**U.S. Department of Justice**

Antitrust Division

*Liberty Square Building*
*450 5th Street, N.W.*
*Suite 4000*
*Washington, D.C. 20530-0001*

May 18, 2011

Representative Phillip Johnson
State Representative, 78th Legislative District
104 War Memorial Building
Nashville, Tennessee 37243

RE: Proposed Repeal of State Action Exemption for Public Hospitals

Dear Chairman Johnson:

You have requested that the Antitrust Division comment on a proposed amendment to Tennessee law that would repeal the state's antitrust exemption for "private act metropolitan hospital authorities" (also known as public hospitals) found in Tenn. Code Ann. § 7-57-501 et seq.[1] The Antitrust Division believes that by enabling the antitrust laws to apply to the conduct of public hospitals in Tennessee, this amendment will help promote hospital competition to the benefit of Tennessee consumers.

## 1. Background

Tenn. Code Ann. § 7-57-501 et seq. grants broad authority to public hospitals in Tennessee. Under this statute, public hospitals may exercise "all powers necessary or convenient to effect any or all the purposes for which [they are] organized,"[2] and they may do so "regardless of the competitive consequences."[3] In 2005, the U.S. Court of Appeals for the Sixth Circuit held that this statute creates an antitrust exemption for public hospitals for a wide range of potentially anticompetitive actions, including exclusive contracts with health insurers. *See Jackson, Tennessee Hosp. Co., LLC v. West*

[1] Letter from Representative Phillip Johnson, Tennessee House of Representatives, to Scott Fitzgerald, Attorney, Litigation I Section, Antitrust Division, U.S. Department of Justice, April 21, 2011.

[2] § 7-57-502(b)(10).

[3] § 7-57-502(c).

*Tennessee Healthcare, Inc.*, 414 F.3d 608, 612 (6th Cir. 2005) ("*Jackson*") (holding that the plain language of the Tennessee statute is "most sensibly read as an [express] authorization to act without regard for the antitrust laws").[4]

Your letter describes the potential impact of the current law on two acute-care hospitals in Jackson, Tennessee. One hospital, Jackson-Madison County General Hospital, is a 635-bed facility chartered as a public hospital; the other, Regional Hospital of Jackson ("Regional Hospital"), is a 154-bed privately owned hospital. Jackson-Madison County General Hospital is part of a larger system of affiliated hospitals operating as West Tennessee Healthcare. Your letter states that Jackson-Madison County General Hospital has "used its organizational structure, size and market presence to demand exclusive insurance contracts with many of the major insurance plans…for the past fifteen years."[5] It is the Antitrust Division's experience that such exclusive contracts can restrict competition between hospitals and harm consumers.

**2. Competition in Health Care**

Although the Antitrust Division has not investigated hospital competition in the Jackson, Tennessee region, it has analyzed competition in health-care markets for many years. For example, during the Division's extensive health-care hearings with the Federal Trade Commission in 2003, the federal agencies obtained substantial evidence about the role of competition in health care and concluded that vigorous competition among health-care providers—including hospitals—"promotes the delivery of high-quality, cost-effective health care."[6]

The Division has also had extensive experience in analyzing the application of the state action doctrine to health-care providers. Together with the FTC, the Division has long opposed unwarranted extensions of the state action doctrine. Our concerns about extensions of the state action doctrine are informed by the fundamental principle that market forces tend to improve the quality and lower the costs of health-care goods and services.

In our antitrust investigations, we often hear the argument that health care is "different" and that competition principles do not apply to the provision of health-care services. However, this proposition is not supported by the evidence or law.[7] Similar arguments made by engineers and lawyers—that competition does not work and, in fact

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[4] In *Jackson*, the court did not require the defendant to show that its conduct was actively supervised by the state. *Id.* at 612, n.5.

[5] Letter from Rep. Phillip Johnson, *supra* note 1.

