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**ROUNDTABLE ON COMPETITIVE NEUTRALITY IN COMPETITION ENFORCEMENT**

-- Note by the United States --

16-18 June 2015

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*More documents related to this discussion can be found at [www.oecd.org/daf/competition/competitive-neutrality-in-competition-enforcement.htm](http://www.oecd.org/daf/competition/competitive-neutrality-in-competition-enforcement.htm).*

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## UNITED STATES

1. As a key part of their mission, the U.S. antitrust agencies (the Antitrust Division of the Department of Justice (“DOJ”) and the Federal Trade Commission (“FTC”)) (collectively “the Agencies”) act as advocates for competition, seeking to promote competition in sectors of the economy that are or may be subject to government ownership or regulation. These sectors include federally regulated industries, such as communications, banking, agriculture, securities, transportation, and energy, as well as state or locally regulated industries, such as insurance, housing, health care, public utilities, professional and occupational licensing, certain aspects of banking, and real estate.

2. The Agencies’ advocacy efforts include participation on Executive Branch policy-making task forces, preparation of testimony on legislative initiatives, and participation in regulatory agency proceedings. The Agencies’ efforts over the years have been a key part of substantial deregulation in a wide number of industries including motor carriers, airlines, telecommunications, electric power, natural gas pipelines.

3. This paper addresses the limited role of state-owned enterprises (“SOEs”) in the United States, followed by an example in which the U.S. has some experience with SOEs in the provision of high-speed broadband services. The paper concludes with an examination of the state action doctrine and the Agencies’ efforts to limit undue extension of this doctrine.

### **1. State-Owned Enterprises in the United States, and “Notional Principles” Promoting Competitive Neutrality**

4. Competition among private enterprises is the norm in the U.S., stimulating efficiency and innovation and providing consumers with the goods and services they desire at competitive prices. Direct governmental participation in commerce in the U.S. has historically been quite limited.<sup>1</sup> This remains true today.

5. Various entities, however, are linked to the federal government by varying degrees of ownership, control, and funding. Most of these carry out governmental or quasi-governmental functions or act where market-based approaches cannot achieve significant governmental goals. Ordinarily, they are specialized enterprises that compete only indirectly, if at all, with private market participants.<sup>2</sup>

6. Based on the 2005 *OECD Guidelines on Corporate Governance of State-Owned Enterprises* (“2005 *OECD Guidelines*”)<sup>3</sup> and our own experience, we previously identified “*notional principles*” to guide policymakers.<sup>4</sup> Among them: an SOE’s<sup>5</sup> relationship to the government, the privileges and

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<sup>1</sup> See Submission of the United States of 20 October 2009 to Working Party No. 3 of the Competition Committee, “*Discussion on Corporate Governance and the Principle of Competitive Neutrality for State-Owned Enterprises*” (“2009 Submission”), available at <https://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-and-other-international-competition-fora/antitrustlawroundtable.pdf>.

<sup>2</sup> These entities are described in the 2009 Submission, *id.*, at paragraphs 9-13 and related notes.

<sup>3</sup> Available at <http://www.oecd.org/corporate/ca/corporategovernanceofstate-ownedenterprises/34803211.pdf>.

<sup>4</sup> See generally 2009 Submission, n.1 *supra*, at paragraphs 4-8.

<sup>5</sup> The term “*SOE*,” meaning “*State Owned Enterprise*,” is not used in U.S. law. We use it here to refer to the government-related enterprises we identified earlier in paragraph 5 of this Submission.

immunities it enjoys for the benefit of identified economic actors, and its public service responsibilities should be clearly delineated by law; the state's investment in private enterprises as required by exigent circumstances should be limited in scope, control, and duration; the state's ownership function should be clearly separated from other state functions, especially with regard to regulation or maintenance of markets; and where SOEs compete with private market participants, the state should avoid providing privileges to SOEs to the greatest extent consistent with their governmental or quasi-governmental mission, to avoid unnecessary market distortions that reduce consumer welfare. Ordinarily, SOEs should be held to the same standards of competition as private market participants.<sup>6</sup>

