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**UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
OFFICE OF ADMINISTRATIVE LAW JUDGES**

<p>In the Matter of</p> <p>Edwards Lifesciences Corp., a corporation,</p> <p>and</p> <p>JenaValve Technology, Inc., a corporation,</p> <p>Respondents.</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>Docket No. 9442</p>
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**ORDER REGARDING AMENDED PREHEARING SCHEDULE**

By September 15, 2025 Order, the Commission granted the parties' joint motion to continue the evidentiary hearing in this case from January 7, 2026 to April 8, 2026. A proposed Amended Scheduling Order is attached.

Accordingly, it is hereby **ORDERED** that:

1. By no later than September 24, 2025, the parties must, by joint filing, advise the Office of Administrative Law Judges whether the proposed amended schedule is acceptable or whether they have any proposed modifications. Any proposed modifications should be inserted by tracked changes in the proposed schedule. If there is disagreement as to any party-proposed modification:

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- a. The parties' respective positions must be identified by the tracked changes (or colored highlighting) in the proposed schedule itself.
- b. The parties may further present their respective positions in separate submissions filed at the same time as their joint filing of proposed modifications. Respondent groups must join in a single submission unless they have different positions on a proposed date modification. Each submission must be limited to 400 words, in total, covering all disputed matters.
- c. After reviewing the submissions, I will advise the parties whether a conference is needed.

2. The Additional Provisions are identical to those included in the August 28, 2025 Scheduling Order and will be included with the amended schedule that will be issued.

**ORDERED:**

*Jay L. Himes*

Jay L. Himes  
Administrative Law Judge

Date: September 17, 2025

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<p>In the Matter of</p> <p>Edwards Lifesciences Corp., a corporation,</p> <p>and</p> <p>JenaValve Technology, Inc., a corporation,</p> <p>Respondents.</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	Docket No. 9442
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**PROPOSED  
AMENDED SCHEDULING ORDER #1**

November 10, 2025	Deadline for parties to exchange preliminary fact witness lists.
December 15, 2025	Deadline for Complaint Counsel and Respondents to provide expert witness lists.
January 16, 2026	Close of discovery, other than discovery permitted under Rule 3.24(a)(4), depositions of experts, and discovery for purposes of authenticity and admissibility of exhibits.
January 20, 2026	Deadline for Complaint Counsel to provide expert witness reports.
January 23, 2026	Parties file Joint Status Report #1. <i>See</i> Additional Provisions ¶ 33.
January 23, 2026	Complaint Counsel provides to Respondents (and a courtesy copy to the ALJ) their final proposed witness and exhibit lists, including: <ul style="list-style-type: none"> <li>- depositions,</li> </ul>

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	<ul style="list-style-type: none"> <li>- copies of all exhibits (except for demonstrative, illustrative or summary exhibits and expert-related exhibits),</li> <li>- the basis of admissibility for each proposed exhibit, and</li> <li>- a brief summary of the testimony of each witness.</li> </ul>
February 9, 2026	Deadline for Respondents to provide expert witness reports. Respondents' expert reports shall include (without limitation) rebuttal, if any, to Complaint Counsel's expert report(s).
February 12, 2026	<p>Respondents provide to Complaint Counsel (and a courtesy copy to the ALJ) their final proposed witness and exhibit lists, including:</p> <ul style="list-style-type: none"> <li>- depositions,</li> <li>- copies of all exhibits (except for demonstrative, illustrative or summary exhibits and expert related exhibits),</li> <li>- the basis of admissibility for each proposed exhibit, and</li> <li>- a brief summary of the testimony of each witness.</li> </ul>
February 23, 2026	Parties that intend to offer confidential materials of an opposing party or non-party as evidence at the hearing must provide notice to the opposing party or non-party, pursuant to 16 C.F.R. § 3.45(b). <sup>1</sup>
February 23, 2026	<p>Complaint Counsel to identify rebuttal expert(s) and provide rebuttal expert report(s).</p> <p>Any such reports shall be limited to rebuttal of matters set forth in Respondents' expert reports. If material outside the scope of fair rebuttal is presented, Respondents may seek appropriate relief.</p>

