IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

FEDERAL TRADE COMMISSION and COMMONWEALTH OF PENNSYLVANIA, Plaintiffs-Appellants, v. PENN STATE HERSHEY MEDICAL CENTER and PINNACLEHEALTH SYSTEM, Defendants-Appellees.	No. 16-2365

EMERGENCY MOTION
OF THE FEDERAL TRADE COMMISSION
AND THE COMMONWEALTH OF PENNSYLVANIA
FOR AN INJUNCTION PENDING APPEAL
AND TO EXPEDITE APPEAL

The Federal Trade Commission and the Commonwealth of Pennsylvania ("the Government") ask the Court to enjoin pending appeal a merger between the two largest health systems in the Harrisburg, Pennsylvania area—the Penn State Hershey Medical Center and PinnacleHealth System. FRAP 8(a) and 3d Cir. LAR 8.1 and 27.7. We also ask the Court to expedite this appeal. In the absence of temporary injunctive relief, defendants may consummate their merger at 12:01 a.m. on Friday, May 13, 2016. The Government sought an injunction pending appeal from the district court, but that court has not yet ruled on the motion. Given the timing, we must now seek relief from this Court.

The merger will eliminate hospital competition in the area surrounding Harrisburg, Pennsylvania. Together, the two hospital systems will control nearly 80 percent of the market in that area. That dominance will increase their bargaining power over insurance companies and enable them to raise rates and forego improvements in patient care and service.

If the merger proceeds, the Government will be irreparably harmed by losing the right to meaningful relief and the public will be harmed by a decrease in competition. The hospitals will be able to share sensitive information about their competitive pricing strategies, lay off employees, consolidate services, and make other changes that can make it impossible to rewind the clock and restore effective competition. By contrast, defendants will not be substantially injured by a brief stay pending appeal since there is no expiration date on their merger.

The Government is likely to prevail on the merits of this appeal. The district court clearly erred when it held that the Government had not properly defined the relevant geographic market. The court ignored the economic reality of the healthcare marketplace when it failed to analyze the geographic market from the perspective of the rate-negotiation process between insurance company customers and hospitals. By utterly disregarding that central economic relationship, the court fundamentally erred in defining the geographic market. That error then infected the court's assessment of the equities, which plainly favor an injunction.

Had the court properly analyzed the geographic market, it would have determined that the combination of the two hospital systems was presumptively unlawful in light of their market dominance, which creates an overwhelming advantage in price negotiations. Unless this Court enjoins the merger, insured patients and their families ultimately will bear the consequences.

JURISDICTION

The FTC sought a preliminary injunction to preserve the status quo under 15 U.S.C. § 53(b) while it examines in an administrative adjudication whether the merger is unlawful; Pennsylvania sought an injunction under 15 U.S.C. § 26. This Court has jurisdiction because the order under review is final, 28 U.S.C. § 1291, and because the lower court denied an injunction, 28 U.S.C. § 1292(a)(1).

BACKGROUND

1. THE PROPOSED MERGER.

Hershey and Pinnacle operate the two largest hospital systems in the Harrisburg area. Hershey owns the Penn State Milton S. Hershey Medical Center, which has a 36 percent share of the market for general-acute-care inpatient services ("GAC services") sold by hospitals in the Harrisburg area to commercial insurers. Op. 6. GAC services include the gamut of inpatient hospital procedures ranging from appendectomies to organ transplants. Pinnacle operates three area hospitals that together command 40 percent of the Harrisburg GAC services market. In March 2015, the hospitals decided to combine into a single system (Op. 3) that would control 76 percent of the total GAC services market in the Harrisburg area.

