Concurring Opinion of Commissioner J. Thomas Rosch
In the Matter of Evanston Northwestern Healthcare Corp.
Docket No. 9315

I concur with the Commission opinion's conclusion that Evanston Northwestern Healthcare Corp.'s acquisition of Highland Park Hospital violated Section 7 of the Clayton Act. There is much to be admired in the Commission opinion. However, particularly in light of Count II of the complaint, I believe the Commission opinion makes this case more difficult than necessary. I write separately to explain why that is so.

I depart from the Commission opinion in two fundamental respects. First, I believe the law and the facts in this case squarely support complaint counsel's theory of anticompetitive

B. Baker, *Unilateral Competitive Effects Theories in Merger Analysis,* 11 ANTITRUST 21, 24-25

likely when differentiated products of the merging parties are each other's next best substitute.[2] To be sure, those provisions might not apply if the merger eliminated only pre-merger localized competition, considered in isolation. In that dimension of competition, Evanston and Highland Park were arguably not each other's best alternative within the meaning of Sections 2.21 and 2.211 of the Merger Guidelines. Advocate Lutheran General was arguably Evanston's closest local competitor and Lake Forest was arguably the closest alternative to Highland Park.

However, under complaint counsel's theory the merger's impact on localized competition cannot be considered in isolation. It was the *consequence* of the merger's primary effect, which was to eliminate competition between Evanston and Highland Park for inclusion in MCO hospital networks. To be specific, under complaint counsel's theory, before the merger MCOs who wanted to compete effectively for insureds located within the triangle considered Evanston and Highland Park to be each other's "next best substitute" in forming a network for that purpose, and the merger eliminated the competition between those next best substitutes. The lessening of the localized dimension of competition is an ancillary anticompetitive effect of the merger because the elimination of that dimension of competition resulted from the merger's elimination of competition between those next best substitutes. Thus, the unilateral effects provisions of the Merger Guidelines apply if the record sufficiently demonstrates that the transaction has had those anticompetitive effects.

This application of Sections 2.21 and 2.211 is not blunted by the language in Section 2.21 stating that "[t]he price rise will be greater the closer substitutes are the products of the merging firms." As the rest of that sentence makes clear, even products that are highly differentiated in terms of their physical and locational differences can be considered to be close substitutes with each other if "buyers of one product consider the other product to be their next choice." Thus, the elimination of the first dimension of competition – the competition between Evanston and Highland Park resulting from MCOs' desire to include one or the other of them in their networks – would represent an elimination of "close substitutes" within the meaning of Sections 2.21 and 2.211. And, since under complaint counsel's theory the injury to the second dimension of competition – the localized competition between each of the merging hospitals and its geographically more proximate rivals – was a consequence of the elimination of competition between those "close substitutes," those provisions of the Merger Guidelines would apply to that injury as well.

Conceptually, the effect of the elimination of the competition between Evanston and Highland Park is the same as if Evanston and Highland Park had entered into an agreement with each other as to the prices they would charge MCOs (or to be more blunt if they had entered into a price-fixing agreement). To be sure, a marketing joint venture could produce a similar result. We tolerate a marketing joint venture when it is shown to produce a new product that would not otherwise exist, absent the collaboration, and if it is shown that the joint venture will produce

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[2] The provisions also establish a safe harbor when the merger could not result in substantial market power. But under complaint counsel's theory, after the merger the merging hospitals here enjoyed substantial market power.

efficiencies that outweigh any pricing effects. Federal Trade Comm'n & U.S. Dep'at f Antitrust Guidelines for

Additionally, MCO representatives testified that prior to the merger there was another

not a tertiary care teaching hospital. CB 54, n.57; ID 191.[4] Indeed, respondent repeatedly emphasized how different Evanston and Highland Park were from each other, RB 2, 7, 9, 10; RRB 28 n.6, 36, and also admitted that tertiary care teaching hospitals like Evanston command higher prices than primary-secondary care community hospitals like Highland Park. RB 17-18, 51; RRB 36-37.

proceeding under Count II complaint counsel did not define a market upfront using the Merger Guidelines methodology. Rather, it relied instead primarily on the direct evidence of the transaction's anticompetitive effects, in accordance with Count II. CB 5. I agree with complaint counsel that especially when a merger has been consummated and the evidence shows it has had actual anticompetitive unilateral effects, the law allows liability to be established by direct evidence of those effects, without initially defining a relevant market using Merger Guidelines methodology, at least where, as here, the evidence of anticompetitive effects identifies the "rough contours" of the market.

A. The Law

The Commission opinion articulately describes the trend in the courts towards greater reliance on direct evidence in defining markets. Comm. Op. 86-88. In cases brought under Section 1 of the Sherman Act, the courts have analyzed the analogous issue of whether it is appropriate to determine the lawfulness of completed or ongoing conduct through direct effects evidence, in lieu of market definition. *See id.* (discussing *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1986) ("IFD")); *Toys "R" Us*, 221 F.3d 928; *Todd v. Exxon Corp.*, 275 F.3d 191, 207 (2d Cir. 2001); *Ball Mem'l Hosp. v. Mutual Hosp. Ins.*, 784 F.2d 1325, 1336 (7th Cir. 1986)).

