

March 9, 2020

The Honorable Mike Lee  
Chairman  
Subcommittee on Antitrust, Competition  
Policy and Consumer Rights  
Committee on the Judiciary  
United States Senate  
Washington, DC 20510

The Honorable Amy Klobuchar  
Ranking Member  
Subcommittee on Antitrust, Competition  
Policy and Consumer Rights  
Committee on the Judiciary  
United States Senate  
Washington, DC 20510

Dear Chairman Lee and Ranking Member Klobuchar:

On behalf of our nearly 5,000 member hospitals, health systems and other health care organizations, our clinician partners – including more than 270,000 affiliated physicians, 2 million nurses and other caregivers – and the 43,000 health care leaders who belong to our professional membership groups, the American Hospital Association (AHA) writes to express concern with the lawsuit brought by the Federal Trade Commission (FTC) and the Attorney General of Pennsylvania to challenge the proposed union of the Thomas Jefferson University (Jefferson) hospital network and Albert Einstein Healthcare Network (Einstein). The merger of these two non-profit hospital systems would bring about higher quality, greater access and more stability of health care services to some of the most vulnerable patient populations in the Philadelphia region.

In deciding to try to block the transaction, the FTC has again relied on its simplistic one-dimensional economic model that fails to account for the realities of providing health care, particularly in underserved communities. And the FTC has used this model again to side with huge health insurance companies at the expense of thousands of patients in need. Unfortunately, this is not surprising because for years the FTC has based its enforcement decisions on its rigged model that purports to predict the future price effects of hospital transactions, while (1) largely ignoring the transactions' ability to spread costs over a larger patient basis and improve quality of care, and (2) entirely ignoring that hospital transactions improve levels of health care access in poorer communities and ensure the long-term viability of critical health care facilities.

With its decision to attempt to block the merger of Jefferson and Einstein, the FTC has taken this flawed enforcement policy into a new realm. Now, the FTC is trying to stop efforts to ensure the sustainability of providing essential health care services to the



most vulnerable communities. The FTC's lawsuit puts these communities at even greater risk of reduced access to health care. It is hard to imagine an effort that is more harmful to the consumers that the FTC claims to protect.

Among the numerous flaws in the FTC's lawsuit, the following are particularly egregious.

First, while purporting to protect consumers, the FTC's complaint is actually focused on trying to protect the bargaining leverage of very large *commercial* insurers. The FTC barely addresses the crucial considerations of how the proposed merger would affect the quality of medical services or levels of access for Philadelphia patients, many of whom live below the poverty line and who the commercial insurers do not serve. In fact, the FTC is clear that it did not directly take the poor and underserved into account.

This makes no sense given the large number of patients covered by Medicare and Medicaid treated by Jefferson and Einstein. In fact, Einstein's Philadelphia hospital has among the highest percentage of government pay patients in Philadelphia, Pennsylvania and the United States. Moreover, the complaint ignores that the number of Medicaid enrollees in Philadelphia skyrocketed from 15.7% of Philadelphia adults in 2013 to 21.1% in 2017, while nearly 10% of Philadelphia adults were uninsured entirely.<sup>1</sup>

Second, the FTC relies heavily on market shares for patients with commercial insurance to infer that the transaction will harm health care services in Philadelphia. This too is wrong. As United States District Judge Marrero recently held in rejecting the efforts of 13 state attorneys general and the District of Columbia to enjoin T-Mobile's acquisition of Sprint, market share-based "presumptions are not self-executing; for the circumstances presumed to transform into actual effects would require real-world conduct by the actors involved . . . [even] highly concentrated markets can nevertheless be quite competitive."<sup>2</sup> Here, the "real-world conduct and decisions by the actors involved" are clear: two non-profit hospitals that treat a poor and underserved population are trying to combine to preserve Einstein's ability to do so.

Third, it appears that the FTC gerrymandered the "relevant geographic markets" to increase the parties' market shares. The complaint bobs and weaves between geographic markets that consist of "the Northern Philadelphia Area," the "Montgomery County Area" and the entire "Philadelphia Area." In short, rather than consider practical realities, the FTC draws lines around a small piece of the Philadelphia metro area when

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<sup>1</sup> City of Philadelphia Dep't of Public Health, "Health of the City 2018" at 31, <https://www.phila.gov/media/20181220135006/Health-of-the-City-2018.pdf>.

