



STATE OF TENNESSEE
DEPARTMENT OF HEALTH

JOHN J. DREYZEHNER, MD, MPH
COMMISSIONER

BILL HASLAM
GOVERNOR

June 25, 2015

The Honorable Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Room 135-H
Washington, D.C. 20580

Re: Request for advisory opinion regarding the effect of the sale of a merged hospital entity operating pursuant to a certificate of public advantage

Dear Mr. Clark:

Pursuant to 16 C.F.R § 1.3, I request a staff advisory opinion regarding the effect of the sale of a merged hospital entity operating pursuant to a certificate of public advantage.

Background

On May 18, 2015, the Tennessee General Assembly enacted legislation amending the Hospital Cooperation Act of 1993, Tenn. Code Ann. § 68-11-1301 – § 68-11-1309, 2015 Tenn. Pub. Act, ch. 464. (enclosed). The Act makes significant changes to the Hospital Cooperation Act. The original legislation provided that hospitals may enter into cooperative agreements for the sharing of personnel and assets. The parties to the cooperation agreement could apply to the Tennessee Department of Health (“department”) for a certificate of public advantage (“certificate” or “COPA”) governing the cooperative agreement. After consultation with and agreement from the Tennessee Attorney General, the department was required to issue the certificate if it determined that the applicants had demonstrated by clear and convincing evidence that the likely benefits from the agreement outweighed any disadvantages attributable to a reduction in competition. As you are aware, COPAs are sought in an effort to receive state approval and ongoing oversight in order to block antitrust enforcement under the “state action” exemption.

The 2015 Act now provides that a cooperative agreement among hospitals may include consolidation by merger or other combination of assets. The Act also now includes a statement that “[i]t is the policy of this state, in certain instances, to displace competition among hospitals with regulation,” and specifically recognizes that there be active supervision of such cooperative agreements in order to provide state action immunity from federal and state antitrust law to the fullest extent possible. Among the benefits that must result from the cooperative

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agreement are: enhancement of the quality of hospital care, demonstration of population health improvement of the region served according to criteria approved by the department, and the extent to which medically underserved populations have access to and are projected to utilize the proposed services.

The amendment to the legislation was initiated because of the proposed merger of two major not-for-profit hospital entities headquartered in East Tennessee. The hospital entities have notified the department and the attorney general that they intend to file an application for a certificate of public advantage within the next six months. Without the issuance of the certificate of advantage, it is understood that the merger will not take place. After the merger is accomplished, the two competing hospital entities will become the dominant hospital system within the region currently served, with a large percentage of the market share.

If the parties are able to show a public advantage and a COPA is granted, it is anticipated that benefits will flow to both consumers as efficiencies and other benefits as well as to the new entity itself. We understand that the hospitals anticipate that the merger will create a healthier financial picture for the not-for-profit merged entity than the current competing entities are now realizing.

Because the COPA operates to serve as a public advantage to the population in the region served by the hospital entity, and because one of the stated reasons for the merger was to avoid the purchase of one or both entities by a hospital corporation or system headquartered outside the region served, there is significant concern in the region and among interested individuals that the merged entity could subsequently be sold to a corporation headquartered outside the region.

I request the opinion of the staff as to whether the sale of a merged entity operating pursuant to a COPA would trigger an antitrust review when the new owner is not a party to the cooperative agreement or operating with active state supervision pursuant to the COPA. Thank you in advance for your kind attention to this request.

