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# United States of America

FEDERAL TRADE COMMISSION

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Docket No. 9315

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IN THE MATTER OF  
EVANSTON NORTHWESTERN  
HEALTHCARE CORPORATION

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RESPONDENT'S CORRECTED APPEAL BRIEF

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~~PUBLISHED~~

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The following abbreviations and citation forms are used:

CCFF

Complaint Counsel's Proposed Finding of Fact

CCPTB

Complaint Counsel's Post Trial Brief

CCRB

Complaint Counsel's Reply Brief

CX

Complaint Counsel's Exhibit

DX

Demonstrative Exhibit

ID

Initial Decision

IDF

Initial Decision Finding of Fact

RD

Respondent's Proposed Finding of Fact

RFF

Respondent's Proposed Finding of Fact

RFF-Reply

Respondent's Proposed Reply Finding of Fact



## SUMMARY OF THE ARGUMENT

a major academic hospital system, and Highland Park Hospital (“HPH”), a community

hospital, resulted in extraordinary quality improvements. C

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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CONFIDENTIAL - SECURITY INFORMATION

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

near the levels alleged in the complaint, but also offered no evidence that prices rose above *competitive levels* or that output declined. And the ALJ ignored contemporaneous

the merger, HPH had serious and systemic quality of care problems and lacked the institutional resources and leadership to address them. For example, one HPH physician

*camera.* Other HPH physicians improperly performed abortions in emergency room (“ER”) facilities that provided limited privacy. HPH lacked in-house evening obstetrics

services and had problems getting physicians to respond to emergency calls.

b.

improvements would not have occurred as fast or as well if at all without the merger

hospital facilities every year for acute inpatient care, and greatly outstrip the population



Since the Mission, ENH has received national and international recognition.

numerous awards. In 2001, ENH received the VTI AS and Duxing Awards for its ten-year

because HPH could not satisfy their needs. RFF43. HPH physicians tended to refer patients away from HPH for many services. IDF277; RFF43.

Part of the reason patients traveled elsewhere for care was that HPH lacked the

Financial records and financial records for 1-1-14 to 1-1-15 HPH C 1 1 1 1 1 1

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1

Financial records and financial records for 1-1-14 to 1-1-15 HPH C 1 1 1 1 1 1



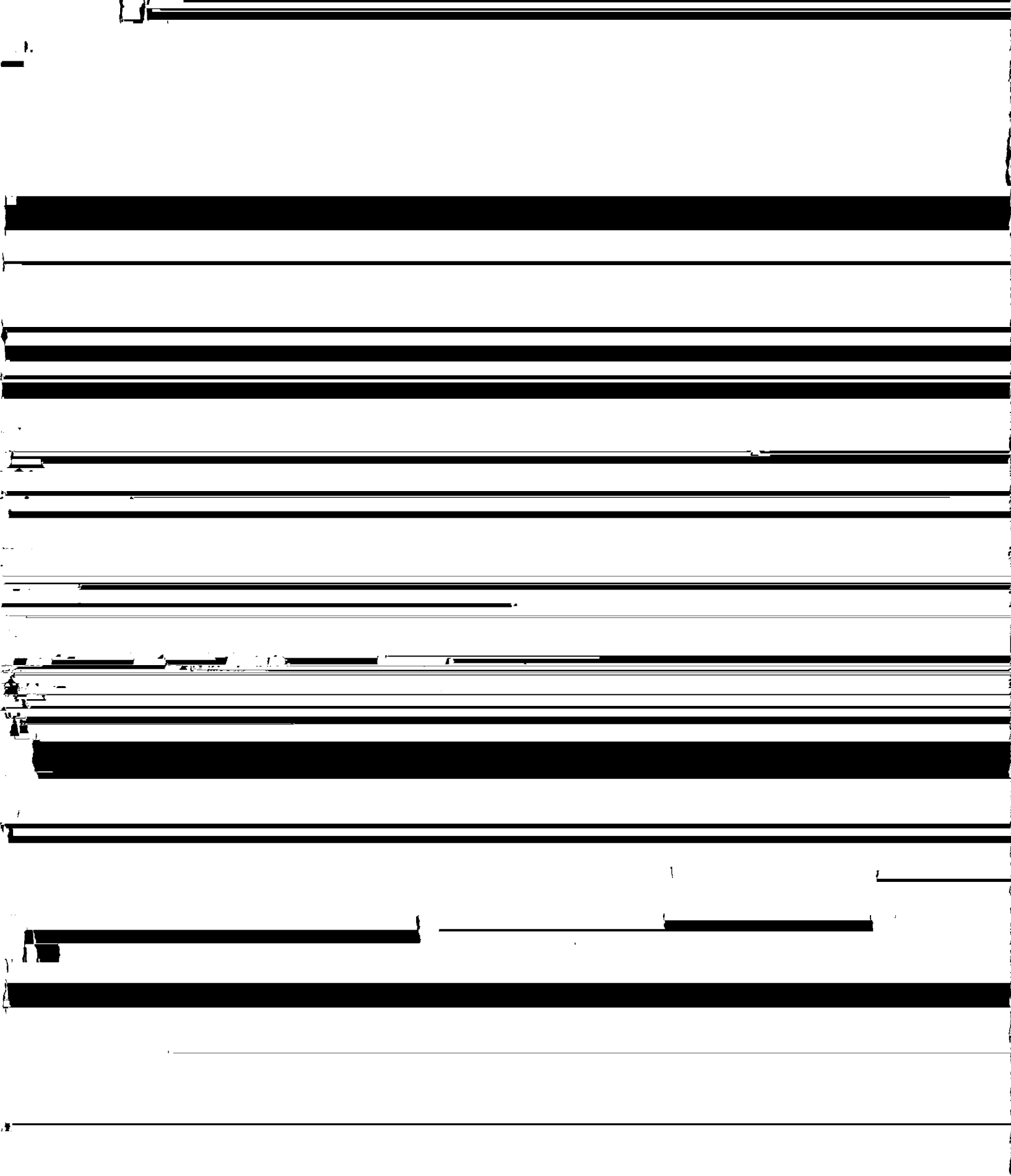
Deficiencies in HPH's physical plant posed a further danger to patients' safety. In 1999, architects commissioned by ENH to review HPH's facilities as part of its pre-merger due diligence determined that HPH had "high risk" problems with ventilation, electrical systems, pressure in isolation rooms, emergency power, and even exposed asbestos—all direct threats to patient safety. RFF1537-48. Concurrently, the Department of Health and Human Services sent a letter to HPH threatening to revoke its Medicare accreditation and stating "the deficiencies are significant and limit [HPH's] capacity to render adequate care and ensure the health and safety of patients." RFF10-1531, 20

