ANTITRUST LAW — HOSPITAL MERGERS — THIRD CIRCUIT CLARIFIES GEOGRAPHIC MARKET DEFINITION AND RAISES BAR FOR EFFICIENCIES DEFENSE. — *FTC v. Penn State Hershey Medical Center*, 838 F.3d 327 (3d Cir. 2016).

Since the early 1990s, the Federal Trade Commission (FTC) has vigorously pursued litigation in federal courts to challenge hospital mergers it views as anticompetitive.[1] Courts dealt the Agency a protracted series of defeats in the mid-1990s, but recent years have brought renewed success.[2] Meanwhile, increased regulations and rising costs under the Affordable Care Act[3] have pressured hospitals to consolidate, raising the stakes in this area of antitrust law.[4] The resulting wave of mergers has not gone unnoticed.[5] Recently, the Third Circuit entered the fray in *FTC v. Penn State Hershey Medical Center*,[6] ordering a preliminary injunction to halt the merger of two Pennsylvania hospital systems.[7] The Third Circuit's opinion helpfully clarified the FTC's favored approach for defining the relevant geographic boundaries in hospital merger analysis. But in dismissing the hospitals' claim that the efficiencies gained from the merger would outweigh its alleged anticompetitive harm, the opinion left important questions unresolved: first, whether to formally adopt the efficiencies defense; and second, the extent to which the benefits from greater efficiencies must be shown to flow to consumers in order to be cognizable.

Penn State Hershey Medical Center and PinnacleHealth System operate "the two largest hospitals in the Harrisburg, Pennsylvania area."[8] The hospitals finalized plans to merge in March 2015.[9] Fol-

---

[1] *See* Toby G. Singer, *Developments in Hospital Merger Litigation: FTC Administrative Proceedings and the* Evanston Northwestern *Case*, ANTITRUST, Spring 2006, at 29, 29. The FTC Act, 15 U.S.C. §§ 41–58 (2012), empowers the FTC to file suit in federal court for a preliminary injunction to enjoin a merger it has challenged through administrative action. *Id.* § 53(b).

[2] *See* Lisa Jose Fales & Paul Feinstein, *How to Turn a Losing Streak into Wins: The FTC and Hospital Merger Enforcement*, ANTITRUST, Fall 2014, at 31, 31.

[3] Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of the U.S. Code).

[4] *See* Leemore Dafny, *Hospital Industry Consolidation — Still More to Come?*, 370 NEW ENG. J. MED. 198, 198 (2014).

[5] *See, e.g.*, FTC v. Phoebe Putney Health Sys., Inc., 133 S. Ct. 1003 (2013); FTC v. Advocate Health Care Network, 841 F.3d 460 (7th Cir. 2016); *see also* FED. TRADE COMM'N, STATS & DATA 2015, https://www.ftc.gov/system/files/attachments/stats-data-2015/statsdata2015.pdf [https://perma.cc/NT38-E473] (reporting that healthcare accounted for approximately half of the FTC's competition enforcement activity for fiscal years 2011 through 2015).

[6] 838 F.3d 327 (3d Cir. 2016).

[7] *Id.* at 334.

[8] *Id.* at 333.

[9] Larry Portzline, *Penn State Board Approves Pinnacle, Hershey Medical Center Merger*, CENT. PENN BUS. J. (Mar. 23, 2015, 3:00 AM), http://cpbj.com/article/20150323/CPBJ01

lowing an investigation, the FTC sued to enjoin the merger pending its separate administrative adjudication.[10] The Agency argued that the merger would decrease competition in the Harrisburg area, resulting in "increased healthcare costs and reduced quality of care."[11]

The district court denied the FTC's motion for a preliminary injunction.[12] A preliminary injunction is warranted where, "weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest."[13] Focusing on the FTC's likelihood of success on the merits, the court first considered whether the FTC had defined a valid geographic market — the area in which the merger's effects are to be considered.[14] Looking to the government's Horizontal Merger Guidelines methodology for determining the relevant geographic market, the court invoked the so-called hypothetical monopolist test.[15] Under this test, the relevant geographic market is the smallest area in which a single firm — the hypothetical monopolist — could raise its prices without consumers resorting to firms outside the area to defeat such a price increase.[16]

Applying the test, the court found that the government failed to adequately prove its proposed relevant geographic market, a four-county area surrounding Harrisburg.[17] The court first emphasized that 43.5% of Hershey's patients travel to the hospital from outside of the region, suggesting that the FTC's proposed market failed to properly account for where the hospitals "draw their business."[18] Next, it found that if a hypothetical monopolist raised prices, customers would turn to alternative options, including nineteen hospitals located within about an hour's drive.[19] Finally, the court found it persuasive that the hospitals, in entering into private agreements with central Pennsylvania's two largest health insurers, committed to re-

---

/150329949/penn-state-board-approves-pinnacle-hershey-medical-center-merger [https://perma.cc/FV9Q-3HZL].

[10] *See* Complaint for Temporary Restraining Order & Preliminary Injunction at 1–2, FTC v. Penn State Hershey Med. Ctr., 185 F. Supp. 3d 552 (M.D. Pa. 2016) (No. 1:15-cv-2362).