7. The 2009 Submission described instances in which “[t]he United States has pursued these kinds of self-limiting policies during . . . crises in the past,”<sup>7</sup> as did the 2010 Contribution of the Federal Trade Commission to the Global Forum on Competition, “*Competition, State Aids and Subsidies*” (“2010 Contribution”).<sup>8</sup> In particular, the 2010 Contribution discussed rescue measures made necessary by the international financial crisis of 2008 and later years. It also discussed the United States’ “Troubled Assets Relief Program” (“TARP”), the Automotive Industry Financing and Restructuring Act and the Auto Industry Financing Program, which were intended to maintain the integrity of financial markets, automobile-related markets, consumers, communities, and the broader economy.<sup>9</sup>

8. These programs were adopted and executed in conformity with the competition-oriented principles described in paragraph 6 of this Submission. As a condition of receiving government assistance, firms were required to make changes necessary to enhance their viability as stand-alone enterprises, and government interventions were designed to be transitory, limited, and avoid “compromis[ing] the independent direction and management of” affected enterprises.<sup>10</sup> In the intervening few years, substantially all government loans and investments made under the TARP and related programs have been repaid and divested, usually more rapidly and at greater profit to the federal treasury than had been anticipated. For example, under various TARP programs the government made roughly \$245.1 billion in loans and investments to stabilize the banking industry. As of April 30, 2015, interest, dividends, loan repayment, warrant sales, and the like returned to the Treasury some \$29.7 billion above those disbursements.<sup>11</sup> The facts are similar with respect to TARP programs to revitalize credit markets,<sup>12</sup> and programs to stabilize the U.S. auto<sup>13</sup> and insurance industries.<sup>14</sup>

<sup>6</sup> See 2005 *OECD Guidelines*, n.2. *supra*. See also ICN Recommended Practices on State-Created Monopolies Analysis Pursuant to Unilateral Conduct Laws, available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc318.pdf>.

<sup>7</sup> See 2009 Submission, n.1 *supra*, at paragraph 8 and related notes. <https://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-and-other-international-competition-fora/stateaidftc.pdf>.

<sup>8</sup> Available at <https://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-and-other-international-competition-fora/stateaidftc.pdf>.

<sup>9</sup> See generally *id.* at section 3.2.

<sup>10</sup> *Id.*

<sup>11</sup> Monthly TARP Update for May 1, 2015, available at [http://www.treasury.gov/initiatives/financial-stability/reports/Documents/Monthly\\_TARP\\_Update%20-%2005.01.2015.pdf](http://www.treasury.gov/initiatives/financial-stability/reports/Documents/Monthly_TARP_Update%20-%2005.01.2015.pdf) and <http://www.treasury.gov/initiatives/financial-stability/TARP-Programs/bank-investment-programs/Pages/default.aspx>.

<sup>12</sup> Treasury had disbursed \$19.1 billion to revitalize credit markets, which has been collected in full (with an additional \$4.5 billion paid to Treasury as dividends, interest, etc.). See Fiscal Year 2014 Citizens’ Report, Office of Financial Stability—Troubled Asset Relief Program, The Department of Treasury, available at [http://www.treasury.gov/initiatives/financial-stability/reports/Documents/Citizens%20Report\\_FY2014\\_TARP\\_FINAL\\_%2012172014.pdf](http://www.treasury.gov/initiatives/financial-stability/reports/Documents/Citizens%20Report_FY2014_TARP_FINAL_%2012172014.pdf), at 4.

<sup>13</sup> Treasury had disbursed \$79.7 billion in loans and equity investments to Chrysler, General Motors, and GM Acceptance Corp. (now known as Ally Financial), and collected \$70.4 billion through sales,

9. The 2009 Submission described kinds of government enterprises and the extent to which they are subject to federal antitrust law, stating, “[a]s a general matter, agencies and instrumentalities of the U.S. government (e.g., National Science Foundation, Small Business Administration) are not subject to liability under the federal antitrust laws, even when engaging in commercial activity.” But whether a federal government corporation—defined as “an agency of the federal government established by Congress to perform a public purpose, which provides a market-oriented product or service and is intended to produce revenue that meets or approximates its expenditures”<sup>15</sup>—can be subject to antitrust liability is fact-dependent.

