

**IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

**Federal Trade Commission
and Commonwealth of Pennsylvania,**

Appellants,

v.

**Penn State Hershey Medical Center
and PinnacleHealth System,**

Appellees.

Case No. 16-2365

**Appellees' Response to Appellants' Motion
To Expedite Appeal And Proposed Briefing Schedule**

Appellees, Penn State Hershey Medical Center and PinnacleHealth System (the "Hospitals"), agree with Appellants, the Federal Trade Commission and the Commonwealth of Pennsylvania (the "Government"), that this appeal should be expedited. For the reasons stated in the district court's memorandum opinion and in the Hospitals' opposition to the Government's motion for an injunction pending appeal, this matter should be resolved promptly.

The Government has proposed the following briefing schedule:

- Government's Opening Brief: June 24 (44 days after record was filed)
- Hospitals' Answering Brief: July 22 (28 days after Opening Brief)
- Government's Reply Brief: August 4 (13 days after Answering Brief)

This proposed schedule, however, is not expedited; it essentially tracks the default schedule for standard appeals set forth in the Federal Rules. *See* Fed. R. App. P. 31(a)(1) (40 days, 30 days, 14 days).

The Hospitals propose the following expedited briefing schedule:

- Government's Opening Brief: June 1 (21 days after record was filed)
- Hospitals' Answering Brief: June 13 (12 days after Opening Brief)
- Government's Reply Brief: June 17 (4 days after Answering Brief)

This schedule is consistent with an expedited appeal in that it provides ample time for the parties to submit high-quality briefing and also accounts for the interest in quickly resolving this appeal and ending this federal-court litigation.

In defense of its much longer proposed schedule, the Government states that “it is hard to see what difference would result from a few extra weeks for briefing.”

Supp. Mot. 3. On the contrary, the difference between the reply deadlines under the two proposals is almost seven weeks, a significant amount of time. If the Government itself is unwilling to work on an expedited basis, it would be presumptuous for it to ask the Court for an expedited hearing and decision (especially if the reply brief is not submitted until the beginning of August, when this Court often does not sit for argument). And a seven-week delay in briefing should be avoided regardless of whether it would affect the pace of the Court’s work thereafter.

The Government claims that the Hospitals would not be prejudiced even if an extended briefing schedule were to delay their ability to consummate the transaction. *Id.* 2-3. As shown in the Hospitals’ opposition to the Government’s motion for an injunction, the Hospitals should not be prevented from consummating the transaction during this appeal. If there is any chance of an injunction, however, the schedule should ensure that such extraordinary relief would be as short in duration as possible. The Government states that the Hospitals “first began to pursue th[is] merger ... in October 2013” and that the Government is “aware of no firm deadline for concluding the deal.” *Id.* But regardless of whether their merger agreement might expire, the Hospitals obviously are prejudiced by delays in their ability to end uncertainty, move beyond the disruption of the pending transaction, and begin achieving the benefits of their combination.

The leisurely briefing schedule proposed by the Government also would be against the public interest, especially if the transaction is enjoined pending appeal. (Again, although the injunction should be denied, the briefing schedule should account for any possibility of it being granted.) As the district court recognized in its opinion, “overcrowding” at Hershey “[o]bviously ... results in negative consequences for patients” (Op. 15 n.5), and the combination—if allowed to proceed—“would *immediately* make additional capacity available to Hershey, causing *near instantaneous* benefits to Hershey’s patients” (*id.* 17 (emphases added)). Every day this combination is delayed, the Hospitals and their patients are deprived of this and other procompetitive benefits.

The Government has not set forth any reason for delay except the work schedules of its own lawyers. Appellees ordinarily would attempt to accommodate opposing counsel, but cannot do so here. It is the Government that brought this case, took an appeal, and now seeks an injunction until that appeal is resolved. The Government’s team of appellate lawyers, which can look to a massive trial team for support, already has submitted a brief centered on the merits of its appeal. And regardless, the press of work for just two government lawyers cannot justify the harm to the Hospitals and patients that would be caused by significant delay.

For these reasons, this appeal should be expedited and the Hospitals’ proposed briefing schedule should be adopted.

Dated: May 18, 2016

Respectfully submitted,

/s/ Louis K. Fisher

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CERTIFICATE OF SERVICE

I hereby certify that on May 18, 2016, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system. Notice of this filing will be sent to all attorneys of record by operation of the Court's electronic filing system.

/s/ Louis K. Fisher

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