

IN THE MATTER OF

TENET HEALTHCARE CORPORATION, ET AL.

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

Docket 9289. Complaint, Aug. 19, 1998—Final Order, Dec. 23, 1999

This final order dismisses the administrative complaint in the proceeding regarding the acquisition agreement between Tenet Healthcare Corporation and Doctors Regional Medical Center.

Participants

For the Commission: *Garry Gibbs, Peter Gulyn and William Baer.*

For the respondents: *Charles James, George Manning and Daryl Marsch, Jones, Day, Reavis & Pogue, Washington, D.C.*

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 ("Commission"), having reason to believe that the respondents, Tenet Healthcare Corporation ("Tenet") and Poplar Bluff Physicians Group, Inc. doing business as Doctors Regional Medical Center ("DRMC"), corporations subject to the jurisdiction of the Commission, have entered into an agreement whereby Tenet will acquire the stock and assets of DRMC; that the acquisition agreement violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; that the proposed acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 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, the Commission hereby issues its complaint, stating its charges in that respect as follows:

DEFINITIONS

PARAGRAPH 1. For purposes of this complaint the following definitions shall apply:

(a) "*General acute care hospital*" means a health facility, licensed as a hospital, other than a federally owned facility, having a duly organized governing body with overall administrative and professional responsibility, and an organized professional staff, that provides 24-hour inpatient care, and may also provide outpatient services, and having as a primary function the provision of inpatient services for medical diagnosis, treatment, and care of physically injured or sick persons with short-term or episodic health problems or infirmities.

(b) "*General acute care inpatient hospital services*" means 24-hour inpatient health care, and related medical or surgical diagnostic and treatment services, for physically injured or sick persons with short-term or episodic health problems or infirmities.

THE PARTIES

PAR. 2. Tenet is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Nevada, with its principal place of business located at 3820 State Street, Santa Barbara, California. Tenet owns and operates, among other things, over 120 acute care hospitals throughout the United States. Included among those hospitals is Lucy Lee Hospital ("Lucy Lee"), a 201-bed general acute care hospital in the city of Poplar Bluff, Missouri. In fiscal year 1997, Tenet had total sales of about \$8.7 billion, and Lucy Lee had total sales of over \$54 million.

PAR. 3. DRMC is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Missouri, with its principal place of business located at 621 Pine Street, Poplar Bluff, Missouri. DRMC owns and operates a 230-bed general acute care hospital in Poplar Bluff, Missouri. In fiscal year 1997, DRMC had total sales of over \$41 million.

JURISDICTION

PAR. 4. Tenet and DRMC, at all times relevant herein, have been and are now engaged in or affecting commerce, as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12. The businesses of Tenet and DRMC, at all times relevant herein, have been and are now in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

THE PROPOSED ACQUISITION

PAR. 5. On or about April 2, 1997, Tenet and DRMC entered into an agreement whereby Tenet will acquire 100 percent of the voting stock of DRMC, and become the owner of all of DRMC's assets. The total value of the transaction is over \$40 million.

NATURE OF TRADE AND COMMERCE

PAR. 6. All general acute care inpatient hospital services offered by Lucy Lee and DRMC constitute a relevant line of commerce in which to assess the competitive effects of the proposed acquisition. Other health care diagnosis and treatment services offered by Lucy Lee and DRMC, including but not limited to psychiatric care, rehabilitation care, and outpatient surgery, constitute one or more additional relevant lines of commerce in which to assess the competitive effects of the proposed acquisition.

PAR. 7. A relevant section of the country within which to assess the competitive effects of the proposed acquisition, for the relevant lines of commerce, is no larger than Butler County and portions of seven surrounding counties (Clay County, Arkansas; Ripley County, Missouri; Carter County, Missouri; Reynolds County, Missouri; Wayne County, Missouri; Stoddard County, Missouri; and Dunklin County, Missouri).

MARKET STRUCTURE

PAR. 8. DRMC and Tenet's Lucy Lee Hospital are the two principal general acute care hospitals in the relevant markets, *i.e.*, the relevant lines of commerce in the relevant section of the country. The only other general acute care hospitals in the relevant section of the country are much smaller than Lucy Lee and DRMC, and do not and cannot practicably offer a range of general acute care hospital services as comprehensive as that available at Lucy Lee and DRMC. Moreover, in the relevant section of the country, there are no specialty hospitals, non-hospital outpatient surgery centers, or any other health facilities that are significant competitive alternatives to Lucy Lee or DRMC for any relevant lines of commerce.

