In the Matter of

any judicial precedent for defining a obstetrical services market separate from an overall inpatient GAC market.[3]

In sum, insofar as the Commission would reverse the ALJ as to the role of tertiary and obstetrical services in the relevant market, the Commission would not only depart from the case law, but also risk accusations of "gerrymandering" the relevant product market so as to make it more susceptible to a structural presumption of liability.

III.

As to the third issue, Complaint Counsel and their economist Dr. Town proffered a study linking hospital concentration to prices in the relevant geographic market (IDF 605-11), an MCO "willingness-to-pay" econometric model (IDF 612-34), and a diversion analysis purporting to show that ProMedica was the closest substitute for St. Luke's patients (IDF 453-61). Respondent and its economist, Ms. Guerin-Calvert, disputed Dr. Town's "willingness to pay" model and adjusted its specifications in an attempt to correct some of its alleged flaws.[4] (RX 71(A).) Thus, there ended up being two competing econometric "willingness to pay" models. As a result, the parties presented competing, and very different, predictions respecting MCOs' "willingness to pay."

A.

Insofar as the Commission relies on Dr. Town's study linking concentration to prices, it supports a "structural" theory of Section 7 liability. *See United States v. Baker Hughes Inc*., 908 F.2d 981 (1990). The traditional way of challenging a merger is to demonstrate that the merger is reasonably likely to lessen competition or create a monopoly by further concentrating an already concentrated market. If the change in concentration resulting from the merger is sufficiently high, this "structural" theory creates a presumption of liability. That presumption stands unless it is rebutted. *See United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963); *United States v. Baker Hughes Inc*., 908 F.2d 981 (1990). In this case, the pre-transaction and

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simply asserts that it would be more "transparent" to treat OB services as a separate market and cites to *Butterworth* as precedent for a separate OB market. However, neither the district court nor the Sixth Circuit (which, incidentally, did not affirm or even address the district court's conclusions regarding the relevant market) in that case held that a separate OB market could be carved out. *See FTC v. Butterworth Health Corp*., 946 F. Supp. 1285, 1290-91 (W.D. Mich. 1996), *aff'd*, 1997-2 Trade Cas. (CCH) ¶ 71,863 (6th Cir. 1997).

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post-transaction HHIs and the increase in the same are more than sufficient to trigger the presumption of liability established by the Supreme Court. *See Philadelphia Nat'l Bank*, 374 U.S. at 363-67. The ALJ found that even using Respondent's proposed market definition, the pre-merger HHIs meet the Merger Guidelines' presumption of a highly concentrated market (IDF 368-69) and that "the Joinder significantly increases concentration in the already highly concentrated Lucas County GAC inpatient service market" (IDF 370).

Moreover, the majority correctly concluded that Respondent had failed to produce evidence that St Luke's was in such bad shape that its market shares would be diluted enough in the future to fall below the level of presumptive illegality. *United States v. Gen. Dynamics Corp.*, 415 U.S. 486 (1974). For example, St. Luke's CEO informed his Board in August 2010—one month prior to the closing of the Joinder Agreement—that the hospital had "high activity" compared to the prior year and "produced a positive operating margin." (IDF 790-91, 948.) He also acknowledged that by the time of the Joinder, St. Luke's had achieved 4 of the 5 "pillars" set forth in its Three-Year Plan. (IDF 931; *see also* IDF 920-41.) Among other things, St. Luke's increased inpatient and outpatient net revenue, increased its occupancy rate, and increased its market share in its core service area. (IDF 924-28.) A variety of other financial metrics also improved in the two years leading up to the Joinder Agreements. (IDF 950-54.) Finally, ProMedica's documents and testimony contradict its assertion that, absent the Joinder, it would need to build a costly new hospital at its Arrowhead property and a new tower at its Flower Hospital. (IDF 1122, 1124, 1126, 1127.)

The structural case—and indeed, the anticompetitive effects of this change in structure—was also buttressed by numerous admissions made by the merging parties in their testimony and documents. For example, ProMedica's CEO acknowledged that before the Joinder, the parties competed to attract patients and also competed to attract and retain physicians. (IDF 464-65.) ProMedica's internal assessments viewed St. Luke's as a capable competitor that could take away patient volume. (IDF 467-71, 1020.) St. Luke's CEO testified that after he came to St. Luke's in 2008, his goal was to regain volume from ProMedica in St. Luke's primary service area. (IDF 441.)

St. Luke's also acknowledged that it entered into the Affiliation Agreement with ProMedica in part based on its expectation of higher reimbursement rates from managed care organizations (MCOs). (IDF 396, 421, 597-603.) A presentation from St. Luke's CEO to the Board of Directors stated that an "affiliation with ProMedica has the greatest potential for higher hospital rates. A ProMedica-[St. Luke's] partnership would have a lot of negotiating clout." (IDF 598.) The same presentation noted that an affiliation with ProMedica could "[h]arm the community by forcing higher hospital rates on them." (IDF 598.) Other merger planning documents noted St. Luke's belief that a ProMedica affiliation would allow it to "force[] high rates on employers and insurance companies" and lead to "outstanding pricing on managed care agreements." (IDF 599-600.)

B.

First, the "willingness to pay" model is not an appropriate basis on which to find that the transaction will result in unilateral effects.[5] The fundamental premise of the unilateral effects theory of liability has long been that customers accounting for a "significant share of sales" in the market must view the merging parties as each other's closest substitutes. *See* 1992 Merger Guidelines § 2.21 ("Substantial un

See Evanston, 2007 FTC LEXIS 210, at *167. The Commission went on to warn that that "potentially creates sticky and unsettled issues for merger analysis, most significantly, determining the percentage of the merged firm's revenues that must come from customers who are harmed by the merger for the transaction to violate Section 7." *Id.*

C.

Second, the Commission should not needlessly resolve all of the thorny issues that surround the "willingness to pay" models or saddle an appellate court with those issues either. Those issues begin with the reliability of the models themselves. They are a form of "simulation" study. Critics have charged that such studies always predict a price increase if there is any degree of substitution between the merging parties' products. *See* Statement of Commissioner J. Thomas Rosch on the Release of the 2010 Horizontal Merger Guidelines at 3-4 (Aug. 19, 2010). And even the Commission has stated that such studies are not "conclusive" in themselves. *See* 2010 Guidelines § 6.1. For another thing, it is not easy to choose between Dr. Town's model and the modifications that Ms. Guerin Calvert made to that model. Dr. Town's model in its original form and as modified predict very different