<sup>1</sup> Appendix A to Commission Rule 3.31, the Standard Protective Order (§ 10), provides, in pertinent part, that if a party or third party wishes *in camera* treatment for a document or transcript that a party intends to introduce into evidence, that party or third party "shall file an appropriate motion with the Administrative Law Judge within 5 days after it receives such notice" of a party's intent to introduce such material. Commission Rule 3.45(b) provides, in pertinent part, that a third party be "given at least 10 days notice of the proposed use of such material." This Scheduling Order construes these provisions so as to require the parties to provide 10 days' notice to allow for the filing of motions for *in camera* treatment.

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March 2, 2026	Deadline for depositions of experts (including rebuttal experts) and exchange of any expert-related exhibits not previously provided.
March 6, 2026	Parties file Joint Status Report #2.
March 9, 2026	Deadline to file motions for <i>in camera</i> treatment of proposed trial exhibits. <i>See</i> Additional Provision 15.
March 10, 2026	<p>To the extent not previously provided, the parties exchange objections to final proposed witness lists and exhibit lists (with a courtesy copy to the ALJ).</p> <p>The parties are directed to review the Commission's Rules on admissibility of evidence before filing objections to exhibits or witnesses and to limit objections to those that are necessary and well-founded.</p>
March 12, 2026	Deadline to file motions <i>in limine</i> to preclude admission of evidence. <i>See</i> Additional Provisions ¶ 16.
March 16, 2026	Deadline to file responses to motions for <i>in camera</i> treatment of proposed trial exhibits. <i>See</i> Additional Provisions ¶ 15.
March 23, 2026	Deadline to file responses to motions <i>in limine</i> to preclude admission of evidence. <i>See</i> Additional Provisions ¶ 16.
March 25, 2026	Deadline for parties to exchange proposed stipulations of law, facts, and admissibility of exhibits.
March 31, 2026	Deadline to file final pretrial briefs supported by legal authority, to be no more than 7,500 words.
April 6, 2026	<p>Final prehearing conference to begin at 10:00 a.m. Eastern Time.</p> <p>The parties shall meet and confer prior to the prehearing conference regarding trial logistics and proposed stipulations of law, facts, and authenticity of exhibits. To the extent the parties have agreed to stipulate to any issues of law, facts, and/or authenticity of exhibits, the parties shall prepare a list of such stipulations and submit a copy of the stipulations to the ALJ one calendar day prior to the conference. At the conference, the parties' list of stipulations</p>

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	<p>shall be marked as “JX1” and signed by each party, and the list shall be offered into evidence as a joint exhibit.</p> <p>No signature by the ALJ on JX1 or JX2 is required. Any subsequent stipulations may be offered as agreed to by the parties.</p>
April 8, 2026	Commencement of Hearing, to begin at 10:00 a.m. Eastern Time.

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## ADDITIONAL PROVISIONS

**Note: Unless the parties are otherwise advised, all hearings in this case will be via Zoom (or comparable service).**

### Filings

1. For all papers that are required to be filed with the Office of the Secretary, the parties shall provide a courtesy copy to the Administrative Law Judge by electronic mail to the following email address: oalj@ftc.gov. The parties are not required to provide a courtesy copy to the Office of Administrative Law Judges (OALJ) in hard copy, except upon request.

- a. The courtesy copy should be transmitted at or shortly after the time of any electronic filing with the Office of the Secretary.
- b. **Courtesy copies must be transmitted to OALJ directly, and the FTC E-filing system shall not be used for this purpose.**
- c. The oalj@ftc.gov email address is to be used only for courtesy copies of pleadings filed with the Office of the Secretary and for documents OALJ specifically requests of the parties.
- d. Certificates of service for any filing shall include the OALJ email address, not the email address of any OALJ personnel, and shall designate 600 Pennsylvania Ave., NW, Rm. H-110 as the place of service.
- e. **The certificate of service shall further certify either that:**
  - i. **No portion of the filing was drafted by generative artificial intelligence ("AI") (such as ChatGPT, Microsoft Copilot, Harvey.AI, or Google Gemini), or**
  - ii. **Any language in the filing that was drafted by generative AI was checked for accuracy by human attorneys or paralegals using printed legal reporters or online legal databases.**

**Any filing that fails to comply with these mandatory certification requirements may be stricken.**

- f. The subject line of all electronic submissions to oalj@ftc.gov shall set forth the docket number, case name, and the title of the submission.

