Office of Commissioner
Melissa Holyoak

UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Dissenting Statement of Commissioner Melissa Holyoak,

Joined by Commissioner Andrew N. Ferguson

In the Matter of The Kroger Company and Albertsons Companies, Inc.
Docket No. 9428
Motion for Continuance of Evidentiary Hearing

May 29, 2024

Merger litigation monopolizes the resources of everyone involved. Shorter timelines, expansive discovery, and complicated issues make it unlike any other litigation. And yet today, the Commission has decided to deny a motion for continuance of an evidentiary hearing—forcing witnesses (including third parties), Complaint Counsel, and Respondents to somehow navigate overlapping merger trials on opposite sides of the country. Given our limited resources and the hardship that will occur from denying the motion for continuance—not to mention its departure from our past practice—I dissent.

The Commission filed an administrative complaint to prevent The Kroger Company from acquiring Albertsons Companies, Inc. (collectively "Respondents") on February 26, 2024. The date for the administrative hearing was set for July 31, 2024—roughly five months after the complaint was filed.[1] The Commission also filed a complaint seeking a preliminary injunction under Section 13(b) of the Federal Trade Commission Act, 15 U.S.C. § 53(b), in the United States District Court for the District of Oregon. Because of scheduling conflicts, the district court was unable to offer the parties dates in June or July and therefore offered dates in May or in August for the preliminary injunction hearing.[2] Respondents argued that May did not provide sufficient time to prepare for the hearing and advocated for the later dates in August,[3] and the district court set August 26, 2024 as the start date for the hearing.[4] Respondents now ask the Commission to grant a continuance for the administrative hearing until October 21, 2024 to prevent overlapping hearings in the district court and in the administrative proceeding.

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[1] *See* 16 C.F.R. § 3.11(b)(4) ("Unless 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 in which the Commission, in an ancillary proceeding, has sought or is seeking relief pursuant to Section 13(b) of the FTC Act . . . .").
[2] D. Or. Status Conf. Tr. 24:19-20, Fed. Trade Comm'n v. Kroger Co., No. 3:24-cv-00347-AN (Mar. 11, 2024) [hereinafter "D. Or. Status Conf. Tr."] ("[T]he Court has given its flexibility in May and in August.").
[3] *Id.* at 30:3-31:21 (arguing that a hearing in May does not allow sufficient time for discovery and to prepare experts); *id.* at 26:11-18 (agreeing that the August dates "should be sufficient").
[4] D. Or. Minutes of Status Conf., Fed. Trade Comm'n v. Kroger Co., No. 3:24-cv-00347-AN (Mar. 11, 2024), ECF No. 74; *see also* D. Or. Status Conf. Tr. 33:15-16.

Complaint Counsel contend that because the Respondents opted to take the August date for the preliminary injunction hearing, rather than the date offered in May, they cannot now ask to change the date of the administrative hearing.[5]

Some further background is relevant to the discussion. The Part 3 rules provide that an administrative hearing should not exceed 210 hours,[6] and Complaint Counsel told the district court that a Part 3 hearing will "[g]enerally . . . run for five weeks" but that this case "has a particularly large scope to it."[7] In nearly every other merger proceeding in the Commission's history, the preliminary injunction hearing has been set before the administrative hearing. Here, the preliminary injunction hearing is set to begin three weeks and five days *after* the beginning of the administrative hearing. If the administrative hearing takes as long as Complaint Counsel represented to the district court, the two hearings will overlap for *at least* one week and two days. To make matters worse, the witnesses (including third parties), experts, lawyers and the entire entourage that makes up a merger litigation do not have to merely cross Pennsylvania Avenue from the Federal Trade Commission to the United States District Court for the District of Columbia. Rather, the Commission authorized the preliminary injunction complaint to be filed in federal court in Oregon and significant travel will be involved during the overlapping period.

The burden and inefficiency of running overlapping trials on opposite sides of the country will be substantial—and was not lost on the Commission's lawyers. As Complaint Counsel explained to the district court during a scheduling conference:

> I respectfully tender it will be quite a burden and indeed an unfair one to force the FTC to litigate simultaneously. But even putting aside the burden on the FTC, we will do whatever the Court needs to be done. You can only imagine the burden on the party witnesses, the defense witnesses, and even to third parties if again you're having simultaneous cross-country trials, where some will appear in Portland on a Monday and potentially in Washington, D.C. in the FTC courtroom on a Tuesday.[8]

But Complaint Counsel has switched sides. Complaint Counsel now contends that the very concerns it raised before the district court are "speculative" when raised before us by Respondents, and "the result of their own scheduling choices."[9] Complaint Counsel points to a single statement before the district court as evidence that overlapping litigation was

