

Interlocutory Orders, Etc.

“a key to a lawful messenger model is that the IPA must refrain from using prospective polling results in determining which payor offers it would elect to messenger, and refrain”.

By the Commission.

EVANSTON NORTHWESTERN HEALTHCARE
CORPORATION

Docket No. 9315 Order, January 24, 2006

Order granting leave for third parties to file *amicus curiae* briefs in the administrative proceeding, and denying third party hospital association’s request to participate in the oral argument before the Commission.

ORDER GRANTING MOTIONS FOR LEAVE TO FILE BRIEFS AMICI
CURIAE

On December 16, 2005, the Advisory Board Company, the American Hospital Association (“AHA”), the Business Roundtable, the City of Highland Park, and the Joint Commission on Accreditation of Health Care Organizations (“Joint Commission”) filed timely motions for leave to file briefs *amici curiae* in this matter, and attached copies of the briefs that they respectively propose to file. The AHA’s motion also requests that it be allowed to participate in the oral argument before the Commission. On December 30, 2005, Complaint Counsel filed a response to these motions, and on January 9 and January 12, 2006, the AHA and the Advisory Board Company respectively filed replies to that

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response¹. For the reasons detailed below, the Commission grants all of the motions to file briefs *amici curiae*, and it denies the portion of the AHA's motion that requests that the Commission allow it to participate in the oral argument.

1. Requests for Leave to File Briefs *Amici Curiae*

The moving parties describe themselves as follows:

- a. The Advisory Board Company is a for-profit research organization that provides best practices research and analysis to the health care industry. The Board has 2,500 member hospitals and health systems, including one of the respondents, Evanston Northwestern Healthcare ("ENH"). Advisory Board Motion at 1.
- b. The AHA represents approximately 4,800 hospitals and health systems. AHA Motion at 1.
- c. The Business Roundtable is an association of chief executive officers of U.S. corporations, whose members are major consumers of health care in the United States. Business Roundtable Motion at 1-2.
- d. The City of Highland Park is a residential community of approximately 32,000 residents located 23 miles north of Chicago, on Lake Michigan's North Shore. Highland Park Hospital, which merged with ENH in 2000, is located in the City of Highland Park. City of Highland Park Motion at 1.

¹ Commission Rule 3.22(c), 16 C.F.R. § 3.22(c)(2005), provides that a "moving party shall have no right to reply, except as permitted by the Administrative Law Judge or the Commission." The Commission has determined, as a matter of discretion, to permit the AHA and the Advisory Board Company to file their Replies.

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- e. The Joint Commission is an Illinois not-for-profit corporation whose members include the American College of Physicians, the American College of Surgeons, the American Dental Association, the American Hospital Association, and the American Medical Association. Joint Commission Motion at 1.

Complaint Counsel do not directly oppose any of the motions in their entirety. With respect to the motions of the Advisory Board, the AHA, and the Joint Commission, Complaint Counsel “suggest” that the Commission

should duly consider the portions [of their respective briefs] that truly serve the traditional purposes of *amicus* briefs but give little if any consideration to the portions . . . that sidestep the Commission’s own evidentiary and procedural rules.

Complaint Counsel Response at 3.² Complaint Counsel also state that they disagree with the views of the Business Roundtable and the City of Highland Park, but Complaint Counsel do not oppose their motions because, in the view of Complaint Counsel, their briefs “do not compromise the evidentiary and procedural protections afforded the parties” *Id.* at 2, n.1.

The Commission will grant all five requests for leave to file briefs *amici curiae* because each motion satisfies the Commission’s requirement that the public interest will benefit from the

² In its Reply to Complaint Counsel’s brief, the AHA states that the Commission should “consider AHA’s proposed brief *amicus curiae* in its entirety.” AHA Reply at 3. In its Reply, the Advisory Board Company states that the Commission should not prejudice the merits of its brief in the context of a motion for leave to file the brief. Advisory Board Reply at 1.

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Commission's consideration of the attached brief³. The Commission takes no position on the substantive or procedural merit of any of the arguments presented in any of the pleadings, except those arguments that concern the right of the moving parties to file the pleadings and to participate in the oral argument.

2.AHA's Request to Participate in Oral Argument

The AHA also requests permission to participate in the oral argument. AHA Motion at 1-2. To support its request, the AHA refers to "the complexity of the issues" in this case, and "the significant interest that the AHA and its member hospitals have" in how hospital mergers are evaluated. AHA Motion at 2.

Commission Rule 3.52(j) provides that "[a] motion for an *amicus curiae* to participate in oral argument will be granted only for extraordinary reasons." 16 C.F.R. § 3.52(j) (2005). The Commission expects that the parties to this proceeding will provide a comprehensive discussion of the relevant issues during the oral argument. Therefore, there is no extraordinary reason for the AHA to participate in the argument.

Accordingly,

It is ordered that the Advisory Board Company, Business Roundtable, City of Highland Park, and Joint Commission motions for leave -- and the portion of the AHA motion requesting leave -- to file briefs amici curiae are granted; and

³ See, e.g., *In the Matter of Telebrands Corp., et al.*, Docket No. 9313, Order Granting Motion for Leave to File Brief *Amicus Curiae* and Revising Briefing Schedule (Dec. 1, 2004); *In the Matter of Rambus Incorporated*, Docket No. 9302, Order Granting Motions for Leave to File Briefs *Amici Curiae* and Scheduling Oral Argument (April 30, 2004), and Order Granting Motions for Leave to File Briefs *Amici Curiae* (June 21, 2004), *In the Matter of Rambus Incorporated*, Docket No. 9302.