



ORIGINAL

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

**COMMISSIONERS: Joseph J. Simons, Chairman
Noah Joshua Phillips
Rohit Chopra
Rebecca Kelly Slaughter
Christine S. Wilson**

In the Matter of

**Axon Enterprise, Inc.
a corporation;**

and

**Safariland, LLC,
a corporation.**

DOCKET NO. D9389

**COMPLAINT COUNSEL’S OPPOSITION TO
RESPONDENT AXON ENTERPRISE, INC. MOTION TO
STAY THE ADMINISTRATIVE PROCEEDING**

Axon’s stay motion is a naked attempt to delay adjudication of the claims against it and continue to profit from its unlawful actions. Axon currently enjoys the benefit of its anticompetitive acquisition of VieVu, while its customers—primarily police departments charged with protecting public safety—suffer the consequences of lost competition. “The law is clear that a party may not halt a legitimate law enforcement proceeding that a federal agency is conducting against that party by seeking an injunction or declaratory order, provided that the party has a meaningful opportunity to obtain judicial review after the proceeding concludes and a final order is issued.” *In re LabMD, Inc.*, 2013 FTC LEXIS 131, at *13 (F.T.C. Dec. 13, 2013) (citing *FTC v. Claire Furnace Co.*, 274 U.S. 160, 174 (1927)). In this proceeding, Axon has that opportunity for judicial review. Axon has made no showing of good cause to stay this

administrative proceeding and there is no reason to delay while Axon attempts to re-write well-settled law in its proceeding in the District Court in Arizona. The Commission should deny Axon's motion to stay these proceedings.

I. Commission policy and precedent favor expeditious adjudication.

“[T]o the extent practicable and consistent with requirements of law, the Commission's policy is to conduct [adjudicative] proceedings expeditiously.” *In re Phoebe Putney Health Sys.*, DKT 9348, at *2 (March 14, 2013) (quoting 16 C.F.R. § 3.1). In furtherance of this policy, Commission Rules of Practice disfavor staying administrative proceedings. “The pendency of a collateral federal court action that relates to the administrative adjudication *shall not stay* the proceeding unless a court of competent jurisdiction, or the Commission for good cause, so directs.” 16 C.F.R. § 3.41(f) (emphasis added); *see also* 16 C.F.R. § 3.22(b) (no stay for dispositive motions absent good cause).

“Stay of administrative proceedings pending judicial review ...[is] ‘an intrusion into the ordinary processes of administration and judicial review.’” *LabMD, Inc.*, 2013 FTC LEXIS 131, at *8 (citing *Nken v. Holder*, 556 U.S. 418, 427 (2009)). To justify such an intrusion, the party seeking a stay bears the burden of demonstrating that a stay is warranted. *Id.* The first two factors of the traditional standard—likelihood of success and irreparable injury—“are the most critical.” *Id.* (citing *Nken*, 566 U.S. at 434).

II. Axon has not shown a likelihood of success on the merits.

Axon must make a strong showing that it is likely to succeed on the merits in the district court action to establish good cause for a stay. *LabMD, Inc.*, 2013 FTC LEXIS 131, at *9-16. Axon cannot make that showing. Even leaving aside the legal and factual deficiencies in the claims Axon is advancing in the district court, Axon cannot establish that the district court has jurisdiction to hear those claims prior to the conclusion of administrative proceedings. Supreme

Court precedent unequivocally establishes that the district court does not. *See, e.g., FTC v. Standard Oil Co.*, 449 U.S. 232, 239 (1980) (holding that a complaint by the FTC is not a final agency action subject to review by the district court); *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 215 (1994) (holding that the district court did not have subject-matter jurisdiction to hear a pre-enforcement due process challenge).

III. Ongoing harm to competition greatly outweighs Axon’s thin claims of injury.

A. Axon’s buy-out of VieVu is causing ongoing harm to police departments.

A delay in the administrative proceedings would prolong ongoing harm to competition and to police departments that would have benefitted from competition between Axon and VieVu. There is no material dispute that VieVu was Axon’s “closest competitor,”¹ which is confirmed by Axon’s own documents and testimony. Before the acquisition, Axon and VieVu had competed on price and innovation, resulting in better products at lower prices for large metropolitan police department customers. Axon’s vulnerability had become particularly acute when VieVu beat out Axon for the sale of BWC Systems to the New York Police Department. This was a big win for VieVu and a stinging loss for Axon. According to Axon’s CEO: “When you’re building a network [of police departments using body worn cameras], it’s really important to have the biggest agencies on board.... To not have the nation’s largest police department would have limited the utility of the network [to Axon] over time.”²

¹ Dana Goodyear, *Can the Manufacturer of Tasers Provide the Answer to Police Abuse?* The New Yorker, August 20, 2018, available at <https://www.newyorker.com/magazine/2018/08/27/can-the-manufacturer-of-tasers-provide-the-answer-to-police-abuse>.

