

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



_____)
In the Matter of)
)
OSF Healthcare System,)
a corporation, and)
)
Rockford Health System,)
a corporation,)
Respondents.)
_____)

DOCKET NO. 9349

**ORDER ON RESPONDENTS' MOTION TO COMPEL DOCUMENTS
REQUESTED FROM UNITEDHEALTH GROUP AND
TO ENFORCE SUBPOENA *AD TESTIFICANDUM***

I.

Respondents OSF Healthcare System and Rockford Health Systems ("Respondents") filed a Motion to Compel UnitedHealth Group to Produce Documents Requested by Subpoena *Duces Tecum* and to Enforce Subpoena *Ad Testificandum* ("Motion") on February 6, 2012. Third party UnitedHealth Group, Inc. ("United") submitted an Opposition on February 13, 2012. For the reasons set forth below, Respondents' Motion to Compel is DENIED IN PART and GRANTED IN PART.

II.

Respondents state that they served a subpoena on United requesting certain documents for the period from January 1, 2007 to present, to be produced for inspection on January 10, 2012. Respondents assert that the following five Subpoena requests are at issue: (1) Subpoena Request No. 7, which seeks member surveys, studies, or analyses; (2) Subpoena Request No. 12, which seeks communications between physician network personnel and sales personnel regarding health plan management; (3) Subpoena Request No. 15, which seeks documents relating to competition between health plans; (4) Subpoena Request No. 18, which seeks documents relating to United's negotiations with providers of general acute care inpatient hospital services in the Rockford area; and (5) Subpoena Request No. 19, which seeks documents relating to pricing models that compare rates for hospitals services.

In addition, Respondents state that they served a subpoena *ad testificandum* for the deposition of United's Vice Regional President for Network Management, Ms.

Michelle Lobe, on January 23, 2012. Respondents further recite the negotiations it engaged in with United and attached a Certificate of Conference, as required by Commission Rule 3.22(g).

United argues that the requests are overly broad and that United has already expended significant time and resources locating, gathering, and producing responsive documents. United further argues that Ms. Lobe has already been deposed twice and provided live testimony during a preliminary injunction hearing and thus should not be compelled to provide additional deposition testimony.

III.

With respect to Request Numbers 7 and 15, United asserts that United has conducted a reasonable search and has not located any documents responsive to these requests. Respondents' Motion does not provide a basis for not accepting United's representation with respect to Request Numbers 7 and 15. Therefore, Respondents' Motion is DENIED as to Request Numbers 7 and 15.

With respect to Request Number 12, United asserts that the request is overly broad and that Respondents have not advanced a specific argument showing why the requested documents are relevant. United states, as an example, that the request for communications relating to "proposed or desired changes to the provider network" will likely encompass communications that have nothing to do with the issues raised in this action and that communications relating to member or employer feedback would more than likely require United to search for customer complaints about issues relating to the timeliness of processing health claims.

In agency actions, "[s]ome burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency's legitimate inquiry and the public interest." *In re Polypore*, 2009 FTC LEXIS 41, at *10 (Jan. 15, 2009); *Federal Trade Commission v. Dresser Indus.*, 1977 U.S. Dist. LEXIS 16178, at *13 (D.D.C. 1977). "The burden of showing that the request is unreasonable is on the subpoenaed party." *In re Polypore*, 2009 FTC LEXIS 41, at *10 (Jan. 15, 2009); *FTC v. Dresser Indus.*, 1977 U.S. Dist. LEXIS 16178, at *13 (D.D.C. 1977). "Further, that burden is not easily met where, as here, the agency inquiry is pursuant to a lawful purpose and the requested documents are relevant to that purpose." *Id.* (enforcing subpoena served on non-party by the respondent). See *In re Kaiser Alum. & Chem. Corp.*, 1976 FTC LEXIS 68, at *19-20 (Nov. 12, 1976) ("Even where a subpoenaed third party adequately demonstrates that compliance with a subpoena will impose a substantial degree of burden, inconvenience, and cost, that will not excuse producing information that appears generally relevant to the issues in the proceeding.").

However, subpoena requests that seek documents "concerning" or "relating to" have been found to lack the reasonable particularity required by Commission Rule 3.34(b) (a subpoena *duces tecum* "shall specify with reasonable particularity the material to be produced"). *E.g.*, *In re North Texas Specialty Physicians*, 2004 FTC LEXIS 19,

*12 (Feb. 4, 2004) (limiting request seeking “[a]ll internal and external correspondence, memoranda, and messages concerning or relating to” the respondent). Consumer complaints about the timeliness of processing health claims are not relevant to the issues in this case.

Accordingly, Respondents’ motion to compel documents responsive to Request Number 12 is GRANTED IN PART. Request Number 12 is hereby narrowed as follows:

12. Documents describing or reflecting any communications between individuals responsible for managing your hospital and physician networks and individuals in your sales group regarding your health plan networks in the Relevant Area, including but not limited to discussions of employer feedback, marketability or quality of the network, proposed or desired changes to the provider network, and product pricing, but excluding communications, not otherwise responsive to this Subpoena, that describe or reflect consumer complaints about the timeliness of processing health claims.

