

**UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION  
OFFICE OF J. THOMAS ROSCH**

In the Matter of )  
 )  
**INOVA HEALTH SYSTEM FOUNDATION,** )  
a corporation, and )  
 )  
**PRINCE WILLIAM HOSPITAL SYSTEM, INC.** )  
a corporation. )  
 )

**Docket No. 9326**

**PUBLIC**

**ORDER DENYING RESPONDENTS' MOTION  
TO STAY ADMINISTRATIVE PROCEEDINGS**

Respondents Inova Health System Foundation and Prince William Health System, Inc. (“Respondents”) seek to stay discovery and all other aspects of this administrative proceeding, pending resolution of the preliminary injunction that the Federal Trade Commission (“FTC”) and Commonwealth of Virginia filed in the Eastern District of Virginia. Respondents’ Motion to Stay Discovery and All Other Aspects of this Proceeding (“Respondents’ Motion to Stay”) (May 23, 2008) *available at* <http://www.ftc.gov/os/adjpro/d9326/080523respmostaydiscov.pdf>. Complaint Counsel filed a response opposing Respondents’ motion on May 27. Complaint Counsel’s Opposition to Respondents’ Motion to Stay Discovery and All Other Aspects of the Proceeding (“Complaint Counsel’s Opposition to Stay Proceedings”) *available at* <http://www.ftc.gov/os/adjpro/d9326/080527ccopprespmostaydiscov.pdf>. Oral argument was invited and occurred on May 29. For the reasons described below, the motion to stay all aspects of this administrative proceedings is denied.

The Federal Trade Commission's Rules of Practice encourage an expeditious resolution of administrative proceedings. The Rules governing these proceedings begin by articulating the Commission's policy that "[administrative] proceedings shall be conducted expeditiously." 16 C.F.R § 3.1; see also Rules of Practice Amendments, Fed. Reg. 50640 (1996) ("The agency's longstanding policy has been that, to the extent practicable and consistent with requirements of law, adjudicative proceedings shall be conducted expeditiously and that both the Administrative Law Judge and litigants shall make every effort to avoid delay at each stage of a proceeding."). Section 3.1 also instructs all parties to this action, including the official presiding over the proceedings, to "make every effort at each state of a proceeding to avoid delay." 16 C.F.R § 3.1. The Rules later specifically instruct the Administrative Law Judge or presiding official to "take all necessary action to avoid delay in the disposition of proceedings." 16 C.F.R. § 3.42(c). This Commissioner is bound by those rules in this proceeding.

Second, a prompt final decision in this matter benefits both Complaint Counsel and Respondents regardless of the outcome of the 13(b) proceedings in federal district court. Both Complaint Counsel and Respondents undoubtedly wish to know where they stand as soon as possible.

Third, a prompt decision is in the public interest. As the Commission has previously recognized, unnecessary delay in adjudications can have a negative impact on the Commission's adjudicatory program and law enforcement mission.

Respondents advance three principal arguments in support of their motion to stay these proceedings. First, they contend that Commission policy and the Commission's rules suggest a stay of these proceedings pending the resolution of the preliminary injunction proceeding is appropriate. Respondents' Motion to Stay at 3 ("[T]he FTC Rules clearly provide that the

judicial preliminary injunction proceeding should run its course before the administrative proceeding moves forward.”).

Respondents read the FTC’s 1995 Policy Statement regarding Administrative Litigation to require an automatic stay of administrative proceedings during the pendency of federal district court proceedings. See Respondents Motion to Stay Proceedings at 2. Yet the language of the FTC’s Policy Statement, and FTC Rule § 3.26 implementing that policy statement, do not support Respondents’ interpretation. See Statement of the Federal Trade Commission Policy Regarding Administrative Merger Litigation Following the Denial of a Preliminary Injunction 60 Fed. Reg. 39,741, 39,743 (1995); 16 C.F.R. § 3.26. Administrative proceedings are not automatically stayed in the event that a preliminary injunction is denied by a federal district court. A Respondent may file a motion under § 3.26 to withdraw a matter from administrative adjudication in the event a preliminary injunction is denied. *Id.* The filing of that motion with the Commission triggers a stay in the administrative proceedings – not the denial of the preliminary injunction itself. 16 C.F.R. § 3.26(c)(2). It is difficult, if not impossible, to square that provision for an automatic stay with the proposition that an earlier stay should be granted.

