

Pursuant to 16 C.F.R. § 352(j), The American Hospital Association ("AHA")

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

	In the Matter of	Docket No. 9315	
	EVANSTON NORTHWESTERN HEALTHCARE CORPORATION,	) Public Record )	
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		ORDER	
•	Upon consideration of the Motion	n of the American Hospital Association for Leave to	
•	File Brief Amicus Curiae In Support of F	Evanston Northwestern Healthcare Corporation and	
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and oral argument by amicus curiae will assist in the determination of the matters presented

#### **CERTIFICATE OF SERVICE**

In the Matter of Evanston Northwestern Healthcare Corporation

#### Docket No. 9315

I, Sharis Arnold Pozen, hereby certify that on this 16th day of December, 2005, copies of the Brief for Amicus Curiae the American Hospital Association in Support of the Evanston Northwestern Healthcare Corporation were served by electronic mail and hand Donald S. Clark Secretary Federal Trade Commission Room H-159

Washington, DC 10580

Duane M. Kelley Winston & Strawn LLP 35 West Wacker Drive Chicago, IL 60601 dkelley@winston.com

Michael L. Sibarium Winston & Strawn LLP 1700 K Street, NW Washington, DC 20005

I further certify that all parties required to be served have been served.

Sharis Arnold Pozen

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

COMMISSIONERS:	Deborah Platt Majo Thomas B. Leary Pamela Jones Harb Jon Leibowitz	-	irman
In the Matter of		) )	Docket No. 9315
EVANSTON NORTHV HEALTHCARE COR		)	Public Record
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# AMERICAN HOSPITAL ASSOCIATION'S AMICUS CURIAE BRIEF IN SUPPORT OF EVANSTON NORTHWESTERN HEALTHCARE CORPORATION

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Dated: December 16, 2005

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### I. INTRODUCTION

The American Hospital Association ("AHA") is a national advocacy organization that

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	nearly 4,800 hospitals and health systems covering the entire spectrum of the field, from large
	urban hospitals to community hospitals to small and typically rural, critical access hospitals. For
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	typically handled, likely to cost hospitals millions of dollars in compliance with FTC requests
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	large-scale review of consummated hospital mergers in numerous markets going back a number
	large-scale review of consummated hospital mergers in numerous markets going back a number of years.
	of years.  Predictably, this backward-looking review of unprecedented scale resulted in a challenge
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alleging violations by ENH in the complaint advanced a novel anticompetitive effects theory that The ALJ declined to adopt Complaint Counsel's unrealistic geographic market and

of anticompetitive effects is not only inconsistent with the requirements of the Merger Guidelines, it impermissibly empowers the FTC to undo any hospital merger it pleases without advancing a reasonable and defensible theory of anticompetitive effects.

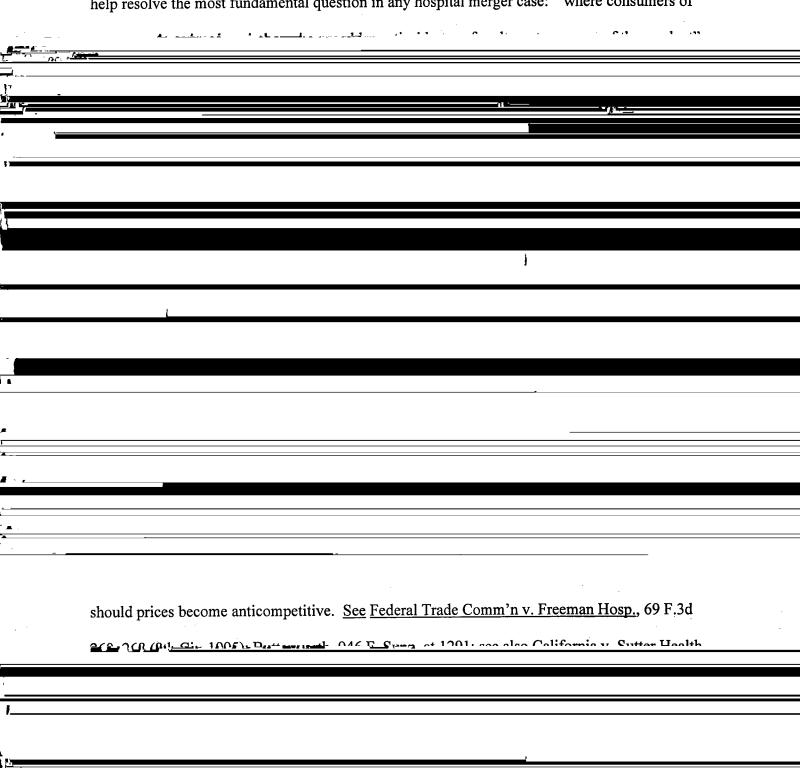
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	unreliable analysis that will create uncertainty and confusion for the entire hospital field as well
	1. The Geographic Market Posited in the Initial Decision Lacks Proper Empirical Foundation Because the ALJ Rejected Empirical Data in Favor of Opinion Testimony and Unscientific Survey Evidence.
	Count I of the Commission's Complaint proposed an unsubstantiated—and unheard-of—
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	of the Complaint attempted to eliminate defining relevant markets all together. See FTC