<sup>2</sup> *New York et al. v. Deutsche Telekom AG, et al.*, No 19-cv-5434-VM ECF No. 409 at 53-54 (S.D.N.Y. filed Feb. 11, 2020).

it suits the desired outcome for inpatient hospitals and draws completely different lines around the *entire* Philadelphia metro area for inpatient rehabilitation facilities.

Even granting the FTC its rigged geographic market definition, the FTC ignores one of the key reasons that those purported market shares are allegedly so high. Philadelphia's St. Joseph's Hospital closed in 2016 and Hahnemann Hospital closed in 2019, costing Philadelphia's most vulnerable neighborhoods 640 hospital beds that treated about 60,000 patients per year.<sup>3</sup> Scientific American has noted that Hahnemann Hospital's demise is a result of having "very few patients with private insurance," and projected that "more hospitals like Hahnemann will not make it."<sup>4</sup>

Einstein much like Hahnemann Hospital has a low percentage of patients with private insurance. As the Philadelphia Inquirer recently reported, Einstein lacks "enough patients with commercial insurance to offset Medicaid losses,"<sup>5</sup> which is the same type of problem that led to the insolvency of Hahnemann Hospital. Among large cities, Philadelphia is the poorest in the nation.<sup>6</sup> The proposed merger with Jefferson was the culmination of Einstein's extensive, concerted effort to find a partner necessary for it to remain solvent and sustainable in order to serve the patients that the FTC and the commercial insurers ignore.

Fourth, as noted, the FTC is again relying on its flawed economic model that centers on the bargaining leverage of health insurance companies. The AHA has previously shown in a study that it released in December 2018 that there are serious defects in both the supply and demand components of this model, which biases the results toward challenging mergers.<sup>7</sup>

It is time for members of Congress and other policymakers to make clear that antitrust enforcement in the hospital sector needs to account for all relevant factors, not simply the FTC's myopic modeling of speculative future results of contract negotiations between large commercial health insurance companies and hospitals. In particular, when the FTC decides to bring cases it must focus on the long-term viability of health care facilities and their ability to provide quality and reliable health

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<sup>3</sup> Hahnemann Hospital had 496 beds and served over 40,000 patients per year. See <https://philadelphia.cbslocal.com/2019/06/27/hahnemann-hospital-closing-cease-desist-nurses-union/>. St. Joseph's Hospital had 146 beds and served about 20,000 patients per year. See [https://www.bizjournals.com/philadelphia/morning\\_roundup/2015/12/st-josephs-hospital-closing-north-phila-temple.html](https://www.bizjournals.com/philadelphia/morning_roundup/2015/12/st-josephs-hospital-closing-north-phila-temple.html).

<sup>4</sup> <https://blogs.scientificamerican.com/observations/the-closure-of-a-historic-hospital-is-an-ominous-warning-sign/>.

<sup>5</sup> <https://www.inquirer.com/business/health/hahnemann-medicare-funds-philadelphia-public-hospital-20191121.html>.

<sup>6</sup> [https://www.pewtrusts.org/-/media/assets/2017/11/pri\\_philadelphias\\_poor.pdf](https://www.pewtrusts.org/-/media/assets/2017/11/pri_philadelphias_poor.pdf).

<sup>7</sup> See *Comments from the American Hospital Association on Defects in the Models Used for Evaluating Hospital Transactions* (Dec. 18, 2018), <https://www.aha.org/system/files/2018-12/181217-let-ftc-defects-in-models-used-for-evaluating-hospital-transactions.pdf>.

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care and access to all members of communities, including the most vulnerable. Had the FTC done so, it would have quickly decided to allow Jefferson and Einstein to combine, rather than putting them through a costly 14-month investigation that culminated in its misguided lawsuit.

Sincerely,

/s/

Thomas P. Nickels  
Executive Vice President

cc: The Honorable Lindsey Graham, Chairman, Judiciary Committee  
The Honorable Dianne Feinstein, Ranking Member, Judiciary Committee  
Members, Subcommittee on Antitrust, Competition Policy and Consumer  
Rights