Sincerely,



John J. Dreyzehner, MD, MPH, FACP, FACHE
Commissioner

JJD/JY/tls

Attachment



State of Tennessee

PUBLIC CHAPTER NO. 464

SENATE BILL NO. 994

By Norris, Crowe, Mr. Speaker Ramsey

Substituted for: House Bill No. 1146

By Eldridge, Harrison, Lundberg, Hulseley, Holsclaw, Hawk

AN ACT to amend Tennessee Code Annotated, Title 68, Chapter 11, Part 13, relative to hospital cooperative agreements.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Section 68-11-1302(2), is amended by deleting the subdivision and substituting instead the following:

(2) "Cooperative agreement" means an agreement among two (2) or more hospitals for the consolidation by merger or other combination of assets, offering, provision, operation, planning, funding, pricing, contracting, utilization review or management of health services or for the sharing, allocation, or referral of patients, personnel, instructional programs, support services and facilities or medical, diagnostic or laboratory facilities or procedures or other services traditionally offered by hospitals;

SECTION 2. Tennessee Code Annotated, Section 68-11-1303, is amended by deleting the section and substituting instead the following:

(a) It is the policy of this state, in certain instances, to displace competition among hospitals with regulation to the extent set forth in this part and to actively supervise that regulation to the fullest extent required by law, in order to promote cooperation and coordination among hospitals in the provision of health services and to provide state action immunity from federal and state antitrust law to the fullest extent possible to those hospitals issued a certificate of public advantage under this section.

(b) A hospital may negotiate and enter into cooperative agreements with other hospitals in the state, if the likely benefits resulting from the agreements outweigh any disadvantages attributable to a reduction in competition that may result from the agreements.

(c) Parties to a cooperative agreement may apply to the department for a certificate of public advantage governing that cooperative agreement. The application shall include an executed written copy of the cooperative agreement and describe the nature and scope of the cooperation in the agreement and any consideration passing to any party under the agreement. A copy of the application and copies of all additional related materials shall be submitted to the attorney general and reporter and to the department at the same time. The attorney general and reporter and the department are entrusted with the active and continuing oversight of all cooperative agreements.

(d) The department shall review the application in accordance with the standards set forth in subsection (e) and shall hold a public hearing in accordance with the rules adopted by the department. The department shall give notice of the application to interested parties by publishing a notice in the Tennessee administrative register in accordance with the Uniform Administrative Procedures Act, compiled in title 4, chapter 5. Any intervenor may intervene in the proceeding. The department shall grant or deny the application within one hundred twenty (120) days of the date of filing of the application, and that decision shall be in writing and set forth the basis for the decision. The department shall furnish a copy of the decision to the applicants, the attorney general and reporter, and any intervenor. An intervenor aggrieved by a decision of the department to grant or deny the application shall have the

right to appeal the department's decision, except that there shall be no stay of the department's decision granting an application unless the chancery court of Davidson County shall have issued a stay of the department's decision in accordance with § 68-11-1304, which shall be accompanied by an appeal bond from the intervenor. Additionally, if the intervenor shall appeal the department's decision and the appeal is unsuccessful, the intervenor shall be responsible for the costs of the appeal and attorneys' fees of the applicants.

(e)(1) After consultation with and agreement from the attorney general and reporter, the department shall issue a certificate of public advantage for a cooperative agreement, if it determines that the applicants have demonstrated by clear and convincing evidence that the likely benefits resulting from the agreement outweigh any disadvantages attributable to a reduction in competition that may result from the agreement.

(2) In evaluating the potential benefits of a cooperative agreement, the department shall consider whether the following benefits may result from the cooperative agreement:

(A) Enhancement of the quality of hospital and hospital-related care provided to Tennessee citizens;

(B) Preservation of hospital facilities in geographical proximity to the communities traditionally served by those facilities;

(C) Gains in the cost-efficiency of services provided by the hospitals involved;

(D) Improvements in the utilization of hospital resources and equipment;

(E) Avoidance of duplication of hospital resources;

(F) Demonstration of population health improvement of the region served according to criteria set forth in the agreement and approved by the department;

(G) The extent to which medically underserved populations have access to and are projected to utilize the proposed services; and

(H) Any other benefits that may be identified.