10. For example, in *U.S. Postal Service v. Flamingo Industries (USA), Ltd.* (“*Flamingo*”),<sup>16</sup> the United States Supreme Court found that the federal antitrust laws were inapplicable to the Postal Service. The Court held that, by statute, the Postal Service was “an independent establishment of the executive branch” of the federal government that exercised “substantial governmental powers,” but lacked certain powers and responsibilities that characterized most private market participants, such as the power to set prices unilaterally and the responsibility to maximize profits. The Court thus held that the Postal Service, like the United States itself, was not subject to the federal antitrust laws.<sup>17</sup>

11. Congress later opened most postal services to competition from private entities and provided that as to those competitive services—essentially all services other than carriage of first class mail—the Postal Service is subject to federal antitrust law.<sup>18</sup>

12. The 2009 Submission contrasted *Flamingo* with a later case in which the Court of Appeals for the Sixth Circuit held that because the Tennessee Valley Authority (“TVA”)—a large public power provider—was a federal corporation rather than “an independent establishment of the executive branch,” it could not claim its “public characteristics” as a basis for receiving an antitrust exemption. The Sixth Circuit nevertheless held that TVA was shielded from the antitrust claim in that case. A federal statute expressly authorized the TVA “to enter into contracts for the purpose of ‘promot[ing] the wider and better use of electric power for agricultural and domestic use, or for small or local industries.’”<sup>19</sup> The court concluded that “concerns about competition would conflict with the fulfillment of TVA’s purpose.”<sup>20</sup>

13. In some instances, the United States itself owns or controls valuable resources, such as radio spectrum or mineral rights. In seeking to ensure balanced utilization of those resources, the United

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repayments, dividends, and interest. The United States wrote off the balance (\$9.3 billion). *Id.* at 6. See also <http://www.treasury.gov/initiatives/financial-stability/TARP-Programs/automotive-programs/Pages/default.aspx>.

<sup>14</sup> Treasury had invested \$67.8 billion to stabilize American International Group (“AIG”), a large international insurer. In 2013 Treasury sold all its interests in AIG, with proceeds exceeding disbursements by about \$5 billion. *Id.* See also <http://www.treasury.gov/initiatives/financial-stability/TARP-Programs/aig/Pages/default.aspx>.

<sup>15</sup> Kevin R. Kosar, Federal Government Corporations: an Overview, Congressional Research Service Report RL30365 (2009) 2. Kosar identified 17 federal government corporations as diverse as the Export-Import Bank, Federal Crop Insurance Program, Federal Prison Industries, Amtrak, and the Tennessee Valley Authority.

<sup>16</sup> 540 U.S. 736 (2004).

<sup>17</sup> *Flamingo*, *id.* at 746-747.

<sup>18</sup> This is described more fully in 2009 Submission, n.1 *supra*, at paragraph 15.

<sup>19</sup> *McCarthy v. Middle Tennessee Electric Membership Corp.*, 466 F.3d 399, 414 (6<sup>th</sup> Cir. 2006) (quoting 16 U.S.C. 831i). Note as well the discussion in the 2009 Submission of certain quasi-governmental entities that “possess attributes of both governmental and private organizations,” such as financial intermediaries Fannie Mae and Freddie Mac, and federally funded R&D institutions such as Los Alamos National Laboratory. 2009 Submission, n.1 *supra*, at paragraph 17.

<sup>20</sup> *McCarthy*, 466 F.3d at 399.

States recognizes the significance of competition for use rights, exploration and development rights, and the like. For example, the DOJ has advised the Federal Communications Commission (“FCC”) how to optimize its allocation of radio spectrum<sup>21</sup> per the FCC’s statutory mandate of “promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses.”<sup>22</sup> Similarly, prior to accepting a bid to explore and develop Outer Continental Shelf petroleum resources, DOJ, in consultation with the FTC, may determine the likely competitive effects of granting a lease, which can be denied by the Bureau of Ocean Energy Management if grant of the lease “may create or maintain a situation inconsistent with the antitrust laws.”<sup>23</sup> Similar regimes govern the leasing of other United States resources.<sup>24</sup>

14. Like the federal government, States and subordinate government units may own, control, or influence the conduct of SOE-like entities. The 2009 Submission identified several sectors in which these entities were prominent.<sup>25</sup> They included transportation, energy, sports facilities, universities, hospitals, concessions in state-owned parks, buildings and facilities, and alcoholic beverages. In many instances these entities are infused with a public purpose and offer differentiated goods and services, but in other instances they may compete with private entities that offer similar goods and services. Nevertheless, as discussed below in Section III, such entities are sometimes shielded from the antitrust laws by the “state action” doctrine.

