

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF J. THOMAS ROSCH**

In the Matter of)
)
INOVA HEALTH SYSTEM FOUNDATION,)
a corporation, and)
)
PRINCE WILLIAM HOSPITAL SYSTEM, INC.)
a corporation.)
)

Docket No. 9326

PUBLIC

SCHEDULING ORDER

In accordance with Federal Trade Commission rule 16 C.F.R. § 3.21(b) a Scheduling Conference with Complaint Counsel and counsel for Respondents was held May 29, 2008 at 9 a.m. before Commissioner J. Thomas Rosch. The parties' positions on the discovery schedule and other matters were described in a Joint Case Management Statement on May 28. This Order seeks to eliminate any disruption or duplication with the preliminary injunction proceedings in the District Court for the Eastern District of Virginia. *Federal Trade Commission v. Inova Health System Foundation et al.*, Case No. 1:08CV460-CMH/JFA. Respondents requested a stay of all administrative proceedings pending the resolution of the preliminary injunction proceedings. Complaint Counsel opposed Respondents' request. This Commissioner denied Respondents' Motion. Order Denying Respondents' Motion to Stay Administrative Proceedings (May 29, 2008).

1. Initial Disclosures: Complaint Counsel and Respondents shall fully comply with 16 C.F.R. § 3.31(b).

2. Statement of Facts. On August 1, 2006, Inova executed a Purchase Agreement by which Inova will acquire PWHS. The Commission issued an administrative complaint on May 7, 2008 alleging that Inova's acquisition of PWHS violates the antitrust laws. The complaint alleges that a relevant product market is general, acute care inpatient hospital services sold to managed care organizations (MCOs) and that the relevant geographic market is no larger than Northern Virginia, defined as Fairfax, Arlington, Loudoun, Prince William and Fauquier counties, and including the independent cities of Alexandria, Fairfax, Falls Church, Manassas and Manassas Park.

Respondents have not yet answered the Complaint but dispute the Commission's contention that the merger of the Hospitals would violate federal antitrust laws. Respondents further dispute the product market and geographic market alleged by the Commission.

3. Legal Issues. The principal legal issues in this case are as follows:

- a. Complaint Counsel alleges that the acquisition of PWHS by Inova may substantially lessen competition or tend to create a monopoly, in violation of section 7 of the Clayton Act, 15 U.S.C. § 18.
- b. Respondents have not yet filed their answers in this case, which are not due until June 2, 2008. However, without waiving their right to further respond to Complaint Counsel's allegations and assert any and all applicable defenses thereto at the appropriate time, Respondents dispute the allegations contained in the Complaint and contend that the planned merger *will not* violate Section 7 of the Clayton Act in any respect.

4. Motions. On May 23, 2008, Respondents filed their Motion to Stay. That same day, Respondents also filed a Motion to Recuse Commissioner J. Thomas Rosch As Administrative

Law Judge (“Motion to Recuse”). Complaint Counsel filed Responses to both Motions and Oral Argument was heard on May 29, 2008. Respondents’ Motion to Stay the Proceedings was denied on May 29. The Motion to Stay Premature Discovery was granted. All discovery served prior to the Scheduling Conference will be treated as if it were served on May 29, 2008. Respondents’ Motion to Recuse Commissioner J. Thomas Rosch was certified to the Commission on May 29, 2008.

5. Amendment of the Pleadings. Complaint Counsel and Respondents do not currently contemplate an amendment to either the complaint or the answers; indeed, Respondents have not yet filed their answers, which are not due until June 2, 2008. However, the parties reserve the right to seek leave to amend the pleadings pursuant to 16 C.F.R. § 3.15.

6. Evidence Preservation. Complaint Counsel and Respondents represent to the Commission that they have taken steps necessary to preserve evidence relevant to the issues reasonably evident in this action, including the interdiction of any document-destruction program or ongoing erasures of emails, voice mails, and other electronically-recorded materials.

7. Discovery.

- a. Interrogatories and Requests for Admissions. There is no limit to the number of sets of interrogatories the parties may issue, as long as the total number of interrogatories, including all discrete subparts, does not exceed twenty-five (25) to Complaint Counsel from all Respondents and does not exceed twenty-five (25) to all Respondents from Complaint Counsel. The interrogatories in separate sets shall be numbered sequentially. The number of requests for admissions, including all discrete subparts, shall not exceed forty (40) to Complaint Counsel from all Respondents and shall not exceed forty (40) to all Respondents from

Complaint Counsel, except that the limit on requests for admissions shall not apply to requests relating to the authenticity or admissibility of exhibits.

Additional interrogatories and requests for admissions will be permitted only for good cause.