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[5] Compl. Counsel's Mem. Opp'n Respts' Mot. Continuance Evidentiary Hr'g., at 6 [hereinafter "Compl. Counsel Opp'n"].
[6] 16 C.F.R. § 3.41(b).
[7] D. Or. Status Conf. Tr. at 27:6-8 (explaining that the case has a "large scope . . . because of the number of communities affected, and it's got two components, the supermarkets component and the labor component"); *see also id.* at 27:10-11 ("I think, at a minimum of four to five weeks.").
[8] *Id.* at 21:25-22:8; *see also id.* at 19:7-9 ("It would seem inefficient to have two simultaneous proceedings in August.").
[9] Compl. Counsel Opp'n, at 1.

Respondents' "choice[e]": "there's an awful lot of lawyers. If we need to go simultaneously, we'll go simultaneously."[10]

Context reveals that this argument misses the mark; Respondents did not affirmatively choose simultaneous litigation. Respondents first requested to schedule the preliminary injunction hearing before the administrative hearing in July, but that did not work for the district court.[11] The district court offered only two dates for the preliminary injunction hearing, May or August. Respondents quite understandably rejected a May hearing as wholly impracticable given the volume of discovery still to be conducted—and not even Complaint Counsel had insisted on a date as early as May.[12] Importantly, however, when Respondents accepted the August date, they also told the district court judge that they would try and move back the administrative proceeding until after the preliminary injunction hearing[13]—a rational suggestion also made by the Commission's own Administrative Law Judge ("ALJ").[14]

Holding a Part 3 administrative hearing before the preliminary injunction hearing is not only irregular, but also may result in wasted resources, which can be avoided by granting the continuance. Respondents correctly observe that the administrative hearing "may prove unnecessary."[15] Complaint Counsel takes issue with Respondents classifying the administrative proceeding as "unnecessary."[16] Of course the administrative proceeding *can potentially* be necessary.[17] But Complaint Counsel fails to acknowledge that the preliminary injunction hearing is *critical* to preventing the consummation of a merger and—depending upon the outcome—*can* obviate the need for the administrative proceeding. In fact, when the FTC prevails in a preliminary injunction hearing, merging parties have proceeded with the administrative hearing on only a few occasions because the proposed mergers almost always fall apart. It has also been more than 30 years since the Commission proceeded—after losing a preliminary injunction—to block a merger through an administrative proceeding.[18]

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[10] *Id.* D. Or. Status Conf. Tr. at 21:11-13.
[11] *Id.* at 17:9-10 ("[W]e would like it in July, ideally mid July."); *id.* at 17:14 ("July would not work for the Court.").
[12] *Id.* at 13:13–14 (requesting a hearing date "no later than June").
[13] *Id.* at 21:10-13 ("[E]ither we move and we succeed in getting the FTC proceeding pushed back a couple weeks or there's an awful lot of lawyers. If we need to go simultaneously, we'll go simultaneously.").
[14] Part 3 Status Conf. Tr. 10:18-21 ("[T]he best way to resolve this would be a joint motion by the Government and the Respondents to delay the start of the FTC trial."). Further, granting continuances to delay an administrative proceeding until after a district court has decided whether to grant a preliminary injunction is consistent with the Commission's past practices. *See, e.g.*, *In re Hackensack Meridian Health, Inc.*, Dkt. 9399, 2021 WL 2379546, *1 (FTC May 25, 2021). The fact that past continuances were granted while waiting for a decision on preliminary injunction is beside the point; in those situations, and in this one, the continuance avoids proceeding with an administrative hearing that may not be needed. And, as described below, the last 30 years of Commission history suggests that the administrative hearing will likely not be needed.
[15] Respondents' Mot. For Continuance Evidentiary Hr'g, at 6.
[16] Compl. Counsel Opp'n, at 3-6.
[17] And to be clear, Respondents only say it "*may* be unnecessary." Respondents' Mot. For Continuance Evidentiary Hr'g, at 6 (emphasis added).
[18] Despite failing to convince a federal court to preliminarily enjoin the acquisition of Activision by Microsoft, even with the lower evidentiary burden required for a proceeding under Section 13(b) of the FTC Act, *Fed. Trade Comm'n v. Microsoft Corp.*, 681 F. Supp. 3d 1069 (N.D. Cal. 2023), the Commission continues to pursue relief through an administrative proceeding, *In the Matter of Microsoft/Activision Blizzard*, Dkt. 9412, last visited May 16,

The Commission's approach today conflicts with its past approach when analyzing continuances. For example, in *Hackensack Meridian Health, Inc.*, the Commission explained that "the public interest is not ideally served if litigants and third parties bear expenditures that later prove unnecessary"—recognizing that the resolution of a district court action "could obviate the need for an administrative hearing."[19] If the Commission now desires to litigate mergers in administrative proceedings even after failing to obtain preliminary injunctive relief, the Commission should articulate that desire and explain how that desire aligns with the Commission's resource constraints.