## 2. The Example of Provision of High-Speed Broadband Services

15. One area in which the United States has some experience with SOEs is in the provision of broadband services by local government entities. The widespread availability of high-speed broadband services can further economic welfare, creating economic opportunities, improving education, enhancing health care services, and increasing government efficiency. While the private sector has made investments to dramatically expand broadband access in the U.S., challenges still remain. Many markets remain unserved or underserved. Others do not benefit from the kind of competition that drives down costs and improves quality. As observed in the U.S. submission to the 2014 WP2 roundtable on Financing of the Roll-Out of Broadband Networks,<sup>26</sup> “[a]ffordable, high-capacity broadband is not yet available in many communities” and “[s]ome underserved municipalities that have not attracted adequate private investment for high-speed broadband have pursued, or are exploring, constructing and/or operating their own local broadband networks, either in partnership with private enterprise or independently.”<sup>27</sup> Both observations remain accurate today.<sup>28</sup>

<sup>21</sup> See, e.g., Letter from William J. Baer to Marlene H. Dortch, Secretary, Federal Communications Commission, Re: Policies Regarding Mobil Spectrum Holdings, WT Docket No. 12-269 (May 14, 2014), available at <http://www.justice.gov/atr/public/comments/305961.pdf>.

<sup>22</sup> 47 U.S.C. 309(j)(3)(B).

<sup>23</sup> 43 U.S.C. 1337(c).

<sup>24</sup> See generally June 2015 Submission of the United States to the OECD Competition Committee, “Hearing on Oligopoly,” paragraphs 12-14.

<sup>25</sup> See generally 2009 Submission, n.1 *supra*, at paragraph 18.

<sup>26</sup> See generally “Financing of the Roll-Out of Broadband Networks,” available at [https://www.ftc.gov/system/files/attachments/us-submissions-oecd-other-international-competition-fora/broadband\\_us\\_oecd.pdf](https://www.ftc.gov/system/files/attachments/us-submissions-oecd-other-international-competition-fora/broadband_us_oecd.pdf).

<sup>27</sup> *Id.* at paragraphs 4, 5.

<sup>28</sup> See generally “Community-Based Broadband Solutions—The Benefits of Competition and Choice for Community Development and Highspeed Internet Access,” Executive Office of the President (January 2015), available at <https://www.whitehouse.gov/sites/default/files/docs/community-based-broadband-report-by-executive-office-of-the-president.pdf>. This report describes the benefits of higher-speed broadband access, the current challenges facing the market, and the benefits of competition – including competition from community broadband networks.

16. Municipal-government provided broadband networks can help address these market shortfalls by creating economic opportunity, increasing consumer choice, and driving consumer and public savings. Hundreds of communities already have built publicly owned broadband networks, sometimes as sole providers of broadband services and sometimes in competition with others, such as cable and DSL providers.<sup>29</sup> Yet some states have enacted or are considering laws to limit or prohibit municipal development or operation of broadband networks.<sup>30</sup> Because they prevent local governments from using various governmental means to correct market imperfections, however, these laws may inhibit or deny to consumers and municipalities the opportunities and efficiencies that more widespread availability of broadband can offer.<sup>31</sup>

17. In March 2015, President Obama issued an Executive Order noting that the United States Government “has an important role to play in developing coordinated policies to promote broadband deployment and adoption, including promoting best practices, breaking down regulatory barriers, and encouraging further investment.”<sup>32</sup> It establishes a Broadband Opportunity Council, co-chaired by the Secretaries of Commerce and Agriculture, to use all available and appropriate authorities to identify and address regulations that may unduly impede either wired broadband deployment or the infrastructure to augment wireless broadband deployment; encourage further public and private investment in broadband networks and services; promote the adoption and meaningful use of broadband technology; and find ways to encourage or support broadband deployment, competition, and adoption in ways that promote the public interest.

### 3. The State Action Doctrine

18. Competition is among the United States’ paramount values.<sup>33</sup> Nevertheless, acts of state sovereigns that may inhibit competition are exempt from antitrust challenge under the “state action doctrine.” The doctrine was first set out by the United States Supreme Court in its 1943 decision in *Parker v. Brown*,<sup>34</sup> and is grounded in principles of federalism.<sup>35</sup> However, “while the Sherman Act confers immunity on the States’ own anticompetitive policies . . . , it does not always confer immunity where . . . a State delegates control over a market to a non-sovereign actor,”<sup>36</sup> such as private market participants as well as subordinate instrumentalities of the state.

<sup>29</sup> *Id.* at paragraphs 6, 8.

