

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

In the Matter of	)	
Caremark Rx, LLC,	)	
Zinc Health Services, LLC,	)	
Express Scripts, Inc.,	)	
Evernorth Health, Inc.,	)	
Medco Health Services, Inc.,	)	DOCKET NO. 9437
Ascent Health Services LLC,	)	
OptumRx, Inc.,	)	
OptumRx Holdings, LLC, and	)	
Emisar Pharma Services LLC,	)	
Respondents.	)	

**ORDER ISSUING AMENDED SCHEDULING ORDER #4**

The Amended Scheduling Order is as follows:

October 1— November 19, 2025	Stay Order in Effect due to Government Shutdown.
December 5, 2025	Deadline for parties to serve document requests, interrogatories, and subpoenas <i>duces tecum</i> , except for discovery directed to witnesses who did not appear on either side’s preliminary lists—provided that the discovery is propounded within two weeks of that witness’s disclosure.

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December 5, 2025	Deadline for parties to serve discovery for purposes of authenticity and admissibility of exhibits.
December 23, 2025	<p>Deadline for Complaint Counsel to remove placeholders from its preliminary proposed witness list for all non-party witnesses and any witnesses affiliated with a Respondent group that has substantially completed document productions by December 9, 2025.</p> <p>For any Respondent group that has not substantially completed document production by December 9, 2025, the deadline for Complaint Counsel to remove placeholders for witnesses affiliated with that Respondent group is two weeks after the date that Respondent group has substantially completed its document production.</p>
January 9, 2026	Deadline for Respondents to remove placeholders from their preliminary proposed witness list.
January 15, 2026	Joint Status Report #1.
January 21 – April 28, 2026	Stay Orders in effect due to Commission consideration of proposed consent agreements and a Government shutdown
May 4, 2026	Deadline for parties to serve subpoenas <i>ad testificandum</i> , except for discovery directed to witnesses who did not appear on either side’s preliminary lists—provided that the discovery is propounded within two weeks of that witness’s disclosure.
May 11, 2026	Deadline for parties to serve requests for admissions, except for requests for admissions for purposes of authenticity and admissibility of documents.
2 days after entry of this amended scheduling order	The parties serve amended preliminary proposed witness list (not including experts), which will include no more than 25 individuals for Complaint Counsel and 15 individuals for Respondents, with a brief summary of the proposed testimony.
June 10, 2026	Close of fact discovery, except for discovery permitted under Rule 3.24(a)(4), depositions of experts, and discovery for purposes of authenticity and admissibility of exhibits.
June 26, 2026	Complaint Counsel serves expert witness reports.

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<p>July 7, 2026</p>	<p>Joint Status Report #2, including parties' proposed stipulations of fact #1.</p>
<p>July 9, 2026</p>	<p>Case Management Conference #1 at 2:00 p.m. Eastern Time.</p>
<p>July 9, 2026</p>	<p>Complaint Counsel serves final proposed witness and exhibit lists, including depositions, copies of all proposed exhibits (except for demonstrative, illustrative, or summary exhibits and expert-related exhibits), the basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness.</p> <p>Complaint Counsel's final proposed witness list shall include no more than 20 fact witnesses.</p> <p>Complaint Counsel provides the Administrative Law Judge (ALJ) with courtesy copies of final proposed witness and exhibit lists, the basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness, including expert witnesses.</p>
<p>July 24, 2026</p>	<p>Respondents serve expert witness reports. Respondents' expert reports shall include (without limitation) rebuttal, if any, to Complaint Counsel's expert witness report(s).</p>
<p>August 3, 2026</p>	<p>Respondents serve final proposed witness and exhibit lists, including depositions, copies of all proposed exhibits (except for demonstrative, illustrative, or summary exhibits and expert-related exhibits), the basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness.</p> <p>Respondent's final proposed witness list shall include no more than 15 fact witnesses.</p> <p>Respondents provide the ALJ with courtesy copies of final proposed witness and exhibit lists, the basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness, including expert witnesses.</p>
<p>August 5, 2026</p>	<p>Joint Status Report #3, including parties' proposed stipulations of fact #2, which will be redlined against version #1 and clean.</p>
<p>August 7, 2026</p>	<p>Parties intending to offer confidential materials of an opposing party or non-party as evidence at the hearing must</p>

