

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION



In the Matter of _____)
_____)
R.J. REYNOLDS TOBACCO COMPANY,) Docket No. 9285
a corporation. _____)
_____)

ORDER REGARDING COMPLAINT COUNSEL'S
MOTION TO RESCHEDULE TRIAL DATE

Having considered complaint counsel's motion to reschedule trial date dated September 25, 1998 and respondent's opposition thereto, as well as oral argument at the pretrial conference held on September 28, 1998, IT IS ORDERED that complaint counsel's motion is GRANTED in part and DENIED in part. Trial in this proceeding will commence November 9, 1998 -- one week later than was originally scheduled in the December 10, 1997 Discovery Order. This ruling is based on the following findings:

1. It is the policy of the Commission that adjudicative proceedings "be conducted expeditiously." 16 C.F.R. § 3.1. The Commission has recognized that "unnecessary delay in adjudications can have a negative impact on the Commission's adjudicatory program and law enforcement mission." 61 Fed. Reg. 50,640 (Sept. 26, 1996)(Rules of Practice Amendments: Interim Rules With Requests for Comments).⁴
2. The complaint in this proceeding was filed on May 28, 1997. By Order dated December 10, 1997, I approved the parties proposed trial date of November 2, 1998. This extension would necessarily delay the filing of the initial decision well beyond one year, as is required under Commission Rule 3.51(a) absent extraordinary circumstances or a pending collateral federal court proceeding. Respondent did not oppose complaint counsel's motion for entry of a negotiated discovery schedule, although it expressed no view as to the arguments set out in

⁴ The preamble to the Rules of Practice Amendments also notes that unnecessarily long proceedings (1) waste Commission and private resources, (2) extend legal uncertainty for respondents and third parties, (3) reduce the efficacy of remedies, (4) lessen the quality of agency decisions, (5) undermine administrative adjudication as an alternative to settlement, and (6) reduce the likelihood that a court might grant a preliminary injunction pending the outcome of the Commission's administrative proceeding. 61 Fed. Reg. 50,640.

complaint counsel's supporting memorandum.² Complaint Counsel Motion for Entry of Negotiated Discovery Schedule (Dec. 9, 1997) at 1-2.

3. Complaint counsel now move pursuant to Rule 3.21(c)(2) to extend that trial date for "at least 60 days." Complaint Counsel's Motion to Reschedule Trial Date (Sept. 25, 1998) at 1. This request would create scheduling conflicts on my own docket that would require me to extend the trial date back even farther. Rule 3.21(c)(2) permits an Administrative Law Judge to extend deadlines for good cause, following consideration of extensions already granted, the length of the proceeding, and the need to conclude the hearing in a timely manner. 16 C.F.R. § 3.21(c)(2). Complaint counsel argue that respondent's identification of "33 new witnesses" on its September 21, 1998 final witness list, and its effect on its trial preparation, constitutes sufficient cause for extension. *Id.*
4. Respondent has represented that 20 of the "33 new witnesses" on its final witness list are fact witnesses who were named to provide context for, and explain the content of, documents that are relied upon by complaint counsel. Respondent has offered to remove these 20 witnesses from its list on the condition that the trial start not later than November 9, 1998.
5. Eight of the remaining 13 witnesses on respondent's final witness list are fact witnesses that have already been deposed by complaint counsel. Complaint counsel have stated that, with limited exception, they do not intend to continue these depositions.
6. The five witnesses who remain on respondent's final witness list are experts not previously identified. Complaint counsel, in its final witness list, named three additional witnesses. Respondent's and complaint counsel's witnesses are currently available to be deposed. They will continue to be available to be deposed up to, and, if necessary, following the commencement of the trial in this proceeding.
7. The parties have known for nearly ten months that motions in limine, stipulations, written objections, and pretrial briefs would be due in October 1998. It is insufficient cause for complaint counsel to assert that their discovery burden is compounded by their having to satisfy these obligations that have long been known to them. This is especially true in light of the late date in which complaint counsel made their principal experts available for deposition by respondent.

² In its supporting memorandum, complaint counsel argued, in the alternative, that extraordinary circumstances and collateral federal court proceedings justify the extension of the time period in which the initial decision must be filed. Mem. in Support of Motion for Entry of Negotiated Discovery Schedule (Dec. 9, 1998). These issues were not resolved by the December 10, 1997 Order and need not be considered here. The issue to be decided is not whether the filing of an initial decision beyond the one year deadline is warranted under Rule 3.51(a); the issue is whether there is good cause to extend the trial date under Rule 3.21(c)(1). The facts demonstrate that there is no good cause.

8. Authority cited by complaint counsel in its motion and during oral argument are not persuasive. In *Mawby v. United States*, 999 F.2d 1252 (8th Cir. 1993), the trial court's decision was reversed because plaintiff did not have "opportunity to rebut last minute evidence put on by the government." Respondent's disclosure is not last minute and complaint counsel will have more than adequate opportunity to rebut at trial. *Allread v. City of Grenada*, 988 F.2d 1425 (5th Cir. 1993) and *Automatic Data Processing, Inc.*, Dkt. No. 9282 (Mar. 3, 1997) are not analogous to the facts at issue. Finally, *Hoescht Celanese Corp.*, D-9216, 1990 FTC LEXIS 285 (Order Modifying Prehearing Scheduling Order) (Aug. 21, 1990) (Timony, ALJ) has no application whatsoever. That Order extended the trial date to accommodate my trial schedule following the retirement of Administrative Law Judge Montgomery K. Hyun.
9. In light of the strong Commission policy for expeditious adjudication and avoidance of unnecessary delay, the extension of more than ten months already granted, the extraordinary length of the proceedings to date, the need to conclude the evidentiary hearing and render an initial decision in a timely manner, respondent's willingness to remove the 20 fact witnesses from its final witness list (excepting Claude Teague), and the scheduling conflicts this requested extension of time would create with my docket in the coming year, I find there is insufficient cause to extend the trial date beyond one week. Accordingly, trial will commence November 9, 1998.

Dated: September 20, 1998

James P. Timony
James P. Timony
Chief Administrative Law Judge