<sup>30</sup> A September 2006 FTC Staff Report explored in detail the potential rewards and competitive risks of municipal participation in the provision of wireless internet service. “Municipal Provision of Wireless Internet,” FTC Staff Report (2006), *available at* [https://www.ftc.gov/sites/default/files/documents/advocacy\\_documents/ftc-staff-report-concerning-municipal-provision-wireless-internet/v060021municipalprovwirelessinternet.pdf](https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-report-concerning-municipal-provision-wireless-internet/v060021municipalprovwirelessinternet.pdf).

<sup>31</sup> Many of these restrictions are described *id.* at paragraphs 10 and 11.

<sup>32</sup> Memorandum for the Heads of Executive Departments and Agencies, Expanding Broadband Deployment and Adoption by Addressing Regulatory Barriers and Encouraging Investment and Training, March 23, 2015, *available at* <https://www.whitehouse.gov/the-press-office/2015/03/23/presidential-memorandum-expanding-broadband-deployment-and-adoption-addr>.

<sup>33</sup> Federal antitrust law is “as important to the preservation of economic freedom . . . as the Bill of Rights is to our fundamental personal freedoms.” *U.S. v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972).

<sup>34</sup> 317 U.S. 341 (1943).

<sup>35</sup> *Parker* “recognized Congress’ purpose to respect the federal balance and to ‘embody in the Sherman Act the federalism principle that the States possess a significant measure of sovereignty under our Constitution.’” *N.C. State Bd. Of Dental Exam’rs v. F.T.C.*, 574 U.S. \_\_\_ (slip opinion at 5-6) (2015), *quoting Cmty. Comc’ns Co. v. Boulder*, 455 U.S. 40, 53 (1982).

<sup>36</sup> *Id.* at \_\_\_ (slip opinion at 7).

19. Application of the state action doctrine to subordinate instrumentalities of the state—municipalities, for example—requires that the challenged conduct has been undertaken pursuant to a “clearly articulated and affirmatively expressed” state policy to displace competition.<sup>37</sup> That rule ensures that the policy underlying the challenged conduct really is that of the state, even without a showing of active supervision, because “[w]here the actor is a municipality there is little or no danger that it is involved” in private anticompetitive conduct, incentives of the kind animating private actors are lacking, and there is electoral accountability.<sup>38</sup>

20. To avoid undue extension of the state’s exemption to private actors, private parties seeking the exemption must show both that the challenged conduct is a foreseeable result of a “clearly articulated and affirmatively expressed . . . state policy,” and that the challenged conduct is “actively supervised” by the state.<sup>39</sup> The “active supervision” element is warranted because of the danger that a private actor engaged in anticompetitive conduct (unlike a municipality, for example) may be pursuing his own private interests rather than the governmental interests of the state. Concern about the private incentives of active market participants is the basis for *Midcal*’s supervision mandate, which requires “realistic assurance that a private party’s anticompetitive conduct promotes state policy, rather than merely the party’s individual interests.”<sup>40</sup>

21. As the state action doctrine developed, a number of questions arose: what constitutes a “clearly articulated and affirmatively expressed” state policy? Is a “clearly articulated and affirmatively expressed” state policy sufficient when applied to a subordinate state entity acting “not in a regulatory capacity but as a commercial participant in a given market,” or must a state entity-commercial participant also satisfy the “active supervision” prong of *Midcal*?<sup>41</sup> And finally, is a “clearly articulated and affirmatively expressed” state policy sufficient when applied to the conduct of a state agency made up of regulated persons, or must such an agency be “actively supervised” as well?

22. Given these questions, a 2003 FTC Staff Report (“State Action Report”)<sup>42</sup> recommended that a variety of Agency tools—competition education and advocacy, amicus curiae filings, and litigation—be used to clarify and avoid overly broad construction of the state action doctrine. Among the State Action Report’s recommendations were: “[r]eaffirm a clear articulation standard tailored to its original purposes and goals”;<sup>43</sup> “[c]larify and strengthen the market participant exception . . .”;<sup>44</sup> and “[c]larify and rationalize the criteria for identifying the quasi-governmental entities that should be subject to active supervision.”<sup>45</sup>

23. Since the report was issued, the United States Supreme Court has (1) clarified the narrow meaning of “clear articulation,”<sup>46</sup> (2) declined to resolve the question of the availability of a “market participant” exception to the state action doctrine,<sup>47</sup> and (3) held that certain state regulatory bodies

<sup>37</sup> *California Retail Liquor Dealers Ass’n v. Midcal Aluminum Co.*, 445 U.S. 97, 105 (1980). *See also* *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 41-42 (1985); *id.* at 45.

