**UNITED STATES OF AMERICA**
**BEFORE THE FEDERAL TRADE COMMISSION**

**COMMISSIONERS:** **Edith Ramirez, Chairwoman**
**Julie Brill**
**Maureen K. Ohlhausen**
**Joshua D. Wright**


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| **In the Matter of** | |
| **Phoebe Putney Health System, Inc.**<br>**a corporation, and** | |
| **Phoebe Putney Memorial Hospital, Inc.**<br>**a corporation, and** | **PUBLIC**<br>DOCKET NO. 9348 |
| **Phoebe North, Inc.**<br>**a corporation, and** | |
| **HCA Inc.**<br>**a corporation, and** | |
| **Palmyra Park Hospital, Inc.**<br>**a corporation, and** | |
| **Hospital Authority of Albany-Dougherty County.** | |

## COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENTS' MOTION TO RESCHEDULE HEARING DATE

On March 19, 2013, Respondents filed, pursuant to Rules 3.21(c), 3.41(b), and 3.22(a), a Motion to Reschedule Hearing Date, seeking a new evidentiary hearing start date of "no earlier than December 2013." Respondents fail to show the "good cause" required by the Rules for changing the Commission's designation that the evidentiary hearing begin no later than July 15, 2013, let alone sound basis for delaying the hearing for at least five months. For the reasons set forth below, Complaint Counsel opposes Respondents' motion.

*First*, in their motion to stay the administrative proceedings in July 2011, Respondents stated that in the event the Commission ordered the stay and subsequently lifted it, they would move the Commission for a "new scheduling order preserving the filing time allotments for each party as granted under the current scheduling order."[1] Had the Commission held Respondents to this agreement, it could have set the hearing date for mid-May 2013. Instead, by ordering a hearing date of no later than July 15, 2013, the Commission has effectively *extended* the amount of time available to the parties prior to the hearing from just over two months to approximately four months. Counting the month and a half of discovery utilized prior to the stay in 2011, this totals approximately five and a half months to prepare for the evidentiary hearing. Respondents, who have since consummated the challenged acquisition, and now enjoy a virtual monopoly in the relevant market, have provided no basis for their requested additional five-month extension.

Respondents claim that the Commission-ordered hearing date is unprecedented, but it is not. Indeed, a five-month period from issuance of the complaint to the start of the evidentiary hearing is standard in any FTC administrative proceeding in which the Commission, in an ancillary proceeding, seeks relief pursuant to Section 13(b) of the FTC Act.[2] In *In re ProMedica Health System, Inc.*,[3] a challenge to a consummated hospital merger under the revised FTC Rules of Practice,[4] the Commission issued its administrative complaint on January 6, 2011, and set a hearing date of May 31, 2011. The hearing commenced on schedule and continued over the

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[1] Unopp. Mot. to Stay at ¶10 (filed July 1, 2011) (referring to Judge Chappell's original scheduling order issued on May 31, 2011).

[2] F.T.C. Rule 3.11(b)(4), 16 C.F.R. § 3.11(b)(4). Rule 3.11(b)(4) requires notice of, *inter alia*, the specific date for the evidentiary hearing, and states "[u]nless a different date is determined by the Commission, the date of the evidentiary hearing shall be 5 months from the date of the administrative complaint in a proceeding where the Commission, in an ancillary proceeding, has sought or is seeking relief pursuant to Section 13(b) of the FTC Act . . . ."

[3] No. 9346 (F.T.C. Mar. 28, 2012).

[4] The Commission issued final rules amending Part 3 of its Rules of Practice on April 27, 2009. The amendments were designed to streamline and improve the agency's Part 3 adjudicative proceedings. They expedite the prehearing, hearing, and appeal phases; streamline discovery and motion practice; and ensure that the FTC can apply its substantive expertise, as appropriate, in order to expedite administrative proceedings.

course of eight weeks with over 200 hours of live testimony. The case cited by Respondents, *In the Matter of Whole Foods*, preceded the 2009 amendments to the FTC Rules, and its timing is therefore of scant relevance here. In fact, the Commission established the presumptive five-month pre-trial period in contemplation of the expedited schedules in complex federal district court antitrust cases, for example *United States v. Microsoft*, 253 F.3d 34 (D.C. Cir. 2001) and *United States v. Oracle*, 331 F. Supp. 2d 1098 (N.D. Cal. 2004), both of which went to trial in five months or less.[5]

*Second*, despite Respondents' contentions to the contrary, a hearing date of July 15, 2013, does provide sufficient time for both Respondents and Complaint Counsel to prepare effectively for trial. This case is unusual from the standpoint of a lengthy stay of administrative proceedings during which Respondents consummated the acquisition – based on lower courts' findings of an immunity defense which the U.S. Supreme Court unanimously rejected. But the tasks at hand – fact and expert discovery as to actual or likely anticompetitive effects – do not differ materially from other administrative merger cases.