*see also* RFF1227,1233-1563. It was not until after the merger that

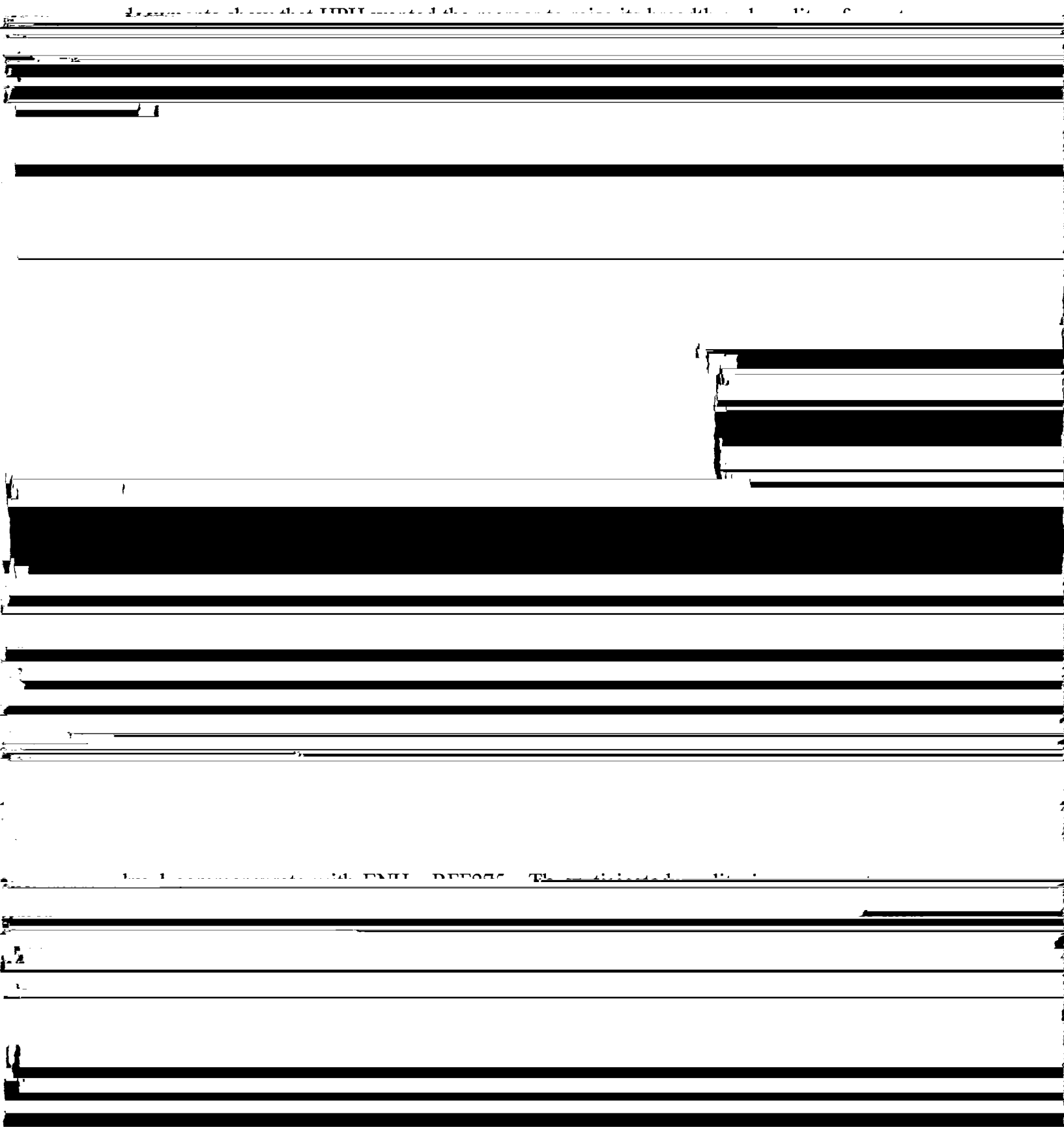
**REDACTED** . RFF1534.

