

ORIGINAL



UNITED STATES OF AMERICA

[REDACTED]

**COMMISSIONERS:**

**William E. Kovacic, Chairman  
Pamela Jones Harbour  
Jon Leibowitz  
J. Thomas Rosch**

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In the Matter of )  
)  
)  
North Texas Specialty Physicians, )  
a corporation. )  
\_\_\_\_\_)

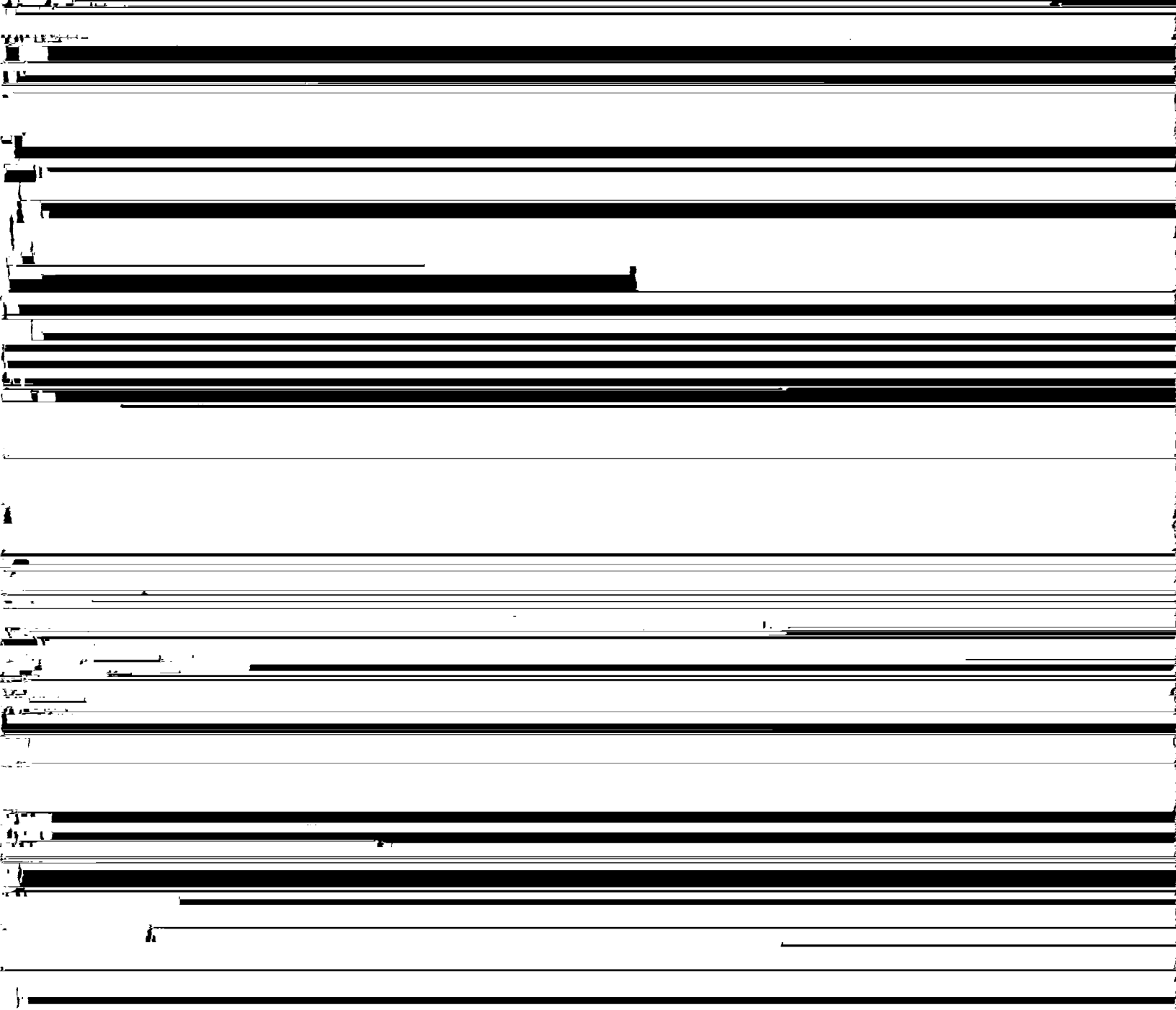
**PUBLIC**  
Docket No. 9312

**Complaint Counsel's Reply Regarding Order Modification on Remand**

The central issue on remand is how to modify Paragraph II A C of the Order on Remand.

First, neither the remand language nor any other part of the opinion indicates that the court of appeals believed it necessary to delete Paragraph II.A.2 to cure the overbreadth concern. Although well aware that the same issue had prompted the administrative law judge to omit the provision from his recommended order, the court did not strike the provision or direct the Commission to do so. Instead, it ordered the case remanded “for modification of subsection II.A.2 of the remedial order in a manner consistent with this opinion.” *North Texas Specialty Physicians v. F.T.C.*, 528 F.3d 346, 372 (5<sup>th</sup> Cir. 2008).

Nothing in the court's opinion indicates that the Commission is required to



messenger contracts or become a party to contracts sent to it by payors regardless of risks”  
NTSP Resp. at 3-4 (internal quotes omitted). In other words, NTSP asserts that complaint  
counsel has recommended a modification that may be “meant to” do precisely what the court of  
appeals found problematic in the current language. It makes this accusation without pointing to  
any evidence, and despite abundant evidence to the contrary. As page two of NTSP’s brief  
reflects, the Commission has made numerous statements explaining that the Order is not  
intended to impose a ban on

modification would add language to the Order to reflect that intent, by limiting the ban on

In the end, NTSP's brief is significant for what it does not say. Notably, NTSP has declined complaint counsel's invitation to provide some substance to its vague claims about risk avoidance justifications for refusals to deal with payors. Nor does it explain how complaint counsel's recommended modification would prevent it from taking legitimate action to protect itself from risky contracts. There is no dispute that, as the court of appeals observed, risk avoidance is a legitimate goal. But, as the court's opinion also reflects, it is not enough to merely assert a legitimate goal. 528 F.3d at 369 (rejecting risk avoidance justification).

In sum, NTSP has offered nothing that undermines the conclusion that the recommended modification to Paragraph II.A.2 set forth in our opening brief is a sound change that fully addresses the concerns expressed by the court of appeals.<sup>3</sup>

*Amir Patel*

**Certificate of Service**

I, Deborah Tucker, hereby certify that on September 5, 2008, I caused a copy of Complaint Counsel's Reply Regarding Order Modification on Remand to be filed with:

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