<sup>38</sup> *Town of Hallie*, *id.* at 47.

<sup>39</sup> *Midcal*, n. 37 *supra*.

<sup>40</sup> *N.C. State Bd. Of Dental Exam’rs v. F.T.C.*, 574 U.S. \_\_\_ (slip opinion at 10) (2015), *quoting* *Patrick v. Burget*, 486 U.S. 94, 100-101 (1988).

<sup>41</sup> *City of Columbia v. Omni Outdoor Adver., Inc.*, 449 U.S. 365 (1991).

<sup>42</sup> Office of Policy Planning, Federal Trade Commission, *Report of the State Action Task Force* (Sept. 2003), available at <http://www.ftc.gov/os/2003/09/stateactionreport.pdf>.

<sup>43</sup> *Id.* at 50. *See generally id.* at 50-52.

<sup>44</sup> *Id.* at 57. *See generally id.* at 57.

<sup>45</sup> *Id.* at 55. *See generally id.* at 55-56.

<sup>46</sup> *See* *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. \_\_\_ (2013) (“*Phoebe Putney*”).

<sup>47</sup> *Phoebe Putney*, n. 47 *supra*, 568 U.S. \_\_\_, n.4.

controlled by market participants are subject to the “active supervision” in addition to the “clear articulation” prong of *Midcal*.<sup>48</sup>

### 3.1 Clarification of the “Clear Articulation” Requirement for State Action Protection

24. In *Phoebe Putney*, the FTC issued an administrative complaint challenging a hospital system’s proposed acquisition of a rival in Albany, Georgia. The Complaint alleged that the acquisition would reduce competition substantially, resulting in increased prices for general acute care services charged to commercial health plans. The FTC further alleged that Phoebe had structured the proposed transaction using a “hospital authority,” a special purpose public entity established pursuant to state statute, to try to immunize its acquisition as state action.<sup>49</sup> FTC staff and the Georgia Attorney General filed a federal court suit for a preliminary injunction halting the acquisition pending resolution of the FTC’s administrative litigation.<sup>50</sup>

25. The district court denied the motion, finding that the state action doctrine was applicable, and granted respondents’ motion to dismiss.<sup>51</sup> The Court of Appeals for the Eleventh Circuit affirmed, finding that the hospital authority was a local government entity entitled to protection by the state action doctrine because the challenged conduct was “reasonably anticipated” by the Georgia legislature in authorizing creation and operation of hospital authorities.<sup>52</sup> The U.S. Supreme Court granted certiorari and reversed, finding no evidence that the Georgia legislature “contemplated that hospital authorities would displace competition by consolidating hospital ownership.”<sup>53</sup>

26. The Supreme Court refused to find such evidence in the state’s grant to the hospital authority of acquisition and leasing powers, contracting authority, permission to participate in a competitive marketplace, capacity to set rates for services, power to sue and be sued, etc.—powers that are fundamentally like the generally worded powers the state regularly grants to private corporations.<sup>54</sup> According to the Supreme Court, the lower courts, in finding otherwise, “applied the concept of ‘foreseeability’ from our clear articulation test too loosely.”<sup>55</sup> For example, “‘simple permission to play in a market’ does not ‘foreseeably entail permission to roughhouse in that market unlawfully.’”<sup>56</sup> The ability of a legislature to anticipate that private and governmental actors (like the hospital authority) might engage in anticompetitive conduct through exercise of their general powers “falls well short of clearly articulating an affirmative state policy to displace competition with a regulatory alternative.”<sup>57</sup> Similarly, no such “clear articulation” reasonably can be drawn from the state’s objective of improving access to health care or requiring respondents to operate as non-profits. These objectives, according to the Court, do not suggest that the legislature contemplated their

<sup>48</sup> See *N.C. State Bd. Of Dental Exam’rs*, n. 40 *supra*.

<sup>49</sup> In re *Phoebe Putney Health System*, FTC Docket No. 9348, FTC Administrative Complaint (April 20, 2011), available at <https://www.ftc.gov/sites/default/files/documents/cases/2011/04/110420phoebecompt.pdf>.

<sup>50</sup> *FTC v. Phoebe Putney Health System, Inc.*, 793 F. Supp. 2d 1356, 1359 (M.D. Ga. 2011).