(3) The department's evaluation of any disadvantages attributable to any reduction in competition likely to result from the agreement shall include, but need not be limited to, the following factors:

(A) The extent of any likely adverse impact on the ability of health maintenance organizations, preferred provider organizations, managed healthcare organizations, or other healthcare payors to negotiate appropriate payment and service arrangements with hospitals, physicians, allied healthcare professionals, or other healthcare providers;

(B) The extent of any reduction in competition among physicians, allied health professionals, other healthcare providers, or other persons furnishing goods or services to, or in competition with, hospitals that is likely to result directly or indirectly from the cooperative agreement;

(C) The extent of any likely adverse impact on patients in the quality, availability, and price of healthcare services; and

(D) The availability of arrangements that are less restrictive to competition and achieve the same benefits or a more favorable balance of benefits over disadvantages attributable to any reduction in competition likely to result from the agreement.

(f) The department shall consult with the attorney general and reporter regarding its evaluation of any potential reduction in competition resulting from a cooperative agreement. The attorney general and reporter may consult with the United States department of justice or the federal trade commission regarding its evaluation of any potential reduction in competition resulting from a cooperative agreement.

(g) The department shall review, on at least an annual basis, each certificate of public advantage it has granted pursuant to this part. If the department determines that the likely benefits resulting from a certified agreement no longer outweigh any disadvantages attributable to any potential reduction in competition resulting from the agreement, the department may first seek modification of the agreement with the consent of the parties. If such modification is not obtained, the department may terminate the certificate of public advantage and the certificate holder may appeal in accordance with § 68-11-1304. The certificate of public advantage shall remain in full force and effect until such time as the certificate of public advantage holder has submitted, the department has approved, and the certificate holder has completed a plan of separation. The department's active supervision shall continue until such time as the department issues an official determination that the plan of separation has been completed.

(h) The department shall maintain on file all cooperative agreements for which certificates of public advantage remain in effect. The holder of a certificate of public advantage who voluntarily seeks to terminate a cooperative agreement shall file a notice of termination with the department at least forty-five (45) days prior to termination. The department, in its discretion, may require a plan of separation before accepting the notice of termination.

SECTION 3. Tennessee Code Annotated, Section 68-11-1304, is amended by deleting the section and substituting instead the following:

(a) Any applicant or certificate holder aggrieved by a decision of the department denying an application, refusing to act on an application, or terminating a certificate is entitled to judicial review of the department's decision by the chancery court of Davidson County, which shall be the only available method of judicial review. The chancery court of Davidson County is granted the jurisdiction to conduct judicial review of the decisions made by the department pursuant to this part, and to render a decision thereon.

(b) Proceedings for review are instituted by filing a petition for review in the chancery court of Davidson County within sixty (60) days after the final decision of the department denying an application, refusing to act on an application, or terminating a certificate. Copies of the petition shall be served upon the department and the attorney general and reporter, in accordance with the provisions of the Tennessee Rules of Civil Procedure pertaining to service of process.

(c) The filing of the petition for review does not itself stay enforcement of the department's decision. The department may grant, or the chancery court of Davidson County may order, a stay upon appropriate terms, but if it is shown to the satisfaction of the chancery court of Davidson County, in a hearing that shall be held within ten (10) days of a request for hearing by either party, that any party or the public at large may suffer injury by reason of the granting of a stay, then no stay shall be granted until a good and sufficient bond, in an amount fixed and approved by the court, shall be given by the petitioner conditioned to indemnify the other persons who might be so injured, and if no bond amount is sufficient, then the stay shall be denied. The chancery court of Davidson County shall not consider a stay unless notice has been given to the attorney general and reporter; nor shall the chancery court of Davidson County consider a stay unless the petitioner has previously sought a stay from the department or demonstrates that the department's ruling on a stay application cannot be obtained within a reasonable time.

(d) Within forty-five (45) days after service of the petition, or within further time allowed by the court, the department shall transmit to the chancery court of Davidson County the original or a certified copy of the entire record of the proceeding under review. By stipulation of all the parties, the record may be shortened. A party unreasonably refusing to stipulate to limit the record may be taxed by the court for the additional cost. The court may require or permit subsequent corrections or additions to the record.