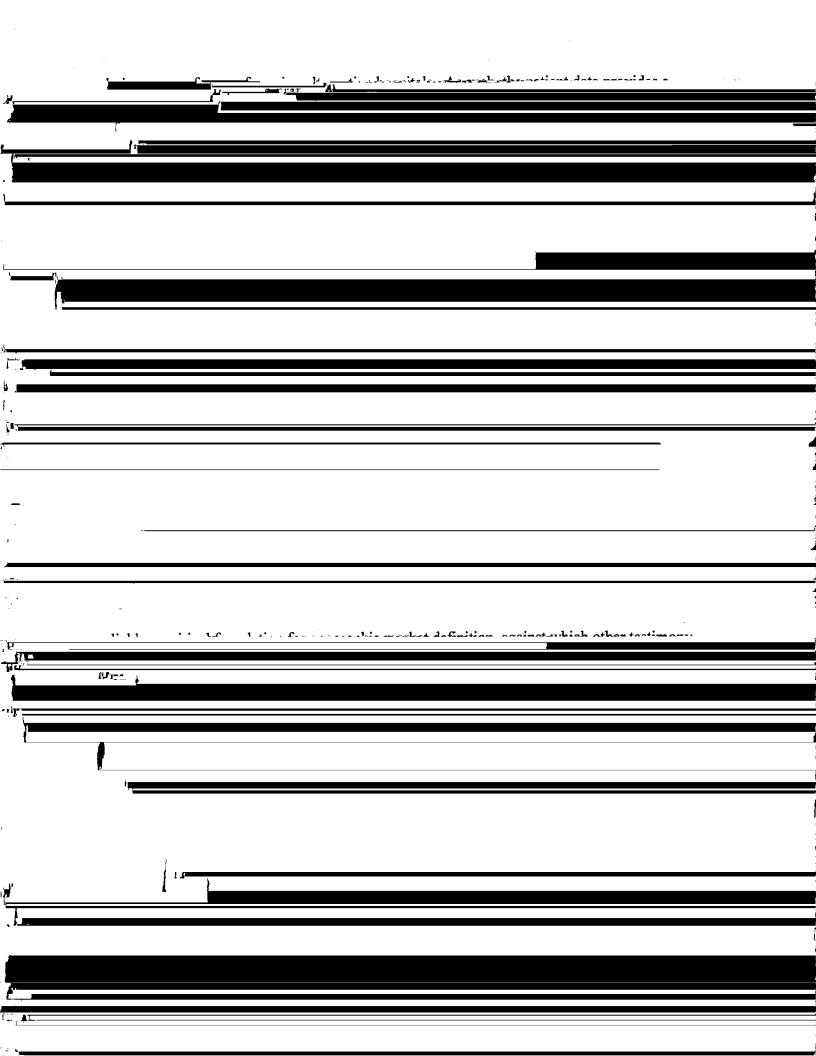
Complaint § 28-32.5 ENH, in contrast, offered a conservative nine-hospital geographic market

# a) Empirical Evidence of the Geographic Market is Critical to a Hospital Merger Analysis.

Empirical analysis has always driven the determination of the relevant geographic market in the hospital merger context. More than any other kind of evidence, reliable empirical data can help resolve the most fundamental question in any hospital merger case: "where consumers of