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- g. Discovery requests and discovery responses shall not be submitted to OALJ.
2. The parties shall serve each other by electronic mail and shall include “Docket 9442” in the subject line. All attached documents shall be in .pdf format. If service through electronic mail is not possible, the parties may serve each other through any method authorized under the Commission’s Rules of Practice.
  3. Each filing that cites to unpublished opinions or opinions not available on LEXIS or WESTLAW shall include copies of such opinions as exhibits.
  4. Each motion (other than a motion to dismiss, motion for summary decision, or a motion for *in camera* treatment) shall be accompanied by a separate signed statement representing that counsel for the moving party has conferred with opposing counsel in an effort in good faith to resolve by agreement the issues raised by the motion and has been unable to reach such an agreement.
    - a. In addition, pursuant to Rule 3.22(g), for each motion to quash filed pursuant to Rule 3.34(c), each motion to compel or determine sufficiency pursuant to Rule 3.38(a), or each motion for sanctions pursuant to Rule 3.38(b), the required signed statement must also “recite the date, time, and place of each . . . conference between counsel, and the names of all parties participating in each such conference.”
    - b. Motions that fail to include this separate statement may be denied on that ground.
  5. In relevant part, Rule 3.22(c) states:
 

All written motions shall state the particular order, ruling, or action desired and the grounds therefor. Memoranda in support of, or in opposition to, any dispositive motion shall not exceed 10,000 words. Memoranda in support of, or in opposition to, any other motion shall not exceed 2,500 words. Any reply in support of a dispositive motion shall not exceed 5,000 words and any reply in support of any other motion authorized by the Administrative Law Judge or the Commission shall not exceed 1,250 words.

    - a. If a party chooses to submit a motion without a separate memorandum, the word count limits of Rule 3.22(c) apply to the motion.
    - b. If a party chooses to submit a motion with a separate memorandum, absent prior approval of the ALJ, the motion shall be limited to 750 words,



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and the word count limits of Rule 3.22(c) apply to the memorandum in support of the motion.

This provision applies to all motions filed with the Administrative Law Judge, including those filed under Rule 3.38.

6. 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 braces}**. 16 C.F.R. § 3.45(e). Parties must adhere to the rules for filings containing such information, including 16 C.F.R. § 4.2.

## Discovery

7. The parties are directed to adhere to the limitations on designating material as confidential under the Protective Order issued in this case. Pursuant to the Protective Order, “confidential material” means “any document or portion thereof that contains privileged, competitively sensitive information, or sensitive personal information.” Designating material as “confidential” constitutes that party’s “representation in good faith and after careful determination that the material is not reasonably believed to be already in the public domain and that counsel believes the material so designated constitutes confidential material as defined” in the Protective Order.

8. Each side is limited to serving on each opposing side:

- a. 50 requests for production of documents, including all discrete subparts;
- b. 25 interrogatories, including all discrete subparts; and
- c. 10 requests for admissions, including all discrete subparts, except that there shall be no limit on the number of requests for admission for authentication and admissibility of exhibits.

There is no limit to the number of sets of discovery requests the parties may issue, so long as the total number of each type of discovery request, including all subparts, does not exceed these limits.

9. The parties will serve any objections to document requests within 14 days of service of the request, and they will meet and confer to attempt to resolve any disputes and to discuss timing of production within 3 days of the objections being served.

- a. Objection to part of a document request does not relieve the objecting

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party of the obligation to produce documents responsive to the part of the request not objected to.

- b. The party responding to document requests will make a good-faith effort to produce responsive documents as expeditiously as possible, including by making productions on a rolling basis and for deponent-related documents at least 7 days before the deponent's deposition.

