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

Office of Commissioner
Melissa Holyoak

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. 24:12-29, 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]

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 a 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 27:8–16 (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–

The Commission's approach today conflicts with its past approach when analyzing continuances.

upon debated assertions of authority and other ill-advised efforts,[24] 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).