PAR. 9. The relevant markets are highly concentrated, whether measured by the Herfindahl-Hirschman Index ("HHI") or by market share. The proposed acquisition would significantly increase concentration in these markets. For example, for general acute care

inpatient hospital services, the proposed acquisition would increase Tenet's market share by more than 30 percent, to over 84 percent. The HHI would increase by 2700 points, to a post-acquisition level over 6200.

ENTRY CONDITIONS

PAR. 10. It is unlikely that entry into the relevant markets would prevent, or remedy in a timely manner, any anticompetitive effects from the proposed acquisition. Entry is difficult and likely to take more than two years due to, among other things, the unlikelihood of obtaining state certificate of need approval required for new entry in Missouri, and the time required to complete construction of facilities necessary to provide the relevant health services.

COMPETITION

PAR. 11. Tenet and DRMC are actual and potential competitors in the relevant markets.

EFFECTS

PAR. 12. The effects of the aforesaid acquisition, if consummated, may be substantially to lessen competition in the relevant markets in the following ways, among others:

(a) It would eliminate actual and potential competition between Tenet and DRMC;

(b) It would significantly increase the already high levels of concentration;

(c) It would eliminate DRMC as a substantial, independent and competitive provider of the relevant health services;

(d) It may permit Tenet to unilaterally raise prices;

(e) It may result in less favorable prices and other terms for health plans that contract with providers to obtain the general acute care inpatient services or other relevant services for plan subscribers in the relevant area;

(f) It may increase the possibility of collusion or interdependent coordination by the remaining providers in the relevant markets; and

(g) It may deny patients, physicians, third-party payers, and other consumers of the relevant services the benefits of free and open competition based on price, quality, and service.

VIOLATIONS CHARGED

PAR. 13. The acquisition agreement described in paragraph five above violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

PAR. 14. The acquisition described in paragraph five, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

ORDER DISMISSING COMPLAINT

In response to the Commission's Order to Show Cause issued on December 3, 1999, both complaint counsel and respondent have suggested that we dismiss the administrative complaint in this proceeding.¹

In light of the positions of both parties to this litigation, and pursuant to the criteria set forth in the Statement of Federal Trade Commission Policy Regarding Administrative Merger Litigation Following the Denial of a Preliminary Injunction, 4 Trade Reg. Rep. (CCH) ¶ 13,242, and the accompanying Commission Statement, *id.* at 20,997, we have determined to dismiss the complaint. Accordingly,

It is ordered, That the administrative complaint in Docket No. 9289 be, and it hereby is, dismissed.

¹ Complaint Counsel's Response to Order to Show Cause (Dec. 10, 1999); Response of Respondent Tenet Healthcare Corporation to Order to Show Cause (Dec. 17, 1999).

**Re: Petition of Hoechst Marion Roussel, Inc. to Quash --
Investigation of Andrx Corp. and Hoechst Marion
Roussel, Inc. File No. 981-0368.**

November 1, 1999

Dear Mr. Koon:

This letter advises you of the Federal Trade Commission's ruling on Hoechst Marion Roussel, Inc.'s ("Hoechst" or "Petitioner") petition to quash the subpoena *ad testificandum* issued to James M. Spears, Esquire ("Petition"). The Petition is denied for the reasons stated below. The new date and time for James M. Spears to appear and give testimony is Wednesday, November 17, 1999 at 9:00 a.m.

This ruling was made by Commissioner Sheila F. Anthony, acting as the Commission's delegate. *See* 16 CFR 2.7(d)(4). Hoechst has the right to request review of this matter by the full Commission. Such a request must be filed with the Secretary of the Commission within three days after service of this letter.¹ The filing of a request for review by the full Commission will not stay or otherwise affect the new hearing date, November 17, 1999, unless the Commission rules otherwise. *See* 16 CFR 2.7(f).

Hoechst's request for oral argument is denied. Petitioner presented its arguments in substantial detail in its twenty-page Petition. Additional argument both is unnecessary and would only further delay this investigation.

