

**ANALYSIS OF PROPOSED AGREEMENT CONTAINING CONSENT ORDER
TO AID PUBLIC COMMENT**

In the Matter of Phoebe Putney Health System, Inc., et al., Docket No. 9348

I. Introduction

The Federal Trade Commission (“Commission”) has accepted, subject to final approval, an Agreement Containing Consent Order (“Consent Agreement”) from 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”) in settlement of administrative litigation challenging the Hospital Authority’s acquisition of Palmyra from HCA and subsequent transfer of all management control of Palmyra to Phoebe Putney under a long-term lease arrangement (the “Transaction”).

The circumstances in this matter are highly unusual and the Commission’s discontinuation of litigation and settlement of this case on the proposed terms are acceptable to the Commission only under the unique circumstances presented here. In particular, as described further below, the Commission believes that, assuming a finding of liability following a full merits trial and appeals, 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. The Commission has declined to seek price cap or other non-structural relief, as such remedies are typically insufficient to replicate pre-merger competition, often involve monitoring costs, are unlikely to address significant harms from lost quality competition, and may even dampen incentives to maintain and improve healthcare quality.

Accordingly, the proposed Consent Agreement, among other things, contains for settlement purposes a stipulation from Respondents Phoebe Putney and Hospital Authority that the effect of the consummated Transaction may be substantially to lessen competition within the relevant service and geographic markets alleged in the Administrative Complaint dated April 20, 2011 (“Complaint”). The Consent Agreement also requires Respondents Phoebe Putney and Hospital Authority to provide the Commission prior notice of any acquisition of certain healthcare providers in the six-county area around Albany, Georgia, including other general acute-care hospitals, inpatient and outpatient facilities, and physician practices with five (5) physicians or more. Finally, the Consent Agreement restricts Respondents Phoebe Putney and Hospital Authority from raising any objections to or negative comments about CON applications for general acute-care hospitals in the six-county area surrounding Albany, Georgia. Additionally, the Consent Agreement requires Phoebe Putney and the Hospital Authority to provide copies of any objections they file in connection with a CON application for an inpatient or outpatient clinic providing any of the services provided by Phoebe Putney or the Hospital Authority in the six-county area around Albany, Georgia within five (5) days of its submission to the Georgia Department of Community Health (“DCH”).

The Consent Agreement has been placed on the public record for thirty (30) days to solicit comments from interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the proposed Consent Agreement and will decide whether it should withdraw from the proposed Consent Agreement, modify it, or make it final and issue its Decision and Order (“Order”).

II. The Parties

PPHS is a non-profit Georgia corporation consisting of several hospitals and other health care facilities in southwest Georgia with its principal place of business located at 417 Third Avenue, Albany, Georgia 31701. In 2011, total annual patient revenues for PPHS at all of its facilities were over \$1.6 billion. PPMH is a non-profit Georgia corporation, wholly-owned by PPHS, which operates a 443-bed general acute-care hospital with its principal place of business located at 417 Third Avenue, Albany, Georgia 31701. Opened in 1911, PPMH offers a full range of general acute-care hospital services, as well as emergency care services, tertiary care services, and outpatient services.

Respondent Hospital Authority is organized and exists pursuant to the Georgia Hospital Authorities Law, O.C.G.A. §§ 31-7-70 *et seq.*, and maintains its principal place of business at 417 Third Avenue, Albany, Georgia 31701. The Hospital Authority is composed of nine volunteer members appointed to five-year terms by the Dougherty County Commission, and has no employees, no staff, and no budget. Since 2012, the Hospital Authority holds title to both PPMH and the former Palmyra assets (now known as Phoebe North) and has entered into a single, long-term lease covering both of these facilities with PPMH at the rate of \$1 per year.