For patients who live in the four counties surrounding Harrisburg (Dauphin, Cumberland, Perry, and Lebanon counties), Hershey and Pinnacle are close rivals. The two hospitals provide essentially the same range of services. Hrg. 334:18-21; PX01062 (Wilson Rpt.) at 131.[1] Pinnacle, like Hershey, is a sophisticated health system with a teaching hospital that offers the "most complex surgeries" and innovative medical technology. Hrg. 523:15-530:12; PX0280-002. One Pinnacle document identified Hershey as "our main competitor." PX00527-001. Another

[1] "Hrg." refers to the transcript of the preliminary injunction hearing. "PX" refers to plaintiffs' numbered exhibits. The most important supporting materials are included in the separately filed sealed appendix.

stated that the two systems "aggressively compete." PX00037-008. No other hospital in the area has anywhere near the market clout of Hershey and Pinnacle. The next largest, Holy Spirit Hospital in Cumberland County, has a 15 percent market share, and two others have shares of 5 percent or less. PX1062 at 116.

2. ECONOMICS OF THE COMMERCIAL HEALTHCARE MARKET.

Understanding the unique competitive dynamics of the healthcare market is essential to assessing the competitive effects of the merger. The analysis turns on how the transaction changes the relative bargaining strengths of the hospitals and their insurance company customers with which they negotiate their prices.

a. Unlike a typical market with one buyer and one seller, commercial healthcare markets have four participants: insured patients; their employers, who select the policies offered to them; healthcare providers; and insurance companies, which directly pay for services. Hrg. 305:5-306:20. Because the insurers pay the bulk of the healthcare costs of their policy holders and negotiate the prices of services, they are the direct customers. PX01062 (Wilson Rpt.) at 59-60; Hrg. 492:2-10, 306:11-13.

Insurers sell policies in a competitive market and must make them attractive to patients and their employers. One critical selling point is the insurer's network, the group of healthcare providers (including hospitals) that have agreed to treat the insurer's policyholders at negotiated rates. An insurer's hospital network therefore must take into account the preferences of its customers, who typically demand that the network include hospitals that are geographically convenient, provide quality care, and offer necessary services. Hrg. 305:14-22, 306:15-20, 308:1-5; PX01062 (Wilson Rpt.) at 65; PX01424 (Wilson Rebuttal) at 61.

Hospitals compete with each other to be included in insurance networks, which are important sources of patients. Competition for inclusion both fosters improved quality of care and enables insurers to negotiate lower reimbursement rates, which lead to lower costs for patients and employers. Conversely, less competition leads to higher rates and consumer costs and lower quality of care. Hrg. 306:1-308:9; PX01062 (Wilson Rpt.) at 59, 66-67.

b. The amount an insurer reimburses a network participant for healthcare services is established in a contract negotiation. Like any business deal, the negotiation turns on the relative bargaining strength of the insurer and the hospital. Each side has some leverage. Hospitals need inclusion in networks to attract patients. Insurers need hospitals to participate in a network to make it marketable to policyholders. Whichever side has the stronger bargaining position achieves more favorable rates. *See ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559, 562 (6th Cir. 2014); *St. Alphonsus Medical Center v. St. Luke's Health System*, 778 F.3d 775, 784-785 (9th Cir. 2015).

The presence of nearby comparable alternatives increases an insurer's bargaining power and constrains a hospital's ability to negotiate higher rates. PX01062 (Wilson Rpt.) at 56, 65-66. If an insurer can form a marketable network without a given hospital, then the insurer can reject demands from that hospital for high rates. PX01062 (Wilson Rpt.) at 65-66; Hrg. 309:14-25; *see ProMedica*, 749 F.3d at 562.

Without alternative hospital providers valued by policyholders in a given area, however, an insurer's bargaining strength is significantly diminished. Then, a dominant hospital provider's superior bargaining position forces the insurer to accede to its demand for higher reimbursement rates or risk being left with a network it cannot successfully market. PX01062 (Wilson Rpt.) at 66-67; *see also ProMedica*, 749 F.3d at 562. Higher rates are borne by employers and policyholders via increased premiums. PX01062 (Wilson Rpt.) at 73-74.