I. BACKGROUND

On October 18, 1998, the Commission issued a resolution authorizing the use of compulsory process in a nonpublic investigation to determine whether Hoechst, "Andrx Corporation, or other persons, partnerships, or corporations have engaged or are engaging in unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, as amended, by monopolizing or attempting to monopolize the market for any pharmaceutical product; by entering into any agreement that has the purpose or effect of restricting entry into the generic market for any pharmaceutical product, or by otherwise

¹ This letter decision is being delivered by facsimile and express mail. The facsimile copy is being provided as a courtesy. Computation of the time for appeal, therefore, should be calculated from the date you receive the original by express mail.

restricting competition in the manufacture or sale of any pharmaceutical product."

The investigation of Hoechst and Andrx has focused on an agreement the two companies entered in September, 1997 ("Agreement"), in connection with their litigation of a patent dispute regarding Hoechst's once-a-day diltiazem product, Cardizem CD. As its resolution states, the Commission is concerned that the Agreement may have unlawfully prevented or delayed Andrx and others from marketing generic alternatives, or at least may have been intended to achieve these ends. Thus, the meaning and impact of certain provisions of the Agreement, as well as the intent of the parties in entering into it, are central to the investigation. These points, in turn, are informed by facts regarding the negotiation and related conduct by the parties in arriving at the Agreement.

As part of its effort to gather these facts, on September 3, 1999, the Commission issued a subpoena to James M. Spears, outside counsel to Hoechst, requiring that he appear and give testimony on September 16, 1999, at an investigational hearing to be conducted by FTC attorneys leading the investigation. Staff identified Spears as a potential witness based upon, among other things, the testimony of other witnesses involved in the negotiation of the Agreement.² Those witnesses uniformly identified Spears as having led the negotiation on behalf of Hoechst. []

On September 15, 1999, Hoechst filed a Petition to Quash the subpoena served upon Spears. Hoechst argues that (1) the subpoena "seeks privileged information for which the Commission has failed to make the requisite showing of necessity" and (2) "compliance with the subpoena would be unduly burdensome." Petition at 6.

After careful review of the Petition, Commissioner Anthony finds that none of Petitioner's arguments, each addressed separately below, provide a basis for quashing the subpoena.

² In June, 1999, Hoechst and Andrx entered a second related agreement. In its Petition, Hoechst describes this as an agreement settling the patent litigation between the parties. Hoechst adds that Spears represented the company in the negotiation of this agreement as well. Petition at 2. In his communications with Hoechst, the FTC staff attorney leading the investigation indicated that this second related agreement also would be a topic of questioning during their hearing with Spears. *See e.g.*, Petition, Ex. C (Letter from Bradley Albert to counsel for Hoechst, dated August 18, 1999).

II. ANALYSIS

A. Hoechst's Privilege and Disqualification Arguments are Baseless.

Hoechst's position in this matter boils down to the proposition that because some of the questions that may be asked during the investigational hearing of Spears might implicate one or more legal privileges, or because the hearing might lead to the disqualification of Spears from representing Hoechst in this and other related matters. Spears should not be required to submit to the hearing. While both arguments are addressed in more detail in later sections of this decision, their fundamental and overarching flaws are worth noting at the outset.

The mere fact that some questions posed during the hearing might be met with a privilege claim does not in any way provide a ground for quashing the subpoena. The questioners cannot know what information is protected by privilege or, for that matter, whether a witness will even choose to invoke an applicable privilege. This is a routine part of investigational hearings. Each witness must appear, listen to each question, and answer or assert a privilege claim as appropriate. *See* 16 CFR 2.9(b)(2). Thus, Petitioner's lengthy arguments regarding attorney-client and work-product privileges are premature.³

Petitioner's disqualification argument is likewise premature. Disqualification occurs in those instances where counsel is likely to be called as a witness at trial. *See* American Bar Association, Model Rule of Professional Conduct 3.7. An FTC hearing in a non-public investigation is not a trial. Rather, it is a process whereby the Commission attempts to gather the information needed to decide whether a law enforcement action should be initiated. This decision must be informed by as much relevant evidence as possible. The disqualification issue will not be ripe until and unless, as a result of the investigation, the Commission votes to pursue litigation against Hoechst, and a party to that litigation names Spears as a witness. Spears could be named as a witness by any party to the litigation

