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

In the Matter of	)	
The Penn State Hershey Medical Center, a corporation,	)	**Docket No. 9368**
and	)	**PUBLIC**
Pinnacle Health System, a corporation.	)	

COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENTS' MOTION TO STAY

Complaint Counsel respectfully opposes the motion to stay the commencement of the Part 3 administrative hearing submitted by Respondents Penn State Hershey Medical Center and Pinnacle Health System (collectively, "Respondents"). Respondents' failure to show "good cause" for staying the Part 3 hearing requires that their motion be denied.

INTRODUCTION

In 2009, the Commission amended its Part 3 Rules, expressly committing itself to expedited administrative litigation. The 2009 Amendments included a new rule providing that an administrative hearing in a merger case "shall be" held five months after the complaint is filed. The Amendments also deleted an existing rule that had endorsed the stay of a Part 3 lawsuit pending a decision in a collateral, preliminary injunction case. Now, pursuant to the 2009 Amendments, administrative proceedings shall be stayed only for "good cause." *See* Rule 3.41(f)(i). The Commission adopted these and other measures in response to widespread

criticism – both by businesses and by the bar – that the Commission's stop-and-go Part 3 proceedings were "too protracted."[1]

Nevertheless, Respondents have moved to stay the commencement of the administrative hearing in this case, scheduled to commence on May 17, 2016, until 60 days after the district court's ruling in the preliminary injunction litigation. However, Respondents have failed to show good cause for a stay. Respondents have not explained how this case warrants a departure from the 2009 Amendments and they cannot distinguish this case from the pre-2009 cases in which motions to stay were denied. Respondents also cannot identify any logistical problems that would preclude proceeding with the this case and the other cases now scheduled for hearings in the next few months.

ARGUMENT

I. Under the Part 3 Rules and Past Precedent, Respondents Must Show "Good Cause" for a Stay of the Proceeding.

The Part 3 Rules, as amended in 2009, establish a schedule for administrative hearings. Under Rule 3.11(b)(4), the administrative hearing is scheduled five months after the issuance of the complaint in any case involving a merger which the Commission has sought to preliminarily enjoin under section 13(b) of the FTC Act, 15 U.S.C. §53(b). Rule 3.41(b) expressly provides that "The hearing will take place on the date specified in the notice accompanying the complaint, pursuant to §3.11(b)(4)…." And, Rule 3.41(f) provides that the Part 3 proceedings will not be stayed due to the pendency of a collateral federal court action unless "the Commission for good cause so directs…."

[1] 73 Fed. Reg. 58832 (Oct. 7, 2008) (proposed rules), *citing, e.g.*, J. Robert Robertson, *FTC Part 3 Litigation*, 20 Antitrust 12 (Spring 2006).

This five-month rule was part of a "comprehensive and systematic" set of 2009 revisions to the Part 3 Rules to establish "tighter time limits" for Part 3 litigation.[2] One other rule change in the 2009 Amendments is especially important here. Until 2009, Rule 3.51(a) had provided that, "The ALJ may stay the administrative proceeding until resolution of the collateral federal court proceeding." 16 C.F.R. § 3.51(a) (2008). The 2009 Amendments deleted this provision and the applicable rules permit a stay only on a showing of good cause.

Although the Commission retains its inherent authority to stay a Part 3 proceeding, it has done so in only two merger cases since 2009 with procedural issues not present here. In *Ardagh Group S.A.*, Docket No. 9356 (Dec. 13, 2013), the Commission stayed an administrative hearing because a settlement was imminent, the parties jointly requested a stay, and the parties had stipulated to a preliminary injunction.[3] In *Phoebe Putney Health Systems, Inc.*, Docket No. 9348 (July 15, 2011), the Commission granted the respondents' unopposed motion to stay the administrative proceedings, while the Eleventh Circuit reviewed, on an expedited basis, the district court's decision denying the motion for a preliminary injunction based on the state action doctrine.[4] Since 2009, no Part 3 merger case has been stayed simply because a district court's decision on a preliminary injunction motion would possibly be pending.

