



PG Bulletin

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FTC Challenges Jefferson-Einstein Merger

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On February 27, 2020, the Federal Trade Commission issued an Administrative Complaint (Complaint) against the Thomas Jefferson University (Jefferson) and Albert Einstein Healthcare Network (Einstein) health care systems (together, the Systems), alleging that a proposed merger between the two would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act.¹ According to the Complaint, the Systems are two of the “leading providers” of inpatient general acute care hospital services (GAC services) and inpatient acute rehabilitation services (rehab services) in Philadelphia and Montgomery counties.² Through the proposed merger, the Systems would become the largest hospital system in both counties, as well as the largest hospital system in the “greater Philadelphia region.”³

As in other health care merger enforcements,⁴ the Commission laid the foundation for its antitrust claims against the Systems by alleging its view of the relevant service markets (here, GAC services and rehab services), then turning to relevant geographic markets.⁵ Specifically, using the hypothetical monopolist test, the Commission alleged that there are two relevant geographic markets for GAC services, with one in Philadelphia County (the Northern Philadelphia Area) and another in Montgomery County (the Montgomery Area), and one relevant geographic market for rehab services that includes parts of both counties (the Philadelphia Area).⁶

Based on its definition of the relevant markets, the Commission then alleged that under the 2010 Horizontal Merger Guidelines (Merger Guidelines), the proposed merger would increase market concentration to a presumptively unlawful level, as measured by the Herfindahl-Hirschman Index (HHI).⁷

Specifically, the Commission alleged that were the proposed merger to go forward, GAC services in the Northern Philadelphia Area would result in an HHI increase of at least 1,200 points, raising the post-merger HHI to at least 4,500—and leaving the Systems in control of at least 60% of that market.⁸ Likewise, the Commission alleged that in the Montgomery Area, the post-merger HHI for the GAC services market would be at least 3,500, reflecting an increase of at least 700 points, with the Systems controlling at least 45% of that market.⁹ Last, the Commission alleged that post-merger, the HHI in the Philadelphia Area for rehab services would increase by 2,500 points,

yielding a post-merger HHI of 5,900.¹⁰ According to the Commission, that service market would also see the highest market share for the newly merged entity: together, the Systems would account for 70% of the rehab services market in the Philadelphia Area.¹¹ Notably, most prior hospital merger enforcement cases from the past decade involving GAC markets involved higher increases in HHI and higher post-merger HHI figures.¹²

The Complaint also alleged several anticompetitive effects of the proposed merger.¹³ In particular, although certain details were redacted, the Commission alleged that the Systems are “close competitors” for both GAC services and rehab services, noting their “history” of upgrading medical facilities, improving patient access, and offering more competitive reimbursement rates “because of competition from each other.”¹⁴ The Commission also alleged that the Systems “closely track each other’s quality and brand recognition,” which suggests that the Systems explicitly viewed each other as key competitors in materials produced to the Commission during its investigation.¹⁵ Similarly, in other hospital merger enforcements in which the Commission successfully halted or unwound the subject transaction, such as the *ProMedica* case, the Commission stressed that “the parties’ documents [and] their business conduct,” among other things, all showed “substantial head-to-head competition” between the two merging hospital systems.¹⁶

The Commission also relied on diversion analysis to support its allegations that the proposed merger would decrease competition, presenting a range of diversion ratios to allege that Einstein and Jefferson are viewed as substitutes for one another.¹⁷ For example, the Complaint notes that up to 35% of patients at one Einstein hospital viewed a Jefferson hospital as a substitute should the Einstein hospital no longer be available to them. The Complaint also notes that as few as 7% of patients at two different Jefferson hospitals viewed an Einstein hospital as a substitute if a Jefferson hospital were not available.¹⁸ These ratios, at least those on the higher end, comport with those alleged by the Commission in some recent hospital merger enforcements, but are significantly lower than those in several other cases.¹⁹ The single-digit diversion in particular is significantly lower than those that have been alleged in other matters, and it indicates an increased willingness of the Commission to pursue litigation even where the extent of head-to-head competition is low in one direction.²⁰ Another noteworthy aspect of this Complaint is the fact that it did not mention system-level diversions, indicating that system-level competition may have been viewed as less relevant by the Commission in this instance.