³ If, during his hearing, Spears asserts a privilege claim in response to a particular question, and FTC counsel do not believe the privilege applies, the invocation of the privilege can then be properly tested. *See* 16 CFR 2.8A, 2.9, 2.13. Witnesses cannot assert blanket privilege claims, as Hoechst attempts to here, which amount to: "I believe that everything you will ask me will call for privileged information. As I do not intend to waive any privileges, I should not have to appear and listen to your specific questions at all." *See. e.g.,* Petition at 4, 5, Ex. G, *Statement Pursuant to Commission Rule 2.7(d)(2)*, ¶¶ 2, 4, 9.

whether or not the Commission holds an investigational hearing. Of course, FTC counsel would certainly be more likely to name Spears as a witness should the investigational hearing reveal that his testimony is unique and relevant. Apparently recognizing this, Hoechst would have the Commission voluntarily abandon this promising avenue of inquiry. The Commission's mandate to enforce the antitrust laws, however, precludes the Commission from choosing to ignore likely sources of relevant evidence at the request of the target.

B. The Subpoena Meets the Standards for Enforcement Applied by the Courts.

The Federal Trade Commission Act grants the Commission extensive investigatory powers. *See* 15 U.S.C. 46, 49, 50, and 57b-1. These powers are essential to allow the Commission to carry out its broad mandate. Among the Commission's investigatory powers is the ability to issue subpoenas and the concomitant right to enforce them in the federal district courts. *See* 15 U.S.C. 49; 16 CFR 2.13. The courts apply a deferential standard in enforcement proceedings, asking only whether (i) the investigation is within the Commission's authority, (ii) the information sought is reasonably relevant to the investigation, and (iii) the request is not unduly burdensome. *See, e.g., FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1089 (D.C. Cir. 1992), *cert. denied* 507 U.S. 910 (1993). Each of these three requisites is met here.

1. Authority

Hoechst does not challenge the Commission's authority to conduct the instant investigation. Indeed, it is beyond cavil that the investigation of a potentially anticompetitive agreement between pharmaceutical companies is within the Commission's statutory authority.

2. Relevance

Hoechst does question the relevance of Spear's testimony to this investigation. While common sense counsels that little testimony is likely to be more relevant to an investigation of an agreement than that of one of its principal negotiators, we need not rely upon common sense alone here.

Hoechst's relevancy challenge is based largely on the contention that there is nothing to be gained from an investigational hearing of Spears that the Commission does not already possess or could not obtain from other sources. Petition at 19. This contention is faulty for several reasons. First, Hoechst, as a target of this non-public investigation, is not in a position to accurately assess what the Commission has so far obtained, or as yet still seeks, through its investigation. Second, the Commission, as it carries out its mandate to enforce the antitrust laws, must conduct its investigation as it sees fit, and plainly cannot simply accept a target's word that nothing fruitful will come out of an investigational hearing of a central participant in a matter under investigation. Finally, and most importantly, Hoechst's argument that the information sought from Spears is redundant and that "no non-privileged information could be gained through this subpoena that the Commission does not already possess or could readily obtain by further discovery directly from [Hoechst]" is just plain wrong. *Id.* A review of the transcripts from the other investigational hearings taken to date reveals that Spears' testimony is extremely likely to be relevant and unique. []⁴

In short, the record compiled to date in this investigation overwhelmingly demonstrates the relevance of Spears' testimony.

3. Burden

Hoechst argues that it would be unreasonably burdened if Spears were to appear and give testimony at the Commission's investigational hearing because such an appearance "could result in the disqualification" of Spears, and perhaps others in his firm, from representing Hoechst in this investigation and in other actions pending in various courts throughout the country which arise from the same facts and circumstances under investigation here.⁵ Petition at 18. This argument is unpersuasive for numerous reasons.

Disqualification is not an issue that the Commission created by serving a subpoena upon Spears. Rather, this threat, to the extent it

⁴ While the Andrx representatives might provide some testimony on these points, they, of course, can only provide the perspective of one party to the negotiation. In addition, it bears noting that discussions between Spears and his Andrx counterpart, as well as the drafts they exchanged, are not privileged.

