

Complaint

112 F.T.C.

IN THE MATTER OF

ROBERT G. KOSKI, D.O.

DISMISSAL ORDER IN REGARD TO ALLEGED VIOLATION OF  
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket 9225. Complaint, Feb. 13, 1989—Dismissal Order, Oct. 10, 1989*

The Federal Trade Commission issued a complaint against Dr. Robert G. Koski alleging that he conspired to boycott Marquette General Hospital, to prevent it from opening a clinic. In light of newly discovered evidence, the Commission has decided to dismiss the complaint.

*Appearances*

For the Commission: *David R. Pender* and *Paul J. Nolan*.

For the respondent: *Larry J. Saylor, Miller, Canfield, Paddock & Stone*, Detroit, Mi. and *Richard D. Carr*, Munising, Mi.

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Robert G. Koski, D.O. ("respondent"), has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating in that respect its charges as follows:

PARAGRAPH 1. Respondent is a doctor of osteopathy licensed by the State of Michigan. He specializes in the practice of anesthesia, and practices in the Upper Peninsula of Michigan in Dickinson County. His office address is Dickinson County Memorial Hospital, 400 Woodward Avenue, Iron Mountain, Michigan.

PAR. 2. Respondent has been on the active Medical Staff of Dickinson County Memorial Hospital ("Medical Staff") since at least September, 1986. The Medical Staff is composed of physicians and other health care practitioners who have privileges to attend patients at Dickinson County Memorial Hospital. The Medical Staff's physician members constitute almost all of the practicing physicians in Dickinson County.

PAR. 3. Respondent has been a member of the Dickinson-Iron County Medical Society since at least September, 1986. The Dickinson-Iron Medical Society is composed of physicians in the private practice of medicine in Dickinson County and in Iron County, in the Upper Peninsula of Michigan. The Dickinson-Iron County Medical Society's physician members constitute almost all of the practicing physicians in Dickinson County, in Iron County, and on the Medical Staff.

PAR. 4. Except to the extent that competition has been restrained as alleged herein, the respondent has been and now is in actual or potential competition with other physicians or health care practitioners in the provision of health care services in or near Dickinson County. The respondent is engaged in the business of providing health care services to patients for a fee.

PAR. 5. The Delta County Medical Society is composed of physicians in the private practice of medicine in Delta County in the Upper Peninsula of Michigan. The Delta County Medical Society's physician members constitute almost all of the practicing physicians in Delta County.

PAR. 6. The acts and practices of the respondent, including those herein alleged, are in or affect commerce within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

PAR. 7. Dickinson County Hospitals, a non-profit organization, operates two hospitals in Dickinson County—Dickinson County Memorial Hospital, a 110-bed hospital in the city of Iron Mountain, and Anderson Hospital, a 19-bed hospital in the city of Norway. The Veterans' Administration operates the only other hospital in Dickinson County. Residents of the county receive most of their health care services from physicians and other health care practitioners on the Medical Staff, including respondent Koski, and from Dickinson County Memorial Hospital. For diagnosis and treatment using some complex medical procedures, or by physicians who practice specialties not available in Dickinson County, residents of Dickinson County usually travel to physicians and/or hospitals in Green Bay, Wisconsin (approximately 85 miles south of Dickinson County), Marquette, Michigan (approximately 85 miles north of Dickinson County), or Marshfield, Wisconsin (approximately 140 miles southwest of Dickinson County).

PAR. 8. Marquette General Hospital, which is located in the city and

county of Marquette, in the Upper Peninsula of Michigan, is a tertiary care hospital that provides specialized diagnostic and treatment services not available at smaller hospitals in the Upper Peninsula of Michigan, such as Dickinson County Memorial Hospital and Anderson Hospital. Marquette General Hospital provides tertiary care services in such areas as cardiac care, oncology, neurological services, neonatal services, and nephrology. Many specialty and subspecialty physicians on Marquette General Hospital's Medical Staff receive a significant number of referrals from physicians in other parts of the Upper Peninsula, because they offer diagnostic and treatment techniques not available locally. Marquette General Hospital, in turn, derives a substantial portion of its revenues as a result of tests and hospital admissions of patients who were referred to physicians on its medical staff by physicians in other parts of the Upper Peninsula.