Significantly, the Commission also emphasized the growth of “narrow network” and “tiered” health insurance products.²¹ According to the Complaint, these networks present a “tradeoff to consumers,” with fewer participating hospitals available to consumers in exchange for heavy price discounts.²² Alleging that commercial insurers treat the Systems as substitutes “when constructing narrow network or tiered network products for patients” in the relevant geographic areas, the Commission concluded that the proposed merger would give the combined system “leverage” to bargain for better terms when participating in such networks.²³ This is also a novel argument for the

Commission. Typically, assessments of competition between systems or hospitals tend to take into account the fact that network design, or the structuring of narrow and tiered networks, offers payers a mechanism to defeat price increases that could be contemplated by hospitals.²⁴ Here the Commission instead argues that the merger would compromise payers' ability to obtain favorable pricing through such arrangements.²⁵ It appears the Commission is focused on competition between the Systems specifically for inclusion in narrow networks, rather than competition with remaining market participants for network inclusion more generally. Yet competition between the two merging parties and other non-merging parties would allow payers to discipline post-transaction pricing by relying on network design that places remaining competitors in more favorable network tiers. The Commission appears to have discounted such sources of competitive discipline in this Complaint.

The Complaint also alleged several barriers to entry in the relevant markets, citing the expense, time, and logistical hurdles in building a new hospital or expanding an existing hospital.²⁶ The Commission further focused on the strengths of the Systems themselves as their own barrier to entry, alleging that "replicating the competitiveness and reputation" of either one would be a significant challenge given their establishment in the community and billions of dollars in revenue.²⁷

Last, and in line with prior enforcements,²⁸ the Complaint alleged that Jefferson and Einstein had not "substantiated verifiable, merger-specific efficiencies" to rebut either the merger's presumed unlawfulness or evidence of its anticompetitive effects.²⁹

Although alleged in the Background section of the Complaint and not in the analysis of the merger's anticompetitive effects, it is also worth noting that Jefferson had acquired four other hospital systems and inpatient rehabilitation facilities within the past five years alone, with yet other affiliations still in the works.³⁰ It seems likely that Jefferson's aggressive growth in the region played a role in the Commission's decision to pursue enforcement.

Currently, the Complaint is set for a September trial date, with a parallel proceeding in the U.S. District Court for the Eastern District of Pennsylvania.

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¹ *In the Matter of Thomas Jefferson Univ.*, Docket No. 9392, Administrative Complaint (Feb. 27, 2020), https://www.ftc.gov/system/files/documents/cases/part_iii_complaint_jeff-einsteinproposed_public_version_addl_redactio_redacted.pdf (hereinafter the "Jefferson Complaint"); see also Fed. Trade Comm'n, Press Release, *FTC and Commonwealth of Pennsylvania Challenge Proposed Merger of Two Major Philadelphia-area Hospital Systems* (Feb. 27, 2020), https://www.ftc.gov/news-events/press-releases/2020/02/ftc-commonwealth-pennsylvania-challenge-proposed-merger-two-major?utm_source=govdelivery.

² *Jefferson Complaint* at ¶ 1.

³ *Id.* at ¶¶ 30-38.

⁴ See, e.g., *In the Matter of Advocate Health Care Network*, Docket No. 9369, Administrative Complaint (Dec. 17, 2015), <https://www.ftc.gov/system/files/documents/cases/151218ahc-pt3cmpt.pdf> (hereinafter the *Advocate Complaint*), at ¶¶ 19-27; *In the Matter of The Penn State Hershey Med. Ctr.*, Docket No. 9368, Administrative Complaint (Dec. 7, 2015), <https://www.ftc.gov/system/files/documents/cases/151214hersheypinnaclecmpt.pdf> (hereinafter the *Penn State Complaint*), at ¶¶ 17-25.

