

ORIGINAL



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

_____)
In the Matter of)
)
PHOEBE PUTNEY HEALTH)
SYSTEM, INC., and)
)
PHOEBE PUTNEY MEMORIAL)
HOSPITAL, INC., and)
)
PHOEBE NORTH, INC., and)
)
HCA INC., and)
)
PALMYRA PARK HOSPITAL, INC., and)
)
HOSPITAL AUTHORITY OF,)
ALBANY-DOUGHERTY COUNTY,)
Respondents.)
_____)

DOCKET NO. 9348

ORDER CERTIFYING UNOPPOSED MOTION FOR STAY

I.

On July 1, 2011, pursuant to Commission Rule 3.22(a), Respondents filed an Unopposed Motion to Stay the proceedings in this matter ("Motion"). For the reasons that follow, the Motion is certified to the Commission, with the recommendation that the unopposed request to stay be granted.

II.

The relevant procedural background, as stated in the Motion and reflected by public record, shows that on April 19, 2011, the Federal Trade Commission ("FTC"), along with the State of Georgia, filed a complaint, a motion for a temporary restraining order, and a motion for a preliminary injunction in the United States District Court for the Middle District of Georgia ("District Court"). *FTC v. Phoebe Putney Health System, et al.*, No. 1:11-cv-58. The District Court granted the temporary restraining order on April 21, 2011. Thereafter, on May 26, 2011, the present administrative proceeding commenced.

On June 27, 2011, the District Court dismissed with prejudice the FTC's complaint, ruling that the transaction alleged in the complaint was immune from federal antitrust laws based upon the state action doctrine. The FTC filed an appeal of the District Court's ruling the following day with the Court of Appeals for the Eleventh Circuit ("Eleventh Circuit"). *FTC v. Phoebe Putney Health System, et al.*, No. 11-12906 (11th Cir.). On June 29, 2011, the FTC filed an emergency motion for an injunction to stay the District Court's ruling and to expedite the appeal. Respondents advised the Eleventh Circuit that they would refrain from consummating the merger at issue until after July 6, 2011, at which time they expected a ruling from the Eleventh Circuit on the FTC's emergency motion.

On July 6, 2011, a three-judge panel of the Eleventh Circuit issued an order granting the FTC's motion for an injunction pending appeal, without prejudice to the appellees' right to move for dissolution of the injunction once briefing on the merits of the appeal is completed. That order also granted the FTC's motion to expedite the appeal and set an expedited briefing schedule. Pursuant to the schedule set by the Eleventh Circuit, briefing should be completed in approximately 49 days, by August 24, 2011.

III.

Respondents assert that there is no benefit to undergoing the burden and expense of continuing this administrative proceeding, given the decision of the District Court and the pending appeal in the Eleventh Circuit. According to the Motion, Respondents and Complaint Counsel agree that state action immunity, which is the issue on appeal, is critical to the disposition of this administrative proceeding. Respondents further state that, should this proceeding go forward, any appeal by Respondents from a final decision by the Commission would also be heard and ruled upon by the Eleventh Circuit. Therefore, Respondents conclude, there is no reason for the Commission or the Respondents to expend the substantial resources necessary for this proceeding when the Eleventh Circuit is already considering the critical issue.

Respondents argue further that, in the event the Eleventh Circuit reverses the District Court, this matter can resume with no prejudice. According to the Motion, Respondents and Complaint Counsel agree that in the event this matter resumes, both parties will move the Commission for a new hearing date, and will request a revised Scheduling Order.¹ Respondents state that the parties have conferred and that Complaint Counsel does not oppose the Motion.

IV.

Rule 3.41(f) of the Commission's Rules of Practice states in pertinent part: "The pendency of a collateral federal court action that relates to the administrative adjudication shall not stay the proceeding unless a court of competent jurisdiction, or the Commission

¹ On July 5, 2011, prior to the July 6, 2011 ruling on the injunction request, an Order issued extending certain Scheduling Order deadlines in light of the District Court's dismissal of the FTC's complaint and the pending appeal.

for good cause, so directs.” 16 C.F.R. § 3.41(f). Accordingly, the Motion is properly directed to the Commission, and is hereby certified to the Commission for ruling pursuant to Commission Rule 3.22(a). 16 C.F.R. § 3.22(a) (“The Administrative Law Judge shall certify to the Commission forthwith any other motion upon which he or she has no authority to rule.”).

This certification further recommends that the Commission find good cause and grant a stay of this proceeding, pending the outcome of the appeal to the Eleventh Circuit. The issue of state action immunity, currently on appeal, is central to this case, and will be decided by the Eleventh Circuit on an expedited basis. In addition, the Eleventh Circuit injunction ensures that no merger will occur unless and until that injunction is lifted. Thus, the status quo is preserved. Under these circumstances, a stay pending a ruling by the Eleventh Circuit is reasonable, will prevent an avoidable and certain waste of resources should the District Court’s ruling be upheld,² and will not prejudice either side.

V.

For all the foregoing reasons, the Unopposed Motion for Stay is hereby certified to the Commission, with the recommendation that the Commission stay this proceeding, pending the outcome of the appeal to the Eleventh Circuit.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: July 7, 2011

² Without a stay, ongoing discovery and preparation for the administrative trial by all parties is required.