- b. Document Requests. There shall be no limit on the number of document requests.
- c. Timing of Requests. Document requests, requests for admission, interrogatories, and subpoenas, except for discovery for purposes of authenticity and admissibility of exhibits, shall be served so that the time for a response to the discovery request shall be on or before the discovery cut-off date.
- d. Timing of Responses.
 - (i) For all interrogatories and requests for production served prior to this Order's issuance, objections to the interrogatories and requests for production shall be due within fifteen (15) days of service of the discovery request, and responses, documents and materials shall be produced within twenty (20) days of the date of this Order.
 - (ii) For interrogatories, requests for production and requests for admissions served after the issuance of this Order, objections shall be due within fifteen (15) days of service of the discovery request, and responses, documents and materials shall be produced within twenty (20) days, of service of the discovery request.
- e. Electronically-Stored Information. Disclosure and discovery of electronically-stored information shall be governed by the Federal Rules of Civil Procedure, as amended on December 1, 2006.

f. Deposition Notices. Service of a notice of deposition five business days in advance of the date set for the taking of the deposition shall constitute reasonable notice.

8. Related Cases. On May 12, 2008, the Commission and the Attorney General of the Commonwealth of Virginia filed a Complaint for Preliminary Injunction in the United States District Court for the Eastern District of Virginia, *Federal Trade Commission et al. v. Inova Health System Foundation, et al.*, Case No. 1:08CV460-CMH/JFA, in which the Commission and the Attorney General of the Commonwealth of Virginia seek a preliminary injunction enjoining Inova's acquisition of PWSH pending a final decision in this administrative litigation. A hearing on Defendants' Motion for a Scheduling Order and an Expedited Status Conference is set for May 30, 2008 at 10:00 a.m. in front of the Honorable Claude Hilton.

9. Scheduling. As indicated above, Respondents requested a stay of this administrative proceeding pending the resolution of the related case identified in Paragraph 8. That request was denied. The following is the pre-hearing schedule:

June 2, 2008	Respondents file their answers to the Complaint. Exchange Preliminary Witness List (not including experts) with description of proposed testimony.
June 9, 2008	Non-expert depositions can begin.
July 9, 2008	Exchange revised witness lists (not including experts), including preliminary rebuttal fact witnesses, with description of proposed testimony.
July 25, 2008	Complaint Counsel serves expert witness list and expert witness reports other than rebuttal expert reports (if any).
August 1, 2008	Deadline for serving document requests, requests for admissions, interrogatories, and subpoenas, except for discovery for purposes of authenticity and admissibility of exhibits.

- Status report due and, if requested by either party, conference with the ALJ to discuss the preliminary injunction proceedings.
- August 11, 2008 Respondents serve expert witness list and expert witness reports.
- August 18, 2008 Complaint Counsel serves rebuttal expert witness list and rebuttal expert reports. Any such report is to be limited to rebuttal of matters set forth in the Respondents' expert reports. If material outside the scope of fair rebuttal is presented, the Respondents will have the right to seek appropriate relief (such as striking part or all of Complaint Counsel's rebuttal expert report(s) or seeking leave to submit surrebuttal expert reports).
- September 5, 2008 Deadline for completion of depositions of all experts.
- Close of discovery, other than discovery permitted under FTC Rules of Practice § 3.24(a)(4) and discovery for purposes of authenticity and admissibility of exhibits.
- Status report due and, if requested by either party, conference with the ALJ.
- September 19, 2008 File final proposed witness and exhibit lists, including designated testimony to be presented by deposition, copies of all exhibits and a brief summary of the expected testimony of each witness.
- For parties that intend to offer into evidence at the hearing confidential materials of an opposing party or non-party, provide notice to the opposing party or non-party, pursuant to FTC Rules of Practice § 3.45 (b).
- September 22, 2008 Deadline for filing motions for summary decision, motions *in limine*, motions to strike, and motions for in camera treatment of proposed trial exhibits.

September 26, 2008 Exchange and file with the ALJ objections to final proposed witness lists and exhibits lists. Exchange objections to the designated testimony to be presented by deposition and counter designations.

Exchange proposed stipulations of law, facts, and authenticity.

Parties file pretrial briefs, not to exceed fifty (50) pages.

September 29, 2008 Deadline for filing responses to motions for summary decision motions *in limine*, motions to strike, and motions for in camera treatment of proposed trial exhibits.

October 3, 2008 Deadline for filing reply to responses to motions for summary decision motions *in limine*, motions to strike, and motions for in camera treatment of proposed trial exhibits.

October 6, 2008 Commencement of Hearing.

10. Hearing. The hearing will take no more than four weeks.

11. Other Matters.

- a. Service on the parties shall be deemed effective on the date of delivery by electronic mail (formatted in Adobe Acrobat) except in those instances where service by electronic mail is not technically possible, and three days shall be added to the time for any responsive action, consistent with the provisions of Fed. R. Civ. P. 6(e) regarding service by electronic mail. Absent leave of the Administrative Law Judge, this provision does not modify any of the dates set forth in Paragraph 9.
- b. Memoranda in support of, or in opposition to, any dispositive motion shall not exceed ten (10) pages, exclusive of attachments.