10. Compliance with the scheduled end of discovery requires that the parties serve subpoenas and discovery requests sufficiently in advance of the discovery cut-off and that all responses and objections will be due on or before that date, unless otherwise noted. Any motion to compel responses to discovery requests, or to seek certification of a request for court enforcement of a non-party subpoena, shall be filed within 30 days of service of the responses or objections to the discovery requests, or within 20 days after the close of discovery, whichever first occurs; except that, where the parties have been engaging in negotiations over a discovery dispute, including negotiations with any non-party with regard to a subpoena, the deadline for the motion to compel shall be 5 days after the date on which an impasse is reached.

## **Depositions**

### **11. General Provisions.**

- a. Unless the parties otherwise agree or the Administrative Law Judge orders otherwise, the following provisions will govern all depositions, including those taken under Rule 3.33(c)(1).
- b. The parties shall consult and coordinate the time and place of the deposition prior to confirming any deposition. The parties shall use reasonable efforts to reduce the burden on persons noticed for depositions and to accommodate their schedules.
- c. The deposition of any person may be recorded by video. At least five days in advance of the deposition, the party noticing the deposition must notify the deponent and all parties of its intention to record the deposition by video. The parties may agree upon and submit to the Administrative Law Judge a remote deposition protocol, designed to cover all such depositions.
- d. No deposition, whether or not recorded by video, may exceed a single, eight-hour day.
- e. Regardless of the allocation of time set forth below, the party noticing the deposition will examine first. Where Complaint Counsel is not the

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- noticing party, it will examine after both Respondents have concluded their direct examination. The same order will apply to re-direct and re-cross examination, if any.
- f. Respondents must provide the order of their examinations and, where applicable, the allocation of time among them:
    - i. on the deposition record before any Respondent begins an examination; or
    - ii. in a written agreement among counsel for all Respondents, prior to the start of the deposition.
  - g. These provisions apply regardless of whether presence of the deponent is secured by notice alone, or by notice and subpoena.
  - h. A party whose examination follows that of one or more other parties will **not** be limited, in its examination, to the scope of the deponent's testimony during preceding examination(s).
  - i. Cross-noticing a deposition will not increase the examination time allocated to the cross-noticing party that would apply in the absence of the cross-notice.
  - j. Depositions of all persons designated as representatives for purposes of a Rule 3.33(c) deposition shall count as one deposition, even if the noticed entity designates multiple persons to provide testimony.
  - k. Unused examination time in any party's allocation will not transfer to the other party.

**12. Allocation of Examination Time.**

- a. The allocations below apply in the absence of a different agreement between the parties for any or all depositions.
- b. Depositions of persons previously examined during the investigation underlying this case, regardless of the party noticing the deposition:
  - i. Complaint Counsel will have 2.5 hours examination time.
  - ii. Respondents will have 5.5 hours, which they may allocate among themselves as they deem appropriate.

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c. Depositions not subject to ¶ a noticed by Complaint Counsel:

- i. For any person who is not a designated expert, Complaint Counsel will have 5.0 hours examination time. Respondents will have 3.0 hours, which they may allocate among themselves as they deem appropriate.
- ii. For any designated expert, Complaint Counsel will have 6.0 hours. Respondents will have 2.0 hours, which they may allocate among themselves as they deem appropriate.

d. Depositions not subject to ¶ a noticed by a Respondent:

- i. For either noticing Respondent's own then-current or former employees, consultants, agents, contractors, or other representatives (a "Party Affiliate"), the noticing Respondent will have 2.5 hours examination time. Complaint Counsel will have 4.5 hours examination time, and the non-noticing Respondent will have 1.0 hour examination time.

- 1. The same allocation of time will apply if a Respondent notices the deposition of a person represented by either Respondent's counsel or if either Respondent (or its counsel) is paying for the noticed person's counsel.
- 2. If the person noticed is a Party Affiliate of more than one Respondent, Complaint Counsel will have 5.5 hours. The Respondents will have 2.5 hours, which they may allocate among themselves as they deem appropriate, regardless of the Respondent that noticed the deposition.