HPH also lacked the organizational strength to solve its many problems. RFF1424. HPH lacked effective procedures to discipline problem doctors, and it tended to address quality issues only when confronted with adverse media coverage. The

Erington was an academic teaching hospital, not a community hospital. Erington's



After searching for a suitable partner, HPH determined that a merger with Evanston would provide these much-needed improvements. RFF275. Contemporaneous



**3. The Merger Produced Substantial Quality Improvements, Especially At HPH.**

As anticipated, the merger substantially benefited patients and the community by improving quality at both HPH and ENH. Post-merger, ENH invested more than \$120

of care. The ALJ conclusively found improvements in obstetrics, quality assurance, nursing, physical plant, oncology, radiology, radiation medicine, emergency care, laboratory, pharmacy services, cardiac surgery, psychiatry, intensive care, electronic medical records, academic affiliation, and clinical integration. ID183-91; IDF876-

pathways experiencing failed pregnancies were treated in outpatient settings, and

that psychologists and social workers were present to help care for them. RFF1301-03.

ENH has provided the bulk of physician services. RFF1054-1007. A 1/

undertaken. RFF1530-41,1543-57. ENH spent almost \$15 million responding to physical plant deficiencies that did or could threaten patient safety. RFF1534,1540-41.

ENH quickly made other structural improvements to IIPU. It built a corridor

substitution job (completed March 2000) at the same time as the other

1504,1509-11.

REDACTED

RFF1490,1492,1494-

In February 2005 FBIJ completed a 67,000 square foot Anklebone One Center

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]



largest customers, Blue Cross Blue Shield ("Blue Cross") and Humana. RFF604. In

Accordingly, Evanston hired Bain & Co. ("Bain") in the fall of 1999, in part to



catch up.” RFF732. In ~~short~~, ENH was able to obtain more favorable rates after the merger simply because “Evanston was just so far behind” the market *before* the merger. RFF733. One of ENH’s MCO customers, United, conceded as much during post-merger negotiations. RFF684.

To be sure, ENH benefited “from understanding Highland Park’s contracts and the process they had gone through in negotiating their contracts.” RFF733. But, as the Bain

them.

**5. Complaint Counsel's Theories And The Evidence Presented At Trial Differed Significantly From The Allegations In The Complaint.**

necessarily *included* tertiary services. RFF382; Haas-Wilson, Tr. 2490.<sup>2</sup> Thus, the product market alleged by Complaint Counsel at trial was significantly broader than the product market alleged in the complaint, and therefore necessarily included a significantly larger group of hospitals.

“directly proximate to the three ENH hospitals and contiguous areas.” Compl. ¶17.

market is well below the levels alleged in the complaint. Although the complaint never

specified which hospitals were included in the relevant market, it alleged that the post-

1999 VIII exceeded 2000 and had increased more than 500 points as a result of the

10. 1999 VIII. Yet even the ALJ's artificial market definition resulted in a post-