The purpose of market definition and the direct analysis of anticompetitive effects are consistent – both techniques seek to determine whether a planned agreement by competitors is likely to facilitate the exercise of market power, or whether a completed one has enabled the exercise of market power. *See Toys "R" Us*, 221 F.3d at 937. As the Commission opinion observes, for more than a decade the courts and scholars have recognized repeatedly that market definition is not an end in itself but rather an indirect means to assist in determining the presence or the likelihood of market power. Comm. Op. 86-88; *see also United States v. Baker Hughes, Inc.*, 908 F.2d 981, 992 (D.C. Cir. 1990); IIA AREEDA, HOVENKAMP & SOLOW, *supra*, ¶ 532a, at 190-91; HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY § 12.8, at 550 (3d ed. 2005) ("H(u 9 07 12.8, s(ga, at)Tj009 Icw Tc 0 I(447 (1)4I3aj0.06 T9 0aTw 0.45 0868 Icw Tc 0 I(rororo1b9os 0 8.o0
190-91; H

relevant markets. *Id*. The Section 1 cases discussed by the Commission opinion permitted the

In short, I believe that as a matter of law, it was not necessary that anything more than the "rough contours" of the relevant market be defined in order to establish the existence of a Section 7 violation in this case, where complaint counsel's theory of anticompetitive effects could be tested because the merger had been consummated. The evidence shows that this consummated merger enabled the merged firm unilaterally to engage in supra-competitive pricing, and that fact supports the propriety of relying on direct evidence in defining the rough contours of the relevant market.[6]

B. The Facts

In this case, respondent's documents and economic evidence described above, as well as the testimony of MCOs previously described, not only established the existence of anticompetitive effects resulting from the merger, but also identified at least the "rough contours" of the product and geographic markets alleged by complaint counsel. More specifically, complaint counsel asserted that the relevant product market is "general acute care hospital services, including primary, secondary, and tertiary services, sold to MCOs." CB 37. Complaint counsel contended that the relevant geographic market was the triangle bounded by the three hospitals in the ENH system. CB 38; ID 137.

As Areeda and Hovenkamp explain, a relevant market is "a market relevant to the particular legal issue being litigated." IIA AREEDA, HOVENKAMP & SOLOW, *supra*, ¶ 533c. Here the issue is whether the merger enabled ENH to impose supra-competitive prices on MCOs who wished to compete effectively for insureds located within the geographic triangle bounded by the three ENH hospitals. I agree with the Commission opinion that the relevant product market in this case is acute inpatient services, which hospitals alone can provide. As the Commission opinion points out, the record in this respect is consistent with the long line of cases that have reached the same conclusion. Comm. Op. 56.

I also conclude that complaint counsel demonstrated that the relevant geographic market consisted of the triangle bounded by the three ENH hospitals. That conclusion is based on the evidence previously described that MCOs considered Evanston or Highland Park to be next best substitutes in forming networks in order to compete effectively for insureds located within that triangle. *See supra* p. 4. That conclusion is also based on the evidence previously described that after the merger, ENH gained the power to control the price of all three ENH hospitals, and ENH

Elders Grain, Inc., 868 F.2d 901, 906 (7th Cir. 1989) (Posner, J.) (describing coordinated effects as the prevailing theory of anticompetitive effects in merger cases). As the Commission opinion points out, when that is the theory, it is important that all the competitors in the market be identified. Comm. Op. 59.

[6] Of course, if anticompetitive effects have not yet occurred because the merged party is aware of the antitrust risks of engaging in post-transaction anticompetitive conduct, or for some other reason, the upfront market definition methodology described in the Merger Guidelines may be useful to predict whether or not they are likely to occur in the future.

enjoyed and exercised this market power to impose extraordinarily high system prices on MCOs as the price for their effective competition in that geographic area. *See supra* pp. 5-7; CB 14, 19-21. And it is based on the evidence that, despite ENH's post-transaction system pricing and despite the extraordinarily high pricing that occurred at all three ENH system hospitals, none of the MCOs competing in that triangle ultimately declined to deal with ENH.

Again, respondent did not contest that the three ENH hospitals were uniquely located with respect to that triangle, or that ENH could and did engage in system pricing after the merger. Respondent instead argued that the triangle did not constitute the relevant geographic market because each of the ENH hospitals was located closer to other hospitals than to each other and that the pricing at these other hospitals would constrain the pricing at each. RB 2, 10. That is a *non sequitur*. It is correct that at one level of competition, prior to the transaction the pricing at Evanston and Highland Park was constrained by other hospitals that were located proximate to each. But that does not mean that same competitive constraint existed after the merger, when MCOs were forced to contract with all three ENH hospitals on ENH's terms, instead of confronting each constituent hospital with the local competition each faced, as MCOs could do before the merger. Indeed, respondent's argument simply underscores that injury to that localized pre-merger competition is another consequence of the merger, which strengthens the conclusion that the competitive forces affecting pricing vis-à-vis the triangle were lessened as a result of the merger.

In short, what the record demonstrates is that, as complaint counsel has claimed, the merger had the effect of lessening competition in a relevant market consisting of primary, secondary, and/or tertiary inpatient hospital care services in the triangular area bounded by the ENH hospitals. ENH's control of all three hospitals in the triangle enabled it to impose supra-competitive prices for inpatient hospital care services that could not have been charged prior to the merger when the hospitals forming the triangle bargained separately.

I would affirm for these reasons, and I agree with the Commission opinion's relief order.