- ii. For any other person who is not a designated expert, the noticing Respondent and non-noticing Respondent will have 5.0 hours examination time, which they may allocate among themselves as they deem appropriate. Complaint Counsel will have 3.0 hours examination time.
- iii. For any designated expert, Respondents will have 6.0 hours, which they may allocate among themselves as they deem appropriate. Complaint Counsel will have 2.0 hours.

e. Depositions of persons who provided a declaration, affidavit, or comparable note of support (a "Witness Statement"), regardless of the party noticing the deposition:

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- i. The party that obtained the Witness Statement will have 1.0 hour.
  - ii. If Complaint Counsel is the party who obtained the Witness Statement, the Respondents may allocate the remaining 7.0 hours among themselves as they deem appropriate.
  - iii. If Complaint Counsel is not the party who obtained the Witness Statement, Complaint Counsel will have 7.0 hours, and the obtaining and non-obtaining Respondents will have 1.0 hour, which they may allocate among themselves as they deem appropriate.
13. The parties shall serve upon one another, at the time of issuance, copies of all *subpoenas duces tecum* and *subpoenas ad testificandum*.
- a. For *subpoenas ad testificandum*, the party seeking the deposition shall consult with the other parties, including any non-party deponent, before the time and place of the deposition are scheduled.
  - b. Every *subpoenas duces tecum* to a non-party shall include a cover letter requesting that:
    - i. The non-party Bates-stamp each document with a production number and any applicable confidentiality designation prior to producing it, and
    - ii. The non-party provide to the other parties copies of all productions at the same time as they are produced to the requesting party.
  - c. If a non-party fails to provide copies of productions to the other parties, the requesting party shall produce all materials received pursuant to the non-party subpoena, as well as all materials received voluntarily in lieu of a subpoena, including declarations or affidavits obtained from a non-party, within 3 days of its receipt of the materials.
  - d. If a party serves together a non-party *subpoena duces tecum* and a *subpoena ad testificandum*, the deposition date must be at least 7 days after the original return date for the *subpoenas duces tecum*, unless a shorter time is (i) required by unforeseen logistical issues in scheduling the deposition, or (ii) agreed to by all parties and the non-party.

### Witness Statements

14. A party that obtains a declaration, affidavit, or note of support (“Witness

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Statement”), from a party or non-party witness must produce it to the other parties, not later than (a) four days before the party or non-party is scheduled to be deposed, or (b) 14 days before the end of fact discovery, whichever is earlier, absent a showing of good cause. A Witness Statement produced after this date shall not be admitted into evidence or used in the administrative proceeding (A) except upon a showing of good cause, and (B) unless signed under penalty of perjury.

- a. The parties reserve all rights and objections with respect to the use and admissibility of any Witness Statement.
- b. No Witness Statement will be admitted into evidence at the hearing unless a fair opportunity was available to depose the signatory.

## Motions

15. If a party intends to offer confidential materials of an opposing party or non-party as evidence at the hearing, in providing notice to such non-party, the parties must inform each non-party of the strict standards for motions for *in camera* treatment for evidence to be introduced at trial set forth in 16 C.F.R. § 3.45. Motions must be supported by a declaration or affidavit by a person qualified to explain the confidential nature of the documents. *See, e.g.:*

- a. *In re Otto Bock Healthcare North American*, No. 9378, 2018 WL 3491602 at \*1 (FTC July 2, 2018).
- b. *In re 1-800 Contacts, Inc.*, No. 9372, 2017 FTC LEXIS 55 (Apr. 4, 2017).
- c. *In re North Texas Specialty Physicians*, No. 9312, 2004 FTC LEXIS 66 (Apr. 23, 2004).

Each party or non-party that files a motion for *in camera* treatment shall provide one copy of the documents for which *in camera* treatment is sought to the Administrative Law Judge.

