

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

COMMISSIONERS: Deborah Platt Majoras, Chairman
Thomas B. Leary
Pamela Jones Harbour
Jon Leibowitz

_____)	
In the Matter of)	
EVANSTON NORTHWESTERN)	Docket No. 9315
HEALTHCARE CORPORATION)	Public Version
_____)	
a corporation)	
_____)	

**RESPONDENT'S EXPEDITED MOTION FOR EXTENSION
OF LENGTH OF INITIAL APPEAL BRIEF**

Respondent, Evanston Northwestern Healthcare, Inc. ("ENH"), respectfully moves for leave to submit an opening appeal brief that exceeds the word limitations set forth by FTC Rule of Practice § 3.52. Previously, the Commission denied that portion of the parties' Joint Motion Requesting Extension Of Time And Length For Appeal Briefs ("Joint Motion") requesting that the length all briefs to be filed on these cross-appeals be extended. That motion specifically requested a limit of 30,000 words for Respondent's opening brief. The Commission denied the motion, in part, because it did not include "any elaboration as to the nature of the complexity of the issues" and, therefore, the reasons for the request did not "by themselves constitute the necessary strong showing to warrant extending the word count limitations." *See Order Granting in Part and Denying In Part Joint Motion For Extension of Time and Length of Appeal Briefs*, Nov. 18, 2005, at 2.

This is the first post-consummation challenge to a hospital merger in decades -- and it is the only challenge to a fully integrated hospital merger. The case arises from the January, 2000 merger between ENH and Highland Park Hospital ("HPH") (the "Merger"). Through the Merger, ENH strengthened a financially-strapped community hospital that labored with quality problems and transformed it into a superior institution, providing new services rarely, if ever, found in community hospitals and improving the quality of a broad range of hospital services that benefited patients and their families. Nevertheless, Administrative Law Judge McGuire found that the Merger violated Section 7 of the Clayton Act and ordered that HPH be divested. Such an order, if upheld, would unwind the extraordinary quality gains ENH has brought to HPH to date and derail further investments that have already been planned. Moreover, this case presents the opportunity for the Commission to revisit a number of broader issues in merger analysis that go well beyond the borders of the Chicago metropolitan area. These issues include, for example, the proper methodology for defining relevant markets, the role of quality improvements in competitive effects analysis, and the proper interpretation of pricing evidence in post-consummation cases. Each of these issues requires detailed legal analysis and extensive references to the record.

After completing a comprehensive draft of the initial appeal brief, it is clear that confining the brief to the standard length permitted by FTC Rule 3.52 will require that Respondent omit important arguments necessary for its defense and will so limit its discussion of other complex, nuanced and novel issues raised on this appeal as to interfere with their clarity and completeness. Accordingly, Respondent respectfully requests leave to file an opening brief not to exceed 24,000 words. Complaint counsel has authorized the undersigned to indicate that it takes no position on the relief requested in this motion. Respondent's initial appeal brief is due

December 16, 2005. In order to allow Respondents to effectively utilize any additional length that may be granted, Respondent respectfully requests that the Commission issue a ruling as soon as possible and, in any event, not later than close of business on Thursday, December 8.

ARGUMENT

Although extensions of word count limitations are generally “disfavored,” the circumstances here meet the test for such extensions, which is that “undue prejudice would result from complying with the existing limit.” FTC Rules of Practice § 3.52. The record in this case is based on an eight-week trial and includes testimony from over 40 witnesses and over 1,600 exhibits. The evidence is integrally related to the legal theories argued by both parties, many of which are novel and complex, and all of which require very fact-intensive inquiries. The ALJ issued a 225-page, single-spaced Initial Decision containing 1,000 findings of fact. The ALJ, however, oversimplified and misapplied the law and, as a consequence, ignored many essential facts. In order to properly brief the issues on appeal, Respondent needs additional space to provide a detailed explanation of the legal concepts and supporting factual analysis in order to give the Commission a full understanding of the critical issues.