⁵ With respect to Hoechst's suggestion that the threat of disqualification might extend to other related cases pending across the country, the Commission has no control of these third-party cases and the witnesses that the plaintiffs (or even co-defendants) in these crises might call. Moreover, the Commission's investigational hearings are non-public. *See* 16 CFR 2.8(c).

exists, was created by Hoechst when it first chose to have its outside counsel act as the company's negotiator of the Agreement at issue and again when it chose to retain Spears to represent the company in connection with the Commission's investigation and other litigation relating to that Agreement. Lawyers and their clients routinely face the issue of whether representation by a lawyer is advisable in a matter where the possibility exists that the lawyer may be a witness. Clients cannot shield relevant witnesses from testifying by hiring them as counsel. This point -- that Spears is a first-hand actor and participant in the actions at issue, rather than a mere outside counsel consulted by the primary actors -- seems to be lost on Hoechst. Compare *Johnston Development Group, Inc. v. Carpenters Local Union No. 1578*, 130 F.R.D. 348, 352-54 (D.N.J. 1990) (deposition permitted where counsel was a fact witness by virtue of participating in a series of meetings), with *Shelton v. American Motors Corp.*, 805 F.2d 1323 (8th Cir. 1986) (deposition not allowed where attorney was not an actor or witness to the events at issue). This is a crucial distinction, and one that severely undermines the arguments set forth in Hoechst's Petition.

In addition. Spears would not be disqualified merely because he had testified in an investigational hearing. Hoechst argues that the hearing would make it more likely that Spears would be called as a witness should this investigation prompt the Commission to file suit or issue an administrative complaint. This argument proves too much. If the hearing shows that he has no relevant or unique information, his risk of being called as a witness and, therefore, disqualified, is remote. On the other hand, if he has such information, and its probity outweighs the prejudice to Hoechst that would result from his disqualification, he *should* be a witness. Spears' fate is controlled not by his attendance at a hearing, but rather by the nature of the evidence he possesses. The investigational hearing, therefore, only affects the likelihood that Spears will be called as a witness in any potential trial to the extent that it provides a basis for informing that decision. Hoechst seeks to render the possibility of Spears being called as a witness "less likely" by asking the Commission to commit to willful ignorance as to what evidence Spears has to offer.

In sum, the subpoena was issued in connection with a proper investigation, seeks relevant information, and does not pose an unreasonable burden on Hoechst.

C. Hoechst's Privilege Arguments Are Premature and Misplaced.

Hoechst's Petition largely ignores the legal standards, addressed above, applicable to the enforcement of an FTC subpoena. Instead, Hoechst poses privilege arguments based upon precedents arising under the Federal Rules of Civil Procedure. Hoechst's fervent protestations of privilege are premature and misplaced.

Hoechst argues that because some questions asked during the hearing may solicit information for which a privilege could be claimed, holding the hearing at all is improper and the subpoena invalid. If this were the case, the Commission could hold no investigational hearings because in every hearing there is the prospect of inquiries into privileged matters. While Spears' status as Hoechst's outside counsel may well give rise to privileges that may be properly asserted in response to specific questions, that does not excuse him from having to attend the hearing at all. In short, he must appear, listen to each question asked by the examiners, and either answer or assert any privileges that he or Hoechst believes apply. *See* 16 CFR 2.9.

Throughout its Petition, Hoechst confuses this issue. Again and again Hoechst makes arguments to the effect that the subpoena is aimed at intruding "upon protected attorney-client communications and attorney thought processes . . . " and that "compliance with the Commission's subpoena will require [Hoechst's] counsel to disclose privileged information and other protected material" Petition at 7, 13. While questions, if and when posed, may call for such information, Hoechst is not being compelled to provide it. The issue here is simply whether Spears must appear for a hearing, not the validity of any privileges Hoechst might claim in response to questions asked during the hearing. Indeed, no assessment of privilege claims is even possible because as yet, no questions have been posed and no proper assertions of privilege have been lodged.

Relying on case law arising in the context of civil discovery, Hoechst argues that before the Commission can interview Spears, it "must offer proof of relevancy and need." Petition at 7. More specifically, Hoechst argues that the Commission "must show: (1) the information sought is otherwise not available; (2) the information sought is relevant and non-privileged; and (3) the information sought is critical to the preparation of the case." *Id.* (citations omitted).