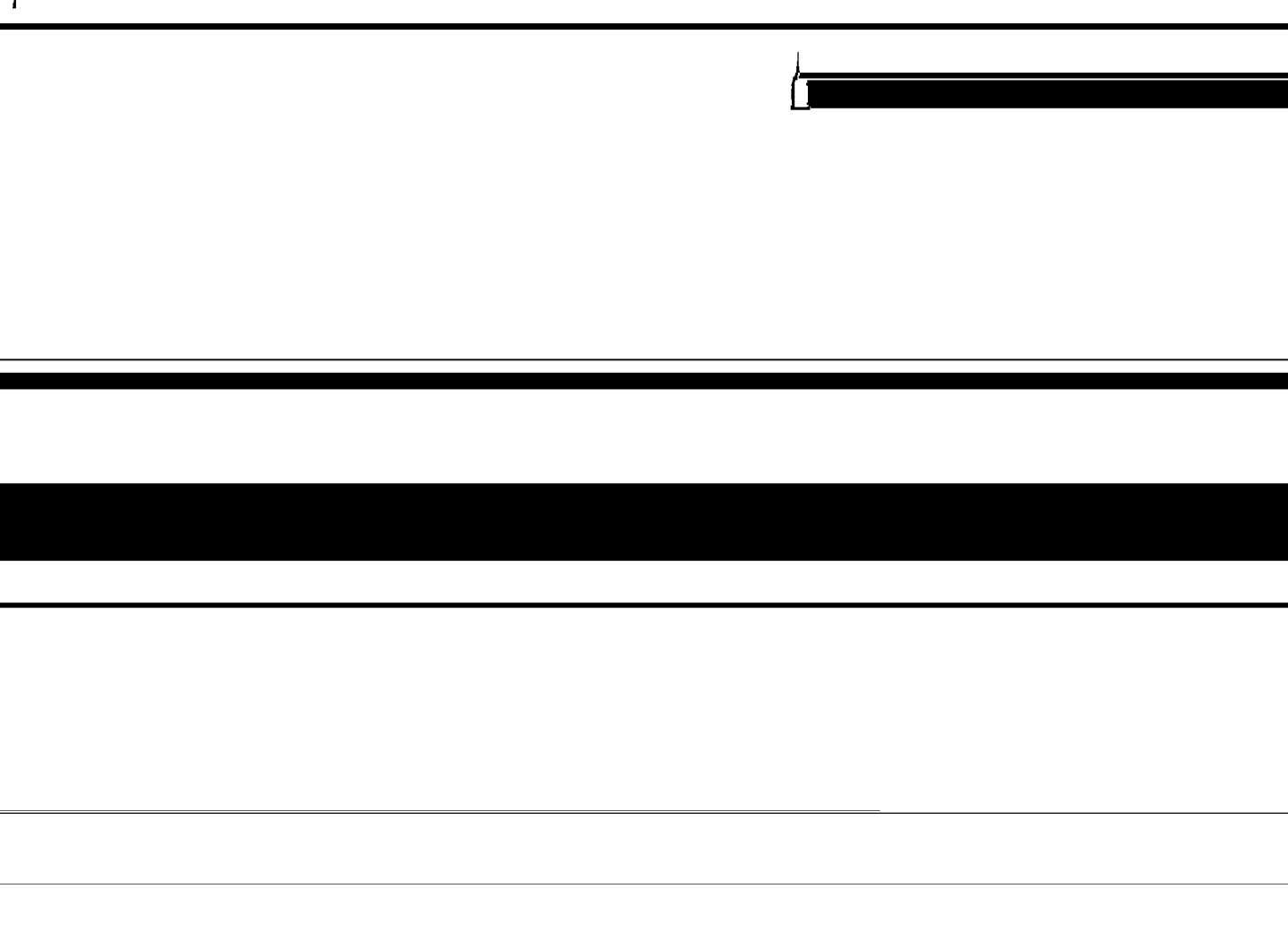
## QUESTIONS PRESENTED

antitrust effects can be established when the market share of


the merged firm is far below a monopoly level?

## ARGUMENT

In determining whether a merger will “substantially lessen competition” in a relevant market in violation of Section 7, “the economic concept of competition” rather



than any desire to preserve rivals as such, is the lodestar” that controls the analysis.





establish some other basis for concluding that the merger is likely to be anticompetitive.

**I. COMPLAINT COUNSEL FAILED TO CARRY ITS BURDEN OF ESTABLISHING ANY SUBSTANTIAL RISK TO COMPETITION.**

Throughout these proceedings, Complaint Counsel attempted to establish that the merger poses a risk to competition—not from coordinated effects, but solely from unilateral effects. As shown below, even if this merger is found to have coordinated effects,

unilateral effects. As shown below, even if this merger is found to have coordinated effects,

case, the market structure evidence would not warrant a presumption of illegality, much

17 C. H. ... .. 1000 00 11 10

have in the future.” ID131-32,136. The ALJ erred, however, both by failing to include hospital-based outpatient services in the product market,<sup>3</sup> and more importantly, by failing to include several additional hospitals in the geographic market. The ALJ’s entire market structure analysis is flawed and cannot create any presumption of illegality even under a traditional coordinated-effects analysis.

**1. The ALJ Erred In Excluding From The Relevant Geographic Market Numerous Hospitals That Compete With ENH.**

outpatient services” the geographic market must still “both encompassed to the commercial

encompassed entire counties, or multiple counties, even in urban and suburban areas.