## 16. Motions *in Limine*

- a. Motion *in limine* refers “to any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered.” *In re McWane, Inc.*, No. 9351, 2012 WL 3719035, at \*2 (FTC Aug. 16, 2012) (quoting *Luce v. United States*, 469 U.S. 38, 40 n.2 (1984)).
- b. Evidence should be excluded in advance of trial on a motion *in limine*

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“only when the evidence is clearly inadmissible on all potential grounds.” *McWane*, 2012 WL 3719035, at \*3 (citing *Hawthorne Partners v. AT&T Technologies, Inc.*, 831 F. Supp. 1398, 1400 (N.D. Ill. 1993)); *SEC v. U.S. Environmental, Inc.*, No. 94-Civ.-6608 (PKL) (AJP), 2002 WL 31323832, at \*2 (S.D.N.Y. Oct. 16, 2002).

- c. Motions *in limine* are **strongly discouraged**. The risk of prejudice from giving undue weight to marginally relevant evidence, or of confusion or misdirection, “ha[ve] little application in a bench trial.” *McWane*, 2012 WL 3719035, at \*3 (citing *In re Daniel Chapter One*, No. 9329, 2009 FTC LEXIS 85, at \*21-22 (Apr. 20, 2009)). *See also In re H&R Block Inc.*, No. 9427, 2024 WL 4382194 (FTC ALJ Sept. 25, 2024).
- d. Motions *in limine* (including memoranda in support) shall be presented individually, and shall be limited to 750 words, but may include, as exhibits, excerpts of the discovery limited to that required to present the motion’s context. Responses to motions *in limine* shall be responded to individually and shall be limited to 750 words, but may include, as exhibits, excerpts of the discovery limited to that which is not part of the motion *in limine* and which in fairness ought to be considered at the same time. No reply by the moving party may be served.
- e. A motion *in limine* must not address more than one topic of proof objected to, but may assert more than one basis for objection.
- f. Each side shall be limited to 5 motions *in limine*.

## Witnesses

17. The final proposed witness lists shall represent counsel’s good faith designation of all potential witnesses whom counsel reasonably expect may be called in their case-in-chief.

- a. A general designation that a party reserves the right to call anyone on the opposing party’s witness list is not sufficient.
- b. Parties shall notify the opposing party promptly of changes in witness lists to facilitate completion of discovery within the dates of this Scheduling Order.
- c. The final proposed witness lists may not include additional witnesses not listed in the preliminary witness lists previously exchanged or who have not been deposed or for whom a Witness Statement has not been submitted, unless (i) by consent of all parties, or (ii) if the parties do not

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consent, by an order of the Administrative Law Judge upon a showing of good cause.

18. If any party wishes to offer a rebuttal witness other than a rebuttal expert, the party shall file a motion requesting such relief. The motion shall be filed as soon as possible after the testimony sought to be rebutted is known and shall include:

- a. The name of any witness being proposed;
- b. A detailed description of the rebuttal evidence to be offered;
- c. Citations to the record, by page and line number, to the evidence that the party intends to rebut; and
- d. A showing that the witness the party seeks to call has previously been designated on its witness list or that adequately explains why the requested witness was not so designated.

19. Witnesses shall not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. *See* Federal Rule of Evidence (“F.R.E.”) 602.

20. Witnesses not properly designated as expert witnesses shall not provide opinions beyond what is allowed in F.R.E. 701.

### **Expert Witnesses**

21. The parties are required to comply with Rule 3.31A and with the following:

- a. At the time an expert is first listed as a witness by a party, that party shall provide to all other parties:
  - i. Materials fully describing or identifying the background and qualifications of the expert, all publications authored by the expert within the preceding ten years, and all prior cases in which the expert has testified or has been deposed within the preceding four years; and
  - ii. Transcripts of such testimony in the possession, custody, or control of the producing party or the expert, except that transcript sections that are under seal in a separate proceeding need not be produced.
- b. At the time an expert report is produced, the producing party shall