PAR. 9. On September 3, 1986, Marquette General Hospital announced plans to build a multispecialty medical office in Kingsford, Michigan, the second largest city in Dickinson County. Kingsford borders Iron Mountain, the largest city in the county, and is within several miles of the Wisconsin border. Marquette General Hospital planned to staff the new office with three salaried primary care physicians, to have some specialty and subspecialty physicians visit Dickinson County more frequently, and to offer some specialized physician services and diagnostic tests that were not previously available in Dickinson County. Marquette General Hospital officials believed that their new medical office in Kingsford would provide valuable primary care and specialty services to consumers of health care services in the Dickinson County area and consequently would attract a substantial number of patients to, and enhance the revenues of, Marquette General Hospital. Marquette General Hospital officials believed the new medical office would permit it to compete more effectively with hospitals in Green Bay, Wisconsin, and Marshfield, Wisconsin, for patients in the Dickinson County area.

PAR. 10. The respondent, other health care practitioners in the Dickinson County area, and the Medical Staff saw as a competitive threat the prospect of increased competition from both specialty and primary care physicians who would work in Marquette General Hospital's planned office in Dickinson County, including the salaried primary care physicians who would work there. As a result, beginning in September 1986, the respondent and other health care practitioners in the Dickinson County area entered into a combination or conspiracy

to coerce, intimidate, threaten to boycott, or boycott Marquette General Hospital and its physicians in order to prevent the proposed new medical office from offering services to consumers in competition with them. In September 1986, the Medical Staff and the Dickinson-Iron County Medical Society, acting as combinations of their members or in conspiracy with at least some of their members, joined in the conspiracy to suppress competition from Marquette General Hospital's proposed new medical office in Kingsford, Michigan. In November 1986, the Delta County Medical Society, acting as a combination of its members or in conspiracy with at least some of its members, joined in the conspiracy. Throughout the course of the conspiracy, the Dickinson-Iron County Medical Society provided support to, and advised its physician members of, the actions undertaken in furtherance of the combination or conspiracy to suppress competition from the proposed new medical office.

PAR. 11. In furtherance of the aforesaid combination or conspiracy, and as described in paragraphs twelve through twenty below:

A. Respondent Koski, other health care practitioners in the Dickinson County area, the Medical Staff, and the Dickinson-Iron County Medical Society, in response to the Marquette General Hospital's plan to establish a medical office in Dickinson County.

1. Threatened to refuse to refer, or refused to refer, patients to specialist physicians practicing at a Marquette General Hospital medical office in Dickinson County;

2. Agreed to refuse to enter into any contractual relationship with, including possible salaried employment in, Marquette General Hospital's medical office in Dickinson County; and

3. Solicited physicians throughout the Upper Peninsula of Michigan to join in a combination or conspiracy to threaten to cease referring, or to cease referring, patients to physicians practicing at Marquette General Hospital.

B. Respondent Koski, other health care practitioners in the Dickinson County area, the Medical Staff, the Dickinson-Iron County Medical Society, and the Delta County Medical Society threatened to cease referring, or ceased to refer, patients to specialist physicians practicing at Marquette General Hospital.

PAR. 12. On September 4, 1986, the Medical Staff, at an emergency meeting held to discuss the proposed Marquette General Hospital medical office, authorized an Ad-hoc Executive Committee of the

Medical Staff to "actively pursue effective counter measures to this move by Marquette," *i.e.*, its plan to open the clinic. The president of the Dickinson-Iron County Medical Society was named to this committee. This committee met on September 8, 1986, and approved the issuance of a press release which stated in part that: (1) the Medical Staff objected to the establishment of the new medical office in Dickinson County, which was not under "local control," and (2) the new medical office "not only brings in specialists unavailable locally, but also competes directly with services and specialties already present in our hospital." Substantial portions of this press release subsequently appeared in the local newspapers.

PAR. 13. On September 13, 1986, the Medical Staff met and the physicians and other health care practitioners present, including respondent Koski, voted unanimously to approve the following commitment and to seek a written commitment to that effect from each Medical Staff member:

We the Medical Staff of DCH, support the right of the individual practitioner to be non-aligned to any specific institution and, therefore, pledge that we will not cooperate or be hired by the Marquette Hospital Clinic or any subsidiary thereof.

One or more members of the Medical Staff distributed a typed version of this statement to the members of the Medical Staff, and it was signed by many of them. On September 22, 1986, the Medical Staff approved a second statement expressing opposition to the medical office. This second statement, which served the same purpose as the first statement, read as follows: "I am opposed to Marquette General Hospital placing a clinic in Dickinson County." Shortly thereafter, the second statement was distributed to, and signed by, almost every member of the Medical Staff, including respondent Koski.