[11] *Id.* at 3.

[12] *Penn State Hershey*, 185 F. Supp. 3d at 554.

[13] 15 U.S.C. § 53(b) (2012).

[14] *See Penn State Hershey*, 185 F. Supp. 3d at 555–58.

[15] *Id.* at 556 (citing U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES §§ 4.1–.2 (2010) [hereinafter MERGER GUIDELINES]). The Guidelines, while not binding on courts, "are often used as persuasive authority." Saint Alphonsus Med. Ctr.–Nampa Inc. v. St. Luke's Health Sys., Ltd., 778 F.3d 775, 784 n.9 (9th Cir. 2015) (quoting Chi. Bridge & Iron Co. v. FTC, 534 F.3d 410, 431 n.11 (5th Cir. 2008)).

[16] *See* MERGER GUIDELINES, *supra* note 15, §§ 4.1–.2.

[17] *Penn State Hershey*, 185 F. Supp. 3d at 556, 558.

[18] *Id.* at 557. Likewise, the court noted that "several thousand of Pinnacle's patients reside outside of the Harrisburg area." *Id.*

[19] *Id.*

frain from increasing postmerger rates for at least five years.[20] Concluding that the FTC "failed . . . to show a likelihood of ultimate success on the merits," the court denied the injunction.[21]

The Third Circuit reversed.[22] Writing for a unanimous panel, Judge Fisher[23] began by noting that, although a district court's factual findings are generally accepted unless clearly erroneous, "where a district court applies an incomplete economic analysis or an erroneous economic theory to those facts that make up the relevant geographic market, it has committed legal error subject to plenary review."[24] Concluding that the district court "erred in both its formulation and its application" of the hypothetical monopolist test,[25] the panel focused on three analytical missteps.

First, the panel reasoned that when the district court relied "solely on patient flow data,"[26] it was actually applying the discredited Elzinga-Hogarty approach to market definition,[27] rather than the hypothetical monopolist test it purported to follow. In emphasizing that large numbers of the hospitals' patients resided outside of the four-county area, the district court failed to recognize that this fact "says little about what the (silent) majority of 'non-travelers' would do in response to a post-merger price increase."[28] Second, the panel noted that the district court ignored the likely response of *insurers* to a hypothetical monopolist's price increase.[29] The district court therefore overlooked that healthcare-market competition comes in two stages: in the first stage, hospitals compete for inclusion in an insurance plan's hospital network; only in the second stage do hospitals compete for a plan's individual enrollees.[30] At the first stage, insurers (not patients)

---

[20] *Id.* at 557–58.

[21] *Id.* at 564.

[22] *Penn State Hershey*, 838 F.3d at 334.

[23] Judges Greenaway and Krause joined Judge Fisher's opinion.

[24] *Penn State Hershey*, 838 F.3d at 336.

[25] *Id.* at 339. The panel stated it was "not suggesting that the hypothetical monopolist test is the only test that the district courts may use in determining . . . the relevant geographic market." *Id.* at 345. But because both parties and the district court had agreed that the hypothetical monopolist test was the proper standard, the district court's flawed application was legal error. *Id.*

[26] *Id.* at 341.

[27] *Id.* at 339–41. The Elzinga-Hogarty method defines a geographic market as "an area that has both low inflows and low outflows." Consent Brief of Amici Curiae Economics Professors in Support of Plaintiffs/Appellants Urging Reversal at 12, *Penn State Hershey*, 838 F.3d 327 (3d Cir. 2016) (No. 16-2365) [hereinafter Brief of Amici Curiae]. The panel found persuasive an amici curiae brief filed by thirty-six economics professors, including Professor Kenneth Elzinga himself, who argued that the district court had employed faulty and outdated economic reasoning by relying on the Elzinga-Hogarty approach. *See Penn State Hershey*, 838 F.3d at 340–41, 340 n.3.

[28] Brief of Amici Curiae, *supra* note 27, at 15; *see also Penn State Hershey*, 838 F.3d at 341.

[29] *See Penn State Hershey*, 838 F.3d at 341–43.

[30] *See id.* at 342 (citing Gregory Vistnes, *Hospitals, Mergers, and Two-Stage Competition*, 67 ANTITRUST L.J. 671, 672 (2000)).

negotiate directly with hospitals, so the hypothetical monopolist test should focus, at least in part, on insurers.[31] Third, the panel concluded that the district court was wrong to rely on the pricing agreements negotiated between the hospitals and the two insurers.[32] Because *actual*, *real-world* privately negotiated contracts have no bearing on what a *hypothetical* monopolist could achieve, such agreements "have no place" in geographic market analysis.[33]

The panel determined that the FTC's proposed four-county area was in fact a properly defined geographic market.[34] Further, because merging the hospitals would significantly increase market concentration,[35] the panel found the merger to be "presumptively anticompetitive."[36] The FTC had thus successfully established its prima facie case, leaving the panel to consider whether the hospitals' rebuttal arguments sufficiently disputed the Agency's likelihood of success on the merits.[37] The hospitals' efficiencies-based defense centered on two claims: first, that the merger would eliminate the need to construct a $277 million bed tower; and second, that the combination would improve the hospitals' ability to utilize risk-based contracting.[38] Skeptical that efficiencies could *ever* justify an otherwise anticompetitive merger, the panel emphasized that if efficiencies were to be credited, they "must be merger specific, verifiable, and must not arise from any anticompetitive reduction in output or service."[39] Because each of the asserted efficiencies failed to meet this standard, the panel rejected both claims.[40] Concluding its analysis with a holding that the equities on balance favored granting the injunction, the panel reversed and remanded with directions to preliminarily enjoin the merger.[41]

---

[31] *Id.*

[32] *See id.* at 343–44.

