[1] The views stated here are my own and do not necessarily reflect the views of the Commission or other Commissioners. I am grateful to my attorney advisor Kyle Andeer for his invaluable assistance in preparing this paper.

[2] FTC v. Arch Coal, Inc. 329 F. Supp. 2d 109 (D.D.C. 2004).

[3] United States v. Oracle, 331 F. Supp. 2d 1098 (N.D. Cal. 2004).

[4] FTC v. Whole Foods Market, Inc., 502 F. Supp. 2d 1 (D.D.C. 2007).

[5] FTC v. Foster, 2007-1 Trade Cas. (CCH) ¶ 75,725 (D.N.M. 2007).

[6] Federal Trade Commission, Unilateral Effects Analysis and Litigation Workshop (Feb. 12. 2007) http://www.ftc.gov/bc

[7] United States v. E.I. Du Pont de Nemours & Co., 353 U.S. 586, 593 (1957); United States v. Br

emphasized market definition. They have tried to define the relevant markets with precision in their pleadings.[10] They have told district courts that the fundamental issue in their cases is market definition. And they have made that issue front and center in appeals from those district court decisions. The goal appears to have been to take advantage of the presumptions articulated in *Philadelphia National Bank*.[11] Those presumptions are based on market shares and thus the agencies must define the relevant markets in order to avail themselves of the presumptions.

It is not simply the case law that suggests that market definition should be the threshold or first step in merger analysis. The framework of the agencies' own guidelines appear to embrace that approach as well. The order of the 1992 Horizontal Merger Guidelines suggests that one must first define the relevant market before one can then assess theTD(he)Tj11.2800 0.07somp200 TD6

[10] See, e.g., Complaint at ¶ 23, United States v. Oracle (N.D.Cal. 2004) (No. 04-807) *available at* http://www.usdoj.gov/atr/cases/f202500/202587.htm; Complaint at ¶22, United States v. Sungard (D.D.C. 2001) (No. 01-2196) *available at* http://www.usdoj.gov/atr/cases/f9400/9438.htm

[11] Philadelphia National Bank, 374 U.S. 321.

[12] U.S. Dep't of Justice & Federal Trade Comm'n, Horizontal Merger Guidelines (1992; as amended 1997) reprinted in 4 Trade Reg Rep. (CCH) ¶ 13,104.

[13] Id. at § 2.211.

[14] Toys "R" Us, Inc. v. FTC, 221 F.3d 928, 937 (7th Cir. 2000) ("The share a firm has in a properly defined relevant market is only a way of estimating market power, which is the ultimate consideration."); Ball Mem'l Hosp., Inc. v. Mutual Hosp. Ins., 784 F.2d 132

power is clear."); Tops Markets, Inc. v. Quality Markets, Inc., 142 F.3d 90, 98 (2d Cir. 1993) (market power "may be proven directly by evidenc

when the burden of production has shifted to the respondent.[18] Thus, the Commission's direct evidence of competitive effects may be offered not only to prove that ultimate issue but to define the relevant markets – i.e. the markets in which the merger is likely to result in the exercise of market power.

All of this is not to say that the agencies can eschew market definition altogether. For example, as the Seventh Circuit held in a Sherman Act case, the plaintiff must at least identify the "rough contours" of the relevant markets.[19] That makes sense. It is implausible to argue (or conclude) that a merger is likely to have competitive effects without describing at least roughly those who are likely to be adversely affected by it. But I would contend that the proof of relevant markets can be defined by direct proof of likely competitive effects. I have described this as "backing into" the market definition.[20] Others have described the competitive effects evidence and the market definition evidence as "two sides of the same coin."[21] Both mean the same thing to me: the relevant markets need not be defined in the order or in the fashion set forth the Merger Guidelines.[22]

I also think a focus on competitive effects is an easier story for the government to tell and

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[18] Chicago Bridge & Iron v. FTC, 515 F.3d 447 (5th Cir. 2008).

[19] Republic Tobacco Co. v. North Atlantic Trading Co., 381 F.3d 717, 736 (7th Cir. 2002).

[20] In the Matter of Evanston Northwestern Healthcare Corp., Docket No. concurring opinion of Commissioner J. Thomas Rosch at (2007) *available at* http://www.ftc.gov/os/adjpro/d9315/070806rosch.pdf.

[21] Brief of Appellant, FTC v. Whole Foods Market, Inc., No.07-5276 at p. 38 (D.C. Cir. argued April 23, 2008).

[22] Gregory J. Werden, *Market Delineation under the Merger Guidelines: A Tenth Anniversiary Retrospective*, 48 THE ANTITRUST BULLETIN 517, 535 (1993)(the merger guidelines are not meant to serve as a "cookbook consisting of specific directions to be followed in precise order.").

Oracle, 331 F

agencies intend to prove the merit of their merger challenges primarily through direct evidence of competitive effects rather than in the fashion described in Section 1 it is arguably a big mistake for them to rely on critical loss analysis as a major part of their case. This is not to say that such an analysis has no value at all. It can support more direct evidence of competitive effects. But I don't believe it can or should be a substitute for such evidence in most cases.

Price elasticity analyses and natural experiments are another matter. If properly and simply explained by an economist who is a good teacher and an experienced and attractive witness, they can be used very effectively to help tell the agencies' story. For example, where the merging parties enjoy prices that are substantially above the prices of other players selling similar products or services, and either entry has not occurred or the entry that has occurred has not materially eroded the prices of the merging parties, a compelling competitive effects story can be told. Most economists, however well prepared, will not have the industry experience to serve as the primary "storytellers." However, they can play an important complementary role and reinforce the testimony of those witnesses by presenting data respecting prices, entry, diversion and/or price erosion.

A note of caution about such analyses and experiments should be sounded. They must be "well-controlled" so as to eliminate or at least minimize the possibility of other explanatory variables. As I say, an experienced and attractive economist who is a good teacher can be a significant contributor to the story line. How(ts r)Tju00 0.00 rgBT72.0000fD( “)D( “)D( “)D( “0.00 0.00 0.00 rg

### B. Case Presentation: A Modest Proposal

The overriding consideration for non-economic evidence is the same as it is for economic evidence: does it tell the agencies' story effectively? In terms of the order of proof, I have already indicated that my bias is that the burden in that respect be carried primarily by the non-economic evidence. The economic evidence may be important, but non-economic

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[26] Oracle, 331 F.Supp. 2d at 1131 ("[]he issue is not what solutions the customers would like or prefer for their data processing needs; the issue is what they could do in the event of an anticompetitive price increase by a post-merger Oracle. Although these witnesses speculated on that subject, their speculation was not backed up by serious analysis that they had themselves performed or evidence they presented. There was little, if any, testimony by these witnesses about what they would or could do o

discussion about what constitutes effective trial strategy in a merger case, whether the theory be one of unilateral effects or coordinated effects. Courts do not decide these cases in a vacuum, especially if it is a high profile merger and the trial is lengthy. They read the papers, watch television and surf the net the way the rest of us do. It is important that they not get the impression that the case they are deciding is either a slam dunk or a lost cause. The merging parties and their public relations people spend a lot of money making sure that a case of this kind is fairly reported. Part of the agencies' job during trial is to try to make sure that that reporting is fair and balance. It certainly helps if that effort is amusing too. Frankly, I'm not very good at that. Dan Wall and Joseph L. Alioto are masters at it. They would stroll out of the courtroom each day and tell the media in colloquial terms what had just happened and what it meant. I don't know how much it helped (although they both won). But it sure didn't hurt.