As this is still an investigation, rather than a case pending before a judge, it is unclear to whom Hoechst believes these prerequisite showings must be made. This oversight demonstrates Hoechst's fundamental failure to appreciate the context of this subpoena: an investigation undertaken by the Commission pursuant to its statutory authority, rather than discovery undertaken in connection with litigation. While both are "investigatory" in nature, their bases and aims are quite different, and so too, therefore, are the rules that govern them.⁶ As the Ninth Circuit explained in *EEOC v. Deer Valley Unified School Dist.*, 968 F.2d 904 (9th Cir. 1992):

The function of administrative investigatory subpoenas differs from that of the discovery provisions of the Federal Rules of Civil Procedure. The discovery provisions apply to actions that have already been filed with the court, and the parties are seeking to develop evidence for the action that is before the court. The statutory subpoena authority, on the other hand, is designed for administrative investigations, which may or may not result in any further action before the district court. The enforcement is dependent upon the interpretation of statutory authority, not interpretations of the discovery provisions of the Federal Rules of Civil Procedure.

Id. at 906; see also *Linde Thompson Langworthy Kohn & Van Dyke v. RTC*, 5 F.3d 1508, 1513 (D.C. Cir. 1993) ("Unlike a discovery procedure, an administrative investigation is a proceeding distinct from any litigation that may eventually flow from it"); *EPA v. Alyeska Pipeline Service Co.*, 836 P.2d 443, 447 (9th Cir. 1988) ("An administrative agency, unlike parties relying on the judicial discovery process, need not first allege a violation of the law before it can investigate" (internal citations omitted)). Thus, Hoechst's arguments regarding the Commission's failure to make requisite showings of relevancy and necessity begin from the mistaken premise that federal discovery rules apply here; they do not.

Even assuming that Hoechst was arguing by analogy in discussing the discovery standards applied by courts considering whether to allow a party to depose opposing counsel, *i.e.*, that such precedent is

⁶ For example, the relevancy inquiry applicable to administrative compulsory process is different than the inquiry applicable to civil litigation discovery demands:

[U]nlike a court which gathers information only as it relates to issues relevant to the litigation at hand, an agency in its acquisition of facts is not bound by the parameters of a particular case or controversy. Because the need for investigating allegations of unlawful activity is a substantial one, the law requires that courts give agencies leeway when considering relevance objections.

FTC v. Invention Submission Corp., 1991-1 Trade Cas. (CCH) ¶ 69,338 at 65,351 (D.D.C. 1991), *aff'd*, 965 F.2d 1086 (D.C. Cir. 1992), *cert. denied* 507 U.S. 910 (1993). Thus, the bounds of relevancy in the context of an investigation are broader than those applicable to a civil suit.

persuasive, but not binding, authority,⁷ the argument still fails. This is so because, leaving aside the issue of whether the *Shelton* standards are applicable and appropriate in the context of a Commission investigation, all of those standards -- (i) the information is not available for another source, (ii) it is relevant and non-privileged, and (iii) it is important to the case -- are plainly met here.

The primary focus of the investigational hearing of Spears will be on communications between Spears and representatives of Andrx relating to the negotiation and drafting of the Agreement. As Spears was the only Hoechst representative taking part in many of these communications, the information he can offer is not available from any other source. As discussed above, this information is clearly relevant. Moreover, communications with third-parties are not privileged. Finally, the details of the Grafting of the Agreement are essential to this investigation. In order to evaluate the likely effects of the Agreement and the parties' asserted business justifications, the Commission must obtain an understanding of the meaning and operation of specific provisions of the Agreement, as well as the purpose of the parties in including those provisions or, indeed, of not including others. Learning the thought processes that went into these negotiations, as reflected in discussions between the parties' representatives and in the drafts they exchanged, is crucial to the investigation.⁸

III. CONCLUSION

For all of the foregoing reasons, the Petition is denied, and, pursuant to Rule 2.7(e), 16 CFR 2.7(e), the new date and time for James M. Spears to appear and give testimony is Wednesday, November 17, 1999 at 9:00 a.m.

⁷ The Commission carefully considers the use of its compulsory process powers each time they are exercised. While not technically bound by precedents established under the Federal Rules of Civil Procedure, and recognizing that the aims and limits applicable in its investigations often diverge from those applicable in litigation, the Commission's consideration of whether to issue compulsory process in a given case is informed by some of the same touchstones used by courts in assessing discovery requests in the context of civil litigation.

⁸ None of the foregoing is intended to in any way place limits on the avenues of inquiry that the FTC counsel conducting this investigation may pursue in the course of the hearing. Rather, it merely is intended to provide an example of at least one important line of inquiry that meets all of the *Shelton* standards. The Commission is confident that the FTC staff conducting the investigation will work as cooperatively as possible with Spears and Hoechst in dealing with areas where privileges might be implicated.

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