Significantly, motions to stay Part 3 proceedings were regularly denied even before 2009. In *Inova Health Systems Foundation*, Docket No. 9326 (2008), as in this case, the Commission

[2] 74 Fed. Reg. 1807 (Oct 7, 2008), *see generally* 73 Fed. Reg. 58832 (Oct. 7, 2008) (proposed rules); 74 Fed. Reg. 1804 (January 13, 2009) (interim final rules).
[3] *See* Order, *Ardagh Group S.A.*, Docket No. 9356 (Dec. 18, 2013), at https://www.ftc.gov/sites/default/files/documents/cases/131218ardaghorder.pdf The parties had stipulated to a preliminary injunction in the federal litigation. *See* Stipulation and Order dated November 8, 2013, *FTC v. Ardagh Group et al.*, Case No. 13-CV-1021 (BJR).
[4] Order, *Phoebe Putney Health Systems, Inc.*, Docket No. 9348 (July 15, 2011), at https://www.ftc.gov/system/files/documents/cases/130222ccnoa_0.pdf. It is important to note, however, that in the past, even motions to stay pending an appeal have been denied. *Butterworth Health Corp*., 1997 FTC Lexis 97 (1997).

had issued the federal complaint for preliminary injunction and the administrative complaint on the same day, and had scheduled the Part 3 hearing to commence several months later. The respondents' motion to stay the Part 3 case was denied because, even before the 2009 rulemaking, the Commission's "most recent practice is not to stay the proceedings pending adjudication of the preliminary injunction."[5] Likewise, in *Arch Coal, Inc.*, Docket No. 9316 (2004), the administrative law judge denied complaint counsel's motion for just an eight-week stay of the Part 3 proceeding pending the federal court's ruling on a motion for preliminary injunction.[6]

In sum, the Commission has a strong interest in completing Part 3 proceedings expeditiously and stays pending the completion of preliminary injunction proceedings are strongly disfavored. Under the 2009 Amendments, a Part 3 proceeding must proceed concurrently with any district court litigation in the absence of demonstrable good cause.

II. Respondents Have Not Shown "Good Cause" for Staying the Hearing.

In their motion, Respondents pay lip service to the 2009 Amendments and the Commission's commitment to expedited hearings. *See* Resp. Brief at 4, n. 2. They do not mention that the regulations now prescribe that a hearing "shall be" held five months after issuance of the administrative complaint. They do not discuss, and they certainly do not show, how their case is somehow the "exceptional case" that warrants a departure from the five-month rule. And, they do not mention that the 2009 Amendments deleted the provision of Rule 3.51(a)

[5] Order dated May 29, 2008, at 5, at https://www.ftc.gov/sites/default/files/documents/cases/2008/05/080530orderdenying.pdf

[6] Order dated June 2, 2004, at https://www.ftc.gov/sites/default/files/documents/cases/2004/06/040602orderdenyingmotiontostay.pdf. Motions to stay were disfavored in other contexts, too. In *Rambus, Inc.*, Docket No. 9302, the respondent moved to stay a case pending a decision in a parallel treble damage action. That motion was denied. Order dated July 18, 2002, at https://www.ftc.gov/sites/default/files/documents/cases/2002/07/020718odms.pdf.

that had authorized a stay of Part 3 proceedings pending a decision in collateral federal court action.

According to Respondents, a stay is warranted in this case because the district court might not reach a decision on the Commission's preliminary injunction motion prior to the scheduled hearing date and one of the parties could choose not to proceed with the administrative case following a decision from the district court. This is not "good cause" for a stay. *Every* case in which the Commission seeks a preliminary injunction may take the district court more than five months (from the filing of the complaint) to issue a decision on the merits. Despite this, the Commission specifically amended the Part 3 rules to provide for a hearing date five months from the date of the administrative complaint in any proceeding in which the Commission seeks to enjoin a merger pursuant to Section 13(b). Rule 3.11(b)(4). The Commission could have issued a rule calling for the administrative hearing to start after a decision is issued on the preliminary injunction, but it did not. Instead, the Commission deleted the rule providing for a discretionary stay of administrative proceedings during the pendency of a collateral action in federal court and determined that the administrative hearing "shall be" set for five months after the issuance of the administrative complaint.

That Respondents seek a stay of only the hearing date – and do not seek a stay of either discovery or trial preparations – is a distinction without a difference. Expedited discovery and trial preparations are not goals in themselves. Instead, the 2009 Amendments expedited the discovery process and trial preparations to achieve the goal of a quick resolution of the case. Thus, a stay of the hearing date, just like a stay of the entire proceedings, would delay what is truly important: an initial decision by the administrative law judge and, if appealed, a final decision by the Commission. Thus, a stay of the hearing, as requested by Respondents, will still

defeat the goals of the regulations promulgated in 2009, even if Respondents "are not seeking to stay any deadlines other than the hearing itself." Resp. Brief at 8.

