

UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
WASHINGTON, D.C. 20580



Office of the Secretary

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**VIA E-MAIL AND EXPRESS MAIL**

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**RE:** *Petitions to Quash or Limit Subpoenas Duces Tecum and Civil Investigative Demands Directed to Phoebe Putney Health System, Inc. and HCA Inc. (FTC File No. 111-0067)*

Dear Messrs. Van Voorhis and Arquit:

This letter advises you of the Commission's disposition of petitions to quash or limit subpoenas *duces tecum* and Civil Investigative Demands directed to your respective clients, Phoebe Putney Health System, Inc. and HCA Inc. (together, the "hospitals"). The Commission issued the subpoenas and CIDs on February 14, 2011, in connection with its antitrust investigation of the proposed acquisition of HCA's Palmyra Park Hospital by the Hospital Authority of Albany-Dougherty County (Georgia) and/or Phoebe Putney Health System. The hospitals filed separate petitions to quash or limit the subpoenas and CIDs on February 25, 2011. Commissioner Julie Brill, acting as the Commission's delegate, has referred the petitions to the full Commission for determination. *See* 16 C.F.R. § 2.7(d)(4). For the reasons set forth below, the petitions are denied.

The central argument contained in both petitions is that the February 28, 2011, compliance deadline set by the subpoenas and CIDs is unreasonable in light of the volume of documents and information demanded. (PP Pet. at 6-9; HCA Pet. at 13-19.) This argument ignores the reality that the compliance deadline is linked to events within the hospitals' control. The petitions note that Commission staff declined to extend the compliance date from February 28 to March 15, as the hospitals requested. (PP Pet. at 3-4; HCA Pet. at 11.) But staff's decision on the compliance deadline was directly connected to the hospitals' refusal to defer consummation of the transaction under investigation beyond March 31. (HCA Pet. at 11.) The hospitals would undoubtedly be granted more time to comply with the subpoenas and CIDs if they were to give Commission staff additional time to conduct its investigation.

Moreover, much of the material demanded by the subpoenas and CIDs was originally requested in voluntary access letters dated December 29, 2010, and February 4, 2011. (PP Pet. at 1, 3, Exs. C, G; HCA Pet. at 7, 9-10, Ex. A.) The hospitals have had sufficient time to gather and produce this information.

The hospitals argue that the subpoenas and CIDs are particularly unreasonable in light of the potential applicability of the state action doctrine to the conduct under investigation. (PP Pet. at 8-9; HCA Pet. at 3-4, 23.) The state action doctrine, however, does not provide immunity from compulsory process in a pre-complaint investigation, particularly where, as here, there are questions about whether the doctrine applies. *See FTC v. Monahan*, 832 F.2d 688, 690 (1st Cir. 1987) (enforcing subpoenas and stating that state action dispute “ought not to be settled in a subpoena enforcement proceeding”); *see generally FTC v. Ken Roberts Co.*, 276 F.3d 583, 586 (D.C. Cir. 2001) (“administrative agencies must be given wide latitude in asserting their power to investigate by subpoena”); *United States v. Construction Prods. Research, Inc.*, 73 F.3d 464, 470 (2d Cir. 1996) (“[A]t the subpoena enforcement stage, courts need not determine whether the subpoenaed party is within the agency’s jurisdiction or covered by the statute it administers; rather the coverage determination should wait until an enforcement action is brought against the subpoenaed party.”).

Finally, the hospitals, particularly HCA, argue that the subpoenas and CIDs are overly broad. (HCA Pet. at 19-22; PP Pet. at 6.) Both subpoenas and CIDs, however, request relevant information and are comparable to subpoenas and CIDs issued in similar investigations. *See, e.g., FTC v. ProMedica Health System, Inc.*, No. 10-2340 (N.D. Ohio, filed Oct. 13, 2010) (subpoena enforcement action in hospital merger investigation with similar subpoenas and CIDs). In addition, authorized Commission staff has demonstrated a willingness to modify the subpoenas and CIDs to reduce the hospitals’ burden. As one example, staff has agreed that HCA may limit its search to the files of a limited group of custodians. (HCA Pet., Ex. B at 2.)

While we deny the petitions, we note that designated Commission staff are authorized to extend the compliance deadline. 16 C.F.R. § 2.7(c). We encourage staff to consider any extension request that is accompanied by a commitment to give staff additional time to investigate by deferring consummation of the acquisition in question.

For the foregoing reasons, **IT IS HEREBY ORDERED THAT** Phoebe Putney Health System’s and HCA’s Petitions to Quash or Limit are **DENIED**; and

**IT IS FURTHER ORDERED THAT** Phoebe Putney Health System shall comply with the Commission’s subpoena and CID by March 15, 2011; and

**IT IS FURTHER ORDERED THAT** HCA shall comply with the Commission’s subpoena and CID by March 15, 2011.

By direction of the Commission.

Donald S. Clark  
Secretary