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- provide to all other parties all documents and other written materials relied upon by the expert in formulating an opinion in this case, subject to the provisions of paragraph 22(g) below, except that documents and materials already produced in the case need only be listed by Bates number.
- c. It shall be the responsibility of a party designating an expert witness to ensure that the expert witness is reasonably available for deposition in keeping with this Scheduling Order. Unless otherwise agreed to by the parties or ordered by the Administrative Law Judge, expert witnesses shall be deposed only once, and each expert deposition shall be limited to 8 hours on one day.
  - d. Each expert report shall include:
    - i. A complete statement of all opinions to be expressed and the basis and the reasons for the opinions;
    - ii. The data or other information relied upon by the expert in forming the opinions;
    - iii. Any exhibits to be used as a summary of or support for the opinions;
    - iv. The qualifications of the expert; and
    - v. The compensation to be paid for the study and testimony.
  - e. A party may not discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of this litigation or preparation for the hearing and who is not designated by a party as a testifying expert, absent a showing of exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.
  - f. At the time of service of the expert reports, the producing party shall provide opposing counsel:
    - i. A list of all commercially-available computer programs used by the expert in the preparation of the report;
    - ii. A copy of all data sets used by the expert, in native file format and processed data file format; and

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- iii. All customized computer programs used by the expert in the preparation of the report or necessary to replicate the findings on which the expert report is based.
- g. Experts' disclosures and reports shall comply in all respects with Rule 3.31A, except that no party must disclose:
  - i. Any form of communication or work product shared between any of the parties' counsel and their experts or between any of the experts themselves;
  - ii. Any form of communication or work product shared between experts and persons assisting the experts;
  - iii. Experts' notes, unless they constitute the only record of a fact or an assumption relied upon by the expert in formulating an opinion in this case;
  - iv. Drafts of expert reports, analyses, or other work product; or
  - v. Data formulations, data runs, data analyses, or any database-related operations not relied upon by the expert in the opinions contained in his or her final report.

22. If any expert report prepared for a party contains confidential information that has been granted *in camera* treatment, the party shall prepare two versions of the report in accordance with Additional Provision 6 of this Scheduling Order and 16 C.F.R. § 3.45(e).

23. An expert witness's testimony is limited to opinions contained in the expert report that has been previously and properly provided to the opposing party. In addition, no opinion will be considered, even if included in an expert report, if the underlying and supporting documents and information have not been properly provided to the opposing party. Unless an expert witness is qualified as a fact witness, an expert witness is only allowed to provide opinion testimony; expert testimony is not considered for the purpose of establishing the underlying facts of the case.

### **Video Hearing and Trial Depositions**

24. It is possible that the evidentiary hearing in this matter will be conducted remotely by video conference, and if so:

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- a. The parties are encouraged, in advance of the hearing, to take trial depositions of some or all of their expert witnesses for the purpose of perpetuating trial testimony and to submit such deposition testimony as an exhibit in lieu of presenting the expert's testimony via live video at trial. A certified or stipulated-to transcript of any such testimony shall be submitted along with the video. A trial deposition may be conducted in addition to any discovery deposition of an expert witness.
- b. The parties may, in advance of the hearing, take trial depositions of fact witnesses who have been deposed before the close of discovery and submit such deposition testimony as an exhibit in lieu of presenting the fact witness's testimony via live video at trial. A certified or stipulated-to transcript of any such testimony shall be submitted along with the video.
- c. A party may elect to submit trial depositions in lieu of live video testimony at trial for all or fewer than all its percipient or expert witnesses.

### **Hearing Preparation and Proceedings**

25. The final exhibit lists shall represent counsels' good faith designation of all trial exhibits other than demonstrative, illustrative, or summary exhibits. Additional exhibits may be added after the submission of the final lists only (a) by consent of all parties, or (b) if the parties do not consent, by an order of the Administrative Law Judge upon a showing of good cause.

26. Properly admitted deposition testimony and properly admitted investigational hearing transcripts are part of the record and need not be read in open court. Video deposition excerpts that have been admitted in evidence may be presented in open court only upon prior approval by the Administrative Law Judge.

27. The parties shall provide to one another, the Administrative Law Judge, and the court reporter, no later than 48 hours in advance, not including weekends and holidays, a list of all witnesses to be called on each day of the hearing, subject to possible unforeseen delays or other comparable circumstances.

28. The parties shall provide one another with copies of any demonstrative, illustrative or summary exhibits (other than those prepared for cross-examination) 24 hours before they are used with a witness, not including weekends and holidays.