3. THE HARRISBURG MARKET.

Patients in the Harrisburg area overwhelmingly demand hospital care close to their homes. Hrg. (Wilson) 314:12-317:20, 320:11-321:12; Hrg. (Hillemeier) 474:7-10; Hrg. (Pugh) 521:19-522:6. More than 90 percent of commercially insured patients in the Harrisburg area seek GAC services in that area. Their median travel time to a GAC hospital is 15-minutes. A survey defendants conducted concluded that convenient location was the most important factor in selecting a hospital. PX01360-036. The vast majority of Harrisburg area residents reported that defendants were either their first or second choice hospital. PX01360-033. The nearest large hospitals outside the Harrisburg area (in York and Lancaster counties), which are 30 to 45 minutes away, collectively provide care to less than 2 percent of Harrisburg area patients. PX01062 (Wilson Rpt.) at 43, 122.

Before the proposed merger, competition between Hershey and Pinnacle for inclusion in networks constrained their demands for higher reimbursement rates from insurers. For example, in 2014, one of the area's largest insurance companies successfully resisted Pinnacle's demand for substantial price increases by threatening to form a network that included only Hershey and Holy Spirit. PX00701 ¶18.

The merger will dramatically alter the insurers' previously favorable bargaining position because they will no longer be able to use the separate existence of the hospitals to their advantage in contract negotiations. Any viable network must contain either Pinnacle or Hershey, as proven by the experience of one small area health plan. For more than a decade, the insurer successfully sold policies in the Harrisburg area using a network that included Pinnacle and Holy Spirit but not Hershey. PX00704 ¶10; Hrg. 208:25-209:11. In 2014, Pinnacle terminated its participation in the network, PX01533; Hrg. 209:18-210:13, and the health plan attempted to market its policies with a network that included Holy Spirit and numerous hospital systems outside the Harrisburg area. PX01542. Despite offering a substantial discount, however, the network was unattractive to customers, half of whom switched carriers. PX01542; PX01608; Hrg. 223:20-226:19; PX01610; PX00704 ¶10. Brokers opined that the network without Hershey or Pinnacle was unmarketable at any price point. PX00704 ¶10; PX00708 ¶¶ 7-13; Hrg. 225:15-226:19.

Large Harrisburg area insurers recognized that they too could face a similar problem, because without Hershey or Pinnacle "for all intents and purposes there would be no network." PX01236 at 48:17-22. One large insurer predicted that a network without defendants' hospitals would lose half its membership in Dauphin County. To avert that commercial disaster, a company witness stated, the insurer would have no realistic alternative but to pay rates 25 percent higher. PX01236 at 144:6-16. Another large area insurer explained that it would need to include the combined Hershey/Pinnacle to successfully market its network, and the merger increase the hospitals' bargaining power, rendering the insurer "not … able to negotiate . . . appropriate pricing and terms." PX00804 at 49:8-15, 91:16-25, 64:13-20; PX00378-002.

4. THE DISTRICT COURT'S ORDER

The FTC is about to undertake an administrative adjudication to determine whether the Hershey/Pinnacle merger violates the Clayton Act, 15 U.S.C. § 18. Congress recognized that administrative proceedings can take time, and it therefore granted the FTC authority to seek a court order enjoining a merger pending completion of the agency's determination. 15 U.S.C. § 13(b). An injunction is appropriate where "weighing the equities and considering the Commission's likelihood of ultimate success," stopping the merger would be "in the public interest." *Id*.

The district court denied the Government's request for an injunction. It determined that the Government had not shown the four-county Harrisburg area to be a properly defined antitrust geographic market, which was "dispositive to the outcome" of the proceeding. Op. 8. The court's decision turned almost entirely on the statistic that 43.5 percent of Hershey's patients come from outside the Harrisburg area and half of them travel 30 minutes to an hour to get there. Op. 10. In the court's view, Hershey and Pinnacle's prices would be constrained by that customer base. If the combined hospital systems raised prices, the court believed, it would lose those patients to closer hospitals.

