ORIGINAL

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the matter of		PUBLIC
Inova Health System Foundation, a corporation, and	Docket No. 9326	237774 536155
Prince William Health System, Inc., a corporation.		

COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENTS' MOTION TO STAY DISCOVERY AND ALL OTHER ASPECTS OF THIS PROCEEDING

Complaint Counsel opposes Respondents' motion to stay all aspects of this administrative proceeding, including discovery, pending resolution of the preliminary injunction proceeding filed by the Federal Trade Commission and the Commonwealth of Virginia on May 12, 2008 in the United States District Court for the Eastern District of Virginia.

ARGUMENT

No stay of this action should be granted. First, Commission policy and the FTC Rules of Practice encourage "expeditious" administrative proceedings that "avoid delay." Second, the Respondents, the Commission, and the public interest will benefit from a quick resolution of this litigation. Third, in recent cases Complaint Counsel has fully pursued the administrative proceeding throughout the preliminary injunction action. Fourth, the preliminary injunction proceeding may still benefit and inform the administrative proceeding without the stay sought by Respondents.

Likewise, discovery in this action should not be stayed. First, expeditious discovery in this action is necessary to reach a prompt conclusion that will benefit both sides. Second,

expeditious discovery will help avoid duplicative discovery with the preliminary injunction proceeding, and allow for efficient litigation of the parallel proceedings.[1] Third, pre-Answer discovery of the type served to date by Complaint Counsel is clearly permitted by the FTC Rules of Practice and has been replicated in several recent administrative actions.

I. A Stay of the Administrative Proceedings Would be Contrary to FTC Rules of Practice and Policy, and Contrary to the Interest of the Parties and the Public

The FTC Rules of Practice state clearly that "[i]t is the policy of the Commission that . . . [administrative] proceedings shall be conducted expeditiously." 16 C.F.R. § 3.1. Moreover, the Rules require that "counsel for all parties shall make every effort at each state of a proceeding to avoid delay." *Id.* These policy-related FTC Rules of Practice are consistent with the President's Executive Order on "Principles to Promote Just and Efficient Administrative Adjudications" which directs that "[a]ll Federal agencies should review their administrative adjudicatory processes and develop specific procedures to reduce delay in decision-making . . . and to invest maximum discretion in fact-finding officers to encourage appropriate settlement of claims as early as possible."[2]

There is good reason for both sides to want to avoid delay and obtain a final decision by the Commission regarding this proposed acquisition as promptly as possible. If a preliminary injunction is not granted by the district court and the parties consummate the acquisition, it would be in the Commission's interest to obtain a prompt final determination on the legality of the merger such that the Commission might still be able to fashion effective relief, such as

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[1]Additionally, even if a preliminary injunction is denied, it is in the Respondents' interest to have a prompt resolution in the administrative proceeding that may potentially end the antitrust challenge to the merger.

[2]Exec. Order No. 12,988, 61 Fed. Reg. 4,732 (Feb. 7, 1996).

divestiture, before the "eggs are scrambled" completely. On the other hand, if a preliminary injunction were granted by the district court, presumably Respondents would desire a Commission decision as quickly as possible so that if the Commission were to find the merger lawful, Respondents could merge and bring the claimed benefits of the merger to prompt fruition.

Respondents cite a number of cases where the Commission did not continue with the administrative proceeding after the loss of the preliminary injunction motion. *See* Resp. Mot. at 2, n.1. Rather than supporting a stay of the administrative proceeding here, those cases are indicative of the difficulty the Commission has recently found in fashioning effective relief once the preliminary injunction is denied and the parties are permitted to close the transaction.[3] For example, as the Commission stated when discussing its decision to stay an administrative proceeding in a case when a preliminary injunction was denied, "The federal district court action was intended to maintain the independence and viability of the two hospitals so that, if the FTC ultimately won its administrative case, a remedial order (which, for example, could have required divestiture of one of the hospitals to a third party) actually would restore competition",