Moreover, Respondents argue they are *particularly prejudiced* by the time constraints for discovery of post-acquisition evidence, noting "[t]he parties have collected no evidence from this period, including evidence of post-merger pricing, quality improvements or changes in market conditions."[6] Ironically, all of this evidence is, and has been at all times, in Respondents' direct control, while Complaint Counsel will be seeing post-merger evidence for the first time. Similarly, the vast majority of the witnesses on Complaint Counsel's preliminary witness list are Respondents' employees, and most of the new witnesses who will provide relevant post-merger evidence will be Respondents' employees and consultants as well. Respondents have immediate

[5] *See* Federal Register Vol. 74, No. 8, at 1808 (Jan. 13, 2009).
[6] Respondents' Motion to Reschedule Hearing Date at 4.

and ongoing access to these individuals and their documents, and to the extent that new witnesses are unidentified, it is only because Respondents have not yet provided Complaint Counsel with information relating to these witnesses.[7] Respondents' argument that they would have only 15 days to analyze and prepare their expert rebuttal of Complaint Counsel's economic expert report is equally unavailing: Dr. Garmon's prior report, numbering just 33 pages, was an exhibit to Complaint Counsel's preliminary injunction submission filed with the district court on April 20, 2011. Thus, Respondents have had a copy of this report, and an opportunity to analyze it and prepare for rebuttal, for *almost two years*.

*Third*, from a policy standpoint, Respondents argue incorrectly that consummation of the merger in this matter alleviates the need for an expedited hearing. Rather, the Commission policy that favors expedited administrative proceedings in merger cases recognizes not only the need to protect the merging parties' interests in obtaining swift resolution of agency merger challenges prior to consummation, but also the need to protect interim competition. Each day since Respondents' consummation of this transaction in December 2011, consumers have been deprived of the full benefit of price, service, and quality competition between the former rival hospitals. Respondents' efforts to delay the merits proceeding by five months will needlessly compound this harm.

When viewed in this context, Respondents' offer to cease further integration is self-serving and insufficient. It may ameliorate some of the remedial issues that arise when litigating a consummated transaction, but it does nothing to address interim harm to competition and consumers. In its order lifting the stay, the Commission stated its conviction that "time is of the essence" due to the acquisition's consummation and the significant amount of time that has

[7] During the March 21, 2013, Scheduling Conference, Judge Chappell directed Respondents to timely transfer information to Complaint Counsel relating to updated organizational charts indicating which individuals have had involvement with post-consummation integration, and Complaint Counsel awaits this information.

already since passed.[8] By adding two months to the pre-hearing schedule, the Commission struck an appropriate balance between the burden of an expedited discovery schedule and the need to avoid interim harm. The Commission need not revisit this decision now.

*Finally*, we note that, from a practical standpoint, it makes more sense for Respondents and Complaint Counsel alike to endeavor in good faith to meet the deadlines set forth in Judge Chappell's forthcoming scheduling order, and seek leave for extensions if and when issues arise, rather than presuming such problems from the outset.

Accordingly, for the reasons set forth above, Complaint Counsel opposes Respondents' motion to reschedule the hearing date set forth in the Commission's Order to lift the stay.

Respectfully submitted,

s/ Jeffrey H. Perry
Jeffrey H. Perry

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Dated: March 21, 2013

[8] Order Granting Complaint Counsel's Mot. to Lift Stay at 2 (Mar. 14, 2013).

**CERTIFICATE OF SERVICE**

I hereby certify that on March 21, 2013, 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
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Washington, DC 20580

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

The Honorable D. Michael Chappell
Administrative Law Judge
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I further certify that I delivered via electronic mail a copy of the foregoing document to:

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**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 21, 2013

By: s/ Maria DiMoscato
Attorney