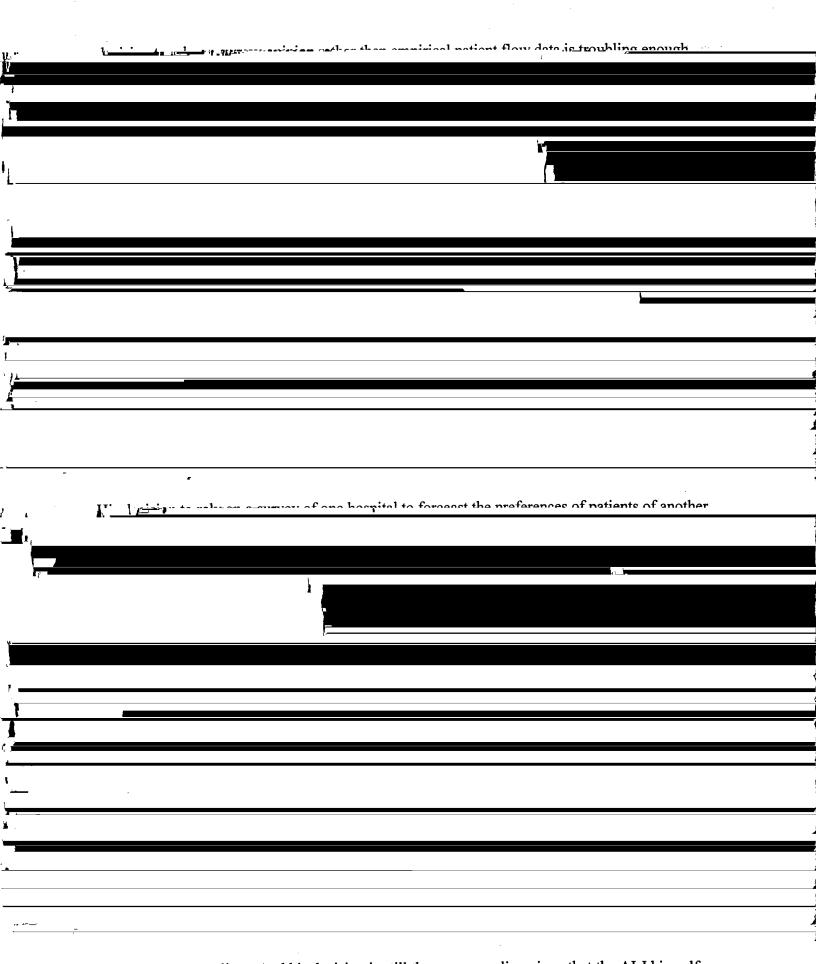


Supp. at 130, 140-42 (rejecting argument that defendant was a "must have" hospital). Insurance nations also was nations flow data to determine if they can "steer nations to lower cost health



	role to play in the competition for hospital services. This premise is wrong. Patients, not
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	insurance companies, consume hospital services. Butterworth, 946 F. Supp. at 1299. Health
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·	that serve them. Patient preferences—demonstrated by actual behavior—drive the decisions
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	made by both insurance companies and hospitals in all stages of competition. Health insurance
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economic interests and is thus suspect." Tenet, 186 F.3d at 1054 & n.15 ("Although the The insurance company testimony on which the ALJ relied in this case is particularly from interested insurance companies to establish the views and preferences of employers and patients. potentially tainted with bias—such testimony would still be inherently less reliable than empirical evidence such as patient flow and origin data that the ALJ refused to consider. Unlike insurance company opinion testimony—which, at best, is only a slanted guess as to patients' preferences—empirical patient flow and origin data evidences patients' actual behavior and their