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[3] *See, e.g.*, FTC Press Release, "FTC Ends Administrative Challenge of Hospital Merger in Joplin, Missouri" Dec. 1, 1995, *available at* http://www.ftc.gov/opa/1995/12/free.shtm. Although most recent administrative proceedings have not survived the denial of a preliminary injunction motion, there have been several cases where the Commission has continued with administrative litigation even after a preliminary injunction was denied. *See, e.g.*, *R.R. Donnelley & Sons*, Co., Docket No. 9243, 1995 WL 17012641, 120 F.T.C. 36 (1995); *Owens-Illinois, Inc.*, FTC Docket No. 9212, 1987-1993 Transfer Binder (CCH) para. 22,731 (Sept. 11, 1989) (Initial Decision), rev.'d, 1987-1993 Transfer Binder (CCH) para. 23,162 (Feb. 26, 1992); *Promodes, S.A.*, FTC Docket No. 9228, 113 F.T.C. 372 (1990); *Occidental Petroleum Co.*, FTC Docket. No. 9205, 1987-1993 Transfer Binder (CCH) para. 22,603 (Sept. 30, 1988) (Initial Decision), aff'd, 5 Trade Reg. Rep. (CCH) para. 23,370 (Dec. 22, 1992), appeal dismissed pursuant to stipulation and modified order, 5 Trade Reg. Rep. (CCH) para. 23,531 (Jan. 14, 1994).

but because the PI was denied "Freeman and Oak Hill subsequently completed their merger, and there have been significant changes to Oak Hill hospital since that time that could make divestiture difficult or inadequate."[4]

Many antitrust commentators, including former FTC official and current Arnold & Porter antitrust group head William Baer, have cited the difficulty the Commission has in fashioning effective relief after the parties are allowed to close a transaction:

> During the course of the post-merger litigation, the acquired firm's assets, technology, marketing systems, and trademarks are replaced, transferred, sold off, or combined with those of the acquiring firm. Similarly, its personnel and management are shifted, retrained, or simply discharged. In these ways, the acquiring and acquired firms are, in effect, irreversibly "scrambled" together. The independent identity of the acquired firm disappears. "Unscrambling" the merger, and restoring the acquired firm to its former status as an independent competitor is difficult at best, and frequently impossible.[5]

Presumably, Respondents also stand to benefit from a prompt final decision from the Commission – whether the preliminary injunction is granted or denied. As the respondents in one recent administrative proceeding argued in opposing a stay of the administrative proceeding during the preliminary injunction action, "[r]espondents are entitled to a quick and decisive disposition."[6] The Commission, itself, recognizes that delaying the final resolution of administrative actions is not in the public interest. A Commission task force found that

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[4]http://www.ftc.gov/opa/1995/12/free.shtm.

[5]http://ftc.gov/speeches/other/hsrspeec.shtm.

[6]*In re Arch Coal, Inc.*, FTC Docket No. 9316, Opposition of Respondents to Complaint Counsel's Motion to Stay This Proceeding or in the Alternative to Stay Discovery, (May 24, 2004), *available at* 2004 WL 1204204.

"[u]nnecessarily long proceedings waste Commission and private resources. Third parties are adversely affected by delay, both by having to endure extended legal uncertainty and because any remedy is postponed and likely made less effective."[7] Thus, the interests of Respondents, the Commission and the public are all served by expeditiously completing the administrative proceeding.

Respondents cite to the Statement of the Federal Trade Commission Policy Regarding Administrative Merger Litigation Following the Denial of a Preliminary Injunction,[8] as purportedly requiring the Commission to consider the evidentiary record developed in the preliminary injunction "***before*** determining whether to move forward with an administrative action." Resp. Mot. at 2 (emphasis in original). However, the title and text of the Policy Statement are clear that the policy considerations enunciated therein come into play only ***after*** a preliminary injunction is already denied by the district court. *See* 60 Fed. Reg. At 39,742 ("The Commission is issuing the attached Statement to clarify the process it follows in deciding whether to pursue administrative litigation ***following denial*** of a preliminary injunction.") (emphasis added). Thus, the FTC Policy Statement relied on by Respondents plays absolutely no role in determining whether to stay an administrative proceeding at the current stage of this proceeding – more than two months before a decision in the preliminary injunction action is expected.[9]

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[7]Task Force on Administrative Adjudication at the Federal Trade Commission (March 22, 1996).

[8] 60 Fed. Reg. 39,741-39,745 (Aug. 3, 1995).