If the Commission does not pursue preliminary injunctive relief as specified by the HSR Act and Section 13(b) of the FTC Act,[20] then nothing prevents parties from merging after the expiration of the HSR waiting periods.[21] Filing an administrative action without also filing a preliminary injunction will not suffice because a final Commission decision will not be issued for at least a year after the complaint is filed.[22] Merging parties will be very unlikely to delay consummation of a merger for that long, forcing the Commission to unscramble the eggs if it ultimately prevails.[23] Given the role of preliminary injunctions, as specified in Section 13(b), subordinating a preliminary injunction hearing while elevating administrative proceedings seems misplaced in this circumstance, especially when the cause of the delay appears to be an exogenous factor: a busy calendar for the district court.

My concerns with denying the continuance are driven, in part, by the resource constraints we face as law enforcers. And given the current Commission's expansive rulemakings based

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2024, https://www.ftc.gov/legal-library/browse/cases-proceedings/2210077-microsoftactivision-blizzard-matter. *Tronox* was also unique because foreign investigations prevented the consummation of the merger and delayed the need for the FTC to obtain preliminary injunctive relief. *See* Matthew Perlman, *EU Approves $2.4B Tronox-Cristal Deal with Conditions*, Law360 (Jul. 5, 2018), https://www.law360.com/articles/1060278?scroll=1&related=1.

[19] *In re Hackensack Meridian Health, Inc.*, Dkt. 9399, 2021 WL 2379546, *2 (FTC May 25, 2021).

[20] *See* 15 U.S.C. § 18a(f); 15 U.S.C. § 53(b).

[21] Complaint Counsel acknowledges that it needs to "preliminarily enjoin a merger until the Commission adjudicates its legality [in an administrative proceeding]." Compl. Counsel Opp'n, at 4.

[22] An administrative hearing is typically scheduled to begin eight months after the complaint is issued for proceedings where the Commission does not seek a preliminary injunction in federal court. 16 C.F.R. § 3.11(b)(4). After the administrative hearing, the parties have 21 days to submit "findings of fact, conclusions of law . . . and briefs in support thereof." 16 C.F.R. § 3.46(a). The ALJ then has 70 days after that to issue a recommended decision, which can be extended 30 days for good cause. 16 C.F.R. § 3.51(a). Where the Commission has not sought a preliminary injunction, parties have 30 days to submit exceptions to the Commission (i.e., a review of the ALJ's recommendation), with an answering brief 30 days after that and a reply brief due after an additional seven days. 16 C.F.R. § 3.52(b)(1). Oral argument follows 15 days later and then the Commission has an additional 100 days to issue its final decision. 16 C.F.R. § 3.52(b)(1). From the time the administrative hearing ends until the Commission issues the final decision is 273 days. If the time from the filing of the complaint to the end of the hearing (eight months plus the length of the hearing) is included, the total time before the Commission issues a final decision will be well over a year.

[23] The Commission may, of course, under Section 13(b), pursue a permanent injunction in federal court rather than proceeding via administrative action. Not only would this be consistent with the approach taken by the Antitrust Division of the U.S. Department of Justice, it has been done by the Commission in the past. *See, e.g.*, Compl., *Fed. Trade Comm'n v. St. Luke's Health System, Ltd.*, No. 13-cv-116-BLW (D. Idaho 2013); Compl., *Fed. Trade Comm'n v. Hearst Trust*, No. 1:01CV00734 (D.D.C. 2001); Compl., *Fed. Trade Comm'n v. Ovation Pharmaceuticals, Inc.*, No. 08-6379 (D. Minn. 2008).

upon debated assertions of authority[24] and other ill-advised efforts, I disagree with unnecessarily burdening Commission staff with two trials—particularly when one is likely enough to determine the fate of the merger. The unnecessarily overtaxed resources could be redeployed to protect additional American consumers.

For these reasons, I respectfully dissent.

[24] *See* Oral Statement of Commissioner Melissa Holyoak, In the Matter of the Non-Compete Clause Rule, Matter No. P201200 at 3 (Apr. 23, 2024).