



UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Office of Policy Planning
Bureau of Economics
Bureau of Competition

July

EcEand gastrointestinal procedure rooms, and contains require

care, to require annual reporting and to facilitate coordination v
HB200 narrows the application of North Carolina's Certificate
represents a procompetitive improvement in the law as compar

CON laws have the laudable goals of reducing health c
to care.

³ However, CON laws can prevent the efficient functioning of health care markets in several ways that may undermine those goals. First, they often create barriers to entry and expansion, limit consumer choice, and stifle innovation. Second, CON laws can be prone to exploitation by incumbent firms seeking to thwart or delay entry by new competitors. Third, as recently illustrated by the Commission's experience in the *Phoebe Putney* case, CON laws can deny consumers the benefit

A. CON Laws Create Barriers to Entry

FTC staff appreciates the opportunity to provide our input on HB200. We hope that our comments will be of assistance as you consider these issues.

assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers.”).

⁸ A description of, and links to, the FTC’s various, health care-related activities can be found at <https://www.ftc.gov/tips-advice/competition-guidance/industry-guidance/health-care>.

⁹ See N.C. Gen. Stat. § 131E-178 (2015).

¹⁰ See *id.* § 176(9b).

¹¹ See *id.* § 176(16).

¹² See N.C. Division of Health Service Reg., Healthcare Planning and Certificate of Need Section, Overview of Certificate of Need, *available at* <https://www.dhsr.nc.gov/Healthcare-Planning-and-Certificate-of-Need-Section/Overview-of-Certificate-of-Need>.

²⁴ The Eleventh Circuit affirmed the district court’s dismissal of the case on state action grounds and dissolved the stay that had prevented the parties from consummating the merger. The Supreme Court reversed, finding against state action immunity. *See FTC v. Phoebe Putney Health Sys. Inc.*, 133 S. Ct. 1003, 1011 (2013).

²⁵ *In re Phoebe Putney Health Sys., Inc.*, Dkt. No. 9348, Statement of the Federal Trade Commission, at 1 (Mar. 31, 2015), available at https://www.ftc.gov/system/files/documents/public_statements/634181/150331phoebeputneycommstmt.pdf.

²⁶ *Id.* at 3.

²⁷ *See* A Dose of Competition, *supra* note 14, ch. 8 at 2; Christine L. White et. al., *Antitrust and Healthcare: A Comprehensive Guide* 527 (2013).

²⁸ *See, e.g.*, Patrick A. Rivers, Myron D. Fottler & Jemima A. Frimpong, *The Effects of Certificate of Need Regulation on Hospital Costs*, 36 J. Health Care Fin. 1, 12 (2010); DOJ-FTC Illinois Testimony, *supra* note 15, at 5 & nn.16-18 (collecting studies on the effects of CON laws); The Lewin Group Report, *supra* note 3, at i-ii (“Based on our review of relevant literature and our independent analysis, it is clear that the evidence on cost containment is weak”); *but see* Michael D. Rosko & Ryan L. Mutter, *The Association of Hospital Cost-Inefficiency with Certificate-of-Need Regulation*, 71 Med. Care Res. & mRev. 280 (2014) (finding lower hospital cost-inefficiency in CON states than non-CON states).

²⁹ *See* Vivian Ho & Meei-Hsiang Ku-Goto, *State Deregulation and Medicare Costs for Acute Cardiac Care*, 70(2) Med. Care Res. & Rev. 201 (2013) (“Removal of CON regulations is also associated with lower Medicare reimbursements pre patient for both CABG and PCI.”).