IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 98-3123

FEDERAL TRADE COMMISSION

and

STATE OF MISSOURI,
By and through its Attorney General Jeremiah W. (Jay) Nixon,

Plaintiffs-Appellees,

v.

TENET HEALTHCARE CORPORATION, and
POPLAR BLUFF PHYSICIANS GROUP, INC. d/b/a
Doctors Regional Medical Center,

Defendants-Appellants.

Petition for Rehearing En Banc

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STATEMENT PURSUANT TO FED. R. APP. P. 35(b)(1)

A panel of this Court has reversed the district court's grant of a preliminary injunction to halt the merger of the only two general acute care hospitals in Poplar Bluff, Missouri. In so doing, the panel displaced the district court as fact-finder and departed from settled principles regarding the adjudication of such injunctions. Because of the harmful effects this ruling will have on consumers, and because of the alarming legal ramifications of the panel's opinion, plaintiff-appellee the Federal Trade Commission (FTC) petitions, pursuant to Fed. R. App. P. 35, for rehearing en banc.

Appellee FTC respectfully submits that the panel decision is contrary to the following decisions of the United States Supreme Court and of this Court, and that consideration by the full Court is necessary to secure and maintain uniformity of the Court's decisions: *Anderson v. City of Bessemer City,* 470 U.S. 564 (1985); *Airlines Reporting Corp. v. Barry,* 825 F.2d 1220 (8th Cir. 1987). We also submit that this appeal involves questions of exceptional importance: (1) whether this Court will adhere to the "clearly erroneous" standard of review for district court factual findings; and (2) whether the panel adopted an evidentiary standard that effectively forecloses the government from obtaining a preliminary injunction in a case of this sort.

STATEMENT OF THE CASE

1. Tenet Healthcare — a for-profit chain of over 100 hospitals, including one of two general acute care hospitals in Poplar Bluff, Missouri — proposes to acquire

the only other hospital in that city. Because the acquisition would eliminate the vigorous existing competition between these two profitable, high-quality hospitals — competition that has greatly benefitted health care consumers — the FTC and the State of Missouri sued to enjoin the merger. The FTC's claim is based on Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), which provides for a preliminary injunction to enable the Commission to complete an administrative proceeding to assess the lawfulness of the proposed acquisition. *See* Clayton Act §§ 7, 11(b), 15 U.S.C. §§ 18, 21(b).

On July 30, 1998, after receiving the live or sworn written testimony of more than 40 witnesses and approximately 100 documentary exhibits, the district court (per Hon. Catherine D. Perry) entered a preliminary injunction, having concluded that the FTC and State of Missouri had demonstrated a likelihood of success on the "ultimate issue of whether the merger would have the effect of substantially lessening competition in the relevant market * * *." 17 F. Supp. 2d 937, 939 (E.D. Mo. 1998).

The district court found that plaintiffs had identified a "credible relevant market," as mandated by this Court's ruling in *FTC v. Freeman Hospital,* 69 F.3d 260, 268 (8th Cir. 1995). 17 F. Supp. 2d at 941-45. The parties did not dispute the relevant product market — *i.e.,* primary and secondary inpatient hospital services. Accordingly, the district court focused chiefly on the evidence regarding the proper scope of the geographic market, the area to which customers "could practicably turn

for alternative sources of the product" in the event of a postmerger price increase. *See Freeman,* 69 F.3d at 268; U.S. Dept. of Justice & FTC, *Horizontal Merger Guidelines,* 4 Trade Reg. Rep. (CCH) ¶ 13,104 (1997). The court thoroughly analyzed the full range of evidence adduced on this issue — testimony of market participants, expert testimony, and statistical evidence — and concluded that plaintiffs' evidence was "more credible, logical, and persuasive." 17 F. Supp. 2d at 942.

In keeping with this Court's instructions to base the market definition inquiry on alternatives practicably available to consumers, the district court gave close consideration to the testimony of employers in the Poplar Bluff area, who are among the most important customers for hospital services, through their employee health plans. *Id.* at 943-44. The court credited the consistent testimony of both employers and health plans that, if the merged Poplar Bluff hospitals raised their prices by as much as ten percent, they would still *not* find it practicable to avoid such increases by "steering" their employees to hospitals in distant cities such as Cape Girardeau and Sikeston. *Id.* As the court understood, those assessments by key market participants were based on a number of factors with which they had direct familiarity: the strong preferences of their employees to remain close to home for primary and secondary hospital services; the importance of a good health plan in attracting and retaining employees; the costs to employer and employee alike of increased travel time for

health care; and the higher level of prices at the Cape Girardeau and Sikeston hospitals. Taking all of these factors into account — and also understanding that the defection of a limited (though substantial) number of "marginal" customers could defeat the hypothetical post-merger price increase — the district court found that "sufficient numbers of consumers in the Poplar Bluff region would not practicably turn to these larger [distant] hospitals * * * in the event of a price increase" by the Poplar Bluff hospitals. *Id.* at 943.