² *Id.*

Indeed, Axon documents indicate a clear concern that competitors, VieVu in particular, were getting much more price aggressive to prevent Axon from consolidating the remaining half of the market that had not yet purchased BWC Systems. In addition to the NYPD, police departments in Oakland, Phoenix, Miami-Dade, and Buffalo all received substantially lower bids from VieVu as compared to Axon. Customers also benefitted as Axon and VieVu sought to compete by developing innovative features such as auto-activation of BWCs in the event of an officer unholstering a gun or Taser, and computer-assisted facial redaction tools for DEMS videos. But rather than continue fighting it out in the market, Axon bought the only other firm that was consistently a finalist in major BWC competitions. Having strengthened its “competitive moat,” Axon stopped improving VieVu products, raised its own list prices, and even sought—sometimes successfully—to raise prices to VieVu customers already under contract.

The need to restore lost competition is urgent and should not be delayed. A significant number of large metropolitan police departments, including roughly fifteen percent of Major Cities Chiefs Association members, have not yet contracted to buy body worn camera systems.³ In August, 2019, Axon estimated that the total addressable market in the United States for Officer Worn Sensors and Body Camera Software is about \$1.3 billion.⁴ Cities such as Portland⁵

³ Axon Investor Presentation, August 2019, at *12-13 *available at* [https://investor.axon.com/files/doc_presentations/2019/08/AAXN-Axon-IR-Presentation-August-26-2019-\(1\).pdf](https://investor.axon.com/files/doc_presentations/2019/08/AAXN-Axon-IR-Presentation-August-26-2019-(1).pdf).

⁴ *Id.* at *41.

⁵ The City of Portland Oregon, Police Bureau, Body Worn Camera Pilot Program FAQ, *available at* <https://www.portlandoregon.gov/police/article/712457> (last visited Jan. 21, 2020).

and St. Louis⁶ are already in the procurement process. Axon has even acknowledged that its price increases impact budget constrained law enforcement officers: “It’s no secret that budget constraints are a constant inconvenience for law enforcement agencies. Long needs lists + short funds = under equipped officers and potentially underserved communities.”⁷ Police departments, patrol officers, and ultimately residents and taxpayers, suffer when those procurements do not benefit from full competition.

Further delay will also complicate fashioning and enforcing an effective remedy. As Axon acknowledges, research and development are an important aspect of competition in the BWC industry, and Axon has not invested in VieVu products. Instead, Axon has transitioned, or begun transitioning, customers that initially chose VieVu over Axon, onto Axon products. The more time that passes, the more complicated it will be to disentangle former VieVu assets and to identify the Axon contracts and products that would need to be made available to a prospective buyer to re-create the competitive conditions as they existed.

B. Axon’s claims of harm fail.

Against this back-drop, it is plain to see that a stay is not warranted. Axon asserts that a stay would avoid “waste of substantial resources.” Mot. at 3. But it has not identified any extraordinary expenses it will incur; avoidance of ordinary litigation expenses is not sufficient to make a showing of good cause.⁸ *See in re RagingWire Data Ctrs., Inc.*, 2020 FTC LEXIS 3, at *1-3 (F.T.C. Jan. 6, 2020) (collecting cases and denying stay during pendency of dispositive

⁶ Chris Regnier, *Body cameras for St. Louis city police take a step forward*, Fox 2 Now, October 1, 2019 available at <https://fox2now.com/2019/10/01/body-cameras-for-st-louis-city-police-take-a-step-forward/>.

⁷ Complaint, Para. 42.

⁸ Axon’s reference to expenses it incurred during the investigation necessarily do not address whether good cause exists going forward.

motion). “Generally, routine discovery costs do not outweigh the competing public interest in the efficient and expeditious resolution of litigated matters.” *In re La. Real Estate Appraisers Bd.*, 2018 FTC LEXIS 7, at *3 (F.T.C. Jan. 12, 2018).⁹

Axon also points to its claims of constitutional harm as supporting good cause. This argument is without merit. Until the Commission “takes final action in the proceedings before it, any constitutional injury is simply hypothetical.” *N.C. State Bd. of Dental Exam’rs v. FTC*, 768 F. Supp. 2d 818, 824 (E.D.N.C. 2011) (citations omitted); *see also Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938) (“[N]o one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.”). Axon’s suggestion that it would be unable to vindicate its interests after an administrative hearing is similarly false. A “court of appeals reviewing a cease-and-desist order has the power to review alleged unlawfulness in the issuance of a complaint,” including Axon’s constitutional claims. *FTC v. Standard Oil Co.*, 449 U.S. 232, 245 (1980). Moreover, if and when the Commission takes final agency action, Axon will then have the right to appeal to any court that has jurisdiction. 15 USC § 45(c).