PAR. 14. On September 29, 1986, three members of the Medical Staff met, on behalf of the Medical Staff and its individual members including respondent Koski, with physician representatives of the Medical Staff of Marquette General Hospital. At this meeting, these three individuals presented the Marquette physicians with a statement, dated September 29, 1986, which (1) expressed the united opposition of the Medical Staff and its individual members to Marquette General Hospital's plan to open the new medical office in Dickinson County, and (2) stated they would use "whatever means necessary" to prevent the new office from offering services to patients in competition with them. The Chief of the Medical Staff, relying on

the statements of opposition referred to in paragraph thirteen above, including that of respondent Koski, signed this letter as "Chief of Staff and Representative of the Forty-two (42) Physicians on the Medical Staff."

PAR. 15. The Tri-County Medical Society and the Delta County Medical Society have physician members who frequently refer patients to physicians on the staff of Marquette General Hospital. A significant number of these patients undergo tests at, or are admitted to, Marquette General Hospital. On or about January, 1986, officers of the Dickinson-Iron County and Delta County Medical Societies discussed "turf protection and it was unanimously voted by all parties concerned that our relationship with Marquette is favorable and we wish to continue this, however all communities absolutely insist on having the freedom to choose a consultant and recent moves by Marquette administration which signify a move towards mandatory consultation will be aggressively opposed by our societies jointly." This action took place because members of the Dickinson-Iron County and Delta County Medical Societies were concerned that physicians who signed such contracts would increase their referrals to specialists at Marquette General Hospital and decrease their referrals to specialists who belonged to the respondent medical societies. On October 7, 1986, respondent Koski and another individual, as representatives of the other individual members of the Medical Staff and of the Medical Staff, solicited the Tri-County Medical Society in Calumet, Michigan, to join the combination or conspiracy described in paragraphs ten through fourteen. On October 21, 1986, four individuals as representatives of the Medical Staff and of the individual members of the Medical Staff including respondent Koski, and one representative of the Dickinson-Iron County Medical Society, solicited the Delta County Medical Society in Escanaba, Michigan, to join the conspiracy described in paragraphs ten through fourteen.

PAR. 16. After respondent Koski and the other individuals solicited the participation of the Tri-County and Delta County Medical Societies as discussed in paragraph fifteen, the Tri-County Medical Society advised its membership to write individual letters personally expressing their opinion to the physicians in Marquette, but took no other action. On November 18, 1986, however, the Delta County medical Society unanimously approved a letter that stated the society's official position. The Delta County Medical Society sent this letter to the Presidents of both the Dickinson-Iron County and Marquette-Alger

Medical Societies. This letter stated that "if the clinic is constructed as proposed, there will be a definite change in the referral patterns of many Delta County physicians and perhaps physicians in other U.P. counties. We feel that this would be unfortunate for all involved." Officials of Marquette General Hospital saw this as a threat to cut referrals to physicians on its medical staff. One purpose of the letter was to put pressure on Marquette General not to open a similar clinic in the Delta County area. The president of the Delta County Medical Society, accompanied by two society members, thereafter spoke at a meeting of the Marquette-Alger Medical Society and told them "they would have to be aware [a number of Delta] physicians would no longer utilize the services of Marquette unless their patient specifically requested it."

PAR. 17. On October 10, 1986, the Medical Staff Ad-hoc Executive Committee, which was empowered to represent and act on behalf of the Medical Staff and the individual members of the Medical Staff including respondent Koski, sent a letter to many members of the Medical Staff and to most, if not all, of the physicians in the Upper Peninsula, including physicians on the Medical Staff of Marquette General Hospital. The letter included the following statements: (1) that the Medical Staff intended to do "everything in our power" to prevent the Kingsford, Michigan, medical office from opening as planned; (2) that Upper Peninsula physicians should "reevaluate our relationship with Marquette"; and (3) that Marquette physicians were not welcome in Dickinson County "as salaried employees whose purpose in our community will be to direct traffic to" Marquette. The ten members of the Ad-hoc Executive Committee signed this letter as the "Ad hoc Executive Committee on behalf of the forty-two physicians of Dickinson County Hospitals." Officials of Marquette General Hospital perceived these statements as a threat to cut referrals to physicians on its Medical Staff.

