

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Andrew N. Ferguson, Chairman  
Rebecca Kelly Slaughter  
Lina M. Khan  
Alvaro M. Bedoya  
Melissa Holyoak

**In the Matter of**

Caremark Rx, LLC;  
Zinc Health Services, LLC;  
Express Scripts, Inc.;  
Evernorth Health, Inc.;  
Medco Health Services, Inc.;  
Ascent Health Services LLC;  
OptumRx, Inc.;  
OptumRx Holdings, LLC;  
and  
Emisar Pharma Services LLC.

DOCKET NO. 9437

**ORDER DENYING APPLICATION FOR REVIEW OF WITNESS  
CAPS IN THE SCHEDULING ORDER**

On January 17, 2025, Complaint Counsel filed an Application for Review of Witness Caps in the Scheduling Order (“Application”) entered by Chief Administrative Law Judge D. Michael Chappell (“ALJ”). For the reasons discussed below, we deny the Application.

**I. Background**

In September 2024, the Commission issued a Complaint against three groups of pharmacy benefit managers and their affiliated group purchasing organizations. The Complaint

alleges that Respondents engaged in anticompetitive and unfair rebating practices with respect to insulin. Although the Complaint does not claim that the Respondents conspired with one another, the vast majority of the allegations apply to all Respondent groups, and all are charged with the same violations of law.

In October 2024, the three Respondent groups each filed a motion with the ALJ for separate evidentiary hearings. Respondents argued, among other things, that proving the alleged violations would involve different facts, documents, and witnesses, and that a single trial for all Respondents risked unfairness and prejudice due to the prescribed limitations on witnesses, briefs, and deposition and trial time. *See Order Denying Respondents' Motions for Separate Evidentiary Hearings at 3-4 (Nov. 11, 2024)* (summarizing the parties' arguments). Complaint Counsel opposed the Respondents' motions, arguing that, because of substantial common issues of law and fact, separating the evidentiary hearings would lead to waste and inefficiency. *See Complaint Counsel's Opposition to Respondents' Motions for Separate Evidentiary Hearings at 7 (Nov. 4, 2024)*. Complaint Counsel asserted that much of their evidence would apply across Respondents, that each Respondent is charged with violating the same laws in the same way, and that they had raised essentially the same defenses. *Id.* at 2-6.

The ALJ sided with Complaint Counsel, finding that splitting the case into three separate trials would be neither economical nor expeditious. The ALJ observed that much of the case will involve proof of matters common to all three Respondent groups. *See Order Denying Respondents' Motions for Separate Evidentiary Hearings at 4-5 (Nov. 11, 2024)*. As for Respondents' concerns about witness and trial limitations, the ALJ noted that a Scheduling Order issued after the filing of Respondents' motions addressed these concerns by: (1) allowing up to 15 fact witnesses and 5 expert witnesses for each Respondent group, not just per side,<sup>1</sup> (2) allowing pretrial and post-briefing page limits to apply per Respondent group, and (3) allowing deposition time to be provided for each Respondent group, which may in total exceed the usual default. *Id.* at 6-7.

On January 6, 2025, Complaint Counsel asked the ALJ for a determination that an interlocutory appeal to the Commission of the Scheduling Order was appropriate, consistent with the requirements of Commission Rule 3.23(b), 16 C.F.R. § 3.23(b) (referencing a determination that, *inter alia*, the contested ruling "involves a controlling question of law or policy as to which there is substantial ground for difference of opinion"). Complaint Counsel took issue with the Scheduling Order's provisions that allowed up to 5 expert witnesses and 15 fact witnesses for each Respondent group, for a total of up to 15 expert witnesses and 45 fact witnesses, while Complaint Counsel are limited to 5 expert witnesses and 25 fact witnesses in total, despite bearing the burden of proof.

The ALJ denied Complaint Counsel's request for a determination to support an interlocutory appeal. He held that Complaint Counsel failed to establish that their request involved a controlling question of law, per the requirements of Rule 3.23(b). *Order Denying Complaint Counsel's Request for Interlocutory Appeal at 4 (Jan. 16, 2025)*. He also explained

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<sup>1</sup> Pursuant to Commission Rule 3.31A(b), "Each side will be limited to calling at the evidentiary hearing 5 expert witnesses, including any rebuttal or surrebuttal expert witnesses. A party may file a motion seeking leave to call additional expert witnesses due to extraordinary circumstance." 16 C.F.R. § 3.31A(b).

that this case involved “extraordinary circumstances,” allowing him to exceed the expert witness limit in Commission Rule 3.31A(b), 16 C.F.R. 3.31A(b), because multiple Respondents would be tried in a single evidentiary hearing even though the case did not concern a merger or concerted action. Order Denying Complaint Counsel’s Request for Interlocutory Appeal at 4. The ALJ found that Complaint Counsel did not demonstrate that there was substantial ground for difference of opinion on the contested issues and failed to articulate any basis to support an immediate appeal. *Id.* at 5-7.

In their present Application, Complaint Counsel argue that whether Commission rules allow for disparate and purportedly unfair witness caps and, if so, under what circumstances, “present novel and unsettled questions that pertain to a wide spectrum of cases, and thus are appropriate for interlocutory review.” Application at 6. Complaint Counsel contend that the Commission should grant the interlocutory appeal despite the ALJ’s denial of their request, as such a review is permitted under Rule 3.23(b) and would be consistent with recent revisions to the Commission’s Rules that facilitate greater oversight of the ALJ. *See id.* at 2-3. Respondents oppose Complaint Counsel’s Application. Respondents argue that Rule 3.23(b) prohibits Complaint Counsel’s Application following the ALJ’s denial of certification of an interlocutory appeal; that Complaint Counsel have not satisfied the substantive standards required by Rule 3.23(b) for interlocutory appeals; and that, in any case, the ALJ’s witness allocations were warranted. *See* Respondents’ Opposition to Complaint Counsel’s Application for Review of Witness Caps in the Scheduling Order (Jan. 23, 2025).