⁵ *Jefferson Complaint* at ¶¶ 30-46.

⁶ *Id.* at ¶ 39.

⁷ *Id.* at ¶¶ 6, 47-51.

⁸ *Id.* at ¶ 49.

⁹ *Id.* at ¶ 50.

¹⁰ *Id.* at ¶ 51.

¹¹ *Id.*

¹² See, e.g., *Fed. Trade Comm'n v. Advocate Health Care*, No. 15 C 11473, 2017 WL 1022015, at *7 (N.D. Ill. Mar. 16, 2017) (finding that pre-merger HHI of relevant geographic market was 2,161, and that post-merger, HHI would increase by 1,782 points to 3,943); *Penn State Complaint* at ¶ 6 (alleging that post-merger HHI would be approximately 4,500 with an increase of about 2,000 points in GAC services market); *In the Matter of Cabell Huntington Hosp., Inc.*, Docket No. 9366, Administrative Complaint (Nov. 5, 2015), <https://www.ftc.gov/system/files/documents/cases/151106cabellpart3cmpt.pdf>, at ¶¶ 39 (alleging that post-Acquisition HHI in the general acute care inpatient hospital services market would exceed 5,800, with an increase in HHI of over 2,800 points).

¹³ *Jefferson Complaint* at ¶¶ 60-73.

¹⁴ *Id.* at ¶¶ 14, 60.

¹⁵ *Id.* at ¶ 68.

¹⁶ *In the Matter of ProMedica Health Sys., Inc.*, Docket No. 9346, Opinion of the Commission (Mar. 28, 2012), <https://www.ftc.gov/sites/default/files/documents/cases/2012/06/120625promedicaopinion.pdf>, at 46; see also *Penn State Complaint* at ¶ 45 (“Hershey’s internal documents reveal that Hershey identifies Pinnacle as being one of its principal competitors. Hershey focuses significant attention on Pinnacle’s strategy, while focusing its own competitive strategies on capturing market share from Pinnacle.”).

¹⁷ *Jefferson Complaint* at ¶¶ 61, 63.

¹⁸ *Id.* at ¶ 61.

¹⁹ See, e.g., *In the Matter of OSF Healthcare Sys.*, Docket No. 9349, Complaint Counsel’s Pre-Trial Brief (Apr. 4, 2012), <https://www.ftc.gov/sites/default/files/documents/cases/2012/04/120404ccpretrialbrief.pdf> (hereinafter *OSF Brief*), at p. 38 (discussing diversion ratios found by Commission’s expert of 35% and 34%, respectively, for the two hospital systems party to the proposed merger).

²⁰ See, e.g., *OSF Brief* at p. 38 (discussing diversion ratios found by Commission’s expert of 35 percent and 34 percent, respectively, for the two hospital systems party to the proposed merger); *Penn State Complaint* at ¶ 40 (alleging that diversion analyses showed that if the first respondent hospital were not available, “over 40% of its patients would seek GAC services” at the second respondent hospital, and if the second respondent hospital were not available, “over 30% of its patients would seek GAC services” at the first).

²¹ *Jefferson Complaint* at ¶ 66.

²² *Id.*

²³ *Id.*

²⁴ See, e.g., Elena Prager, *Tiered Hospital Networks, Health Care Demand, and Prices* (2016) (unpublished Ph.D. dissertation, The Wharton School, University of Pennsylvania), https://pdfs.semanticscholar.org/fbe3/8dc13719225e0ae0fc21b82f646f95efc061.pdf?_ga=2.83095574.1055164627.1583260790-487550956.1583260790.

²⁵ *Jefferson Complaint* at ¶ 66.

²⁶ *Id.* at ¶¶ 70-72.

²⁷ *Id.* at ¶ 72.

²⁸ See, e.g., *Penn State Complaint* at ¶ 75.

²⁹ *Jefferson Complaint* at ¶ 73.

³⁰ *Id.* at ¶¶ 23-25.

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