[9]Of course, should a preliminary injunction not be granted, the Commission would be free to consider, pursuant to the Policy Statement, the decision and the record developed in the preliminary injunction action. In such circumstances, the Commission considers the following

Respondents also argue that the "regular course of conduct" has been to stay administrative litigation during the pendency of a preliminary injunction proceeding in federal district court. *See* Resp. Mot. at 1, 4. Respondents point in particular to *In re Arch Coal, Inc.*, FTC Docket. No. 9316, where Complaint Counsel sought an eight-week stay of the administrative litigation during the pendency of a four-month long preliminary injunction proceeding.[10] However, Respondents conspicuously fail to mention the most important fact about Arch Coal – that Administrative Law Judge Chappell *denied* the motion to stay, and the administrative action proceeded in parallel with the preliminary injunction proceeding, through

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five factors in determining whether to dismiss an administrative complaint after unsuccessfully seeking a preliminary injunction: "(1) the factual findings and legal conclusions of the district court or any appellate court; (2) any new evidence developed during the course of the preliminary injunction proceeding; (3) whether the transaction raises important issues of fact, law, or merger policy that need resolution in administrative litigation; (4) an overall assessment of the costs and benefits of further proceedings; and (5) any other matter that bears on whether it would be in the public interest to proceed with the merger challenge." *Id.*

[10]Complaint Counsel sought the stay of the administrative action in large part because Arch Coal stated in open court that if the preliminary injunction was granted, the acquisition would terminate, mooting the need for an administrative proceeding. Thus, there was the possibility that resources might have been conserved by a stay of the administrative proceeding. In addition, Complaint Counsel was concerned that Respondents would use discovery in the administrative proceeding to exceed the limitations that the district court had placed on discovery in the federal court proceeding. Here, the parties have made no claim that if a preliminary injunction is granted the acquisition will end. Nor could they, given that neither financing nor time appears to be a constraint. In addition, in this case, rather than being concerned about Respondents using the administrative discovery to exceed the limits on discovery in the preliminary injunction proceeding, Complaint Counsel has encouraged Respondents to take as much discovery and as many depositions in the administrative proceeding as they wish, and to use it in both the district court proceeding and the administrative proceeding.

fact and expert discovery, expert depositions in the administrative proceeding, and to within one month of the start of the administrative trial.[11]

As in *Arch Coal*, there was no stay of the administrative proceedings during the preliminary injunction proceedings related to two other recent administrative merger challenges: *In re Equitable Resources, Inc.*, FTC Docket No. 9322 and *In re Paul L. Foster*, FTC Docket. No. 9323. Thus, contrary to Respondents' claim that a stay of the administrative proceeding during the preliminary injunction action is the "regular practice," in three of the four most recent FTC preliminary injunction merger challenges, there was no stay of any kind in the administrative proceeding prior to the federal district court opinion.[12]

Respondents claim that they are aware of no instance in which the parties have engaged in substantial discovery in an administrative proceeding while also litigating a preliminary injunction in federal court. Resp. Mot. at 4. As discussed above, substantial discovery occurred in the administrative challenge of the Arch Coal merger. Of course, discovery is discovery,

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[11]*See* Order Denying Motion to Stay Proceeding or to Stay Discovery (June 2, 2004), *available at* http://www.ftc.gov/os/adjpro/d9316/040602orderdenyingmotiontostay.pdf; Scheduling Order (May 13, 2004), *available at* http://www.ftc.gov/os/adjpro/d9316/040513scheduling.pdf.

[12]Even if the stays of the administrative proceedings sought by Complaint Counsel in the two cases Respondents cite, *Arch Coal* and *Whole Foods,* could be characterized as a "practice" of the Commission (Resp. Mot. at 4), there is no basis to hold Complaint Counsel or the Commission to such a "practice" in other cases. "[A]n agency is not prohibited from changing its mind. '[F]aced with new developments or in light of reconsideration of the relevant facts and its mandate, (the agency) may alter its past interpretation and overturn past administrative rulings and practice.'" *Spartan Radiocasting Co. v. F.C.C.*, 619 F.2d 314, 322 (1980) (citing *American Trucking Ass'ns, v. Atchinson, Topeka and Santa Fe Railway Co.*, 387 U.S. 397, 416 (1967)).

whether it is taken in federal court or in the administrative proceeding.[13] There is no reason that identical discovery should be taken in both proceedings. In order to avoid duplicative discovery, Complaint Counsel has proposed to Respondents that no deposition of the same witness be taken in both proceedings without good cause shown. Respondents have, to date, declined that proposal.

II. Discovery Should Not Be Stayed and Pre-Answer Discovery is Entirely Permissible

Discovery in this administrative proceeding should not be stayed for all the same reasons that this administrative action in its entirety should not be stayed. In order for a prompt Initial Decision to be rendered, discovery and trial must proceed expeditiously. In addition, as in *Arch Coal*, where duplicative discovery between the administrative litigation and the preliminary injunction was largely avoided because the fact discovery periods in the two proceedings tracked fairly closely together, an expeditious fact discovery schedule in this proceeding as Complaint Counsel has proposed should enable the parties to avoid duplicative discovery.

