RE: Comments to ‘‘Parts 3 and 4 Rules of Practice Rulemaking—P072104

Rule 3.1 mandates that "...all parties shall make every effort at each stage of a proceeding to avoid delay." This goal proceeds on an asymmetrical premise. Commission staff may take years to review documents, confer with experts, develop the theory for an action, and prepare for a potential administrative proceeding, *during the Part II stage*, then – without advance notice – contact one or more respondents and demand prompt agreement to a consent order lest Complaint issuance be recommended, after which a staff recommendation might not be pursued, or be authorized in a limited or different manner. Consequently, especially in circumstances of protracted Commission staff review, respondent(s) are likely to limit resource commitments, focus on business prerogatives, and avoid significant strategic and tactical attention unless and until Commission action is certain. *If* a Complaint issues, respondent(s) may not deliberately want delay yet legitimately need time to locate, interview, engage, and prepare specialized counsel or experts, while the Commission may be prepared to pounce. Under such circumstances, compressing Part III deadlines for respondent(s) that (or who) cooperated with Commission staff and did not impede the Part II investigation process, would be unfair.

Proposed amendments expressly intended to (1) “improve the quality of decisionmaking” or (2) “expedite the Part 3 process by imposing stricter deadlines” or (3) authorize “the Commission to intercede earlier in the proceedings” should not address Part III in isolation. They should, as part of a continuum that takes into account Commission staff protracted investigation and review during Part II, to avoid materially disadvantaging the overall deliberative process and respondent(s) rights, which are a correlative aspect of “public interest.”

Accordingly, in limited circumstances in which the Part II deliberative process was protracted, additional time may be needed by respondent(s) to prepare for Part III adjudication. The proposed Rule amendments need to accommodate a reasonable departure from expedited deadlines in such limited circumstances, *as a matter of right*. Rule 3.1 should provide for limited authorization to lengthen one or more time limits to facilitate fairness, perhaps in a ratio to time utilized by the Commission staff in the Part II phase. This might entail a significant [perhaps, formulaic] accommodation in the time permitted to answer, set forth in Rule 3.12(a), rather than adjustment of all normative deadlines in the Part III process.

Rule 3.21(a) refers to “the answer.” Where there are multiple respondents, there may be multiple answers. If there is no consolidated answer, one respondent cannot be served promptly, or some externality delays a respondent’s answer, the remaining respondents may be prejudiced. Under such circumstances, if a “prehearing scheduling conference” can proceed on some or all topics set forth in Rule 3.21(b), the Rule should so provide. [It should be noted that Rule 3.41(b)(3)

contemplates potential bifurcation. Consideration should be given to expanding Rule 3.41(b)(3) to explicitly provide for a separate segment of a hearing concerning one or more respondent(s) in the event any claim or issue necessitates such treatment.]

Rule 3.21(b) refers to "a scheduling conference." The wording "prehearing scheduling conference" used in Section (a) should be used in Section (b) to promote clarity and consistency, as well as to accommodate the prospect of more than one "prehearing scheduling conference" in circumstances described in the above comment concerning Rule 3.21(a).

Rule 3.21(e) provides for a "final prehearing conference" at which designation of "testimony to be presented by deposition" is to be made. No party counsel should be required to so designate except for witnesses known to be [or highly likely to become] unavailable at the hearing. Thereafter, any party should be unconstrained to designate and present deposition testimony in lieu of "live" testimony. [Note, this needed modification is important because the strict time limits set forth in Rule 3.41(b)(4) subsequently may preclude the option to present "live" testimony.]

Rule 3.22(c) mandates conduct using the word "shall" seven times, and suggests conduct using the word "may" one time. However, it also uses the word "must" on one occasion, which is an anomaly. In the sentence that reads, "Motions must also include the name, address, telephone number, fax number, and e-mail address (if any) of counsel and attach a draft order containing the proposed relief" the word "must" should be replaced with the word "shall" for consistency and clarity.

Rule 3.22(g) advises in the last sentence, "Unless otherwise ordered by the Administrative Law Judge, the statement required by this rule must be filed only with the first motion concerning compliance with the discovery demand at issue." The word "must" is an anomaly that should be replaced with the word "shall" for consistency and clarity.

Rule 3.24(b)(2) provides for "reprimand, suspension or disbarment" before the Commission as potential disciplinary actions. Consideration should be given to expanding the Rule to provide for "notice to all professional licensing, registration, and certification entities to which a lawyer is subject to discipline."

Rule 3.31(a) permits discovery by a number of enumerated methods. However, nothing in the Rules absolutely requires a respondent to use only formal discovery methods. The Rule should acknowledge this by amending the first sentence to add the following words at the end, "…or by informal investigation." A party may choose to forego formal discovery processes even if the Commission does not do so. Such informal investigation would be protected, in parts, by the attorney-client privilege and the work-product doctrine. Consequently, the

suggested language clarifies and reinforces existing rights notwithstanding "General Discovery Provisions."