See, e.g., *United States v. Long Island Jewish Med. Ctr.*, 983 F. Supp. 121, 141-42

(E.D.N.Y. 1997) (Queens and Nassau Counties); *Rockford*, 898 F.2d at 1284-85

(Western County and various of other counties); *Q.D.C. v. ...*, 110 F.2d 100

F 9 011100 1100 QID 010001 ( ... )



Moreover, eighteen hospitals are closer to Evanston or HPH than those two are to each other. RX1912 at 20,21. Yet, the ALJ's defined market excluded such easily accessible hospitals as Advocate Illinois Masonic and Advocate Ravenswood (North Side), Children's Memorial, Swedish Covenant, Holy Family, Northwestern Memorial, Condell, Grant, Louis A. Weiss Memorial, Methodist Hospital of Chicago, Our Lady of the Resurrection, Resurrection, and Saint Joseph. RX1912 at 20,21; RFF389-390; *see* ID, Attachment1, DX8173. Additionally, six other hospitals are within 27 minutes driving time of the Glenbrook campus. RX1912 at 021.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

RFF456. One MCO wanted only to ensure that its “members have access to the hospital within 30 miles of where they live or where they work so that [its plans] have *sufficient*

of at least one of the ENH hospitals must be included in the relevant market.RFF387-90.<sup>5</sup>

In determining the geographic market, the ALJ also relied on a 2001 Lake Forest





MCOs must take into account current patients' geographic preferences when building

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Although slightly above the challenge threshold levels in the *Guidelines*, such

concentration levels are well within accepted bounds for today's economy. 1

standards, especially given Complaint Counsel's theory of the case. *See infra* Section

I.B.; *Baker Hughes*, 908 F.2d at 983. n.3 (merger not enjoined although it "increased the

[REDACTED]

(because Complaint Counsel offered no evidence from which such figures could be computed). including even one or two of these hospitals would drive the HHI well below

the levels for highly concentrated markets under the *Guidelines*. In any event, Complaint Counsel has failed to prove the relevant geographic market alleged in its complaint and the complaint should be dismissed for that reason alone. *In re Adventist Health Sys. /West*, 117 F.T.C. 224, 285, 289 (1994).

[REDACTED]

overt collusion or implicit understanding, in order to restrict output and achieve profits above competitive levels.”(citations and quotations omitted); *CB&I*, Dkt. No. 9300 at 5; *HCA*, 807 F.2d at 1387. Yet Complaint Counsel never alleged the merger would facilitate collusion, and there is neither evidence nor findings to support such a theory. Moreover, none of the industry characteristics that may give rise to coordinated effects—

factor determining the market power that will be created by a merger in a differentiated

product setting, and market concentration plays a lesser role." *P. P. Dornelle*, 120

E.T.C., at 196. 140 (citing Robert D. Willig, *Merger Analysis*, *Industrial Organization*

*Theory and Merger Guidelines*, BROOKINGS PAPERS ON ECONOMIC ACTIVITY 281-300.

differentiated products unilateral effects claim, a plaintiff must prove a relevant market in which the merging parties would have essentially a monopoly or dominant position.”). Any presumption of illegality in a unilateral effects case therefore requires a substantially higher measure of concentration than was proven in this case.

Under the ALJ’s flawed market definition, ENH’s post-merger market share is only REDACTED, and it is only REDACTED using the “minimum” geographic market that Respondent’s expert defined. IDF322; RX1912-058. Moreover, REDACTED — a hospital included in the ALJ’s geographic market and acknowledged to be Emerson’s

*Antitrust Law* at 124. Thus, Complaint Counsel's failure to demonstrate that ENH acquired a monopoly or dominant share of a well-defined market violates its theory of

competitive harm and requires dismissal of the complaint.

**C. Limited Substitutability Between ENH And HPH, And The Ability Of Competitors To "Reposition" Their Services, Further**





hospitals were not close substitutes. For example, a BICS memo noted that in the event

of a termination with ENH, "there are other contracted providers within the geographical

area, including that of Highland Park Hospital and Englewood Northwestern Healthcare." JDE 228;

Why were Evanston and HPH *not* viewed as close substitutes? The evidence

by MedPac, the advisory board to Congress on hospital reimbursement issues. IDF6,275; RFF415,559; RX1912 at 60.

**2. Evanston and HPH also were not close geographic**

**substitutes.**

In addition, the two hospitals were not close geographic substitutes. As noted earlier, Evanston and HPH are 13.7 miles (27 minutes) from each other. RFF388. And,

\_\_\_\_\_ (comment 20) number of hospitals including St

is unlikely. *Oracle*, 331 F. Supp. 2d at 1118; *Guidelines* § 2.212; see also *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1441 (9th Cir. 1995); Philip F. Areeda & Herbert

Hovenkamp, ANTITRUST LAW ¶ 501 at 90 (2d ed. 2002). Here, there is no evidence that rival hospitals would not reposition themselves to compete with ENH if ENH raised prices to supra-competitive levels.