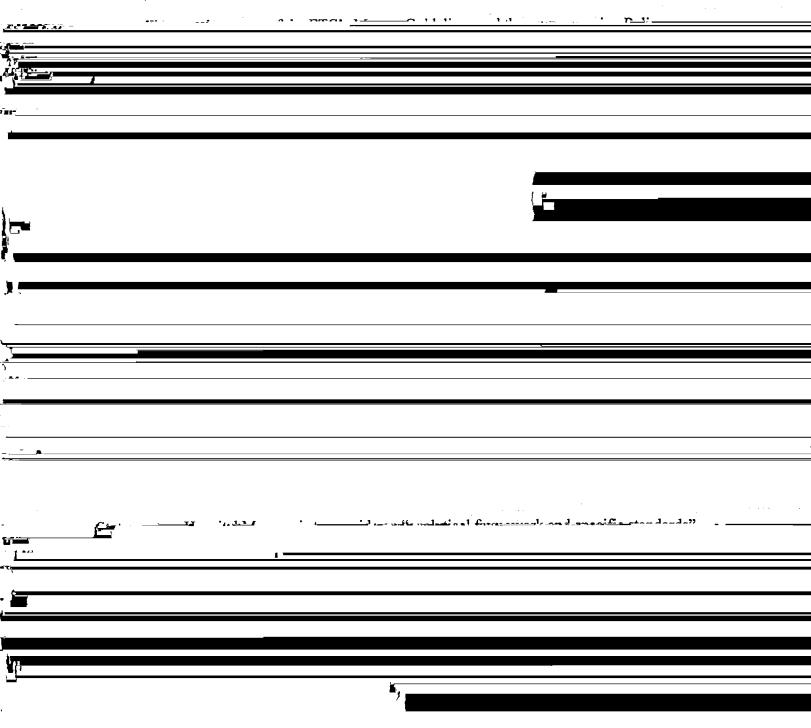


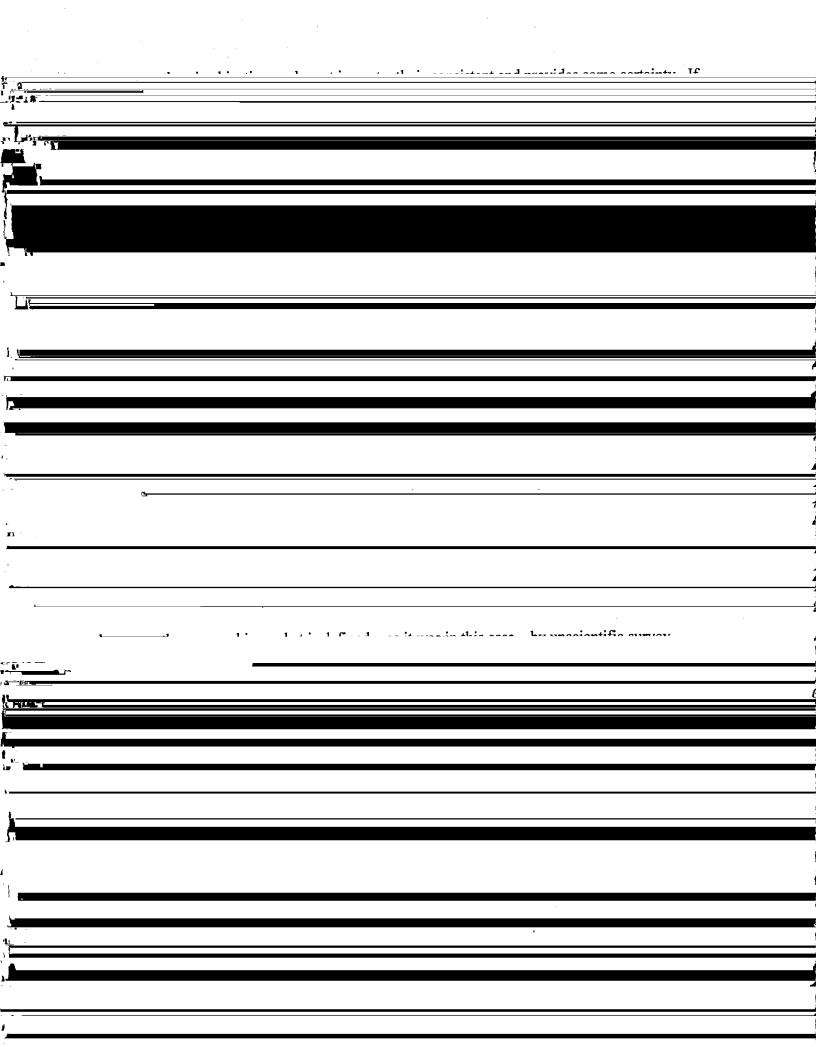
is even more unsettling. And his decision is still the more puzzling given that the ALJ himself describes the report as "not [] a scientific survey." <u>Initial Decision</u> at 142. This is too kind a

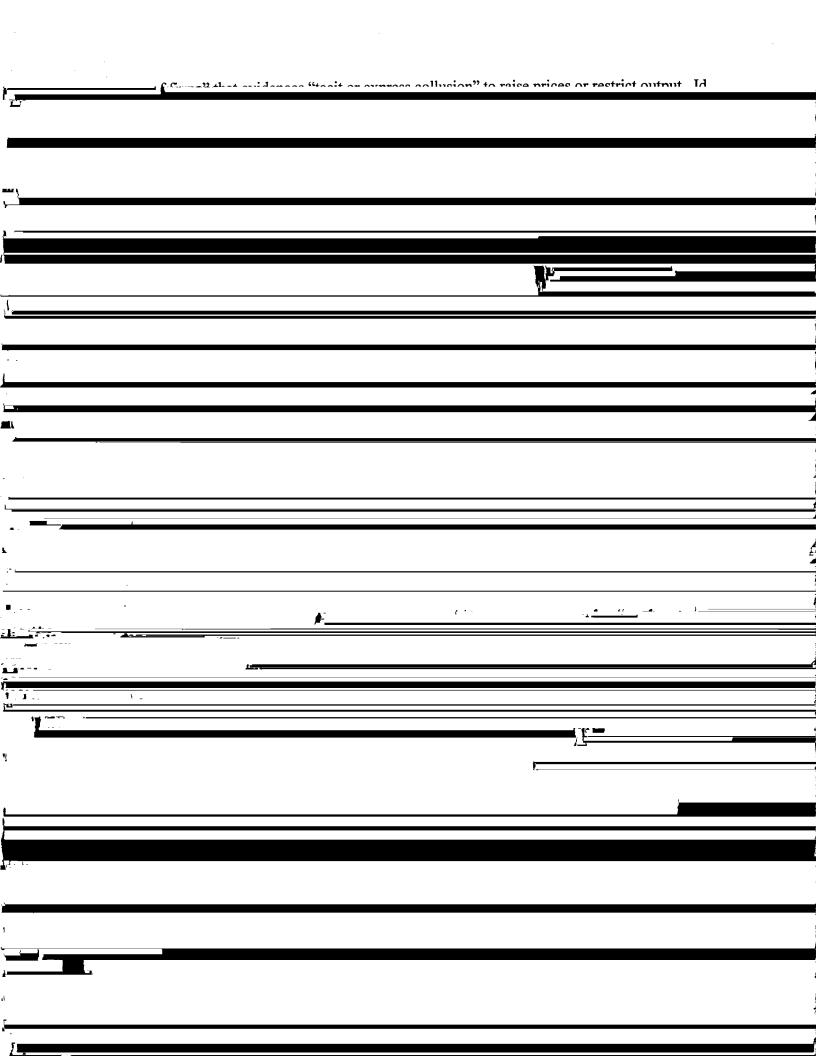
The surlivian effices bearitals from the accoranhic market seems to turn on the fact