PAR. 18. On December 10, 1986, the Medical Staff held a special meeting and voted unanimously that they "remain firmly opposed to the Marquette Clinic." The Medical Staff confirmed its opposition in a March 2, 1987, letter from the chief of the Medical Staff and the spokesman for the Medical Staff, to the chief of the Marquette General Hospital Medical Staff.

PAR. 19. As a result of the actions described in paragraphs ten through eighteen, Marquette General Hospital opened a medical office in Kingsford that was smaller than its originally proposed medical

office building. This medical office did not offer primary care services to consumers as had originally been planned by Marquette General Hospital. On May 11, 1987, as a result of the actions of the Medical Staff, respondent Koski and other individual members of the Medical Staff, the Dickinson-Iron County Medical Society, and the Delta County Medical Society, as set forth above, Marquette General Hospital suspended action on its plan to offer primary care services at its Kingsford medical office.

PAR. 20. No health care practitioner in Dickinson County has agreed to work in the Marquette General Hospital medical office, and unless requested to do so by their patients, many of these health care practitioners continue to refuse to refer patients to physicians who provide specialized services at the Kingsford medical office.

PAR. 21. The purposes or effects or the tendency and capacity of the combination or conspiracy and conduct described in paragraphs ten through twenty are and have been to restrain trade unreasonably in the provision of health care services in or near Dickinson County, Michigan, and deprive consumers of the benefits of competition, in the following ways, among others:

A. Hindering competition among physicians and hospitals in the provision of health care services;

B. Depriving consumers of their ability to choose among a variety of alternative types of health care facilities and primary care and specialty physicians competing on the basis of price, service, and quality;

C. Impairing Marquette General Hospital's efforts to increase consumer access to primary care and specialty medical services, including services offered by salaried primary care physicians; and

D. Deterring other hospitals or medical clinics from operating medical facilities in competition with the private practice of physicians.

PAR. 22. The combination or conspiracy and the acts and practices described above constitute unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. The violation, or the effects thereof, as herein alleged, is continuing and will continue in the absence of the relief herein requested.

#### ORDER DISMISSING COMPLAINT

On February 13, 1989, the Commission issued a complaint charging

that Dr. Robert G. Koski conspired with other health care practitioners, the Dickinson County Memorial Hospital Medical Staff, and two medical societies to boycott Marquette General Hospital to prevent it from opening a clinic. The complaint charged that on September 13, 1986, members of the Medical Staff, including Dr. Koski, voted to adopt a resolution pledging "that we will not cooperate or be hired by the Marquette Hospital Clinic or any subsidiary thereof."

Complaint counsel have moved that the Commission dismiss the complaint against Dr. Koski, and the Administrative Law Judge has certified the motion to the Commission. Although the minutes of the Medical Staff meeting, of September 13, 1986, indicate that Dr. Koski was present at the meeting, subsequent to the issuance of the complaint the respondent produced evidence establishing that he left the meeting prior to the boycott vote. That evidence included hospital records indicating that Dr. Koski was in surgery at the time of the boycott vote and a corroborating affidavit by a nurse anesthetist. In light of the newly discovered evidence, the Commission has decided to dismiss the complaint.

The complaint is hereby dismissed.

## IN THE MATTER OF

## ARKLA, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF  
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE  
FEDERAL TRADE COMMISSION ACT

*Docket C-3265. Complaint, Oct. 10, 1989—Decision, Oct. 10, 1989*

This consent order requires, among other things, a Shreveport, La. corporation to divest the TransArk assets and also requires that the divestiture be made to a Commission-approved acquirer or acquirers. In addition, respondent is also required to obtain prior Commission approval and to apply to the Federal Energy Regulatory Commission for approval under that agency's abandonment procedures.

*Appearances*

For the Commission: *Marc G. Schildkraut, Ronald B. Rowe and David C. Dickey.*

For the respondent: *Ky P. Ewing, Jr., Page I. Austin, and Neil W. Imus, Vinson & Elkins, Washington, D.C.*

## COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondent Arkla, Inc., a corporation subject to the jurisdiction of the Commission, entered into an agreement to acquire, took actions to implement the agreement to acquire, and did in fact acquire, certain assets from the TransArk Transmission Co. ("TransArk") in violation of the provisions of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint pursuant to Section 11 of the Clayton Act, 15 U.S.C. 21 and Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), stating its charges as follows:

## I. DEFINITIONS

1. For purposes of this complaint, the following definitions apply:
  - a. "Arkla" means Arkla, Inc., its subsidiaries, divisions and groups