- c. If papers filed with the Office of the Secretary contain *in camera* or confidential material, the filing party shall mark any such material in the complete version of their submission with **{bold font and brackets}**. 16 C.F.R. § 3.45. Parties shall act in accordance with the rules for filings containing such information, including FTC Rules of Practice, 16 C.F.R. § 4.2. Public versions of the papers with the *in camera* or confidential material omitted shall be filed pursuant to 16 C.F.R. § 3.45(e).
- d. The parties shall serve upon one another, at the time of service, copies of all subpoenas *duces tecum* and subpoenas *ad testificandum*. For subpoenas *duces tecum*, the party issuing the non-party subpoena shall provide copies of the subpoenaed documents and materials to the opposing party within five (5) business days of service. For subpoenas *ad testificandum*, the party seeking the non-party deposition shall consult with the other parties before the deposition date is scheduled. Additionally, the deposition of any person may be recorded by any means permitted by Fed. R. Civ. P. 30. Depositions shall be taken by stenographic means unless the party seeking the deposition notifies the deponent and the other party of its intention to record the deposition by other than stenographic means at least two (2) days in advance of the deposition.
- e. No deposition of a non-party shall be scheduled between the time of production in response to a subpoena *duces tecum* and three (3) days after copies of the production are provided to the non-issuing party, unless a

shorter time is required by unforeseen logistical issues in scheduling the deposition, the documents are produced at the time of the deposition, or as agreed to by all parties involved.

- f. Any declaration obtained by a party that the party intends to use affirmatively in the proceeding (e.g. for purposes other than strictly rebuttal, authenticity or evidentiary foundation) must be produced to the opposing party sufficiently before the close of fact discovery such that opposing counsel shall have a reasonable amount of time to subpoena documents for and to take the deposition of any such declarant.
- g. The parties shall provide for each testifying expert witness a written report containing the information required by the FTC Rules of Practice § 3.31(b)(3). Drafts of expert reports and notes taken by expert witnesses need not be produced. Communications (oral, written and by e-mail) between expert witnesses and counsel or consultants need not be produced and are not discoverable unless relied upon.
- h. The preliminary and revised witness lists shall represent the parties' good faith designation of all potential witnesses the parties reasonably expect may be called at the hearing. A party shall notify the other parties promptly of changes in preliminary and revised witness lists to facilitate completion of discovery within the dates specified by the scheduling order. After the submission of the final witness lists, additional witnesses may be added only: (a) by order of the Commission or the presiding official, upon a showing for good cause; (b) by agreement of the parties,

with notice to the Commission or the presiding official; or (c) if needed to authenticate, or provide the evidentiary foundation for, documents in dispute, with notice to the other parties and the Commission or the presiding official. Opposing counsel shall have a reasonable amount of time to subpoena documents for and depose any witness added to the witness list pursuant to this paragraph, even if the discovery takes place during the hearing.

- i. The final exhibit lists shall represent the parties' good faith designations of all exhibits the parties reasonably expect may be used in the hearing, other than demonstrative, illustrative, or summary exhibits. Additional exhibits other than demonstrative, illustrative, or summary exhibits may be added after the submission of the final lists only: (a) by order of the Commission or the presiding official, upon a showing of good cause; (b) by agreement of the parties, with notice to the Commission or the presiding official; or (c) where necessary for purposes of impeachment.
- j. Applications for the issuance of subpoenas commanding a person to attend and give testimony at the hearing must comply with FTC Rules of Practice § 3.34, must demonstrate that the subject is located in the United States, and must be served on opposing counsel. Oppositions to applications for issuance of subpoenas shall be due within three (3) business days after the filing of the application.
- k. Complaint Counsel shall serve, with a courtesy copy to the ALJ, no later than 48 hours in advance of the start of the case-in-chief, a schedule by

day showing the best estimate of the expected witnesses to be called.

Respondents shall serve, with a courtesy copy to the ALJ, no later than 48 hours in advance of the start of the defense case, a schedule by day showing the best estimate of the expected witnesses to be called. At least 48 hours in prior to Complaint Counsel's rebuttal case, Complaint Counsel shall provide Respondents with a schedule of witnesses expected to be called each day during the rebuttal case. The parties further shall provide one another with copies of any demonstrative exhibits forty-eight (48) hours before they are used with a witness.

1. The procedure for marking of exhibits used in the adjudicative proceedings shall be as follows: (a) Complaint Counsel's exhibits shall bear the designation "CX" and Respondents' exhibits shall bear the designation "RX"; and (b) the parties shall number the first page of each exhibit with a single series of consecutive numbers. For example, Complaint Counsel's first exhibit shall be marked "CX-1." When an exhibit consists of more than one page, each page of the exhibit must bear a consecutive control number. Additionally, all exhibit numbers must be

accounted for, even if a particular number is not actually used at the hearing.

- m. The parties shall endeavor to resolve any discovery disputes quickly and efficiently. If the parties are unable to reach an agreement resolving the disputes they should bring them promptly to this Commissioner's attention by calling Kyle Andeer, Attorney Advisor to Commissioner J. Thomas Rosch at 202-326-2916 and arranging for a telephonic hearing with the Commissioner on the dispute.

ORDERED:



J. Thomas Rosch
Commissioner

ISSUED: May 30, 2008