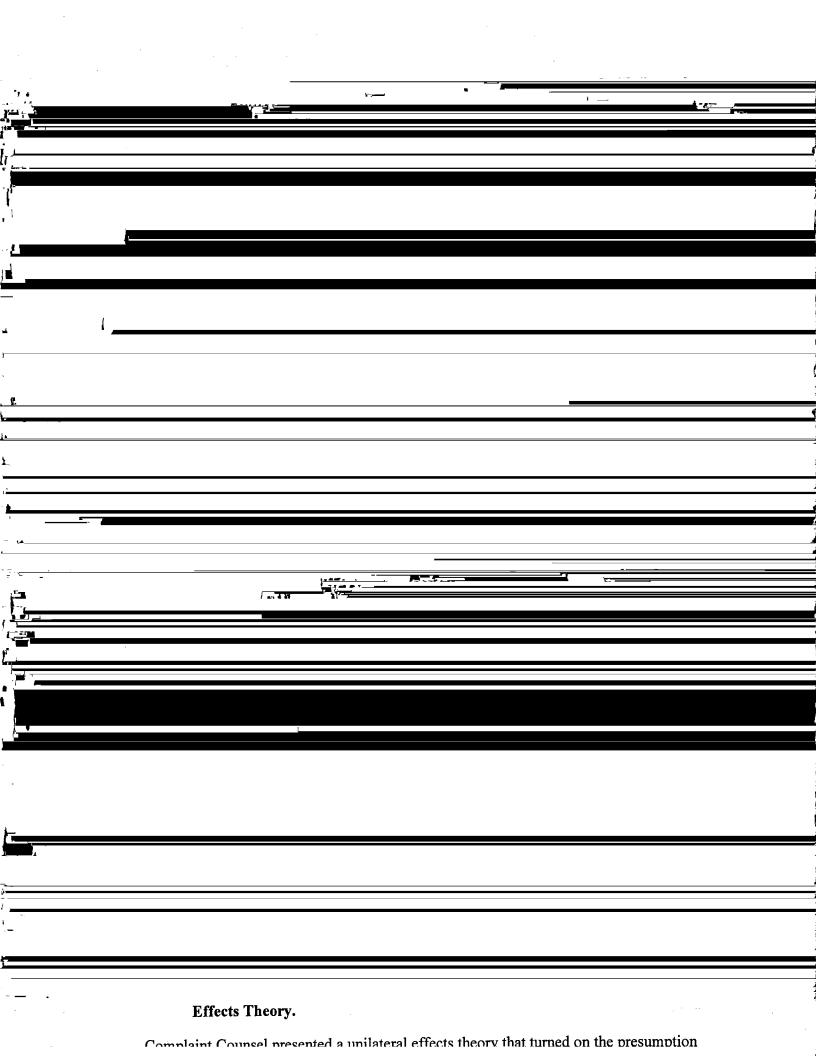
hospitals that are within the 35 minutes travel time preferred by Lake Forest consumers for such non-emergency care—including *at least* the nine hospitals in ENH's geographic market and several hospitals in downtown Chicago. That the Initial Decision did not even consider this possibility when rejecting ENH's geographic market makes its rejection of that market dubious at best.

2. The Initial Decision's Geographic Market Analysis, If Permitted to Stand, Will Lead to Uncertainty and Confusion for Hospitals.