<sup>51</sup> 793 F.Supp.2d 1356, 1366-81 (M.D. Ga. 2011).

<sup>52</sup> 663 F. 3d 1369, 1375-78 (11<sup>th</sup> Cir. 2011).

<sup>53</sup> *Phoebe Putney*, n. 47 *supra* , 568 U.S. \_\_\_at \_\_\_ (slip opinion at 9, 10).

<sup>54</sup> *Id.*

<sup>55</sup> *Phoebe Putney*, n. 47 *supra* , 568 U.S. \_\_\_at \_\_\_ (slip opinion at 11).

<sup>56</sup> *Phoebe Putney*, n. 47 *supra* , 568 U.S. \_\_\_at \_\_\_ (slip opinion at 13), quoting *Kay Elec. Cooperative v. Newkirk*, 647 F.3d 1039, 1043 (10<sup>th</sup> Cir. 2011).

<sup>57</sup> *Phoebe Putney*, n. 47 *supra* , 568 U.S. \_\_\_at \_\_\_ (slip opinion at 13). Moreover, only a small part of the conduct permitted the hospital authority under Georgia law had the potential to harm competition.



accomplishment through anticompetitive means.<sup>58</sup> Nor does the state’s imposition of certificate-of-need-regulation imply a state policy of anticompetitive consolidation of hospitals.<sup>59</sup>

27. The Court expressly stated that it did not find any ambiguity as to whether the state had made the requisite “clear articulation”: it had not.<sup>60</sup> “More fundamentally,” the Court reaffirmed its previously stated principle that “state-action immunity is disfavored. . . . [F]ederalism and state sovereignty are poorly served by a rule of construction that would allow ‘essential national policies’ embodied in the antitrust laws to be displaced by state delegations of authority ‘intended to achieve more limited ends.’”<sup>61</sup>

### 3.2 *The “Commercial Market Participant” Exception to the State Action Doctrine*

28. An amicus in *Phoebe Putney* had suggested that the Court additionally find the state action exemption inapplicable to the defendant hospitals because, notwithstanding that the acquiring hospital was owned by a subordinate state entity, they were engaged in proprietary activities as a competitor. The Court earlier had suggested in *City of Columbia v. Omni Outdoor Advertising, Inc.* that the state action doctrine might be inapplicable to a city insofar as it was acting as a commercial market participant rather than in a regulatory capacity.<sup>62</sup> But the *Phoebe Putney* Court did not accept this suggestion because the lower courts had not considered the argument, nor had it been raised on appeal by the defendants.<sup>63</sup>

29. The FTC’s State Action Report had recommended “clarif[ication] and strengthen[ing] of the “commercial market participant” exception because the incentives of a city acting “in a proprietary capacity as a competitor” are not necessarily “consonant with the public interest” as determined by the state sovereign.<sup>64</sup> Greater assurance may be required to ensure that a municipality-commercial market participant is acting in furtherance of state policy than would be necessary with a municipality engaged only in a governmental capacity—specifically, active supervision of the anticompetitive conduct by the state to ensure that that conduct is, in effect, the state’s own.<sup>65</sup>

30. At the time of publication of the State Action Report, several courts of appeals had found, or been open to finding, a market participant exception. Some others were less amenable, concluding there is little basis for distinguishing governmental and commercial activities of sub-state entities, or that a market participant exception would all but eliminate the state action exemption.<sup>66</sup> To date, a majority of the courts of appeals have recognized, if not necessarily applied, a commercial market participant exception to the state action exemption.<sup>67</sup>

<sup>58</sup> *Phoebe Putney*, n. 47 *supra*, 568 U.S. \_\_\_ at \_\_\_ (slip opinion at 16).

<sup>59</sup> *Phoebe Putney*, n. 47 *supra*, 568 U.S. \_\_\_ at \_\_\_ (slip opinion at 17).

<sup>60</sup> *Phoebe Putney*, n. 47 *supra*, 568 U.S. \_\_\_ at \_\_\_ (slip opinion at 18).

<sup>61</sup> *Phoebe Putney*, n. 47 *supra*, 568 U.S. \_\_\_ at \_\_\_ (slip opinion at 18), quoting *FTC v. Ticor Title, Ins. Co.*, 504 U.S. 621, 636 (1992).

<sup>62</sup> See *Omni Outdoor Adver., Inc.*, n. 41 *supra*, at 449 U.S. at 374-75.