In the absence of an extension, Respondent would be unable to adequately address all of the ALJ’s critical errors, and would thus be prejudiced in its ability to appeal the Initial Decision -- prejudice that potentially raises due process concerns. *See McClelland v. Andrus*, 606 F.2d 1278, 1285-86 (D.C. Cir. 1979) (stating that the FTC “is bound to ensure that its procedures meet due process requirements”) (citing *Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975) (noting that “a fair trial . . . is a basic requirement of due process” and “[t]his applies to administrative agencies which adjudicate as well as courts”) (quotations and citations omitted)). Moreover, the Commission has previously granted reasonable requests for word count extensions based on

factors similar to those present in this case. *See In re Rambus*, Dkt No. 9302 (Order Granting Extensions of Time to File Appellate Briefs and Increase in Word Count Limits, March 18, 2004) (available at <http://www.ftc.gov/os/adjpro/d9302/index.htm>); *In re Schering-Plough*, Dkt. No. 9297 (Order Granting - In Part Complaint Counsel's Motion For Leave To File An Appeal Brief Exceeding The Word Limit In the Commission's Rules of Practice, July 25, 2002, available at <http://www.ftc.gov/os/adjpro/9297/index.htm>).

1. The Record In This Case Is Voluminous

In *Rambus*, the Commission granted an extension of the word limit based in part on the fact that the record was, like the record in this case, "extremely lengthy and detailed." *In Re Rambus*, Dkt. No. 9302, *Order Granting Extensions of Time To File Appellate Briefs and Increases in Word Count Limits*, Mar. 18, 2004, at 2. Complaint Counsel filed its complaint in this case well over four years after the Merger had been consummated. At the time the complaint was filed, HPH had been fully integrated into the ENH system and the system had undergone significant changes in the areas of contract negotiations, improvements in quality of care and HPH's financial stability, among others. A large part of the evidentiary record relates to conduct, improvements and changes in the marketplace occurring in the several years following the Merger. The documents, empirical studies, testimony and econometric evidence admitted on these issues are voluminous and represent much more evidence than is typically available in a pre-merger case.

It should be no surprise then that the record consists of over 6,000 pages of trial transcripts and 1,600 exhibits admitted at trial. The record also contains 23 volumes of proposed findings of fact and replies to those findings, amounting to a total of over 10,000 paragraphs. The Initial Decision alone is 225 single-spaced pages, containing over 1,000 findings. If

Respondent must appeal the decision in its entirety within the word limits prescribed by the rule it must, in essence, answer 225 single-spaced pages of argumentation in only 63 double-spaced pages.¹ This alone provides a basis to conclude that imposing the page limit in the FTC's Rules of Practice would result in "undue prejudice" to Respondent.

2. The ALJ's Findings of Fact Contain Numerous Errors and Omissions

The length of the record is even more significant in light of the fact that the ALJ's Initial Decision contains serious factual errors and ignores significant evidence. Rule 3.51(c) of the FTC's Rules of Practice provides that initial decisions "shall be based on a considerations of the whole record relevant to the issues decided and shall be supported by reliable and probative evidence." 16 C.F.R. §3.51(d) (2002). As an initial matter, the ALJ's numerous factual errors and omissions suggest that the standard imposed by Rule 3.51(e) was not met. In addition, each of the ALJ's factual errors and omissions are particularly significant because the outcome of this case turns on a weighing of competitive effects under a totality of the circumstances analysis. *United States v. Baker Hughes*, 908 F.2d 981, 982 (D.C. Cir 1990) (citing and quoting *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974)). In light of this governing principle, Respondent's brief must contain a reasonably detailed discussion of the evidence, particularly the evidence that was ignored or misinterpreted by the ALJ, in order to explain the ALJ's erroneous legal conclusions.

a. Quality

This is the first instance in which it has been argued and demonstrated that a hospital merger had substantial, verified pro-competitive effects arising from improved quality of care. The novelty of the legal issues and the sheer volume of evidence on this issue alone justify an extension of the word limit. In his Initial Decision, the ALJ examined the evidence of quality of

¹ Based on its current draft, Respondent estimates that there are approximately 300 words per double-spaced page.

care improvements on an area-by-area basis (e.g. obstetrics, pharmacy, radiology, etc.) making over 132 findings and employing over 17 pages of the text of his decision (ID175-192). But the ALJ also omitted any reference to a substantial body of evidence -- Respondents submitted more than 1,000 proposed findings on quality-related issues (RFF1165-2277) -- which invariably led to his undervaluing the weight of this evidence. This evidence omitted from the opinion further addresses a number of concerns the ALJ raised about the relevance of the quality evidence including, for example, evidence demonstrating that the improvements were merger specific. In addition to the quality improvements discussed in the Initial Decision, the ALJ also ignored significant record evidence showing improvements in other areas. In its brief, Respondent will both answer and evaluate the errors in the ALJ's existing findings and brief the Commission regarding the critical evidence that the ALJ ignored.