To the contrary, not only are competitor hospitals able to expand their capacity

Northwestern Memorial, an obstetrics giant, recently received approval to construct a

Counsel failed to demonstrate the “unlikely repositioning” element of a unilateral effects claim.

**D. The Sophistication Of MCO Customers And The Existence Of Ample Fringe Sellers Make Anticompetitive Effects Even More Unlikely.**

That the merger did not give ENH unilateral market power is stated in paragraph 1

by evidence that the low number of hospital entities in MCO 1111



Finally, MCOs have the ability to constrain hospital prices to competitive levels even though they are indirect purchasers of services chosen in the first instance by patients who subscribe to employer-sponsored health plans. MCOs and employers have ample means to control total insurance costs, such as co-pays and cafeteria plans.

DEFCO-REF-1-120

1. **Evanston's pre-merger prices were below-market and increased to competitive levels because of new information.**

The fundamental flaw in the ALJ's approach is a failure to recognize that post-merger price increases, even increases relative to other firms, do not necessarily demonstrate market power. As the *Guidelines* state and as Complaint Counsel

acknowledged, "market power to a seller is the ability profitably to maintain prices

above competitive levels for a significant period of time." *Guidelines* §§



RFF523(k),1063. The evidence shows that this is precisely what happened.

- a. **ENH's explanation for the post-merger price increases is supported by the documentary evidence.**

First, substantial evidence showed that ENH learned coincident with the merger

that it had been short-changing itself for years in its negotiations with MCOs. RFF734;

see also RFF656-700; RFF Book-755-759. For ten years prior to the merger, Enghart's

less than it paid Highland Park” which cost Evanston “\$30 million over the preceding five years.” IDF395; ID160; RFF681,884. The same was true for most of the major MCOs, including PHCS (IDF411, ID161; RFF685-87), Great West (IDF422; ID161), and Aetna (IDF436; ID162; RFF689).

ENH executives were “horrified,” “shocked” and “embarrassed” by Bain’s findings. RFF669,683,695,703. Accordingly, ENH engaged Bain to help ENH negotiate MCO contracts more effectively. Following Bain’s advice, and coincident with the

ENH leadership team in MCO negotiations by for example making an

[REDACTED]

opening request at the higher of the two hospitals’ rates plus a 10% premium. RFF710-  
25: RFF-Renlv834.1387.1777.

Whether or not knowledge of IDUP's findings would give ENH a different perspective on

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

- b. **The pattern of post-merger price increases is consistent with bringing ENH's prices to competitive levels.**

The pattern of post-merger prices is entirely consistent with ENH's obtaining new

information about market prices and inconsistent with any exercise of market power.

obtained from the merger. United is a good example. Coincident with the merger, Evanston learned that its pre-merger rates with United were nearly 50% less than HPH's

pre-merger rates, but that its pre-merger rates with Astor were only 10% less than HPH's

than HPH's. ENH was able to present these data to the payors to support higher rates. See, e.g., RFF747(REDACTED) RFF779-80(Cigna), RFF785-87(CCN), RFF794-96(Great West), RFF809-12(HFN), RFF831-37(PHCS), RFF849-51(Preferred Plan), RFF883-84,888(United).

The pattern of Defendant's price increases, moreover, is flatly inconsistent with

[REDACTED]

[REDACTED]

Complaint. Counsel's hypothesis that a lower MCO would have a better bargaining

competitive levels. RFF559, 1065-72.<sup>10</sup>

**REDACTED**

RFF1111.

**REDACTED**

RFF1138,1144-49.

**REDACTED**

<sup>11</sup> IDF262,276,280,322; ID145-46. This is

significant because the ALE MCOs and Dr. Hans Wilson all agreed that in "terms of

noted earlier, ENH's breadth of services is comparable to, and in some instances broader

than members of the academic medical group. DEE541 46 548; DXY1010 at 44.

*camera*. Second, the MCOs correctly identified ENH as an advanced teaching hospital.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]



(1004) DD25 20: DDD41 42. There is no ... 12

That failure was particularly pronounced with regard to the increased quality that

In short, Complaint Counsel's theory of relative price increases falls of its own

weight. It offers no plausible means to distinguish between entirely lawful and

unlawful price increases and price increases that result from increased product

the accused party). None of the documents relied on by the ALJ demonstrates that the merger produced or is likely to produce anticompetitive effects.