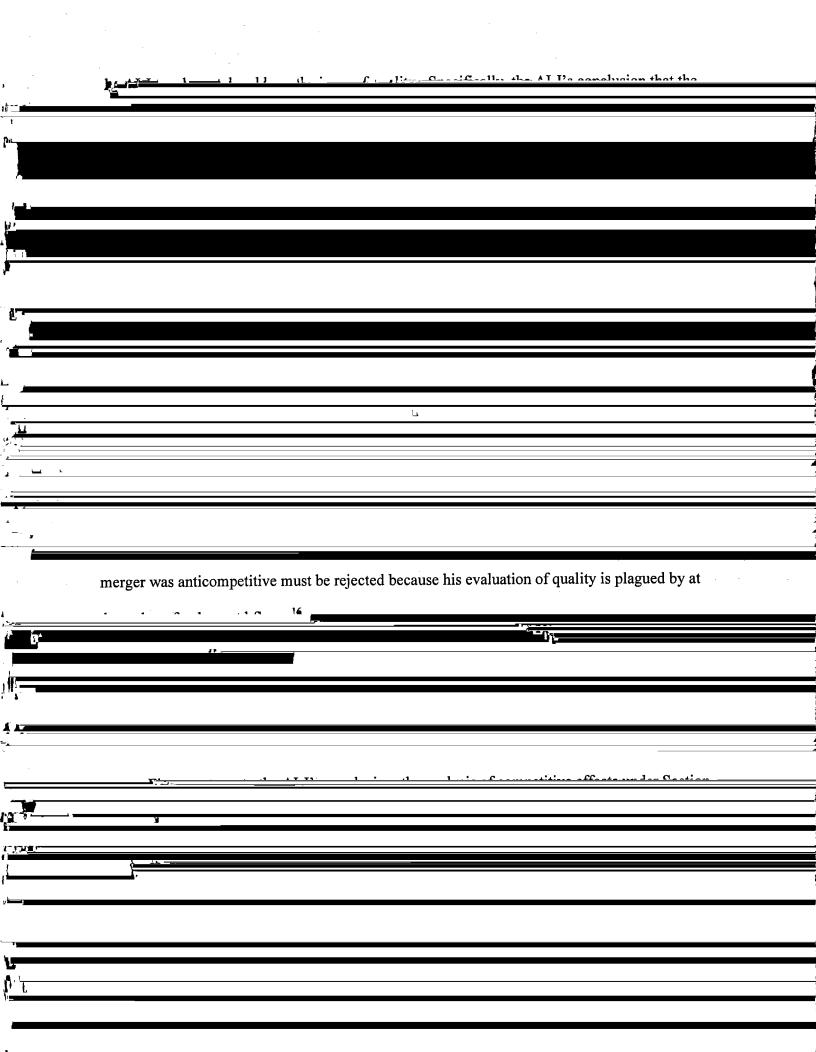


	insurance companies and patients alike demonstrates the inability of ENH to exercise	
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	The ALJ's finding that ENH enjoys a 40% market share does not suggest a different	
	conclusion. As the Merger Guidelines note, "market share and concentration data provide only	
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or the market incentive to artificially increase prices or restrain output. Accordingly, the Initial Decision could not and did not find that competition was lessened by the merger under a theory of coordinated effects.

The Initial Decision's failure to adopt either theory of anticompetitive effects belies its me wine that there was an anticomnatitive price increase. In fact, it suggests that ENU's more

	imperative, to the analysis of competitive effects). For example, a hospital merger that resulted
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	somewhat higher prices.
	In the case at hand, the need to address quality is all the more compelling because of the
	1. 1 11 Alex ENII among than \$120 million on improvements to its system and
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improvements offered by ENH. Indeed, the entire analysis of the quality evidence in the Initial Decision is remarkably sparse given the substantial evidence introduced by ENH regarding really "what we all care about," FTC Trial Br. at 68, quality improvement practices developed 1 mont borrilly on abanque to

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flaws in t	he ALJ's treatment of real	world information reg	garding quality in this	s case will only
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more complex services, where prior to the merger such patients went to teaching or hospitals in downtown Chicago and elsewhere with a reputation for providing such services. See, e.g.,

