). Pursuant to the Decision and Order in Docket No. C-4423, SCI requests prior Commission approval of its proposal to divest certain assets to William Gregory through newly created Cole & Garrett LLC.

After consideration of SCI’s Petition and other available information, the Commission has determined to approve the proposed divestiture as set forth in the Petition. In according its approval, the Commission has relied upon the information submitted and the representations made by SCI and William Gregory in connection with SCI’s Petition and has assumed them to be accurate and complete.

By direction of the Commission.