The court also found it "extremely compelling" for purposes of market definition that the hospitals have entered into long-term contracts with two large insurers that maintain existing rates. Op. 10-11. The court appeared to view those contracts as proof that a monopolist hospital system could not increase prices and as an antidote to the increased bargaining power of the combined hospital.

Despite its denial of an injunction for failure to prove a geographic market, the court went on to address the equities and determined that the hospitals "presented ample evidence demonstrating that anticompetitive effects would not arise" from their merger. Op. 12. It found that the merger would alleviate Hershey's need to enlarge its facilities because patients could be transferred to Pinnacle. Op.14-19.

ARGUMENT

In determining whether to grant an injunction pending appeal, the Court considers: (1) likelihood of success on the merits of the appeal; (2) irreparable injury; (3) substantial harm to other parties; and (4) the public interest. *Republic of Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 658 (3d Cir. 1991). Those factors favor the grant of an injunction to maintain the status quo pending appeal.

I. THE GOVERNMENT IS LIKELY TO SUCCEED ON THE MERITS.

Section 7 of the Clayton Act prohibits mergers that "may" substantially lessen competition "in any section of the country." 15 U.S.C. § 18. The FTC need not show that anticompetitive effects *will* result from a challenged acquisition. Congress's "concern was with probabilities, not certainties." *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 658 (1964); *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962). Similarly, when the FTC seeks to preliminary enjoin a merger under Section 13(b) of the FTC Act, it need not definitively prove that the merger is unlawful, but only that it *likely* is unlawful. *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34, 45 (D.D.C. 1998).

The Government is likely to succeed on its claim that the district court improperly denied the preliminary injunction. We presented abundant evidence that the relevant geographic market is the Harrisburg area. If that geographic market is correct, there is no dispute that the merged hospitals would control 76% of the GAC services market. The market would also undergo a substantial increase in concentration—nearly 15 times what the FTC and Department of Justice's *Merger Guidelines* deem anticompetitive as measured by the Herfindahl-Hirschman Index. *See* U.S. Dept. of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines* § 5.3 (Aug. 19, 2010), available at http://www.ftc.gov/os/2010/08/100819hmg.pdf; PX01062 at 115-116 & Table 5 (post-merger HHI will increase by 2,852 points; a 200-point increase is presumed anticompetitive). Those figures render the transaction presumptively unlawful. *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 363 (1963).

A. The District Court Misapplied The Test For Defining A Geographic Market.

An antitrust geographic market is "the area in which a potential buyer may rationally look for the goods or services he or she seeks." *Pennsylvania Dental Ass'n v. Medical Service Ass'n of Pa.*, 745 F.2d 248, 260 (3d Cir. 1984) (citation omitted). The inquiry is not where "the seller attempts to sell its product, but rather . . . the area where his customers would look to buy such a product." *Tunis Bros. Co. v. Ford Motor Co.*, 952 F.2d 715, 726 (3d Cir. 1991). In antitrust analysis, "economic realities rather than a formalistic approach must govern." *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 189 (3d Cir. 2005).

When the district court rejected the four-county Harrisburg area as the relevant geographic market, it turned a blind eye to the economic realities of the healthcare market generally and Harrisburg in particular. Ignoring, without any explanation, the testimony of industry and expert witnesses on how prices for hospital services are determined, the court instead relied almost entirely on a single fact—where Hershey's patients live— that does not address the question of where insurers, the direct customers at issue, realistically turn for hospital services. That was reversible error.

The court also disregarded a principal tool of geographic market definition. The hypothetical monopolist test is an accepted (and here uncontested) definitional method. It asks whether a "hypothetical monopolist" in the proposed market could impose a small but significant (about 5 percent) non-transitory increase in price (a "SSNIP") without losing enough customers to make the increase unprofitable. If the monopolist could impose a SSNIP from at least one of its locations, then the market is properly defined for antitrust purposes. *See Merger Guidelines* §§ 4.1.2, 4.2.

