

Proposed Settlement Rejected in FTC Challenge to Georgia Hospital Combination; Matter Returns to Administrative Litigation

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The FTC's challenge to the now-consummated combination of Phoebe Putney Health System, Inc.—the operator of Phoebe Putney Memorial Hospital—and rival Palmyra Park Hospital, Inc. in Albany, Georgia, is headed back to administrative litigation. More than a year after announcing a tentative settlement in the case, the FTC has refused to grant final approval to the proposed consent order. On Friday, the Commission issued an order, returning the matter to Part III litigation to determine whether the acquisition reduced competition in the market for acute-care hospital services sold to commercial health plans in a six-county area, as alleged in the agency's 2011 complaint.

The proposed settlement did not include divestiture relief, even though it was believed to be the most appropriate and effective remedy to restore competition in market. It had been thought that 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. However, based on developments during the public comment period for the settlement, a majority of the commissioners has now concluded that structural relief may be available to remedy the apparent anticompetitive effects of the transaction.

According to a statement released on September 5, FTC Chairwoman Edith Ramirez and Commissioners Julie Brill and Maureen K. Ohlhausen now have a different understanding of the relief available. Commissioners Joshua D. Wright and Terrell McSweeney did not participate in the vote.

“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,” the statement reads. The Commission was swayed by the public comments, as well as other information obtained during the comment period. For instance, a newly-formed healthcare entity, North Albany Medical Center, LLC, expressed an interest in acquiring Palmyra and operating it as a competing general acute care hospital, and that the staff of the Georgia Department of Community Health issued an initial determination—now on appeal—that “returning Phoebe North to its status as a separately licensed . . . hospital for divestiture would not require prior CON review and approval.”

The case will once again return to administrative litigation after going all the way to the U.S. Supreme Court. The FTC’s court action seeking injunctive relief to prevent the consummation of the transaction prior to the completion of the administrative proceeding was dismissed but later revived by the U.S. Supreme Court. In February 2013, the High Court ruled that the state action immunity doctrine did not shield the transaction from attack.

An evidentiary hearing is scheduled to commence on February 4, 2015.