b. Pricing

Similarly, the voluminous documentary and pricing evidence serves as the basis for the ALJ's erroneous legal conclusions regarding the competitive effects of the Merger. These issues were the subject of five days of testimony by expert witnesses as well as many hours of testimony by the parties and market participants. Moreover, the parties' post-trial proposed findings on these issues comprised 4,524 paragraphs. RFF515-1164; CCF284-1608, 1742-2031; Reply-RFF284-1608, 1742-2031; Reply-CCF515-1164. Finally, the ALJ's Initial Decision devoted 511 findings (IDF326-837) and 22 single-spaced pages of argument (ID152-174) to an incomplete analysis of these issues. In its brief, Respondent plans to address the ALJ's serious errors in his interpretation of the documentary evidence and the weighing of the pricing evidence.

c. **Competitive Effects**

The ALJ erred in every step of his competitive effects analysis. First, he engaged in a blind structural analysis without ever elucidating a clear theory of competitive harm. As an initial matter, the ALJ erred in defining the relevant market and thus any presumption derived from market statistics is flawed. The discussion of the relevant market and presumptions is both complex and fact-intensive. Moreover, the ALJ purported to strengthen his initial presumption by misinterpreting a complex pricing analyses and internal document evidence. Discussion of these issues in the brief will facilitate the Commission's de novo review of the record. The ALJ never considered whether his presumptions had any predictive value in the relevant market under any legitimate theory of competitive harm. As Respondent will argue in its brief, the evidence does not support a finding of liability under any theory. In particular, the legal and factual issues related to unilateral effects analysis -- the theory under which Complaint Counsel brought this case -- are especially complex and have not been extensively litigated.

3. The Special Circumstances of This Case Justify an Extension

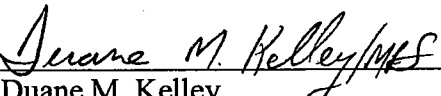
An additional reason to grant leave to file an appeal brief with additional words is that, even apart from the ALJ's errors of law and fact, the special circumstances of this case require a more extensive appeal brief than would be warranted in the typical FTC administrative adjudication. The fact that this is a post-consummation case means that the record in this case contains more evidence than would typically be available in a pre-merger challenge. Moreover, as discussed above, this is the first instance in which comprehensive quality of care improvements have been proven in a hospital merger case. Consequently, this matter presents the Commission with its first opportunity to address, on the basis of an adjudicative record, important issues relating to the role of quality improvements in competitive effects analysis of a

merger. Finally, given the public welfare considerations inherent in the unwinding, through divestiture, of a fully integrated hospital system, the public interest would be better served by permitting a more complete presentation of the legal and factual issues than would be possible under the word limit for appeal briefs prescribed in the FTC's Rules of Practice.

CONCLUSION

For the reasons stated above, the Respondent respectfully request that they be granted an additional 5,250 words for the initial appeal brief, for a total of 24,000 words. This is fewer than half of the words requested in the Joint Motion for the opening brief. Respondent believes that any one of the bases set forth above is sufficient to find that Respondent would face undue prejudice from having to comply with the word limit set forth in the FTC's Rules of Practice.

Date: December 2, 2005


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motion are sufficiently serious that Respondent may be unduly prejudiced if they are not permitted to adequately present their arguments on appeal—whereas no party would suffer any significant harm by allowing counsel some additional word latitude for purposes of filing an Appeal Brief. *See In the Matter of Schering-Plough Corp., Docket No. 9297, Order (July 25, 2002).*

Accordingly,

IT IS ORDERED THAT Respondent's Appeal Brief shall be limited to 24,000 words;

IT IS FURTHER ORDERED THAT the foregoing Brief shall in all other respects conform to the requirements of Commission Rule 3.52, 16 C.F.R. § 3.52.

By the Commission.

Donald S. Clark
Secretary

ISSUED: _____

CERTIFICATE OF SERVICE

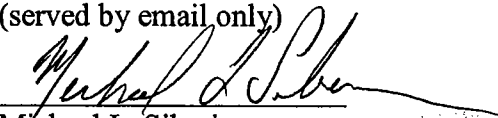
I hereby certify that on December 2, 2005, copies of the foregoing Respondent's Expedited Motion for Extension of Length of Initial Appeal Brief was served (unless otherwise indicated) by email and first class mail, postage prepaid, on:

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