HCA, a Delaware for-profit corporation, is one of the leading health care services companies in the United States with its principal place of business located at One Park Plaza, Nashville, Tennessee 37203. As of December 31, 2012, HCA operated 162 hospitals, comprised of 156 general acute-care hospitals; five psychiatric hospitals; and one rehabilitation hospital. In addition, HCA operates 112 freestanding surgery centers. HCA’s facilities are located in 20 states and England. Prior to the acquisition, Palmyra, a 248-bed general acute-care hospital located 1.6 miles from PPMH, was owned and operated by HCA. Palmyra was a Georgia corporation with its principal place of business at 2000 Palmyra Road, Albany, Georgia 31701. Opened in 1971, Palmyra provided a wide range of general acute-care services.

III. The Acquisition

The Commission issued its Complaint in April 2011 charging that the Transaction violates Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended 15 U.S.C. § 45, by lessening competition for the provision of inpatient general acute-care hospital services sold to commercial health plans in Albany and the surrounding six-county area. The Commission also filed a complaint for temporary and preliminary relief, pursuant to Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 53(b), and Section 16 of the Clayton Act, 15 U.S.C. § 26, in the U.S. District Court for the Middle District of Georgia. On June 27, 2011, U.S. District Court Judge W. Louis Sands granted the defendants’ motion to dismiss, holding that the state action doctrine immunized the

Transaction from federal antitrust scrutiny.¹ 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 agreeing 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."² The Court of Appeals dissolved its injunction pending appeal, and the Transaction was consummated on December 15, 2011. Subsequently, the Georgia DCH granted Phoebe Putney's request for a new, single license covering both Albany hospitals, PPMH and Palmyra, effective August 1, 2012.

Seeking judicial review of the Eleventh Circuit's ruling, the Commission filed a petition for certiorari, which the U.S. Supreme Court granted on June 25, 2012. On February 19, 2013, in a unanimous decision, the Court reversed the judgment of the Eleventh Circuit, holding that state action did not immunize the Transaction, and remanded the case for further proceedings below.³ The Commission thereafter sought a stay of integration and other preliminary relief in the federal district court,⁴ and also lifted its stay of administrative proceedings and scheduled a plenary hearing to commence on August 5, 2013, pursuant to which Complaint Counsel and Respondents engaged in discovery over the antitrust merits of the case. On June 10, 2013, the parties filed a joint motion to withdraw the matter from adjudication for settlement purposes, which was granted by the Commission on June 24, 2013.

IV. The Complaint

The Complaint alleges that the Transaction would reduce competition substantially in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended 15 U.S.C. § 45, with the likely effect of decreasing quality of care and increasing prices for general acute-care hospital services charged to commercial health plans. The alleged relevant product market is general acute-care hospital services sold to commercial health plans. The alleged relevant geographic market is the six-county area surrounding Albany, Georgia.

The Complaint alleges that the Transaction was essentially a merger-to-monopoly. PPMH and Palmyra were the only general acute-care hospitals in Albany, Georgia. The only other hospital in the six-county area surrounding Albany, Georgia, is Mitchell County Hospital, a 25-bed critical-access hospital in Camilla, Georgia, about 31 miles away. The Complaint alleges

¹ *F.T.C. v. Phoebe Putney Health System, Inc.*, 793 F. Supp. 2d 1356, 1366 (M.D. Ga. 2011).

² *F.T.C. v. Phoebe Putney Health System, Inc.*, 663 F.3d 1369, 1375 (11th Cir. 2011).

³ *F.T.C. v. Phoebe Putney Health System, Inc.*, 133 S. Ct. 1003, 1011 (2013).