In order to move discovery in this action forward expeditiously, and to attempt to avoid duplicative discovery in the two proceedings, Complaint Counsel quickly produced to Respondents in the week following issuance of the Complaint, the vast majority of the third party documents that the Commission staff obtained in the investigation of the acquisition.[14]

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[13]Once again, if this proceeding is to move along expeditiously, discovery must be ongoing in this proceeding.

[14]Respondents' claim that the parties in this action have not engaged in discovery in the administrative action, Resp. Mot. at 7, n.6, is patently false. Complaint Counsel's letters to Respondents enclosing the declarations and third party documents explicitly stated that they were being provided in the administrative action. Moreover, if Respondents did not understand that the third party discovery was being provided to them in the administrative action, then their

Indeed, Complaint Counsel has already served deposition notices, document requests, interrogatories, and a request for inspection in this proceeding. Moreover, service of discovery prior to the Scheduling Order in the administrative proceeding is not contrary to the FTC Rules of Practice and has occurred in several recent administrative proceedings.[15] For example, in *In re Equitable Resources*, where the firm representing Respondents here was also involved as attorneys of record, discovery was served before the initial scheduling conference and pre-Answer. Likewise, in *In re Evanston Northwestern*, discovery was also served before the Answer and Initial Scheduling Conference.[16]

Furthermore, Respondents' claim that FTC Rule of Practice 3.21 does not allow for service of discovery prior to the Answer is nonsensical. *See* Resp. Mot. at 6-7. Respondents position is apparently that, because under 16 C.F.R. § 3.31(b) a scheduling conference must be held no more than 14 days after the last Answer is filed, and because the scheduling conference must discuss "possible limitations on discovery," that therefore no discovery can be served before the scheduling conference.[17] There is nothing inconsistent between discussing possible

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counsel had no reason to consent, as they did on May 12, 2008, to the interim Protective Order in this proceeding.

[15]The Federal Rules of Civil Procedure explicitly preclude service of any discovery prior to the Rule 26(f) conference, absent a stipulation by the parties or a court order. Fed. R. Civ. P. 26(d)(1). By contrast, the FTC Rules of Practice do not contain any such prohibition – although they certainly could have if that was the intent. Compare 16 CFR § 3.32, 3.31, 3.33, 3.35, 3.37 with 16 CFR § 3.32 (allowing requests for admissions to be served thirty days after issuance of the complaint).

[16]*See* http://www.ftc.gov/os/adjpro/d9315/index.shtm.

[17]Furthermore, Respondents' argument that the meet and confer prior to the initial Scheduling Conference must be held after the Answer is made up of whole cloth. Rule 3.21(a) states "A[s] early as practicable before the prehearing scheduling conference described in

limitations on discovery at a scheduling conference, yet serving discovery before that conference (as was done here). Indeed, Respondents served discovery in the federal district court proceeding prior to discussing limitations on discovery in the 26(f) conference.

CONCLUSION

For the foregoing reasons, Respondents' motion to stay this proceeding, or to stay discovery in this proceeding pending resolution of the preliminary injunction action should be denied.

Respectfully submitted,

Norman Armstrong, Jr.

Matthew J. Reilly
Norman Armstrong Jr.
Complaint Counsel
Federal Trade Commission
601 New Jersey Ave., N.W.
Washington, D.C. 20580
(202) 326-2072

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paragraph (b)" a meet and confer should be held. The rule does not say "as early as practicable after the Answer." Thus, it is entirely reasonable to assume that a pre-Answer meet and confer is permissible here, as under the Federal Rules of Civil Procedure where the parties may hold their Rule 26(f) conference before the Answer.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 27, 2008, I served the attached Complaint Counsel's Opposition to Respondents' Motion to Stay Discovery And All Other Aspects of This Proceeding upon the following:

Office of the Secretary
Federal Trade Commission
H-159
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

Hon. Commissioner J. Thomas Rosch
Administrative Law Judge
H-528
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

David P. Gersch
Counsel for Inova Health System Foundation
and Prince William Health System
Arnold & Porter LLP
555 Twelfth Street, N.W.
Washington, DC 20004

Norman Armstrong, Jr.

Norman Armstrong, Jr., Esq.
Complaint Counsel