The district court also considered an array of other evidence which, it found, further supports plaintiffs' contention that the relevant market is an area encompassing roughly a 50-mile radius around Poplar Bluff. *Id.* at 944-45. The court credited the testimony of plaintiffs' expert economist, who based his testimony on both statistical analysis and other evidence of the practical choices faced by purchasers of hospital services in this area. *Id.* Based on its weighing of "all the evidence," the court found that the geographic market proposed by plaintiffs was appropriate, and that the broader market proposed by defendants — based on the supposition that hospitals in Cape Girardeau, Sikeston, and even St. Louis, provided effective competition for primary and secondary hospital services — "is unsupported by the evidence and is inconsistent with the economic realities of Southeast Missouri." *Id.* at 945.

The court also concluded that plaintiffs had shown a substantial likelihood of

success regarding the merger's effects, finding that it would eliminate the "intense competition between [the two hospitals], which has resulted in significant benefits for the consumer and encouraged efficiency * * *." *Id.* at 946. Finally, the court rejected the defenses raised by defendants, concluding that both hospitals were capable of remaining effective competitors, and that any speculative efficiencies resulting from the proposed acquisition would not outweigh the anticompetitive effects. *Id.* at 947-48.

Defendants appealed, limiting their challenge to the district court's rulings regarding geographic market. On July 21, 1999, a panel of this Court reversed, basing its ruling on factual disagreements with the lower court. For example, the panel decided — contrary to the findings of the district court — that hospitals in Cape Girardeau and Sikeston, among others, are "practical alternatives for many Poplar Bluff consumers." Op. 15. The panel faulted the district court for reliance on the testimony of employers and health plans that purchase hospital services, which the panel viewed as "suspect." Op. 16. The panel dismissed the vigorous economic competition between the two Poplar Bluff hospitals as "a price war in a small corner of the market," which, it opined without citation to any record evidence, came "at the arguable cost of quality." Op. 18.

ARGUMENT

In this case, the district court has found a likelihood of the most serious kind of consumer injury that can flow from a merger: the replacement of vigorous, head-

to-head competition, which is the lifeblood of our economic system, with a virtual monopoly that will allow the one remaining hospital in Poplar Bluff to raise prices and reduce quality. The panel has improperly substituted its judgment for that of the district court as factfinder, to the serious detriment of consumers.

As regrettable as the panel's ruling is in its practical effect, it also raises broader and troubling jurisprudential concerns, which warrant *en banc* consideration. In creating judicial and administrative bodies, Congress has allocated to them distinct roles. In the present context, Congress has entrusted the district court with making factual findings at the preliminary injunction stage; it has charged the Commission with the initial decision on the lawfulness of the proposed merger; and it has made both decisions subject to this Court's review, under carefully delimited standards. *See* 15 U.S.C. §§ 21(b), 21(c), 53(b). The panel's ruling usurps the roles assigned to both of the other tribunals involved: first, by reweighing a complex factual record without identifying any "clear error," the panel takes over the district court's role as factfinder; second, by imposing an improper standard of proof at the preliminary injunction stage, the panel permits consummation of a harmful merger before the Commission can undertake the administrative adjudication mandated by Congress.

A. The Panel Erred By Substituting Its Factual Assessments For The Findings Of The District Court.

Deference to the district court as factfinder is a bedrock principle of appellate

adjudication, embodied in the "clear error" standard of review. *See generally* Fed. R. Civ. P. 52(a); *Anderson v. Bessemer City*, 470 U.S. 564, 573-74 (1985); *Pullman-Standard v. Swint*, 456 U.S. 273, 290 (1982). This Court consistently applies that standard to factual determinations made in preliminary injunction proceedings. *See Airlines Reporting Corp. v. Barry,* 825 F.2d 1220, 1227 (8th Cir. 1987); *Lewellen v. Raff,* 843 F.2d 1103, 1110-11 (8th Cir. 1988) (citing *Bessemer City*). As the Court held in *Freeman Hospital*, a preliminary injunction ruling may be overturned only where "the proof unmistakably establishes clear error or an abuse of discretion." 69 F.3d at 267.