Respondents also argue that the Commission’s “Fast Track” procedures “make clear that . . . the administrative action as a whole will generally proceed only *after* the preliminary injunction motion is resolved. See 16 C.F.R. § 3.11A(c). The Fast Track procedures were an effort by the Commission to expedite, not delay, proceedings. The pace of the FTC’s administrative proceedings has long been criticized by the courts<sup>1</sup> and the outside bar.<sup>2</sup> Counsel

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<sup>1</sup> See, e.g., *FTC v. Freeman Hosp.*, 1995-1 TRADE CAS. (CCH) ¶71,037, at 74,893 n.8 (D. Mo. 1995) (“The average time from the issuance of a complaint by the FTC to an initial decision by an administrative law judge averaged nearly three years in 1988. Moreover, additional time will be required if that initial decision is appealed.”), *aff’d*, 69 F. 3d 260 (8th Cir.

for the merging parties will often cite the “leisurely pace” of administrative proceedings in an effort to convince a federal district court that it, not the Commission, is the de facto ultimate arbiter of the merger challenge. Indeed, Respondents appear to have already suggested to the federal district court in the Section 13(b) proceedings in this matter that the administrative meetings may take “years.” Reply in Support of Motion for a Scheduling Order and an Expedited Status Conference, *FTC v. Inova Health System Foundation, et. al.*, 1:08-cv-460, at 7 (May 29, 2008).

The Commission has repeatedly tried to address these problems by adopting new rules and procedures designed to expedite and streamline the process. See, e.g., Rules of Practice Amendments, Fed. Reg. 50640 (1996). The Fast Track procedures cited by Respondents grew out of that effort. In implementing those procedures, the Commission encouraged “the ALJs to consider implementing other techniques, besides the rule amendments announced in this notice, to expedite action in each adjudicatory proceeding. Efficient adjudication required affirmative case management, and ALJs have broad powers under Rule 3.42(c) that should be used fully to balance the interests in expedition and fairness.” *Id.* The Fast Track procedures were designed “[a]s a further step in expediting administrative adjudication” and not as a substitute for an Administrative Law Judge’s own efforts to expedite the proceedings. *Id.* at 50,641.

Second, notwithstanding the policy and rules of the Commission, past practice and

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1995); see also *National Dynamics Corp. v. FTC*, 492 F.2d 1333, 1335 (2d Cir. 1974) (remarking upon the “leisurely course typical of FTC proceedings”).

<sup>2</sup> See, e.g., J. Robert Robertson, *FTC Part III Litigation: Lessons from Chicago Bridge and Evanston Northwestern Healthcare*, 20 *Antitrust ABA* 12 (Spring 2006); *Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission*, 58 *ANTITRUST L.J.* 43, 116 n.168 (1989) (“It . . . is disappointing that the Commission continues to have problems of delay.”).

precedent support a stay of the administrative proceedings. Respondents' Motion to Stay Proceedings at 4. Yet the most recent practice is not to stay the proceedings pending adjudication of the preliminary injunction.<sup>3</sup>

Third, Respondents suggest that discovery in the administrative proceedings will interfere with the federal court action. See Respondents' Motion to Stay Proceedings at 5. Indeed, Respondents seem to go so far as to suggest that the preliminary proceedings in federal district court are of greater importance than the plenary proceedings at the Commission. See *id.* ("It is plainly correct that the FTC's federal court action for a preliminary injunction must take priority over any administrative action."). Yet that has it backward. Congress enacted Section 13(b) of the Federal Trade Commission Act to strengthen the Commission's adjudicative powers not abrogate them. As the Fourth Circuit declared in interpreting Section 13(b), "the district court is not authorized to determine whether the antitrust laws have been or are about to be violated. That adjudicatory function is vested in FTC in the first instance. The only purpose of a proceeding under Section 13 is to preserve the status quo until FTC can perform its function." *FTC v. Food Town Stores*, 539 F.2d 1339, 1342 (4th Cir. 1976).

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<sup>3</sup> See, e.g., *In re Arch Coal Inc.*, FTC Docket No. 9316; *In re Equitable Resources, Inc.* FTC Docket No. 9322; *In re Paul L. Foster*, FTC Docket No. 9323.

## Conclusion

For the reasons stated, the motion to stay these proceedings in whole or in part (i.e., to stay discovery in these proceedings) is denied.<sup>4</sup>

**ORDERED:**

  
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J. Thomas Rosch  
Commissioner

**ISSUED:** May 29, 2008

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<sup>4</sup> Respondents assert that the discovery heretofore served by Complaint Counsel is premature because it predates the Scheduling Conference. Respondents Motion to Stay Discovery at 6-7. Complaint Counsel points out that while Federal Rule 26 prohibits discovery prior to the Scheduling Conference, the Commission's Rules of Practice do not. Complaint Counsel Opposition to Stay at 9, note 15. That is correct, but the federal rule constitutes the better practice. Respondents' Motion to Stay that discovery is therefore granted. That said, however, it would be wasteful to require Complaint Counsel to serve that discovery anew. Accordingly, that discovery will be deemed to be served as of this date, and Respondents' time to respond to that discovery will be deemed to commence on this date as well.