Both expert and fact evidence showed that a monopoly hospital system in the Harrisburg area could demand a SSNIP from the most pertinent customers—

insurance companies. The Government's expert economist described at length the operation of the insurer/hospital bargaining process discussed above. He testified that, given the demand for local health care and insurers' needs for commercially viable networks, a monopolist hospital in the Harrisburg area could successfully demand a sizeable rate increase. Hrg. 314:12-21. In short, the Harrisburg area is a proper antitrust market because that is where insurance companies look to buy healthcare services.

Fact witnesses confirmed the economic theory. One witness responsible for provider contracting for a large area insurer testified that without Hershey or Pinnacle in a network, "for all intents and purposes there would be no network." PX01236 at 48:17-22. Without those two hospitals, he explained, his company "would probably lose about 50 percent of our membership in Dauphin County." *Id*. at 144:6-16. It thus would pay a 25 percent increase—five times a SSNIP—to avoid that result. *Id*. at 49:8-15, 91:16-25, 144:6-16. Indeed, as described above, the network of one small insurer without Hershey or Pinnacle was essentially unmarketable at any price.

The hospitals' own documents likewise confirm that they view the four-county area as a distinct market. When they conducted a joint survey, both hospitals' marketing directors agreed that the "primary" market was the immediate Harrisburg area. PX00373-002. The survey concluded that defendants' hospitals were Harrisburg area residents' most preferred hospitals and that more than 90 percent of those surveyed would seek care at either the closest or a very convenient hospital. PX01360-024. Hershey's strategic plan identified the Harrisburg area as a distinct region that needed a unique approach. PX00885-002. Pinnacle's CFO testified that its primary service area was Harrisburg and identified its closest competitors as Hershey and Holy Spirit, both in the Harrisburg area. Hrg. 537:4-10.

The court below totally ignored all of this evidence. It found instead that the market encompassed an area far larger than the four counties based almost entirely on a single data point: that 43.5 percent of Hershey's patients come from outside the Harrisburg area. Op. 9. The court speculated, without citation to record evidence, that these patients would go to other, closer hospitals in the event of a small price increase at Hershey, thereby constraining the hospitals' prices. Op. 10.

That determination was clear error because it "bears no rational relationship" to the way healthcare markets work. *Shire U.S., Inc. v. Barr Labs., Inc.*, 329 F.3d 348, 352 (3d Cir. 2003). By focusing on how patients outside the market would supposedly respond to a price increase, the court fundamentally misunderstood the economics of the healthcare marketplace. To begin with, as both sides agreed in this case (and the district court itself recognized, Op. 6), it is the insurer that bargains over prices and pays directly for services. The patients on which the district court hinged its analysis do not directly bear price increases (the increase filters back to consumers indirectly through higher premiums). Thus, a price increase by Pinnacle or Hershey would be unlikely to cause patients to use other hospitals and there would be no price discipline. Indeed, the evidence showed that only 2 percent of survey respondents considered out of pocket cost to be a factor when choosing a hospital. PX01360-036. As the Ninth Circuit recently recognized, commercially-insured patients "would not change their behavior in the event of a SSNIP" because "the impact of a SSNIP likely would not register." *St. Luke's*, 778 F.3d at 785. [2]

Moreover, the court disregarded the evidence from insurers, impermissibly reading their role—and with it the hypothetical monopolist test—out of the rate-negotiation process entirely. In particular, the court ignored testimony about insurers' concern that prices would increase if the merger occurs. *E.g.*, PX01200 at 34:8-20. Such concerns would not arise if hospitals outside the Harrisburg area