Rule 3.31(c)(2) limits the obligation of Complaint counsel to search for materials. This Rule would be subject to the provisions of 18 U.S.C §3500, especially if parallel proceedings may be pending. Consequently, the second sentence that currently states, "The Administrative Law Judge *may* authorize for good cause additional discovery of materials in the possession, custody, or control of those Bureaus or Offices, or authorize other discovery pursuant to §3.36" [emphasis added] should be amended to add the following words at the end, "or 18 U.S.C §3500."

Rule 3.31(c) limits discovery to prevent unreasonable burdens and expenses, abuse of process, to provide proportionality, to protect evidentiary privileges, and to protect the work-product doctrine. It does not, however mention or address the "crime-fraud exception" to the attorney-client privilege, set forth in *United States v. Zolin*, 491 U.S. 554 (1989). This may be important to Complaint counsel or to respondents with defenses adverse to other respondents.

Rule 3.31 new Appendix A does not require any party (including the Commission) to maintain or [in specified circumstances] to produce a log showing all recipients. Consequently there neither is practicable accountability nor audit capability to assure compliance with the Protective Order. This oversight should be corrected.

Rule 3.31 new Appendix A, "Protective Order" section 7(c) permits disclosure "…only to… outside counsel of record for any respondent, their associated attorneys and other employees of their law firm(s), *provided they are not employees of a respondent*…" [emphasis added]. The limited preclusion in section 7(c) is insufficient. The language in sections 7(c) and 7(d) should be identical however mere "employment" should not be the standard. The wording in section 7(d), "…provided they are not affiliated in any way with a respondent…" also is insufficient, as currently written. It would be preferable to specify, "…provided they are not affiliated with or employed directly or indirectly by any respondent…." Such a limitation is more inclusive, provides broader protection, and provides greater assurance of confidentiality. [For example, it would cover persons "employed" by a separate but related entity to any respondent.]

Rule 3.31 new Appendix A, "Protective Order" section 11 states in the first sentence, "If a party receives a discovery request *in another proceeding* that may require the disclosure of confidential material submitted by another party or third party…" [emphasis added], which is insufficient because it fails to address a discovery request by another governmental entity regardless of the pendency of another actual "proceeding." This omission should be corrected to assure prompt notification irrespective of a formal proceeding.

Rule 3.31 new Appendix A, "Protective Order" section 12 requires (in the first sentence) the "…return to counsel [of] *all copies* of documents or portions thereof designated confidential…" [emphasis added]. In the event of a digital or electronic "copy" the stated language is inchoate. The language should be clarified to state, "…return to counsel [of] all copies in any tangible means of expression, and a certification to counsel that any electronic copy (including back-up or stored copy in each location) not returned has been permanently destroyed by an assured means [which shall be specified]…." A more assured methodology to address this concern would be to specify that all "designated confidential" information may be submitted in "encrypted" form. An encryption/decryption protocol would be appropriate and should be encouraged. Additionally, all recipients of documents in any tangible means of expression should be required to maintain an "audit trail" for digital information to assure access can be curtailed consistent with the intent of the Protective Order.

Rule 3.31A mandates that each party "*shall* serve… a list of experts they *intend* to call as witnesses at the hearing not later than 1 day after the close of fact discovery…" [emphasis added]. The conflation of "shall" and "intend" is oxymoronic with respect to rebuttal experts and may be impractical with respect to primary experts, for four reasons.

First, respondent(s) bear no burden of proof. To require the identification of respondent(s) rebuttal witnesses would: (a) be premature; (b) invade the work-product privilege [moreover, a single "day after the close of fact discovery"]; (c) impose obligations on Complaint counsel that substantially raise litigation expense for the Commission [because in virtually all Part III proceedings the Commission may be forced to needlessly procure additional witnesses on a flawed assumption that testimony by respondent(s) witnesses would be persuasive irrespective of *voir dire* and cross-examination, *or* because opposing counsel "game the system" by disclosing a list of rebuttal experts simply to distract, deflect, or deceive (which are not necessarily irrational "intents")]; (d) is inefficient and burdensome because it forces both Commission and respondent(s) to procure rebuttal testimony that may not be required at a hearing; (e) completely ignores the proportionality expectation that is expressed in Rule 3.31(c)(2)(iii); and (f) invades prerogatives of an Administrative Law Judge.

Second, the balance between expediency and fairness is skewed improvidently. Even if it *might* be expedient to require all parties to anticipate all arguments so as to avoid *potential* delay, any respondent has the right not to telegraph its punches; to choose not to adduce "rebuttal" testimony on threshold issues for which Complaint counsel may be unable to sustain the Commission's burden of proof. To mandate that respondent(s) "shall" identify rebuttal experts "no later than the close of fact discovery" primarily would serve to inform Complaint counsel of potentially fatal defects in their legal theory, insufficient factual support for their theory, or essential proofs needed to prevail on appeal that are lacking. It requires respondents to promptly and involuntarily assist Complaint counsel in

identifying flawed prosecution theories and proofs; tantamount to reversing the burdens of proof and forcing respondent(s) to assist the Commission's lawyers in meeting a burden of proof for the case-in-chief.