## II. Analysis of the Application

Rule 3.23(b) sets out the process for seeking interlocutory appeals. First, parties must ask the ALJ “to determine that a ruling involves a controlling question of law or policy as to which there is substantial ground for difference of opinion and that an immediate appeal from the ruling may materially advance the ultimate termination of the litigation or subsequent review will be an inadequate remedy.” 16 C.F.R. 3.23(b). Rule 3.23(b) continues, “The [requesting] party may file an application for review with the Commission within 1 day after notice that the Administrative Law Judge has issued the requested determination or 1 day after the deadline has passed for the Administrative Law Judge to issue a ruling on the request for determination and the Administrative Law Judge has not issued his or her ruling.”

Complaint Counsel argue that Rule 3.23(b) does not require the ALJ “to agree with the party’s request for a determination of appealability as a prerequisite for seeking review by the Commission.” Application at 2. Rather, it requires only that the ALJ “has *issued*” the determination. *Id.* Complaint Counsel state that the Commission may make its own independent assessment as to whether an application meets the interlocutory appeal criteria. *Id.* They argue that such independent review is particularly appropriate following the Commission’s 2023 rule revisions, which clarified that the ALJ possesses only recommendatory powers and helped facilitate Commission oversight of the ALJ. Application at 3.

Complaint Counsel’s reading of Rule 3.23(b) is contrary to the Commission’s prior interpretation of that Rule. *See N. Carolina Bd. of Dental Examiners*, 151 F.T.C. 636, 638 (2011) (stating that Rule 3.23(b) permits interlocutory appeals to the Commission “only when (1)

the ALJ *fails to rule* on an application to take an interlocutory appeal or (2) the ALJ *grants* the application to take an interlocutory appeal”). The recent changes to the Commission’s Rules relied upon by Complaint Counsel did not modify that regulation’s text. We need not decide, however, whether a petition for interlocutory appeal is ever allowable without the ALJ’s determination that an interlocutory appeal is appropriate, because Complaint Counsel have not demonstrated that the witness caps or allocation in the ALJ’s Scheduling Order “involve[] a controlling question of law or policy,” as required by Rule 3.23(b).

The setting of witness caps presented here is a trial-management issue. Complaint Counsel suggest that law or policy is implicated by questions of whether it is permissible to allow so many expert witnesses or provide for such a large witness disparity between the sides.<sup>2</sup> We disagree. Neither the number of witnesses permitted nor the allocation imbalance raises a controlling question of law or policy at this time. Determinations regarding the presentation of evidence and the course of hearings are responsibilities of the ALJ, *see* 16 C.F.R. §3.42(c), and the ALJ’s close familiarity with the trial record make him especially well-positioned to determine witness numbers and allocations. The Commission is unpersuaded by the argument that it should grant interlocutory review at this time to provide guidance regarding how many expert witnesses is too many or how wide a disparity is too wide under the Rules; such guidance must be fact-based and is unlikely to be generated in the abstract. Consequently, the Commission will not entertain interlocutory review here.

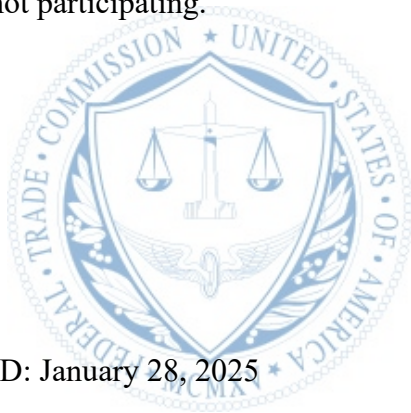
Although we are declining interlocutory review, we recognize that Complaint Counsel have potentially identified a legitimate concern regarding their evidentiary needs. Because the three Respondent groups, which have not been alleged to have engaged in concerted action, will be tried in a joint hearing, they have been granted extra witnesses, beyond what would typically be permitted for a single side. Complaint Counsel, however, may also face extra burdens in establishing independent cases against multiple Respondents, such that adjustment to normal witness allocation may be appropriate for them as well. At this stage, this need is hypothetical. Complaint Counsel have made no showing of the need for extra witnesses. Indeed, they have stated that much of the evidence needed to prove their allegations would be common across Respondents. Complaint Counsel’s Opposition to Respondents’ Motions for Separate Evidentiary Hearings at 3. Nonetheless, Complaint Counsel should have a full opportunity to seek an increase in their witness allotment based on a specific showing of need by motion filed with the ALJ prior to trial.

**IT IS HEREBY ORDERED THAT** Complaint Counsel’s Application for Review of Witness Caps in the Scheduling Order is **DENIED**.

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<sup>2</sup> Specifically, Complaint Counsel contend that that the Scheduling Order raised questions about (1) whether “extraordinary circumstances” could ever merit three times more expert witnesses than the five per side provided in Rule 3.31A(b) and, if so, under what “extraordinary circumstances,” and (2) whether Rule 3.41(b)(4)’s mandate that “[e]ach side shall be allotted no more than half of the trial time” could ever permit one side to have a substantially higher limit on the number of witnesses at trial than the other side, and if so, under what circumstances. Application at 1-2.

By the Commission, Commissioners Ferguson and Holyoak recused. Commissioner Khan not participating.



April J. Tabor  
Secretary

SEAL:  
ISSUED: January 28, 2025