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	provide notice to the opposing party or non-party, pursuant to 16 C.F.R. § 3.45(b). <sup>1</sup>
August 11, 2026	Case Management Conference #2 at 10:00 a.m. Eastern Time.
August 14, 2026	Complaint Counsel to identify rebuttal expert witness(es) and serve rebuttal expert witness report(s). Any such reports are to be limited to rebuttal of matters set forth in Respondents' expert witness reports. If material outside the scope of fair rebuttal is presented, Respondents will have the right to seek appropriate relief (such as striking Complaint Counsel's rebuttal expert witness report(s) or seeking leave to submit surrebuttal expert witness report(s)).
August 26, 2026	Deadline to file motions for <i>in camera</i> treatment of proposed trial exhibits. <i>See</i> Additional Provision 18.
September 2, 2026	Deadline for parties to depose expert witnesses (including rebuttal expert witnesses) and exchange expert-related proposed exhibits.
September 2, 2026	Deadline for parties to file responses to motions for <i>in camera</i> treatment of proposed exhibits. <i>See</i> Additional Provision 18.
September 2, 2026	Complaint Counsel files pretrial brief supported by legal authority.
September 3, 2026	Deadline for parties to file motions <i>in limine</i> to preclude admission of evidence. <i>See</i> Additional Provision 19.
September 4, 2026	Joint Status Report #4, including parties' proposed stipulations of fact #3, which will be redlined against version #2 and clean.

<sup>1</sup> The Standard Protective Order states 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 ALJ within five days after it receives notice of a party's intent to introduce such material. Appendix A to Commission Rule 3.31. Commission Rule 3.45(b) states that parties who seek to use material obtained from a third party subject to confidentiality restrictions must demonstrate that the third party has been given at least ten days' notice of the proposed use of such material. To resolve this apparent conflict, this Scheduling Order requires that the parties provide at least ten days' notice to the opposing party or third parties to allow for the filing of motions for *in camera* treatment.

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<p>September 8, 2026</p>	<p>Case Management Conference #3 at 2:00 p.m. Eastern Time.</p>
<p>September 9, 2026</p>	<p>Deadline for parties to file responses to motions <i>in limine</i> to preclude admission of evidence. <i>See</i> Additional Provision 19.</p>
<p>September 9, 2026</p>	<p>Parties exchange objections to final proposed witness lists and exhibit lists, serving courtesy copies on the ALJ.</p> <p>Parties are to review the Commission’s Rules on the admissibility of evidence before filing objections to exhibits and only raise objections that are necessary and valid.</p>
<p>September 16, 2026</p>	<p>Parties exchange proposed stipulations as to law and proposed stipulations of fact #4, the admissibility of proposed exhibits, and the expertise of any expert witnesses. Proposed stipulations of fact #4 will be filed and provided redlined against version #3 and clean.</p>
<p>September 16, 2026</p>	<p>Respondent files its pretrial brief supported by legal authority.</p>
<p>September 22, 2026</p>	<p>Final prehearing conference begins at 10:00 a.m. Eastern Time. The parties shall meet and confer prior to the final prehearing conference regarding trial logistics and proposed stipulations as to law, facts, admissibility of exhibits, and expertise of any expert witnesses.</p> <p>To the extent the parties have agreed to stipulate to any issues of law, facts, admissibility of exhibits, and/or expertise of any expert witnesses, the parties shall prepare a list of such stipulations and submit a copy of the stipulations to the ALJ one business day prior to the final prehearing conference. At the final prehearing conference, the parties’ list of stipulations shall be marked as “JX1” and signed by each party, and the list shall be offered into evidence as a joint exhibit. No signature by the ALJ is required. Any subsequent stipulations may be offered as agreed to by the parties.</p> <p>Also at the final prehearing conference, the parties may present any objections to the final proposed witness lists and proposed exhibits. All proposed exhibits will be admitted or excluded to the extent practicable. To the extent the parties agree to the admissibility of proposed exhibits, the parties shall prepare a list identifying each proposed exhibit to which admissibility is stipulated, which shall be offered into</p>

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	evidence as a joint exhibit marked as “JX2” and signed by each party. No signature by the ALJ is required.
September 24, 2026	Evidentiary Hearing begins at 10:00 a.m. Eastern Time.

The Additional Provisions in the September 29, 2025 Amended Scheduling Order are revised in the attachment that follows.

## 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.**

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- 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.
  - 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 9437” 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

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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, 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. For purposes of discovery, there are three remaining Respondents, which for purposes of this Order together shall be treated as a single party.
8. 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 information, 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.
9. Complaint Counsel is limited to serving on Respondent:
  - a. 25 requests for production of documents, including all discrete subparts;
  - b. 15 interrogatories, including all discrete subparts, and including those previously served;

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- c. 25 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; and
- d. Notwithstanding the limitations in this paragraph, Respondent will comply with discovery requests served prior to April 1, 2025 subject to their objections and any prior agreements between the parties.

10. Respondent is limited to serving on Complaint Counsel:

- a. 20 requests for production of documents, including all discrete subparts;
- b. 15 interrogatories, including all discrete subparts, and including those previously served;
- c. 25 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; and
- d. Notwithstanding the limitations in this paragraph, Complaint Counsel will comply with discovery requests served prior to April 1, 2025 subject to their objections and any prior agreements between the parties.

11. 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.

12. 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 party of the obligation to produce documents responsive to the part of the request not objected to.
- b. Subject to any prior agreements between the parties, the party responding to document requests will make a good-faith effort

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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.