<sup>63</sup> *Phoebe Putney*, n. 47 *supra*, 568 U.S. \_\_\_, n. 4.

<sup>64</sup> See State Action Report, n. 42 *supra*, at 57.

<sup>65</sup> See State Action Report, n. 42 *supra*, at 44-50.

<sup>66</sup> See discussion of (and citations to) court of appeals decisions at State Action Report, n. 43 *supra*, at 44-50.

<sup>67</sup> See, e.g., *A.D. Bedell Wholesale Co., Inc. v. Phillip Morris Inc.*, 263 F.3d 239, 265 n.55 (3d Cir. 2001); *Genentech, Inc. v. Eli Lilly & Co.*, 998 F.2d 931, 948-49 (Fed. Cir. 1993); *Fisichelli v. City Known as the Town of Methuen*, 956 F.2d 12, 14-15 (1<sup>st</sup> Cir. 1992).

### 3.3 *The Requirement of Active Supervision as a Condition of State Action Protection for Certain Subordinate State Entities*

31. In February 2015, the Supreme Court resolved the question whether a “clearly articulated and affirmatively expressed” state policy is sufficient to convey state action protection to the conduct of a state agency that has a controlling majority of market participants on its decisional body. In *North Carolina State Board of Dental Examiners v. FTC* (“*NC Dental*”), the Supreme Court concluded that it was not. Such an agency also must be “actively supervised” for the state action doctrine to immunize its anticompetitive acts.<sup>68</sup>

32. In *NC Dental*, the Court upheld an FTC determination<sup>69</sup> that acts of the North Carolina State Board of Dental Examiners (“the Board”) that excluded non-dentists from providing teeth whitening services were not entitled to state action protection, even assuming for purposes of argument that the Board’s actions were within a clearly articulated and affirmatively expressed state policy to substitute regulation for competition. The Court observed that the Board, though a state agency under North Carolina law, was not itself a sovereign entitled without more to protection by the state action doctrine.<sup>70</sup> The Court stated that “a state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates [like the Board in *NC Dental*] must satisfy *Midcal*’s active supervision requirement in order to invoke state-action antitrust immunity.”<sup>71</sup> Limiting the bounds of the state action doctrine is most important where, as in *NC Dental*, the state “seeks to delegate its regulatory power to active market participants,” for whom public obligations and private motives may blend in ways not apparent to the market-participant regulators, but prejudicial to the public.<sup>72</sup>

33. Because the Board did not argue that its anticompetitive conduct was actively supervised by the state, the Court could not review “any specific supervisory systems.” The Court nevertheless provided guidance as follows:

*[T]he inquiry regarding active supervision is flexible and context-dependent. Active supervision need not entail day-to-day involvement in an agency’s operations or micromanagement of its every decision. Rather, the question is whether the State’s review mechanisms provide ‘realistic assurance’ that a nonsovereign actor’s anticompetitive conduct ‘promotes state policy, rather than merely the party’s individual interests.’*<sup>73</sup>

34. The Court went on to summarize four “constant requirements of active supervision.” First, the supervisor cannot itself be an active participant in the market being regulated. Second, the supervisor must review “the substance of the anticompetitive decision,” not just the procedures that gave rise to it. Third, the supervisor must be empowered to modify or reject decisions that do not accord with state policy. And finally, the potential for active supervision is not a sufficient substitute for an actual decision by the state.<sup>74</sup>

<sup>68</sup> Note 40 *supra*, 574 U.S. \_\_.

<sup>69</sup> Final Order, *N.C. Bd. of Dental Exam’rs*, FTC, Docket No. 9343 (Dec. 7, 2011), available at <http://www.ftc.gov/sites/default/files/documents/cases/2011/12/111207ncdentalorder.pdf>.

<sup>70</sup> *NC Dental*, n. 40 *supra*, 574 U.S. \_\_ (slip opinion at 6). See also *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791 (1975), cited with approval at 574 U.S. \_\_ (slip opinion at 7).

<sup>71</sup> *NC Dental*, n. 40 *supra*, 574 U.S. \_\_ (slip opinion at 14).

<sup>72</sup> *NC Dental*, n. 40 *supra*, 574 U.S. \_\_ (slip opinion at 8-10).

<sup>73</sup> *NC Dental*, n. 40 *supra*, 574 U.S. \_\_ (slip opinion at 17-18).

<sup>74</sup> *NC Dental*, n. 40 *supra*, 574 U.S. \_\_ (slip opinion at 18).