[6] Fed. Trade Comm'n and U.S. Dep't of Justice, Improving Health Care: A Dose of Competition (2004), Executive Summary at 4.

[7] *See id.*

is harmful to public policy goals—have been rejected by the courts, and private restraints on health-care competition have long been condemned.

Moreover, just as competition between hospitals can lead to lower prices and higher-quality care, so, too, restraints on competition by hospitals can lead to lower quality and more expensive care. Accordingly, the Antitrust Division has pursued formal investigations and prosecutions across the full range of health-care products and services, including challenges to anticompetitive vertical arrangements between hospitals and health insurers.

Most recently, the Antitrust Division brought an enforcement action challenging *de facto* exclusive contracts with commercial health insurers obtained by United Regional Health Care System, the dominant, not-for-profit hospital in Wichita Falls, Texas.[8] United Regional was formed in October 1997 by the merger of what were then the only two general acute-care hospitals in Wichita Falls. To complete the 1997 merger, the two hospitals sought and obtained an antitrust exemption from the Texas legislature relating to the merger.[9] Shortly after the legislature permitted the merger, a group of doctors began planning for a hospital that would compete with United Regional. United Regional responded to this threat by systematically entering into contracts that contained a significant pricing penalty if an insurer contracted with United Regional's rivals. As a result, United Regional's rivals could not obtain contracts with most insurers.

In February 2011, the United States and the State of Texas filed a complaint that challenged United Regional's contracts, which alleged that by denying United Regional's rivals access to most insurers, United Regional had (1) delayed and prevented the expansion and entry of United Regional's competitors; (2) limited price competition for price-sensitive patients; and (3) reduced quality competition between United Regional and its competitors. The United States and Texas settled the case by entering into a consent decree with United Regional that prohibits United Regional from using exclusive and other types of anticompetitive contracts with insurers.

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[8] *United States and State of Texas v. United Regional Health Care System*, No. 7:11-cv-00030-O (N.D. Tex., Feb. 25, 2011).

[9] In 1997, the Texas Legislature enacted Tex. Health & Safety Code Ann. § 265.037(d), which provides that a county-city hospital board "existing in a county with a population of more than 100,000 and a municipality with a population of more than 75,000 . . . may purchase, construct, receive, lease, or otherwise acquire hospital facilities, including the sublease of one or more hospital facilities, regardless of whether the action might be considered anticompetitive under the antitrust laws of the United States or this state." In an attempt to qualify for the state action antitrust exemption enacted by the legislature, the two hospitals entered into a leasing arrangement that involved the local county-city hospital board.

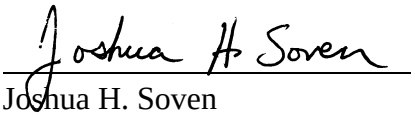
### 3. Analysis

The Antitrust Division believes that repealing the state action exemption for public hospitals in Tennessee will likely promote competition and benefit consumers. In the *United Regional* case, the Antitrust Division and Texas challenged United Regional's contracting practices because we did not think that the antitrust exemption under Texas law (that allowed for United Regional's formation) extended to United Regional's contracting practices. By contrast, if a public hospital in Tennessee engaged in similar conduct, under current state law, that conduct would be exempt from an antitrust challenge under *Jackson*.

As explained above, anticompetitive conduct by dominant hospitals—including dominant *public* hospitals—can lead to higher prices and lower quality to Tennessee's health-care consumers. This type of conduct can include exclusive contracting with commercial insurers, as illustrated by the *United Regional* case. It can also include anticompetitive acquisitions, unlawful predatory pricing, certain types of economic credentialing, and even horizontal agreements with competitors. By repealing the antitrust exemption, this type of conduct could be investigated, prosecuted, and deterred—helping protect competition.

Thank you for the opportunity to comment. In conclusion, we urge the Tennessee legislature to adopt the legislation under consideration, which may be expected to bring the salutary benefits of hospital competition to health-care consumers in Tennessee.

Sincerely yours,



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