

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, October 30, 2014

Order granting temporary stay in the proceedings.

**ORDER GRANTING RESPONDENTS' UNOPPOSED MOTION FOR
TEMPORARY STAY OF PROCEEDING**

On October 21, 2014, Respondents filed an Unopposed Motion For Temporary Stay of the administrative proceedings in this matter under Commission Rule 3.22(a). On October 22, 2014, the Administrative Law Judge certified that motion to the Commission, with the recommendation that the Motion be granted. For the following reasons, the Commission grants the Unopposed Motion for Temporary Stay.

The Commission issued an Order returning this matter to adjudication on September 4, 2014, after determining to withdraw its acceptance of a proposed Consent Agreement for the reasons explained in the Statement of the Commission issued in connection with the Order. In brief, the Commission had accepted for public comment a proposed Consent Agreement without a structural remedy, the most favored way to restore competition, because it appeared at that time that Georgia's Certificate of Need ("CON") laws would preclude a divestiture of Palmyra Park Hospital, Inc. ("Palmyra"). Thereafter -- as a result of public comments the Commission received and other information obtained by the Commission in response to the public comments -- the Commission became aware that the CON laws might not preclude a structural remedy in this matter. The

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Commission's understanding was based, in part, on a June 3, 2014 initial determination by the Georgia Department of Community Health ("DCH") staff 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."¹ At the time the Commission returned this matter to adjudication, the Respondents had filed an appeal from the DCH staff's initial determination with the DCH hearing officer, but the appeal was still pending. The Commission Order provided that the administrative trial should begin on February 4, 2015.

On October 2, 2014, the DCH hearing officer overturned the DCH staff's initial determination letter. In addition, the DCH Commissioner, who will issue the final agency decision on the matter, issued a public statement indicating that he "is in support of and in agreement with the hearing officer decision." *See* Ex. 2 of Respondents' Unopposed Motion.

In light of these developments, which create uncertainty regarding the applicability of Georgia's CON laws to the feasibility of re-establishing Palmyra as a second Dougherty County hospital -- and of the transfer of Palmyra from the Hospital Authority of Albany-Dougherty County ("Authority") to a private owner -- the Commission has decided to issue a temporary stay of the administrative proceeding in this matter as set forth below. This decision is based on Respondents' representation that the status quo will be preserved and that neither party will be prejudiced by a stay. Respondents indicate that they will continue to abide by the Stipulated Preliminary Injunction entered by the United States District Court in the related federal court litigation. We are also mindful of Respondents' statement that continued litigation will cost Respondents and third parties significant resources in continuing to comply with discovery requests.

We also base our decision on the fact that Complaint Counsel has not opposed Respondents' Motion. In its Memorandum

¹ *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).

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Relating to Respondents' Motion, Complaint Counsel concurs with both of the considerations raised by Respondents in seeking the stay. Complaint Counsel states that its case will not be prejudiced by a limited stay of the administrative proceedings because the duration of the stay will be short, and a number of protections are in place through additional commitments from Phoebe Putney Health System, Inc., Phoebe Putney Memorial Hospital, Inc., and the Authority.

In deciding whether to grant Respondents' Motion, we exercise our discretion to oversee this adjudication, comparable to the broad discretion of a court "to stay proceedings[.]. . . incidental to the power inherent in every court to control the disposition of the [cases] on its docket with economy of time and effort for itself, for counsel, and for litigants. How this can best be done calls for an exercise of judgment." *Landis v. North Am. Co.*, 299 U.S. 248, 254 (1936). While the Commission has a strong interest in completing Part 3 proceedings expeditiously,² we conclude that there is good cause to issue a temporary stay in this case.

Accordingly,

IT IS ORDERED that all proceedings before the Administrative Law Judge in this matter be, and they hereby are, stayed until the earlier of:

- A. Thirty (30) days after the expiration of the period for seeking any judicial appeal for a final decision of the Georgia Department of Community Health in DET2014-033, *see* OCGA 50-13-19(b); or
- B. January 28, 2015.

² See Rule 3.1, 16 C.F.R. § 3.1 ("[T]he Commission's policy is to conduct [adjudicative] proceedings expeditiously."); Rule 3.41(b), 16 C.F.R. § 3.41(b) ("Hearings shall proceed with all reasonable expedition"); Rules of Practice Amendments, 61 Fed. Reg. 50,640 (FTC Sept. 26, 1996) ("[A]djudicative proceedings shall be conducted expeditiously and . . . litigants shall make every effort to avoid delay at each stage of a proceeding.").

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

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IN THE MATTER OF

JERK, LLC D/B/A JERK.COM
AND
JOHN FANNING

Docket No. 9361. Order, December 5, 2014

Order denying Complaint Counsel's Motion to Supplement the Record on Complaint Counsel's pending Motion for Summary Decision.

ORDER DENYING WITHOUT PREJUDICE COMPLAINT COUNSEL'S
MOTION TO SUPPLEMENT THE RECORD FOR SUMMARY DECISION

By McSWEENEY, Commissioner:

On November 25, 2014, Complaint Counsel filed a Motion to Supplement the Record on Complaint Counsel's pending Motion for Summary Decision. Complaint Counsel seeks to add to the factual record for summary decision Respondents' admissions that resulted from a failure to timely respond to Complaint Counsel's Second Request for Admissions. On November 26, 2014, Respondent John Fanning filed an objection to Complaint Counsel's motion.

For the reasons set forth below, Complaint Counsel's Motion is **DENIED WITHOUT PREJUDICE**.

Background

On September 29, 2014, Complaint Counsel moved for summary decision, asking for a finding of liability against Respondents Jerk, LLC ("Jerk") and John Fanning. In support of its motion, Complaint Counsel submitted a Statement of Material Facts as to Which There is No Genuine Issue for Trial. On November 4, 2014, Respondent John Fanning filed his opposition to Complaint Counsel's Motion for Summary Decision. Respondent Jerk did not respond to the motion.¹ On November

¹ In fact, Jerk has not provided any response or otherwise participated in this action since Jerk counsel of record filed a notice with the Commission and the