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[2] By defining the geographic market based on patient in-flow, the district court essentially applied the discredited "Elzinga-Hogarty" test, which has been rejected for use in analyzing hospital mergers by the FTC and by its own creator. The test was created for markets like coal and accounts for neither the role of the insurer in setting prices nor the price-insensitivity of patients. *See In re Evanston NW Healthcare Corp.*, 2007 WL 2286195 at **64-66 (F.T.C. Aug. 6, 2007); PX01062 (Wilson Rpt.) at 110-115. Recent judicial decisions recognize that health care mergers are properly analyzed by scrutinizing the relative bargaining power of healthcare providers and insurers. *See St. Luke's*, 778 F.3d at 784-85; *ProMedica*, 749 F.3d at 562-63; *FTC v. OSF Healthcare Sys.*, 852 F. Supp. 2d 1069, 1083-84 (N.D. Ill. 2012).

could constrain prices. The court thus overlooked the "particular structure and circumstances" of the healthcare market. *Verizon Comms. v. Trinko*, 540 U.S. 398, 411 (2004). For that reason alone, the geographic market analysis was fatally flawed. The court's further failure to address unrebutted testimony from insurers that they would pay more than a SSNIP to keep defendants in their networks renders its decision "completely devoid of a credible evidentiary basis" and therefore clearly erroneous. *See Shire*, 329 F.3d at 352.

The court made a second, equally fundamental error by failing to consider whether a hypothetical monopolist could impose a SSNIP at Pinnacle alone. Under Section 4.2.1 of the *Merger Guidelines*, the Harrisburg area is a properly defined geographic market if a combined Hershey/Pinnacle could raise prices "*from at least one location*." Even if it were plausible that Hershey's patient base from outside the Harrisburg area could constrain prices, no evidence supports such a conclusion as to Pinnacle, which draws patients from a smaller area. PX01424 (Wilson Rebuttal) at 68-71. Hershey's own CEO testified to the concern of area insurers that Pinnacle's post-merger prices would increase. PX00801 at 103:24-104:21; *see also* PX00614-001; PX00612-003.

Those basic flaws in the district court's analysis are not salvaged by its reliance on defendants' temporary rate protection agreements with two insurers. Op. 10-11. To the contrary, reliance on those agreements is a reversible analytical error in its own right. Defendants' private contracts with two insurers to retain current prices is simply not relevant to defining a geographic market. The hypothetical monopolist test is just that—hypothetical—and it is used to determine whether a monopolist *could* impose a SSNIP on customers or whether those customers would instead turn to suppliers outside the proposed market as substitutes. Contractual price agreements demonstrate nothing about an antitrust market; at most they amount to temporary promises not to exercise market power. Indeed, "the mere fact that such representations had to be made strongly supports the fears of impermissible monopolization." *Cardinal Health*, 12 F. Supp. at 67.

Moreover, defendants have *not* entered into similar agreements with other insurers in the Harrisburg area, who would be subject to rate increases as a result of defendants' enhanced bargaining power. And even as to the two companies subject to price agreements, the agreements apply only to fee-for-service agreements and not to other payment methods. Of course, as one of the two largest insurers confirmed, once the agreements expire, Hershey and Pinnacle will be free to raise their prices as they wish. PX01236 at 49:8-15, 91:16-25, 144:6-16.

Finally, by even relying on price cap agreements as an element of the geographic market analysis, the district court committed a grave error that under-mines the integrity of the antitrust laws. Under the court's approach, a plaintiff could never successfully prove a geographic market if the defendant enters into rate protection agreements with its customers. That outcome would allow unlawfully merging parties, monopolists, and other antitrust violators to escape antitrust scrutiny, notwithstanding the acquisition or preservation of market power.