Under the clearly erroneous standard, where there are "two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Bessemer City*, 470 U.S. at 573-74. Thus, a court of appeals may not reverse findings that are "plausible in light of the record viewed in its entirety, * * * even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Id.* Deference to the trial court is due "'even when the * * * findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts.'" *Light v. Parkway C-2 School Dist.*, 41 F.3d 1223, 1229 (8th Cir. 1994) (quoting *Bessemer City*, 470 U.S. at 574). The present panel opinion represents a striking departure from the scrupulous deference that this Court has previously accorded district court

factfinding.

As the panel recognizes, a geographic market determination is "highly fact sensitive" and requires a thorough assessment of "commercial realities faced by consumers." Op. 12 (citing *Freeman Hospital*). In undertaking that analysis, the district court understood that, consistent with this Court's rulings and the *Merger Guidelines*, the essential question is whether a hypothetical monopolist in the proposed market could sustain a significant price increase — or whether, instead, such a price increase would be unsustainable because a sufficient number of buyers could practicably turn to other sources. 17 F. Supp. 2d at 942-45. Weighing all of the evidence, the district court found that "sufficient numbers of consumers in the Poplar Bluff region would not practicably turn to these larger [outside] hospitals for acute care services in the event of a price increase" at the merged hospitals. 17 F. Supp. 2d at 943.

The panel identifies no legal error in the district court's analysis, nor does it identify any "clearly erroneous" finding. Instead, it undertakes a *de novo* weighing of the evidence. The panel begins, for example, by identifying "the question before us" as whether plaintiffs' evidence was "sufficient" — not whether there was clear error. Op. 14. The panel then proceeds to fault the district court for "discount[ing]" evidence regarding out-migration (*id.* at 15), for placing undue "reliance" on buyer testimony (*id.* at 16), for "underestimating" the impact of quality on consumer decisions (*id.*), and for placing "inordinate emphasis" on price differences (*id.* at 17).

In other words, the panel opinion does precisely what it should not, under the precedents of this Court and the Supreme Court: it re-weighs the evidence in a complex factual record, and substitutes its own bottom-line assessment for that of the district court.

For example, while the panel accuses the district court of "discounting" current use of outside hospitals (Op. 15), the panel itself ignores the district court's careful assessment of the evidence on both sides of the issue. The district court recognized that *some* area residents use outside hospitals, but also understood that the forward-looking inquiry at hand turns on *why* they do so, and *how* an increase in the use of those hospitals could practicably come about; for that reason, the court rejected the conclusions of defendants' expert, who simply *assumed* answers to the key questions. 17 F. Supp. 2d at 945 & n.5. The court recognized, for example, that the DRG data upon which defendants' expert placed sole reliance does not distinguish between secondary services which are available in Poplar Bluff, and tertiary services which are not. The court accordingly found that much of the existing outflow is indeed due to the need for more intensive levels of care — and therefore is not indicative of any potential *increase* in outflow as a response to competitive changes. *Id.* at 944-45.[1]

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[1] Contrary to the panel's supposition, the district court made no finding that "out-migration is *only* for specialized * * * services," nor did plaintiffs propose such a finding. Op. 15 n.13 (emphasis added).

The district court also carefully considered evidence regarding the mechanism by which such hypothetical switching would have to take place — *i.e.*, changes by employers and health plans in the terms of such plans, which are largely "determinative of patient choice." *See* Op. 17. The court credited the testimony of numerous employer and plan witnesses that they *would not* attempt to steer members away from the Poplar Bluff hospitals. This testimony, by key purchasers of hospital services, directly addressed the "commercial realities faced by consumers," on which market definition hinges. *Bathke v. Casey's General Stores, Inc.*, 64 F.3d 340, 345 (8th Cir. 1995).[2] The evidence showed that these purchasers had a variety of reasons — including the prospect of employee discontent, the importance of health benefits in recruitment, physician affiliations, and the high prices charged by outside hospitals such as those in Cape Girardeau and Sikeston — for concluding that they *could not* practicably turn to such outside hospitals to defeat a post-merger price increase.[3] The

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[2] The panel's skepticism about the views of "market participants" (Op. 16 n.14) is based on a misreading of this Court's ruling in *Bathke*. There the Court was critical of reliance on evidence of *competitor* perceptions, precisely because a proper analysis ought to focus on *consumers*. 64 F.3d at 345-47.