Third, until each party has an opportunity to examine the opposing expert(s) witness reports [which would not occur until at least "28 days after the close of fact discovery"] and serve "a list of any rebuttal expert witnesses and a rebuttal report… not later than 38 days after the close of fact discovery," on what principled basis would knowledgeable counsel realistically be able to "intend" anything? Aside from clairvoyance, a Rule of Procedure that mandates disclosure of "intent" prior to any presumed actual effects promotes metaphysics over practicality.

Fourth, "intent" to call experts in areas in which "Congress determined that the Commission could use *its* [own] expertise," *see* D. Bruce Hoffman & M. Sean Royall, *Administrative Litigation at the FTC: Past, Present, and Future*, 71 Antitrust L.J. at 319 (2003), and the holding in *Kraft, Inc. v. FTC.*, 970 F.2d 311 (7th Cir. 1992)("…the Commission may rely on its own reasoned analysis to determine what claims, including implied ones, are conveyed in a challenged advertisement, so long as those claims are reasonably clear from the face of the advertisement"), largely may be superfluous in the context of alleged "deception." Requiring expeditious disclosure of experts a party may "intend" to call as a witness on issues for which extraneous expertise is immaterial, is inefficient, and confers potential shibboleth status to creative arguments rather than advances the goals of the Part III and IV amendments.

Rule 3.31A limits "[e]ach side" to "5 expert witnesses, including any rebuttal witnesses" at an evidentiary hearing. In circumstances where there may be multiple respondents whose interests and defenses are not coterminous or complimentary but may be oppositional, would deprive some respondent or all respondents of the opportunity to present a full and fair defense to a Part III Complaint. The fifth sentence of the Rule should provide for more than the aggregate number of witnesses *per side* "for good cause shown."

Rule 3.31A should define "extraordinary circumstances" in the sixth sentence in the Rule to provide guidance to Administrative Law Judges and to prevent *ad hoc* determinations antithetical to the goals of the proposed Part III and IV amendments.

Rule 3.31A provides minimum requirements for expert witness reports. Inasmuch as reliance on competing scientific or economic "experts" in FTC proceedings is ubiquitous, the Commission is uniquely situated to "expedite" Part III matters "without unnecessary expense" in connection with discovery concerning experts. In this regard, the minimal requirements should be tightened. All parties should be provided sufficient information to examine each opposing expert for inconsistent positions taken in comparable assignments, bias, sufficiency of experience, philosophy, etc. The limitation of "…a listing of any other cases in

which the witness has testified as an expert at trial or by deposition within the preceding 4 years" is insufficient and is inconsistent with the intent of the Part III amendments.

Every expert should maintain a testimony database that identifies the parties, lawyers, issues on which the expert opined or was examined, (then) current contact information for counsel of record, the forum, venue, jurisdiction, case number, whether an opinion was rendered, a general description of the prior testimony to enable a reader to more efficiently prepare for deposition of the expert, as well as a complete list of the expert's education, training, credentials, and publications. For issues in contention on which the expert will testify, there is no reason to limit the period of time for which such information must be listed in an expert report. The FTC should maintain an electronic database of all expert reports submitted in Part III proceedings, and all expert testimony in depositions and in hearings. This database [with redacted materials, if necessary to protect confidential information] would significantly facilitate and expedite the currently unnecessarily expensive process required to obtain prior expert reports and testimony. The Commission could charge for maintaining the database, and would not be expected to retrieve and reproduce such information without reasonable charges.

Rule 3.31A precludes discovery of "facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for hearing and who is not listed as a witness at hearing." The intent of this portion of the Rule presumably protects the government "deliberative process privilege" as well as a respondent's counsel's work-product privilege via retention or engagement of one expert to prepare other testifying experts. However, any "expert" who participated in the formulation or preparation of an opinion of another "expert," should not be protected from discovery of the *facts* of such retention or engagement, irrespective of the preclusion against discovery of substantive "facts known or opinions held" by the non-testifying expert. The "privilege" shield should not protect the process of layering experts, or prevent discovery of matters that may impact the credibility of the testifying experts.

Rule 3.33(d) provides that, "Objections to questions or to evidence presented shall be in short form, stating *the grounds* of objections relied on" [emphasis added]. This first sentence of sub-part (d) of the Rule should be limited to "the legal grounds" to avoid legitimizing speaking objections that suggest facts to a witness.

Rule 3.33(c)(1) and(e) provide for depositions but limits the right with respect to the FTC and its constituent parts. This absolute prohibition is unwarranted in circumstances in which the "crime/fraud exception" may be applicable.

Rule 3.43(e) provides for disclosure and an offer into evidence of any documents, information or materials obtained by the Commission "…when necessary in connection with adjudicative proceedings…." This provision should require adherence to other applicable Part III Rules, to prevent unfairness or surprise.

Rule 3.51(c) provides that "reliable and probative evidence" shall support an initial decision. To be consistent with Commission nomenclature in relation to scientific matters, the language should be amended to require "competent and reliable, probative evidence."

Respectfully submitted,

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