The documents, moreover, do not even show anticompetitive intent. They show

instead that the merger's principal purposes were to improve the quality of care for the

Hillebrand, Tr. 2021. Similarly, as used by the parties and their consultants, “leverage” was shorthand for the advice given to ENH that it “should recognize its position and not

try to calculate a hypothetical fair market value” rather than the “1. MCO”

to manipulation. ID153 Here unlike *HCA* the merger was not reportable under the

West Coast Radio Act ("WRCA") and consummation was not consummated until several years

after the merger, and there is no reason to believe that ENH representatives altered their conduct or statements in anticipation of post-consummation investigations. 807 F.2d at

1384. As a result, the post-acquisition evidence ignored by the ALJ is entitled to its full

1

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

329 F. Supp. 2d 109, 157 (D.D.C. 2004). As explained below, the evidence of HPH's weakened financial condition prior to the merger confirms that the merger is not likely to cause competitive harm.

**HPH was financially weak.**

The ALJ also erred in finding that HPH had “sufficient cash and assets to cover debts . . . , continue operations, expand services, and invest in new facilities and equipment.” ID196. The ALJ ignored evidence proving HPH's declining financial



In response to these significant losses, HPH was forced to adopt stringent cost containment programs. Spaeth, Tr. 2263,2305; RFF2333. These included cutting vital

patient services such as nursing and dietetics which inevitably reduced quality of care

11

RFF1233-1511,2333.

*Second*, HPH had long-term debt totaling \$120 million, which required significant cash reserves and was considered a “big problem.” Kaufman, Tr. 5816; RFF2354-2364.

HPH borrowed heavily, issuing \$61.7 million in bonds in 1991, \$20 million in 1992, and

25 0276 02 The regulators determined that "the deficiencies are significant and limit

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In sum, simple subtraction—based on HPH’s financial condition just before the merger—refutes the ALJ’s contention that HPH could satisfy its financial needs and continue to operate as a competitive hospital. See ID196: RFF2308-2413: CX 545 at 3:

Available cash and investments = \$235 million

long term debt - \$120 million  
“planned” investment - \$108 million  
Remaining cash and investments (negative) - \$38 million

Thus, in light of the \$45 million in operating losses projected through 2002 and the \$14-19 million in immediate safety and code improvements that were required, if HPH had

stock. RX 724 at ENHRS 2748. If HPH had not merged, nearly 70 percent of its investment portfolio would have been hurt by the stock market crash. The ALJ also failed to recognize that investment gains would not be realized if HPH spent all its funds

on capital improvements, debt coverage, and operations (all of which the ALJ assumed would happen), because there would then have been no money left to invest.

Finally, the ALJ speculatively predicted what "would have" happened had UDU

not merged, while prohibiting Respondents from introducing evidence on that very issue.

See H. Jones, Tr. 4135-4137-38 (sustaining Complaint Counsel's objections to questions



Such quality improvements are highly relevant to the analysis of the merger's effects on competition. Hospitals unquestionably compete on the basis of quality, and quality improvements unquestionably benefit both patients and MCOs and affect how MCOs build their networks. RFF325. Moreover, such non-price competition impacts a

by up-to-date equipment, a qualified nursing staff, and convenient office space—all



authority for dismissing evidence of actual quality improvements as procompetitive effects of a merger based on improvements at other hospitals. The only relevant question is whether, absent the merger, the improvements at HPH and ENH would likely have occurred *as fast, as well, or at all*. Complaint Counsel utterly failed to make such a showing.

~~Beyond this, the evidence showed that, as a result of the merger, IDIU- 1114~~

actually improved faster than at its peer community hospitals in a number of areas. RFF-

~~Doc# 2022-24, DEE1492, 1504, 1600. That was established first by the GC 11-11-11~~



hospital system in the Chicago area that installed Epic or a comparable advanced electronic medical records system across inpatient and ambulatory care areas. Such

2109,2118-2120,2211,2473-75. While the ALJ found that Respondent improved quality at ENH by installing the Epic system, he underestimated the impact that Epic has on the safety and care provided to patients at all three hospitals. ID190-91. Both quality of care experts in the case testified that ENH's roll-out of Epic was a major improvement in quality. RFF2004. In fact, Complaint Counsel's own expert advocated the use of Epic at his home hospital because it would result in improved quality for patients. RFF2005. Finally, the IOM, Leap Frog Group, and the federal government have all endorsed electronic medical records systems such as Epic as an unquestioned improvement in care





The ALJ also mistakenly relied on the JCAHO accreditation score as a “measure of overall quality,” contrary to the evidence that this score established only a *minimum*

~~needed to maintain HDU's eligibility for Medicare reimbursement. ID101.~~

RRB92n.31; RFF-Reply2128,2301. There is no evidence that JCAHO scores measure overall hospital quality or that differences in such scores may be used to measure changes

this context. Complaint Counsel should have been required to rebut that inference by

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

ENH accomplished these improvements in three ways: (1) by integrating the two

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

high quality placements based on ENL's experience with affiliated programs at Weis

and Swedish Covenant. RFF2460-63.<sup>21</sup>

The evidence also demonstrated significant improvements in

improved quality.” ID180.182-83. As shown above, before the merger HPH simply did

not have the financial strength to participate in this supposed “nationwide trend.”<sup>23</sup>

Beyond this, the undisputed evidence showed that HPH’s improvements in existing services and its rapid development of new clinical services far exceeded what

would be expected of similarly-situated community hospitals during the same period.