With respect to Request Number 18, United asserts that the request is overly broad and imposes a substantial burden. In addition, United asserts that to comply with Request Number 18, as written, would require United to search and produce documents that Respondents already have in their possession. United further asserts that it has already produced its contracts with Respondents and that Respondents have failed to show why United should be required to search for and produce communications relating to its contract negotiations with hospitals in the Rockford area.

Discovery shall be limited if Administrative Law Judge determines that the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive. 16 C.F.R. § 3.31(c)(2)(i). To the extent that Request Number 18 seeks documents that Respondents already possess, the Motion is DENIED. However, documents consisting of United’s communications in its contract negotiations with hospitals in the Rockford area are relevant and a request for such documents is not overly broad.

Accordingly, Respondents’ motion to compel documents responsive to Request Number 18 is GRANTED IN PART. Request Number 18 is hereby narrowed as follows:

18. Documents describing or reflecting your negotiations with providers of the Relevant Services in the Relevant Area from January 1, 2005 to the present, including but not limited to contract proposals, drafts, and communications between you and providers of Relevant Services in the Relevant Area; documents identifying key or “must-have” hospitals, outpatient facilities, or primary care physicians in the Relevant Area; documents analyzing the geographic coverage of providers; documents, information, and data relied upon during contract negotiations (such as quality measures, member utilization patterns, and employer or member feedback regarding your provider network or product offerings); documents relied upon to determine whether proposed reimbursement rates are

comparable to those you pay to other providers of Relevant Services in the Relevant Area; documents reflecting whether to include or exclude any hospital or hospital system, or physician or physician organization in your provider network, communications regarding any provider's desire to exclude any other providers from a health plan; and copies of the final provider contracts, including any amendments or modifications, for Relevant Services in the Relevant Area.

With respect to Request Number 19, United asserts that the request seeks documents beyond the Relevant Area and is not limited to a specific time period. United further asserts that because it has produced its contracts and Respondents know the terms of its contracts with other insurance companies and payors, Respondents have the information they seek in this request.

Absent a showing of the relevance of information pertaining to the geographic area alleged in the Complaint or asserted in the Answer, a document request served on a third party will be limited to the relevant geographic area. *In re North Texas Specialty Physicians*, 2004 FTC LEXIS 19, *13 (Feb. 4, 2004). Unless a more limited time has already been agreed to by Respondents, the specific time period shall be limited to the period requested in Subpoena Instruction Number 6, January 1, 2007 to present.

Documents generated by United in their ordinary course of business in which United compares the rates that United is charged by Respondents to the rates United is charged by SwedishAmerica are highly relevant to this proceeding and may be more dispositive than a document generated by Respondents' counsel or experts creating such comparisons from the documents received in litigation.

Accordingly, Respondents' motion to compel documents responsive to Request Number 19 is GRANTED IN PART. Request Number 19 is hereby narrowed as follows:

19. Documents describing or reflecting pricing models that compare the rates of the Relevant Hospitals for Relevant Services and outpatient services to any hospital or provider in the Relevant Area, including documents that you use to determine how actual or proposed contracts with the Relevant Hospitals compare to each other and how those contracts compare to contracts they have with other insurance carriers.

IV.

Respondents also seek to enforce the subpoena *ad testificandum* for the deposition of United's Vice Regional President for Network Management, Ms. Michelle Lobe. Respondents state that Ms. Lobe testified on January 10, 2012 in response to a subpoena to testify in the Northern District of Illinois proceeding, *Federal Trade Commission v. OSF Healthcare System and Rockford Health System* (Case No 11-cv-50344) ("related federal proceeding") ("January 10, 2012 deposition"). Respondents further state that since Ms. Lobe's testimony, United has produced additional documents responsive to Respondents' subpoena requests on January 19, 2012, January 20, 2012, and February 3,

2012. Respondents then assert that they intend to depose Ms. Lobe on documents produced after the January 10, 2012 testimony.

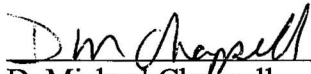
United asserts that Ms. Lobe has already provided testimony on the following three instances: (1) on September 27, 2011, in an investigational hearing conducted by Complaint Counsel in connection with the FTC's investigation into the proposed merger; (2) at the January 10, 2012 deposition; and (3) on February 1, 2012, by providing testimony at the preliminary injunction. United asserts that Respondents made the choice to depose Ms. Lobe on January 10, 2012, and should not be entitled to another deposition.

Although Respondents deposed Ms. Lobe on January 10, 2012 in the related federal proceeding, in advance of her testimony at the preliminary injunction in that matter, Respondents have since received additional documents in this proceeding on which they wish to question Ms. Lobe. Thus, Respondents have provided a sufficient reason to take a deposition of Ms. Lobe in this matter. However, such deposition is allowed only on the limited basis of questioning Ms. Lobe about documents produced after January 10, 2012. Accordingly, in this respect, Respondents' Motion is GRANTED.

V.

The close of discovery in this case is February 17, 2012. That deadline is hereby extended to February 23, 2012 for the limited purpose of allowing United to produce documents and to February 27, 2012 for the limited purpose of allowing United to take the deposition of Ms. Lobe as required by this order.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: February 14, 2012