13. 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**

### 14. General Provisions.

- a. Unless all parties, and where applicable any interested non-party otherwise agree, or the Administrative Law Judge orders otherwise for good cause shown, 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.

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- e. Regardless of the allocation of time set forth below, the party noticing the deposition first will examine first.
- f. These provisions apply regardless of whether presence of the deponent is secured by notice alone, or by notice and subpoena.
- g. The party who examines second will **not** be limited, in its examination, to the scope of the deponent's testimony during preceding examination.
- h. Depositions of all persons designated as representatives for purposes of a 3.33(c) deposition shall count as one deposition, even if the noticed entity designates multiple persons to provide testimony.
- i. Unused examination time in Complaint Counsel's allocation shall not transfer to Respondent and vice versa.

#### 15. Allocation of Examination Time.

- a. The allocations below apply in the absence of a different agreement between the parties for any or all depositions. For purposes of this Paragraph 15, an affiliated witness is a current employee; former employee using the same counsel as the party or counsel paid for by the party; or is an agent, contractor or other representative that is under the control of a party.
- b. For any witness affiliated with Respondent who is not a designated expert and was not previously examined during the investigation underlying this case: Complaint Counsel will have 6 hours examination time and Respondent will have 2 hours.
- c. For any witness affiliated with Respondent who is not a designated expert and was previously examined during the investigation underlying this case: Complaint Counsel will have 5 hours examination time and Respondent will have 3 hours.
- d. For any witness affiliated with Respondent who is a designated expert: Complaint Counsel will have 7 hours examination time and Respondent groups will have 1 hour.
- e. For any witness not affiliated with Respondent: Complaint Counsel will have 4 hours examination time and Respondent will have 4 hours examination time.

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- f. For depositions of insulin drug manufacturers (including their current or former employees, consultants, agents, contractors, or other representatives): Complaint Counsel will have 4 hours examination time and Respondent will have 4 hours examination time.
- g. For any expert designated by Complaint Counsel, Respondent will have 7 hours. Complaint Counsel will have 1 hour.
- h. For persons who provided a declaration, affidavit, or comparable note of support (a “Witness Statement”), regardless of the party noticing the deposition:

the party that obtained the Witness Statement will have 1.0 hour, and the other party will have 7.0 hours of examination time.

16. 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.

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- 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

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

18. 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).

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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.

#### 19. 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* “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 will be limited to 4 motions *in limine*.

## Witnesses

20. As per the above-schedule, each party shall serve an amended preliminary witness list that reflects the party's good faith designation of witnesses it presently intends to call at the evidentiary hearing in light of the current discovery record and the March 23, 2026 and January 20, 2026 Commission Orders Withdrawing Matters from Adjudication with Respect to the Caremark and ESI Respondents. Each party's forthcoming amended preliminary witness list shall be limited to 15 witnesses.

21. As of the date of this order, each party shall be permitted to depose the individuals listed on each party's amended preliminary witness list and take a reasonable number of agreed-upon additional depositions of fact witnesses not listed on the parties' amended preliminary witness lists.

22. The parties' final proposed witness lists shall be limited to 20 witnesses for Complaint Counsel and 15 witnesses for Respondent. 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 consent, by an order of the Administrative Law Judge upon a showing of good cause.

23. 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;

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- 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.

24. 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.

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

### **Expert Witnesses**

- 26. Each party’s expected expert witness list shall be limited to 5 expert witnesses.
- 27. 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 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 24(g) below, except that documents and materials already produced in the case need only be listed by Bates number.

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- 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
  - 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.

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- 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.

28. 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).

29. 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**

30. The parties agree to confer in good faith and revisit the hearing date if a party's lead trial counsel has an immovable conflict.

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

- 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**

32. 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.

33. 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.

34. 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.

35. 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

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

- a. Complaint Counsel's exhibits shall bear the prefix PX.
- b. Respondent's exhibits shall bear the prefix ORX.
- c. Exhibits submitted on behalf of all parties for both sides shall bear the prefix "JX," or another appropriate designation.
- d. Complaint Counsel's and Respondent's demonstrative exhibits shall bear the prefixes PXD and OXD, respectively.
- e. 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.

37. 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.

38. 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 ORX200 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.
- c. Counsel shall contact the court reporter regarding submission of exhibits.

## Briefing and Page Limitations

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

## Joint Status Reports

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

- 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.

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- 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.

**ORDERED:**

*Jay L. Himes*  
\_\_\_\_\_  
Jay L. Himes  
Administrative Law Judge

Date: May 12, 2026

## ATTACHMENT A

<b>Party and Non-Party Discovery Requests</b>			
<b>Proponent</b>	<b>Party Discovery<sup>1</sup> Sought</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 of 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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<b>Other Matters</b>			
<b>Update on the Related Federal Action</b>			
	<b>Pending Motions</b>	<b>Scheduled Court Dates</b>	<b>Other Information</b>