(e) The review shall be conducted by the chancery court of Davidson County without a jury and shall be confined to the record. In cases of alleged irregularities in procedure before the department, not shown in the record, proof thereon may be taken in the court.

(f) The court may reverse the decision of the department if the court finds that the decision is:

- (1) In violation of constitutional or statutory procedures;
- (2) In excess of the statutory authority of the department;
- (3) Made upon unlawful procedure;

(4) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or

(5) Unsupported by evidence that is both substantial and material in the light of the entire record; provided, that in determining the substantiality of evidence, the court shall take into account whatever in the record fairly detracts from its weight, but the court shall not substitute its judgment for that of the department as to the weight of the evidence on questions of fact.

(g) The chancery court of Davidson County shall reduce its findings of fact and conclusions of law to writing and make them parts of the record.

(h) A certificate of public advantage granted by the department pursuant to this part shall not constitute a property right or interest of the recipient.

SECTION 4. Tennessee Code Annotated, Section 68-11-1305, is amended by deleting the language "§ 68-11-1303(d)" wherever it appears and substituting instead the language "§ 68-11-1303(e)".

SECTION 5. Tennessee Code Annotated, Section 68-11-1306(b), is amended by deleting the subsection and substituting instead the following:

(b) If the department determines that the applicants have not established by clear and convincing evidence that the likely benefits resulting from a cooperative agreement outweigh any disadvantages attributable to any potential reduction in competition resulting from the agreement, then the agreement is invalid and has no further force or effect, except that the department's active supervision shall continue until the plan of separation in § 68-11-1303(g) has been determined by the department to be complete.

SECTION 6. Tennessee Code Annotated, Section 68-11-1307, is amended by deleting the section and substituting instead the following:

(a)(1) Parties to a cooperative agreement who have applied to the department for a certificate of public advantage shall pay the charges incurred in the examination of the initial application and, in the event the certificate of public advantage is approved, the charges incurred for the review and ongoing supervision of the agreement, including the expenses of the commissioner, and the expenses of the commissioner's assistants, including, but not limited to experts and examiners employed in the examination and review.

(2) The compensation of the assistants, experts, and examiners designated by the commissioner for examining the agreement and all records deemed relevant by the commissioner for the examination and review shall be fixed by the commissioner at an amount commensurate with usual compensation for like services.

(b) The commissioner may contract, in accordance with applicable state contracting procedures, for qualified experts, the commissioner deems necessary to conduct examination and review of the agreement and the parties' records.

(c) The full cost of the examination and ongoing review fixed by the commissioner shall be paid into the department for its use and benefit in meeting the expenses and compensation for the assistants, experts, and examiners engaged in the examination and review.

(d) The department may promulgate rules to implement this part in accordance with the Uniform Administrative Procedures Act, compiled in title 4, chapter 5, but rules are not necessary for the operation of this part.

SECTION 7. Tennessee Code Annotated, Section 68-11-1308, is amended by adding the following language at the end of the section:

Furthermore, nothing in this part shall be construed as authorizing a public benefit hospital entity to enter into a public benefit hospital conveyance transaction without complying with the requirements of the Public Benefit Hospital Sales and Conveyance Act of 2006, compiled in title 48, chapter 68, part 2, or shall be construed as impacting in any way the authority of the attorney general and reporter with respect to public benefit hospital conveyance transactions under that act.

SECTION 8. This act shall take effect upon becoming a law, the public welfare requiring it.

SENATE BILL NO. 994

PASSED: April 22, 2015

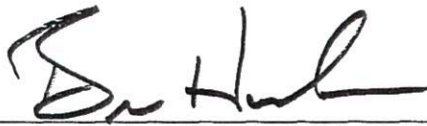


RON RAMSEY
SPEAKER OF THE SENATE



BETH HARWELL, SPEAKER
HOUSE OF REPRESENTATIVES

APPROVED this 18th day of MAY 2015



BILL HASLAM, GOVERNOR