

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

COMMISSIONERS: **Deborah Platt Majoras, Chairman**
 Orson Swindle
 Thomas B. Leary
 Pamela Jones Harbour
 Jon Leibowitz

) In the Matter of)		
) NORTH TEXAS)		Docket No. 9312
) SPECIALTY PHYSICIANS,)		
) a corporation.)		

ORDER DENYING MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Voluntary Trade Council (VTC) has filed a motion for leave to file a brief *amicus curiae* in this matter, and has attached to that motion a copy of the brief it proposes to file. For the reasons set forth below, the Commission denies the motion.

On September 16, 2003, the Commission issued an administrative complaint against a group of Texas physicians, charging that they unlawfully restrained competition in the Fort Worth area. The Administrative Law Judge (ALJ), D. Michael Chappell, upheld the Commission’s complaint. Respondent then appealed.¹

On February 18, 2005, VTC filed the motion at issue here. VTC states that it is “a nonprofit research and education organization that develops practical solutions to the problems caused by violent state intervention in free markets.” VTC Motion at 2. VTC argues that its Brief is filed “in support of neither party . . .”, and therefore that it was not required to file its Brief at the same time as either party. *Id.* at 3.

Complaint Counsel opposes the motion on the ground that VTC’s motion is untimely filed, pursuant to Commission Rule 3.52(j), 16 C.F.R. § 3.52(j) (2005). Complaint Counsel note that VTC argues in its Brief “that the Commission lacks authority to adjudicate the complaint against North Texas Specialty Physicians. . . .”, and maintains that this argument is in support of

¹ Complaint Counsel appealed the part of the ALJ’s Initial Decision that related to the discussion of market definition, and certain provisions of the Order entered by the ALJ.

Respondent's position. Consequently, Complaint Counsel argues that VTC should have filed its Brief on January 14, 2005, the same day that Respondent was required to file its Appeal Brief. Complaint Counsel's Opposition at 1-2. Complaint Counsel do not object, however, to treating the VTC filing, "for record keeping purposes, as a public comment on a pending Commission proceeding, rather than as part of the adjudicative record in this case." *Id.* at 2.

Rule 3.52(j) of the Commission Rules of Practice provides in relevant part:

Except as otherwise permitted by the Commission, an amicus curiae shall file its brief within the time allowed the parties whose position as to affirmance or reversal the amicus brief will support. The Commission shall grant leave for a later filing only for cause shown, in which event it shall specify within what period such brief must be filed.

16 C.F.R. § 3.52(j) (2005).

Although VTC suggests that its Brief supports neither party, numerous statements in both its Motion and in its Brief indicate that the Brief in fact supports the position of Respondent "as to affirmance or reversal. . . ." VTC's Motion states that the Brief "presents objections to the constitutional legitimacy of the Commission and the economic principles of Complaint Counsel's case. . . . [and] constitutes a statement of objections on behalf of United States citizens that refuse to acknowledge the Commission's authority to act in their name and that of the public interest." VTC Motion at 2. The Brief itself states, *inter alia*, that "Neither the Sherman Act nor the FTCA prohibit the particular acts challenged by Complaint Counsel . . ."; "Complaint Counsel's arguments are problematic on a number of fronts. . . ."; "NTSP has adequately addressed the issue of whether its alleged restraints of trade were 'unreasonable' under the prevailing Sherman Act case law."; and ". . . the Commission has no constitutional authority to exercise the judicial power of the United States in adjudicating any complaint against NTSP." VTC Brief at 4, 7, 9.²

These arguments, if true, would require reversal of the ALJ's decision and thus plainly constitute support for Respondent's position that the Initial Decision should be reversed. Consequently, the VTC Brief should have been filed on January 14, 2005, the day on which Respondent was required to file its Appeal Brief, as prescribed by Commission Rule 3.52(j), 16

² The VTC brief makes other statements that similarly support the position of Respondent, such as "The constitutional problems with Complaint Counsel's case extend so far as to negate the prosecution itself, for the Commission cannot adjudicate this case, nor for that matter can Section 5 of the FTCA or the preceding Sherman Act be enforced consistent with the Commission's delegation of legislative power." (VTC Brief at 5); "The Initial Decision's proposed Order creates what amounts to a discriminatory tariff against NTSP," (VTC Brief at 13); ". . . the proposed Order violates the First Amendment." (VTC Brief at 13); and "The Commission has no authority to try any complaint against NTSP, or any other person or corporation." (VTC Brief at 16).

C.F.R. § 3.52(j). Instead, VTC filed its Motion and Brief on February 18, 2005, more than one month later.


VTC also relies on Rule 29 of the Federal Rules of Appellate Procedure to support its position. This argument is incorrect because the Federal Rules of Appellate Procedure are not applicable to the Commission.³

Accordingly,

IT IS ORDERED THAT the Motion of The Voluntary Trade Council for leave to file a brief *amicus curiae* be, and it hereby is, **DENIED**; and

IT IS FURTHER ORDERED THAT while the VTC Brief will not be placed in the adjudicative record of this proceeding, it will be treated as a part of the public records of the Commission, given its status as an attachment to a filing in this proceeding and its designation by VTC as a public record document.

By the Commission.


Donald S. Clark
Secretary

ISSUED: June 7, 2005

³ Even if the Commission followed Rule 29, it would not aid VTC. The rule requires (1) an *amicus curiae* supporting a particular party to file its brief and motion for leave to file “no later than 7 days after the principal brief of [that] party,” and (2) an *amicus curiae* supporting neither party to file its brief “no later than 7 days after the appellant’s or petitioner’s principal brief is filed.” Fed. R. App. 29. Under the rule, VTC’s brief would have been due January 26, 2005, twenty-three days before VTC submitted its pleading.