## 2. The ALJ Erred by Failing to Give a Comprehensive Analysis of the Evidence of Quality Improvement.

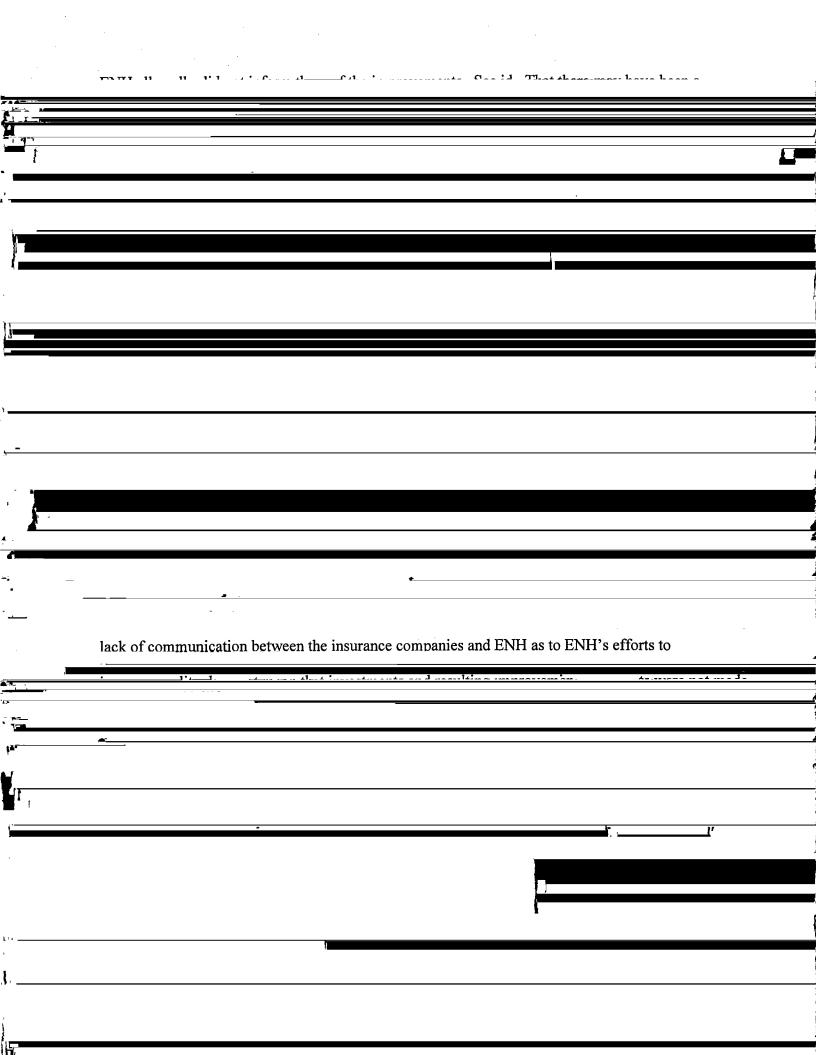
In assessing whether overall quality of care improved at ENH, the ALJ stated, "The Court has carefully considered the parties' arguments and evidence on quality of care, including the extensive data on outcomes, structure, process measures and patient satisfaction." <u>Initial</u>

Decision at 180. However, the ALJ's treatment of the quality evidence belies this assertion. In fact he failed to consider the full range of the quality improvements claimed by ENH. As a

result, his finding that ENH's evidence was inconclusive in some regards and failed to demonstrate improvement is highly questionable and should be discarded.

ENH presented evidence of improvements in no fewer than sixteen individual areas identified by

ENH See Initial Decision at 180 However, rather than evaluate the improvements claimed in



assessment of overall quality. <u>See Initial Decision</u> at 180-81. Quality improvement should not be assessed primarily on these factors alone.

Experts in quality improvement believe that changes in process and structure hold the most promise for changing practice patterns and, thus, improving the quality of care provided to patients.<sup>21</sup> Take, for example, the evidence ENH submitted regarding the improvements in the administration of aspirin and beta-blockers upon admission and discharge, which the ALJ

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	gint salls in smed Can ENTI Findings of Foot at 202 205 Those two process measures are
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•	among a group of quality measures that enjoy consensus support among the healtrain care
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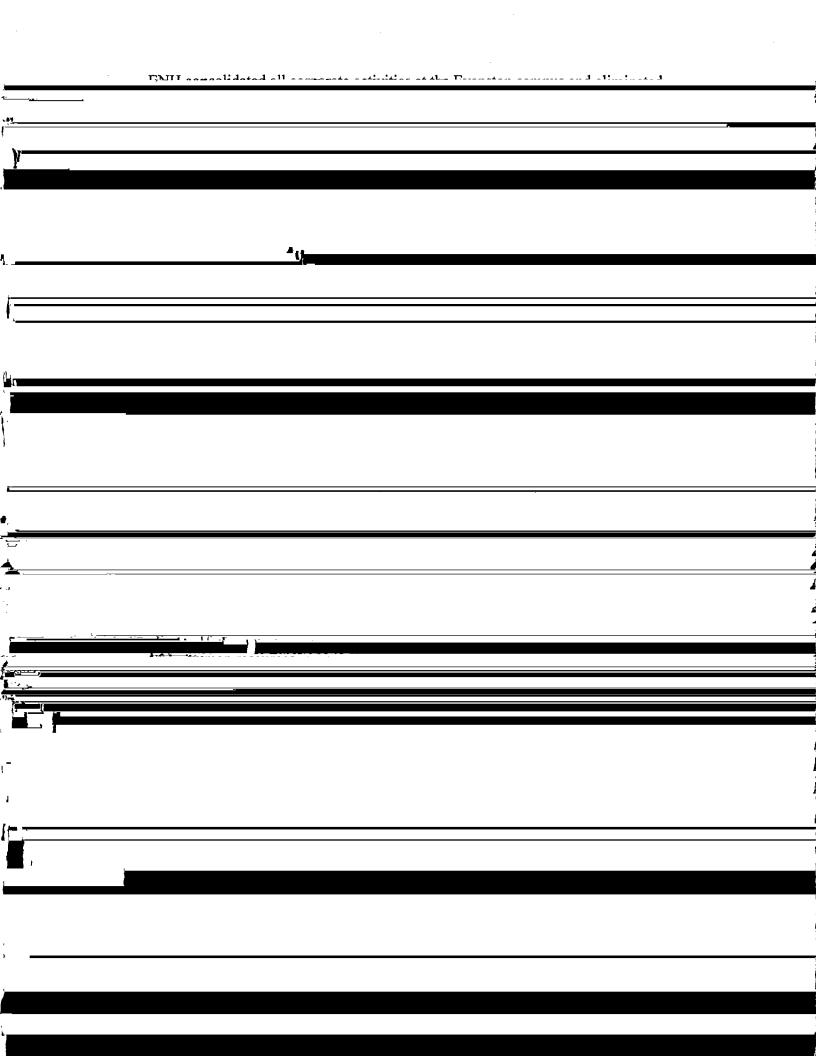
3. The ALJ Erred by Failing to Assess the Competitive Effects of Quality and Price.