Cases in which the Commission has delayed administrative proceedings are easily distinguishable from the case at bar. For example, the Commission recently granted a 49 day continuance—not an untethered stay—when: (1) Complaint Counsel and Respondent jointly moved the Commission; (2) the preliminary injunction hearing and posthearing filings had concluded in federal district court; (3) the parties stated that they would abandon the proposed transaction if the court granted the preliminary injunction; and, (4) upcoming deadlines in the

⁹ Available at https://www.ftc.gov/system/files/documents/cases/d09374_lreab_commission_order_denying_respondents_expedited_motion.pdf

administrative schedule would impose undue burden on third parties. *See in re RAG-Stiftung*, 2020 FTC LEXIS 1 (F.T.C. Jan. 2, 2020).¹⁰ Axon’s stay request does not satisfy a single one of these considerations.

And, importantly, merger cases in which the Commission has granted stays or continuances also involve proposed acquisitions that would not be consummated during the stay or continuance.¹¹ In such situations, competition is not yet harmed and consumers are not yet suffering. The considerations are much different when, as here, a merger has been consummated and assets of the acquired firm are withering from neglect. Police departments, already facing budget issues, are currently paying the price for Axon’s conduct, and that will continue until there is a resolution of this matter.

IV. Conclusion

Ongoing harm to competition and policy considerations favoring expeditious adjudication outweigh Axon’s speculative claims of harm and unfounded allegations of constitutional infirmity. So called “deference” to the federal judiciary does not counsel that the Commission stay proceedings at this time. Such an approach would frustrate the Commission’s policy of expedition. “To allow respondents to stay FTC proceedings based on the pendency of collateral federal court actions that they themselves have initiated would create perverse

¹⁰ Available at https://www.ftc.gov/system/files/documents/cases/d09384_commission_order_granting_mtn_for_continuancepublic.pdf.

¹¹ For example, in *Phoebe Putney*, the Commission granted a stay during the pendency of an appeal related to an unsettled question of law and while the parties were enjoined from consummating their proposed merger. When the injunction was lifted, the Commission lifted the stay. *See* FTC Order Granting Complaint Counsel’s Motion To Lift Stay (FTC March 14, 2013), *available at* <https://www.ftc.gov/sites/default/files/documents/cases/2013/03/130314phoebeordermotion.pdf>

incentives to attempt to create duplicative proceedings, and would place respondents, rather than the Commission, in control of the administrative proceedings schedule.” *In re N.C. Bd. of Dental Examiners*, 151 F.T.C. 640, 642-643, 2011 FTC LEXIS 16, at *6 (F.T.C. Feb. 15, 2011).

The Commission should deny Respondent Axon’s motion to stay the administrative proceedings.

Dated: January 22, 2020

Respectfully submitted,

s/ Jennifer Milici
Jennifer Milici

Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
(202) 326-2912; (202) 326-3496 (fax)
jmilici@ftc.gov

Complaint Counsel

CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2020, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

April Tabor
Acting Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-113
Washington, DC 20580
ElectronicFilings@ftc.gov

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:

Julia E. McEvoy
Michael Knight
Jeremy P. Morrison
Debra R. Belott
Jones Day
51 Louisiana Avenue, N.W.
Washington, D.C. 20001-2113
jmcevoy@jonesday.com
mhknight@jonesday.com
jmorrison@jonesday.com
dbelott@jonesday.com

Joseph Ostoyich
Christine Ryu-Naya
Caroline Jones
Baker Botts LLP
1299 Pennsylvania Ave. NW # 200
Washington, D.C. 20004
joseph.ostoyich@bakerbotts.com
christine.ryu-naya@bakerbotts.com
caroline.jones@bakerbotts.com
Counsel for Respondent
Safariland, LLC

Aaron M. Healey
Jones Day
250 Vesey St.
New York, New York 10281-1047
ahealey@jonesday.com

Lee Van Voorhis
Jenner & Block LLP
1099 New York Ave NW # 900
Washington, DC 20001
LVanVoorhis@jenner.com
Counsel for Respondent
Axon Enterprise, Inc.

s/ Jennifer Milici
Jennifer Milici
Complaint Counsel
Bureau of Competition
Federal Trade Commission
Washington, D.C. 20024

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.

January 22, 2020

By: *s/ Jennifer Milici*
Jennifer Milici