

**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

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 The Parties, w k-1.1248-.7(ral hospitals; five ps hosp Tw(generator132 Tc-.0002 Tw[(P(rvicTj9.91PMH (ns, ileer

Transaction from federal antitrust scrutiny.<sup>1</sup> 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."<sup>2</sup> 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 gr

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

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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 Cons