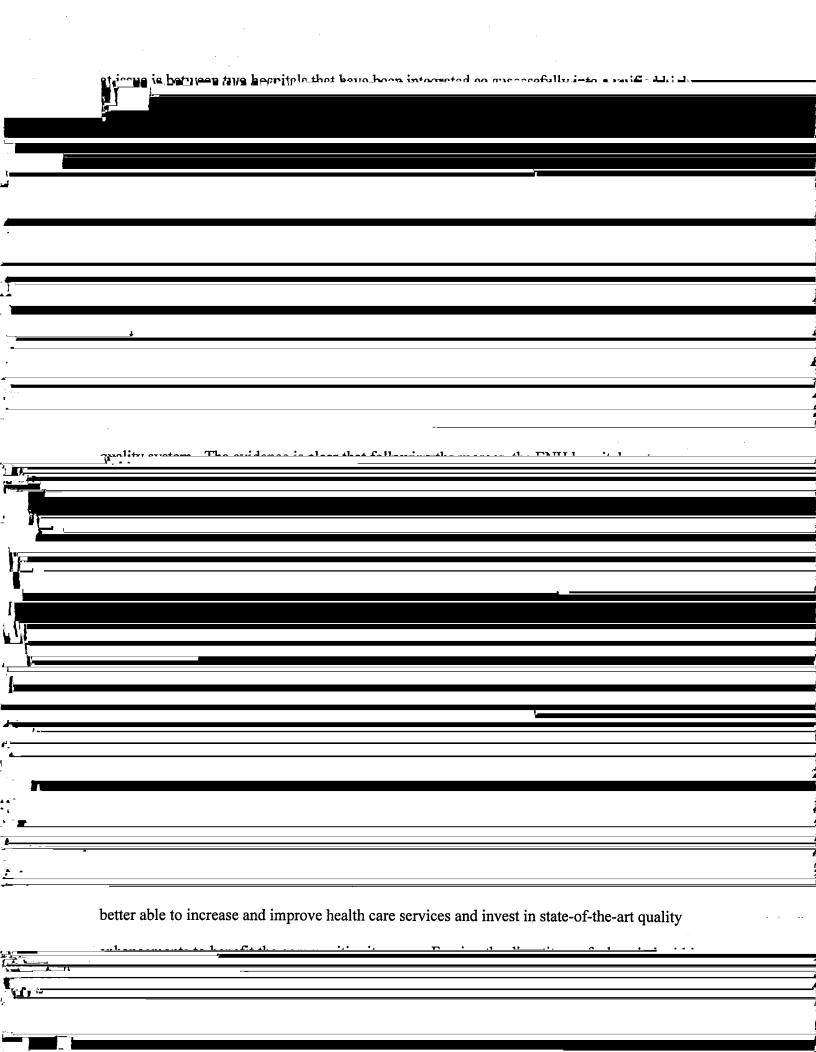
Because of the ALJ's flawed treatment of the quality of care evidence, he sidestepped any meaningful competitive effects analysis of quality in relation to price. As a result, the ALJ corresponding [increase] in quality." Tenet, 186 F.3d at 1054. The Supreme Court's totality of Such a comparison would not have required the valuation of the quality improvements, but it would have nonetheless provided a basis on which to determine whether it would be appropriate to adjust prices for quality. While the ALJ attempted to compare ENH to comparison hospitals, as explained above, he relied on inappropriate measures of overall quality to do so. *Overall* hospital quality is the sum of its parts; thus, the ALJ should have relied on the full scope of

overall quality.

Thus, the ALJ's treatment of quality in the Initial Decision is fundamentally flawed and should be rejected.

D. DIVESTITURE AFTER NEARLY FIVE YEARS OF INTEGRATION IS NOT





nearly five years after the agency waived its right to a pre-merger review of the transaction. The state of the ATT has imposed an address of an artistic among marging