⁴ Following oral argument regarding the need for temporary injunctive relief, U.S. District Court Judge W. Louis Sands issued a temporary restraining order ("TRO") on May 15, 2013, halting further consolidation of the hospitals and prohibiting any price changes to existing health-plan contracts, pending the district court's consideration of the FTC's motion for preliminary injunction. The parties subsequently filed a joint motion for a stipulated preliminary injunction, which the district court granted on June 5, 2013. The stipulated preliminary injunction orders the Defendants to continue to operate the hospitals in the manner in which they were operated when the TRO was entered; to refrain from any further consolidation of Palmyra into Phoebe Putney's hospital system; and to refrain from making any price changes to, or terminating, any existing contracts with health plans.

that, through the Transaction, Phoebe Putney acquired a post-merger market share of approximately 86%, and that the post-merger HHI is 7,453, with a change from the pre-merger HHI of 1,675. This market concentration far exceeds the thresholds set forth in the *Horizontal Merger Guidelines* and creates a presumption that the Transaction created or enhanced market power. In addition, the Complaint alleges uniquely close, direct, and substantial pre-merger competition between Phoebe Putney and Palmyra, confirming the likelihood of adverse competitive effects resulting from the Transaction.

Entry into the relevant market is difficult. Not only is the construction of a new general acute-care hospital extremely expensive and time-consuming, but it is also subject to CON regulation in Georgia. Any person wishing to build a new hospital in the relevant geographic market would need approval from the Georgia DCH. Such an application would face opposition from any hospital in the relevant market, such as Phoebe Putney, and would likely be denied by DCH due to the lack of need as defined by DCH's strict criteria, as discussed further below. As a result, new entry sufficient to achieve a significant market impact within two years is highly unlikely.

V. The Proposed Consent Agreement

Georgia's CON statutes and regulations effectively prevent the Commission from effectuating a divestiture of either hospital in this case. As mentioned above, following the consummation of the Transaction, Phoebe Putney applied for and received a single license authorizing it to operate the formerly-separate hospitals as a single hospital with two campuses. The Georgia DCH issued Phoebe Putney's new license and revoked the two separate licenses that previously covered PPMH and Palmyra. Georgia's CON laws preclude the Commission from re-establishing the former Palmyra assets as a second competing hospital in Albany, because such relief would require: (1) the re-division of the single state-licensed hospital into two separate hospitals; and (2) the transfer of one of those hospitals from the Hospital Authority to a new owner. Either one of those steps is independently sufficient to require CON approval from DCH, which, as discussed further below, would not be forthcoming.

DCH has no statutory authority to revoke Phoebe Putney's current single-hospital license on the basis that its acquisition of Palmyra was anticompetitive. DCH may only revoke a health care facility's license if the facility "violates any of [DCH's] rules and regulations" or does not meet DCH's "quality standards" for "clinical service."⁵ Such circumstances do not exist here.

Moreover, the divestiture of either hospital from the Hospital Authority to a proposed buyer would trigger the need for CON approval from DCH. A CON is required for "[a]ny expenditure by or on behalf of a health care facility in excess of \$2.5 million . . . except expenditures for acquisition of an existing health facility not owned or operated . . . by or on behalf of a hospital authority."⁶ To gain CON approval, the CON applicant must prove both that: (a) there is an "unmet area need" justifying a second Dougherty County hospital; and (b) establishing such a

⁵ Ga. Code Ann. § 31-7-4.

⁶ Ga. Code Ann. § 31-6-40(a)(2) (emphasis added).

facility would not have an adverse impact on the patient volume and revenue of other hospitals in the same state health planning area. Under Georgia's mandatory need formulas, there currently are hundreds of surplus hospital beds in Albany, Georgia.⁷ As such, a new buyer could not prove unmet need in the Albany area as required by Georgia law to justify issuance of a CON.

An applicant seeking a CON for a hospital within the same state health planning area as an existing safety-net hospital, such as PPMH, must also prove that it will not have a detrimental market share or "payer mix" impact on that existing hospital. An adverse impact will be determined if, based on projected utilization, the applicant facility would reduce the utilization of the existing safety-net hospital by ten percent or more.⁸ The CON rules are even more protective of teaching hospitals, such as PPMH, requiring as a precondition to issuance of a CON that the applicant demonstrate that an additional hospital will not reduce the utilization of an existing teaching hospital in the planning area by even five percent.⁹

Finally, Georgia courts have consistently construed exemptions to the CON requirements narrowly, and held that DCH lacks discretion to grant exemptions not clearly and expressly conferred by statute.¹⁰

The proposed Consent Agreement contains a stipulation by Phoebe Putney and the Hospital Authority that, solely for settling this matter, the effect of the Transaction may be substantially to lessen competition within the relevant service and geographic markets alleged in the Complaint. In addition to routine reporting and compliance requirements, the proposed Consent Agreement contemplates certain restrictions on Phoebe Putney and the Hospital Authority discussed below.