[3] *See, e.g.*, Tr. 51, 55, 102, 123, 138-39, 244-45, 249-51, 313 (employer and plan testimony); Tr. 395-405, 529-30, 1166 (expert testimony). Thus, the unrefuted fact that prices were substantially higher at the distant Cape Girardeau and Sikeston hospitals was simply one of several factors that made them impractical as alternatives for Poplar Bluff area health plans. The district court did not place "inordinate emphasis" on this factor (Op. 17), but simply recognized it as one aspect of a complex factual mix. Furthermore, although higher price levels do not necessarily place a particular seller outside of a market (Op. 16-17), here the FTC was

district court, having heard the full array of such testimony, found it "credible, logical and persuasive," and thus found that "sufficient numbers of consumers in the Poplar Bluff area would not practicably turn to" hospitals outside the area. 17 F. Supp. 2d at 942-43.[4]

The panel's rejection of that finding, based on the supposition that the payer testimony was somehow "contrary to the payers' economic interests" (Op. 16), simply ignores the cogent reasons that the witnesses themselves presented and that the district court credited. The panel's related assumption that "large, sophisticated third-

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not asking the factfinder to exclude sellers simply on the basis of a price differential, but presented *direct evidence*, by the key customers in the market, of what they would or would not consider to be practicable alternatives. The district court properly credited that evidence.

Moreover, the panel's suppositions about perceptions of quality serve as an example of the pitfalls of appellate factfinding, for the panel simply misstates what "[t]he evidence shows." Op. 16; *see also id.* at 6. The extensive record before the district court contains no evidence of *any* belief regarding quality at the Sikeston hospital, and only one passing reference to the possibility that some may view the Cape Girardeau hospitals as higher-quality. *See* Tr. 739. The record contains *no* evidence that the employers and plan administrators who are the key decision-makers shared any such perception. Accordingly, the district court reasonably credited testimony that payers would have no reason to "steer" Poplar Bluff patients to hospitals in those cities.

[4] Furthermore, while the panel refers to the possibility of a switch by a "small percentage" of patients (Op. 15), evidence before the district court supported a conclusion that approximately *15 percent* of insured patients — nearly one out of every six — would have to switch to outside hospitals to defeat a likely 10 percent price increase. Tr. 357-58, 430-31, 916. The panel has pointed to no clear error in the district court's conclusion that a sufficient number of patients *would not* find it practicable to make such a switch. 17 F. Supp. 2d at 943.

party buyers can and do resist price increases, especially where consolidation results in cost savings to the merging entities" (Op. 16) is unfounded. Not only does the record provide scant support regarding employers' bargaining power as a general matter,[5] but the district court specifically found that the cost-savings touted by defendants are either achievable without the merger, or would *not* be passed on to consumers, in the absence of the competitive pressure created by head-to-head competition in Poplar Bluff. 17 F. Supp. 2d at 948. The panel did not hold those findings to be clearly erroneous, yet it nullified them by substituting its own, inconsistent factual determinations.[6]

Other aspects of the panel opinion similarly exhibit the alacrity with which it substitutes its factual assessments for those of the district court. The opinion refers to both hospitals as "underutilized" (Op. 4), yet does not address the district court's careful explanation why this is not so (17 F. Supp. at 948). It opines without citation

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[5] The panel's reference to buyer bargaining power appears to relate to the testimony of *one* witness (*see also* Op. 7), who hoped that his company would be able to bargain successfully with the merged hospital (using its leverage as a large, multistate employer), but who also acknowledged that his company *would not* attempt to steer employees to other hospitals if such efforts were not successful. *See* Tr. 548-52, 564-65, 569-71. The district court properly weighed that testimony, along with that of other employers. 17 F. Supp. 2d at 941.

[6] The panel's further criticism of the lower court for not giving greater consideration to "evidence of enhanced efficiency in the context of the competitive effects of the merger" (Op. 17) is particularly inappropriate, for it deals with an issue that defendants did not even raise on their appeal to this Court.

that vigorous price competition in Poplar Bluff has come "at the arguable cost of quality" (Op. 18), despite the parties' agreement below that both hospitals have consistently provided high-quality care.[7] In all of these respects, the panel has, unfortunately, "overstep[ped] the bounds of its duty" as an appellate court, by "undertak[ing] to duplicate the role of the lower court." *Bessemer City*, 470 U.S. at 573. The Court should grant rehearing *en banc*, to ensure adherence to the prescribed standards of appellate review.