B. The District Court Erroneously Assessed The "Equities."

Because the district court concluded that its geographic market analysis was "dispositive," Op. 8, it did not analyze whether the merger would lead to offsetting cognizable efficiencies. The court nonetheless credited defendants' alleged efficiencies in the guise of "equities," finding that they favored the merger. Op. 12-13. The court's erroneous assessment of the geographic market fatally infected its assessment of the purported benefits of the merger because it led the court to excuse defendants from their burden to establish the cognizability of their claims. As a result, the court did not rigorously analyze whether defendants' efficiency claims were verifiable, achievable, and merger-specific, as required by precedent and Section 10 of the *Merger Guidelines*. *See FTC v. H.J. Heinz Co.*, 246 F.3d 708, 721 (D.C. Cir. 2001).

For example, the district court particularly erred when it uncritically accepted the claim that the merger would benefit the Harrisburg area by allowing Hershey to avoid construction of additional patient care facilities. Far from benefiting the community, the canceled construction project is in fact a restriction in output—a classic example of market power that raises prices. Section 10 of the

Merger Guidelines expressly rejects "anticompetitive reductions in output" as a cognizable merger efficiency. Moreover, a nearly identical claim was specifically rejected by a federal district court enjoining a hospital merger. *FTC v. ProMedica Health Sys., Inc.*, WL 1219281 at *36 (N.D. Ohio Mar. 29, 2011). In fact, Hershey's expansion would likely lead to more competition and lower prices. Hrg. 342:3-7; 988:16-990:1.

Equally wrong, the district court asserts without citation that the merger is made necessary by the Affordable Care Act. In fact, regulations issued by the Department of Health and Human Services set forth that "competition in the marketplace … can accelerate advancements in quality and efficiency." 76 Fed. Reg. 67802, 67841 (Nov. 2, 2011). Nothing in the ACA compels anticompetitive consolidation among competing hospitals.

II. THE REMAINING STAY FACTORS STRONGLY FAVOR AN INJUNCTION PENDING APPEAL.

If the merger goes forward the Government and the public will likely suffer irreparable injury. It will be difficult to obtain adequate relief if this Court overturns the district court's refusal to enjoin the merger. Constructing and enforcing an effective divestiture order after merging parties have combined their operations can be difficult or even impossible. *See, e.g.*, *FTC v. Warner Communications Inc.*, 742 F.2d 1156, 1165 (9th Cir. 1984); *FTC v. Whole Foods Market, Inc.*, 548 F.3d 1028, 1033-34 (D.C. Cir. 2008). Such concerns are particularly acute here, because defendants may immediately alter their operations and share their strategic information (including data on one another's separate and ongoing rate negotiations), likely making it impossible to restore competition. Hrg. 819:25-820:4.

Defendants, by contrast, will not be substantially injured by the grant of an injunction pending an expedited appeal. Indeed, they began to pursue the merger in October 2013, and we are aware of no firm deadline for its conclusion. Any effect of delay on defendants' plans pales in comparison to the harm to the public that would result from eliminating competition between these hospitals.

Granting an injunction pending appeal would promote the strong public interest in the effective enforcement of the antitrust laws. Because defendants would control 76 percent of the GAC services market and their merger would dramatically increase market concentration, it is presumptively anticompetitive. PX01062 at 115-116 & Table 5. As health insurers are forced to pay higher rates, patients will suffer higher insurance premiums. The public interest favors preserving Hershey and Pinnacle as independent competitive entities while this Court assesses the merits of the district court's decision.

CONCLUSION

For the foregoing reasons, the Court should grant an injunction pending an expedited appeal.

Respectfully submitted,

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May 12, 2016

CERTIFICATE OF SERVICE

I certify that on May 12, 2016, I electronically filed with the Court's CM/ECF system the foregoing Emergency Motion for Injunction Pending Appeal. The counsel for defendants-appellees listed below will be served by the CM/ECF system. I further certify that I also emailed an electronic copy of the pleading to each of the lawyers below at the listed email addresses. I further certify that FTC counsel has alerted lead opposing counsel to this Motion by telephone.

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