Finally, Respondents argue that "the historically crowded state of the Chief ALJ's docket" establishes good cause for a stay because "this hearing would occur at a time that the Chief ALJ will be presiding over as many as three other substantial merger challenges." Resp. Brief at 7. Notably, though, the Chief Administrative Law Judge has simultaneously and successfully handled multiple Part 3 cases in the past, including concurrent hearings in different cases.[7] Moreover, if the Chief Administrative Law Judge's docket so warrants, the Commission can consider having an administrative law judge from another agency hear one or more of these cases. 5 U.S.C. § 3344.

III. Respondents' Motion is Speculative and Premature.

Although Respondents assert that the district court "is exceedingly likely" to enter its decision *during* the time period of the administrative hearing (and therefore moot the hearing), it is equally likely that the district court will enter a decision *before* the commencement of the administrative hearing. The preliminary injunction hearing is scheduled to conclude no later than by April 15. While the Respondents "expect" a decision from the district before the completion of the administrative hearing, that expectation has no basis in fact. The district court may enter a decision at any time and there is no reason to believe that the court is unable or

[7] *Compare* Initial Decision, *POM Wonderful LLC*, Docket No. 9344, at 2 (trial began May 24, 2011, and concluded on Nov. 4, 2011), at https://www.ftc.gov/sites/default/files/documents/cases/2012/05/120521pomdecision.pdf, *with* Initial Decision, *ProMedica Health System, Inc.*, Docket No. 9346 (trial began on May 31, 201, and concluded on Aug. 18, 2011), at https://www.ftc.gov/sites/default/files/documents/cases/2012/01/120105promedicadecision.pdf.

Both of these administrative hearings commenced after the Chief Administrative Law Judge had just completed the hearing and was drafting the initial decision in a third case. *See* Initial Decision, *The North Carolina Board of Dental Examiners*, Docket No. 9343 (July 14, 2011), at https://www.ftc.gov/sites/default/files/documents/cases/2011/07/110719ncb-decision.pdf.

unlikely to issue a decision before the May 17 commencement date of the Part 3 administrative hearing. In short, Respondents' concerns, which are all derived from this speculation, are not "good cause" for a stay.

Importantly, Respondents do not propose to change the dates for discovery or pre-trial motions practice as now set in the Scheduling Order. Under these circumstances, it is unclear why Respondents have filed a motion, in late February, to stay a hearing that will not begin until mid-May based on speculation about how long the district court may take to issue a decision. There is no immediate need for the stay that Respondents request and their motion is premature.

CONCLUSION

Respondents' motion for stay of the Part 3 hearing should be denied pursuant to Rules 3.41(b) and 3.41(f) for failure to show good cause as to why these proceedings should be stayed.

Dated: March 3, 2016

Respectfully Submitted,

/s/ Gerald A. Stein

WILLIAM E. EFRON
RYAN F. HARSCH
JARED P. NAGLEY
JONATHAN W. PLATT
GERALD A. STEIN
GERALYN J. TRUJILLO
NANCY TURNBLACER
THEORDORE ZANG
Attorneys
Federal Trade Commission
Bureau of Competition, Northeast Region
One Bowling Green, Suite 318
New York, New York 10004
Telephone: (212) 607-2827
Facsimile: (212) 607-2832
Email: wefron@ftc.gov
Email: jnagley@ftc.gov
Email: gstein@ftc.gov

CERTIFICATE OF SERVICE

I hereby certify that on March 3, 2016, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-113
Washington, DC 20580

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-110
Washington, DC 20580

I also certify that I delivered via electronic mail a copy of the foregoing document to:

Adrian Wager-Zito
Julia E. McEvoy
Christopher N. Thatch
Kenneth W. Field
Jones Day
51 Louisiana Ave., NW
Washington, DC 20001
adrianwagerzito@jonesday.com
jmcevoy@jonesday.com
cthatch@jonesday.com
kfield@jonesday.com

Counsel for Respondents Penn State Hershey Medical Center and Pinnacle Health System

CERTIFICATE FOR ELECTRONIC FILING

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

March 3, 2016 By: /s/ Gerald A. Stein