B. The Panel Ruling Impairs Antitrust Enforcement By Imposing An Incorrect Standard At The Preliminary Injunction Stage.

The Commission is entitled to a preliminary injunction if it makes "a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest." 15 U.S.C. § 53(b). The courts have recognized this to be a somewhat less stringent standard than usually applies to preliminary injunctions, requiring not "probability" of success, but a showing of "serious, substantial" questions that are "fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance * * * ." *FTC v. National Tea Co.,* 603 F.2d 694, 697-98 (8th Cir. 1979); *see also FTC v.*

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[7] Similarly, the panel goes far afield in its sweeping speculations that physician choice is "a luxury [patients] can no longer afford," and that the competition plaintiffs seek to preserve in Poplar Bluff is "expensive and inefficient" and based on an "obsolete" model. Op. 18. Such statements are without support in the present record, and are beyond the issues presented on appeal.

University Health Servs., Inc., 938 F.2d 1206, 1217-18 (11th Cir. 1991).

The panel opinion turns this statutory policy on its head, imposing a standard *more* stringent than that applied to private litigants. In the usual case, a party "is not required to prove his case in full at a preliminary injunction hearing." *See University of Texas v. Camenisch,* 451 U.S. 390, 394–95 (1981). Here, however, the panel equates the showing of market definition the Commission was ostensibly required to make at the preliminary injunction stage with what would be necessary for final adjudication. The panel consistently refers, for example, to the Commission's burden of "proving" or "establishing" a geographic market, citing cases that addressed market definition issues following full trials on the merits. Op. 11 (citing *United States v. Marine Bancorporation,* 418 U.S. 602 (1974)); *id.* at 12 (citing *United States v. Connecticut Nat'l Bank,* 418 U.S. 656 (1974)); *id.* at 14.

Confusion on this point may derive from the Court's ruling in *Freeman Hospital*, which referred to the need to "identify a credible relevant market before a preliminary injunction may issue." 69 F.3d at 268 n.12. That phrase can, and should, be read as encompassing the normal preliminary injunction standard. If, however, that statement — reiterated by the present panel, Op. 11 — is read as applying a more stringent evidentiary standard for market definition issues, then it is an anomaly that the *en banc* Court should correct. There is simply no justification for singling out one particular element of a merger case — an element that is often, as here, dispositive

— and imposing a higher standard than what is otherwise required to justify a preliminary injunction.

Moreover, the panel opinion effectively imposes a burden under which an anti-trust enforcement agency likely could *never* establish a "credible" geographic market. In *Freeman Hospital*, the Court faulted the Commission for undue reliance on "static" evidence of hospital admission patterns, holding that it must address the issue in a "dynamic" manner and provide "insight into the future effects" of the merger. 69 F.3d at 269. Here, the Commission did precisely that, following the roadmap set out in *Freeman Hospital*. It amassed extensive, forward-looking evidence, including assessments by key hospital customers of where they *will* or *will not* practicably be able to turn for such services, in light of the practical constraints they face when formulating coverage for Poplar Bluff area residents. If the consistent testimony of such consumers — found "credible, logical, and persuasive" by a district court — is written off as merely reflecting "current * * * consumer habits" (Op. 16), then it is difficult to see how a geographic market can ever be established.

A generation ago, a dissenting Supreme Court Justice complained that the "sole consistency * * * in litigation under § 7 [was that] the Government always wins." *United States v. Von's Grocery Co.*, 384 U.S. 270, 301 (1966) (Stewart, J., dissenting). The FTC seeks no return to the standards of that era; on the contrary, it has led the way in fostering a more refined merger analysis, sensitive to economic

realities and the dynamics of actual markets. *See, e.g., Merger Guidelines, supra.* But, with the present panel opinion, this Court has come perilously close to the other end of the spectrum, precluding the government from stopping in its incipiency even a merger that will create a virtual monopoly. This Court should steer clear of such a course, which is contrary to Supreme Court teachings and profoundly harmful to the American consumer.

CONCLUSION

For the foregoing reasons, this Court should rehear this appeal *en banc*, and affirm the ruling of the district court.

Respectfully submitted,

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September 2, 1999

CERTIFICATE OF SERVICE

I hereby certify that, on this 2nd day of September, 1999, two copies of the foregoing Petition for Rehearing En Banc were served on each of the following, by hand delivery or overnight courier:

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