### **Exhibits**

29. All exhibits shall bear a prefix and number identifier.

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- a. Complaint Counsel's exhibits shall bear the prefix PX.
- b. Respondents' exhibits shall bear the prefix RX (Respondent abbreviation).
- c. Exhibits submitted on behalf of all parties shall bear the prefix "JX," or another appropriate designation.
- d. Complaint Counsel's demonstrative exhibits shall bear the prefix PXD.
- e. Respondents' demonstrative exhibits shall bear the prefix RXD (Respondent abbreviation).
- f. Both sides shall number the first page of each exhibit with a single series of consecutive numbers. When an exhibit consists of more than one page, each page must bear a consecutive page or other control number.

30. If demonstrative exhibits are used with a witness, the exhibit will be marked and may be referred to for identification only. Any demonstrative exhibit referred to by any witness may be included in the trial record, but it is not part of the evidentiary record and may not be cited to support any disputed fact.

31. At the final prehearing conference, counsel must identify all exhibits they intend to introduce at trial. The parties shall confer and shall eliminate duplicative exhibits in advance of the final prehearing conference and, if necessary, during trial.

- a. For example, if PX100 and RX200 are identical copies of the same document, only one of those documents shall be offered into evidence. The parties shall agree in advance which exhibit number they intend to use.
- b. Documents with notations, insertions, deletions, or other comments are not "identical" for these purposes.

Counsel shall contact the court reporter regarding submission of exhibits.

### **Briefing and Page Limitations**

32. Pretrial and post-trial briefing will be addressed after a later status conference with the parties.

### **Joint Status Reports**

33. For the joint status reports (JSRs), the parties should provide a summary on the following topics:

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- a. **Part 1.** An Overview Summary of Party and Non-Party Discovery Requests Outstanding and Dates for Recipient Responses, and Status.

This information may be presented in a table format, using Attachment A as a template. Template modification is fine, so long as the table captures the information presented in the sample and is visually reader-friendly.

- b. **Part 2.** Then-existing Issues that May Require the ALJ or Commission's Intervention, covering:
- i. Each party's present positions on the matter.
  - ii. Status of the meet and confer process, which includes dates and whether the parties met in person, remotely, or telephonically.
  - iii. Estimated date by which resolution may be reached or the decision made to Request, as appropriate, the ALJ's or Commission's intervention.
  - iv. If more than one matter is described, set forth the information in subparagraphs a through c by individual matter (i.e. Matter 1 (a, b, c), Matter 2 (a, b, c)).
  - v. In providing their positions under subparagraph a, parties should refrain from including supporting authority, except to the limited extent that authority may illuminate each party's basic position. Merits briefing must be avoided.
- c. **Part 3.** Any Other Presently Foreseeable Matters that May Need to be Presented to the ALJ or the Commission.
- d. **Part 4.** Status of the Related Federal Proceeding, including pending motions and scheduled court appearance dates and the reason(s) for them.

**PUBLIC****ATTACHMENT A**

<b>Party and Non-Party Discovery Requests</b>			
<b>Proponent</b>	<b>Party Discovery Sought<sup>1</sup></b>	<b>Date for Response<sup>2</sup></b>	<b>Status<sup>3</sup></b>
Complaint Counsel			
Respondents			
	<b>Non-Party Discovery Sought<sup>1</sup></b>	<b>Date for Response<sup>2</sup></b>	<b>Status<sup>3</sup></b>
Complaint Counsel			
Respondents			

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<sup>1</sup> E.g., request for documents, deposition, request for admissions.

<sup>2</sup> Include original date and, individually, each extension, if any.

<sup>3</sup> Briefly summarize whether, e.g., the response is under discussion, has been modified, or appears subject to dispute, in whole or in part. Details may be provided in JSR Parts 2 or 3, as applicable. However, discovery request modifications need not be expanded on unless one or both sides believe the information could be material to adherence to the case schedule or are otherwise believed to be worthy of note.

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Other Matters			
Update on the Related Federal Action			
	Pending Motions	Scheduled Court Dates	Other Information