RFF1759,1762,1773,2119-20,2215. These improvements included, for example, (1) a

**REDACTED**

(RFF1314); (2)

**REDACTED**

(RFF1482-1504); (3) Epic, one of the most



**REDACTED**

RFF1484-1504.

**REDACTED**

RFF1490; RFF-Reply2227.

4. **The ALJ erred in rejecting Respondent's evidence of quality improvements because in his view they did not justify the post-merger price increases.**

But the ALJ erred in rejecting Respondent's quality improvements evidence.

the ALJ erred in rejecting Respondent's quality improvements evidence. ID 179-70. That is, the

Similarly, it is irrelevant whether the quality improvements were focused solely at HPH. *See* ID180. As long as there was no merger related decline in quality elsewhere—and there is no evidence of such a decline here—the quality improvements discussed

already clearly produced a net increase in consumer welfare.<sup>27</sup>

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services and the sophistication of the MCO customers, makes it even less likely that the price increases in the study resulted from market power. By contrast, the ALJ correctly found “verified” improvements in the quality of care. ID178,190. In short, the weak  
[REDACTED]

the merger created—resulting in HPH’s being recognized as one of the 50 best hospitals in the entire nation—stand in stark contrast to the ambiguous and conjectural evidence  
[REDACTED]

of equity or inconsistent with the public interest especially where, as here, there is

evidence that "divestiture would not benefit competition." *Gen. Dynamics*, 415 U.S. at 511; see *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 601, 602-05 (1951) (Reed, J., concurring)(divestiture is "not to be used indiscriminately" where "less harsh" methods are available).

The cases also make clear that "divestiture is an extremely harsh remedy," *Reynolds Metals Co. v. FTC*, 309 F.2d 223, 231 (D.C. Cir. 1962) (Burger, J.), which

~~"is not to be based on assumptions"~~ *United States v. Cornell College & Maxwell Inc.*

Network”) since 1990. ID197; *see* RFF208-12,298-301.<sup>28</sup> The Network received HSR clearance in 1993. RFF210. When a full asset merger was contemplated by Evanston

**A. Divestiture At This Point Would Harm Patients And Their Communities And Would Provide No Countervailing Benefits.**

First, especially in light of the time that has passed since the merger, divestiture would harm patients and their communities. In the cases cited by the ALJ, the entities

appealed by the ALJ before the Commission, *United States v. Grain Processing Co.*, 2000 WL 11200000 (D.C. 11/1/00).

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By contrast, a divested HPH would lose access to the capital that brought about these improvements, returning it to its pre-acquisition plight as a declining provider.

Even the ALJ conceded that, without Everstone, IDIU would lose benefits from the

merger including electronic patient medical records, academic affiliation, clinical integration, and cardiac surgery. ID205. But even this concession understates the magnitude of the injury. Many of the most important improvements in patient care

resulting from the merger including improved education and training skills, improved



Complaint Counsel, on the other hand, has offered only guesses and speculation to suggest that HPH would maintain the quality improvements brought to it by the merger if

to support divestiture when there is actual evidence showing that divestiture would destroy the quality improvements that the merger created thereby harming patients

RFF2483-2532. Accordingly, once the ALJ found (correctly) that there were “significant

anticompetitive”).

Perhaps most tellingly, Complaint Counsel failed to provide any evidence that

disposition would lead to lower prices by either Everston or HPH. As shown earlier, the

**The ALJ Failed To Consider The Public Interest When**

**Rejecting Alternative Remedies.**

The ALJ also failed to consider properly whether remedies other than divestiture

violated the public interest under Section 7. Rather, he found that "D...ent has

so choose. While the ALJ declined to employ such a remedy, he did not analyze whether it would invigorate bargaining and price competition for the benefit of large and

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**CONCLUSION**

For all these reasons, the Complaint should be dismissed.

Respectfully submitted,

*Andrew M. Koehn*

J. Ethan McComb  
Scott C. Walton



**CERTIFICATE OF SERVICE**

I hereby certify that on January 12, 2006, copies of **Respondent's Corrected Appeal Brief (Public Version)** were served (unless otherwise indicated) by messenger on:

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