[redacted]

Pursuant to 16 C.F.R. § 352(j),[1] The American Hospital Association ("AHA")

the consummation of mergers—they will never be sure what standards will be used to evaluate

the competitive effects of these mergers and if those standards are reliable or reflective of the reality of the healthcare field. At best there will be confusion as to the applicable standards, and at worst those standards will guarantee a finding of anticompetitive effects as the FTC relies on interested health insurance testimony to define the geographic market and refuses adequately to consider quality care improvements that are a major benefit of hospital mergers. This will not only deter hospitals from pursuing pro-competitive mergers designed to decrease health care costs and improve quality of care for patients, it will cause significant harm to both hospitals and patients as millions of dollars in merger-related quality

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of	)	Docket No. 9315
EVANSTON NORTHWESTERN HEALTHCARE CORPORATION,	)	Public Record

[redacted]

ORDER

Upon consideration of the Motion of the American Hospital Association for Leave to File Brief *Amicus Curiae* In Support of Evanston Northwestern Healthcare Corporation and [redacted] the Commission finds that the proposed brief [redacted] 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

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

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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

In the Matter of	)	Docket No. 9315
EVANSTON NORTHWESTERN HEALTHCARE CORPORATION,	)	Public Record
a corporation.	)	

AMERICAN HOSPITAL ASSOCIATION'S *AMICUS CURIAE* BRIEF IN SUPPORT OF EVANSTON NORTHWESTERN HEALTHCARE CORPORATION

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I. INTRODUCTION

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

[redacted]

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

[redacted]

typically handled, likely to cost hospitals millions of dollars in compliance with FTC requests

large-scale review of consummated hospital mergers in numerous markets going back a number of years.

Predictably, this backward-looking review of unprecedented scale resulted in a challenge to a consummated hospital merger; the FTC chose the acquisition of Highland Park Hospital

alleging violations by ENH in the complaint advanced a novel anticompetitive effects theory that

[redacted]

The ALJ declined to adopt Complaint Counsel's unrealistic geographic market and

[redacted]

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.

This is not the kind of framework for evaluating hospital mergers that this Commission

unreliable analysis that will create uncertainty and confusion for the entire hospital field as well

[redacted]

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—

[redacted]

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

[redacted]

should prices become anticompetitive. See Federal Trade Comm'n v. Freeman Hosp., 69 F.3d

[redacted]

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

[redacted]

role to play in the competition for hospital services. This premise is wrong. Patients, not insurance companies, consume hospital services. Butterworth, 946 F. Supp. at 1299. Health

[redacted]

that serve them. Patient preferences—demonstrated by actual behavior—drive the decisions made by both insurance companies and hospitals in all stages of competition. Health insurance

[redacted]

economic interests and is thus suspect."[9] Tenet, 186 F.3d at 1054 & n.15 ("Although the

[redacted]

The insurance company testimony on which the ALJ relied in this case is particularly

[redacted]

from interested insurance companies to establish the views and preferences of employers and patients.

[redacted]

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

[redacted]

[redacted]

[redacted]

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." Initial Decision at 142. This is too kind a

[redacted]

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.

[redacted]

[redacted]

[redacted] that evidences "tacit or express collusion" to raise prices or restrict output. Id.

[redacted]

Effects Theory.

Complaint Counsel presented a unilateral effects theory that turned on the presumption

insurance companies and patients alike demonstrates the inability of ENH to exercise

[redacted]

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 [redacted]

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 conclusion that there was an anticompetitive price increase. In fact, it suggests that ENH's more

[redacted]

benign explanations for any apparent price increases – that they are reflective of the massive

imperative, to the analysis of competitive effects). For example, a hospital merger that resulted

somewhat higher prices.

In the case at hand, the need to address quality is all the more compelling because of the

merger was anticompetitive must be rejected because his evaluation of quality is plagued by at

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

[redacted]

really "what we all care about," FTC Trial Br. at 68, quality improvement practices developed

[redacted]

assumptions about the consequences of particular transactions and the nature of competitive

[redacted]

flaws in the ALJ's treatment of real world information regarding quality in this case will only

[redacted]

1278.

In some cases, the merger may result in certain efficiencies (e.g., improved quality, enhanced service, new products) that outweigh the anticompetitive effects of the merger, or are procompetitive justifications for an otherwise illegal combination. See Merger Guidelines § 4; Federal Trade Comm'n v. University Health, Inc., 938 F.2d 1206, 1222-23 (11th Cir. 1991). In

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.,

[redacted]

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." Initial 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.

[redacted]

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

lack of communication between the insurance companies and ENH as to ENH's efforts to

assessment of overall quality. See Initial Decision 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.[21] 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

[redacted]

among a group of quality measures that enjoy consensus support among the health care

[redacted]

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

[redacted]

corresponding [increase] in quality." Tenet, 186 F.3d at 1054. The Supreme Court's totality of

[redacted]

[redacted]

of care." Id.

Thus, although the analysis in the Initial Decision of quality is largely devoid of any evaluation of quality-adjusted prices, the ALJ clearly recognized that such an analysis should be

[redacted]

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

[redacted]

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

[redacted]

[redacted]

better able to increase and improve health care services and invest in state-of-the-art quality

[redacted]

nearly five years after the agency waived its right to a pre-merger review of the transaction.

[redacted]