A. Prior Notice of Acquisitions

First, for the next ten (10) years, Phoebe Putney and the Hospital Authority must give the Commission prior notice for acquisitions of certain healthcare providers¹¹ in the six-county area surrounding Albany, Georgia. Under the Order, Phoebe Putney and the Hospital Authority are required to give the Commission thirty (30) days advance notice of a proposed acquisition that is covered by the Order but not subject to the Hart-Scott-Rodino Act ("HSR Act"). If, within this thirty-day period, the Commission staff makes a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Phoebe Putney and the Hospital Authority may not consummate the transaction until thirty (30) days after submitting

⁷ PPMH and Palmyra both were grandfathered in when Georgia first enacted its CON law in 1976. Neither had ever independently received a CON.

⁸ Ga. Comp. R. & Regs. 111-2-2-.20(3)(d)(2).

⁹ Ga. Comp. R. & Regs. 111-2-2-.20(3)(d)(3).

¹⁰ See, e.g., *North Fulton Med. Ctr. v. Stephenson*, 501 S.E.2d 798, 801 (Ga. 1998); *Phoebe Putney Mem'l Hosp., Inc. v. Roach*, 480 S.E.2d 595, 597 (Ga. 1997); *HCA Health Servs. of Ga., Inc. v. Roach*, 458 S.E.2d 118, 120-121 (Ga. 1995); *HCA Health Servs. of Ga., Inc. v. Roach*, 439 S.E.2d 494, 497 (Ga. 1994).

¹¹ The prior notice provision applies to the acquisition of: (1) any general acute-care hospital; (2) any inpatient or outpatient facility that provides any service provided by Phoebe Putney or the Hospital Authority; and (3) all or a controlling interest in a physician group practice of five (5) or more physicians.

such additional information or documentary material. This provision will prevent smaller, non-reportable transactions from taking place without notice to the Commission, and will provide the Commission with an opportunity to review such acquisitions prior to consummation.

B. CON Opposition Restrictions

Second, Phoebe Putney and the Hospital Authority have agreed to restrictions for a period of five (5) years prohibiting them from raising any objections to or providing negative comments about CON applications for general acute-care hospitals in the six-county area surrounding Albany, Georgia, which spans multiple state health planning areas for CON review purposes. This provision would allow a new entrant to apply for a CON without the potential additional cost and delay associated with opposition from Phoebe Putney or the Hospital Authority. Additionally, the Consent Agreement requires Phoebe Putney and the Hospital Authority to provide copies of any objections they file in connection with a CON application for an inpatient or outpatient clinic providing any of the services provided by Phoebe Putney or the Hospital Authority in the six-county area around Albany, Georgia within five (5) days of its submission to the Georgia DCH. The proposed Consent Agreement would, however, permit Phoebe Putney and the Hospital Authority to respond to questions or information requests received from DCH as part of a CON review process.

C. Dismissal as to HCA and Palmyra

Having accepted a settlement that imposes no further relief upon HCA or Palmyra, the Commission has determined to dismiss the Complaint as to them.

VI. Opportunity for Public Comment

The proposed Consent Agreement has been placed on the public record for thirty (30) days for receipt of comments from interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again review the proposed Consent Agreement, as well as the comments received, and will decide whether it should withdraw from the Consent Agreement or make final the Decision and Order.

The purpose of this analysis is to facilitate public comment on the proposed Consent Agreement and is not intended to constitute an official interpretation of the proposed Consent Agreement or to modify its terms in any way.