[33] *Id.* at 344 (noting that if such private contracts were allowed to affect the analysis, then "any merging entity could enter into similar agreements . . . to impermissibly broaden the scope of the relevant geographic market").

[34] *Id.* at 345–46.

[35] The government alleged that the merged hospitals would control 76% of the Harrisburg market and presented undisputed evidence that the postmerger Herfindahl-Hirschman Index — a measure of market concentration calculated by summing the squares of the individual firms' market shares, *id.* at 346 — was 5984, "more than twice that of a highly concentrated market" under the Merger Guidelines, *id.* at 347; *see also* MERGER GUIDELINES, *supra* note 15, § 5.3.

[36] *Penn State Hershey*, 838 F.3d at 347.

[37] *See id.* ("In order to rebut the prima facie case, the Hospitals must show either that the combination would not have anticompetitive effects or that the anticompetitive effects of the merger will be offset by extraordinary efficiencies resulting from the merger.").

[38] *Id.*; *see also id.* at 351 n.10 ("In risk-based contracting, healthcare providers bear some financial risk and share in the financial upside based on the quality and value of the services they provide.").

[39] *Id.* at 349.

[40] *See id.* at 347–51.

[41] *See id.* at 352–54.

In *Penn State Hershey*, the Third Circuit endorsed the FTC's favored approach to defining geographic markets in hospital merger cases: using a hypothetical monopolist test that focuses on how insurers would respond to a price increase.[42] The opinion's thorough application of this test — and its critique of how the district court got the test wrong — sets forth helpful guidance for healthcare-merger planning and antitrust enforcement. But in rejecting the hospitals' claimed efficiencies, the decision created uncertainty concerning the viability of *any* future efficiencies defense. It did so in two ways: first, by declining to decide whether to formally adopt the efficiencies defense; and second, by indicating a strict requirement that any efficiencies must be shown to benefit consumers in order to be credited.

An efficiencies defense is based on the idea that the cost savings achieved by a merger could yield social savings that would more than compensate for the social loss created by the exercise of increased market power.[43] Law and economics commentators have long called for judicial recognition of an affirmative efficiencies-based defense in merger analysis.[44] Since 1984, revised versions of the Merger Guidelines have come to treat the efficiencies defense as an "integral part of the competitive effects analysis."[45] Gradually, courts have followed suit.[46] But in *Penn State Hershey*, the Third Circuit remained unconvinced. Expressing skepticism "that such an efficiencies defense even exists" and highlighting Supreme Court precedent it viewed as disapproving of the concept, the panel declined to "decide whether to adopt or reject the efficiencies defense."[47]

As an initial matter, the panel's portrayal of three 1960s-era cases likely overstated the purported hostility of the Supreme Court toward the efficiencies defense.[48] The Court has not directly spoken on the is-

---

[42] The Seventh Circuit also recently endorsed this approach. *See* FTC v. Advocate Health Care Network, 841 F.3d 460, 473–76 (7th Cir. 2016).

[43] *See* 4A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW 23–25 (4th ed. 2016).

[44] *See, e.g.*, Oliver E. Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoffs*, 58 AM. ECON. REV. 18, 33–34 (1968); *see also* Robert Pitofsky, Essay, *Efficiency Consideration and Merger Enforcement: Comparison of U.S. and EU Approaches*, 30 FORDHAM INT'L L.J. 1413, 1414 (2007) ("It has been widely accepted for some years in U.S. scholarship that there is a strong case for introducing efficiency consideration into merger review . . . .").

[45] William J. Kolasky & Andrew R. Dick, *The Merger Guidelines and the Integration of Efficiencies into Antitrust Review of Horizontal Mergers*, 71 ANTITRUST L.J. 207, 209 (2003).

[46] *See, e.g.*, Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd., 778 F.3d 775, 790 (9th Cir. 2015) ("[W]e assume . . . a defendant can rebut a prima facie case with evidence that the proposed merger will create a more efficient combined entity and thus increase competition."); FTC v. Univ. Health, Inc., 938 F.2d 1206, 1222 (11th Cir. 1991).

[47] *Penn State Hershey*, 838 F.3d at 347; *see also id.* at 347–48.

[48] *See* Mark N. Berry, *Efficiencies and Horizontal Mergers: In Search of a Defense*, 33 SAN DIEGO L. REV. 515, 521–25 (1996) (finding "it would be wrong to conclude that the Supreme Court has expressly rejected the [efficiencies] defense," *id.* at 525, based on these three opinions).

sue of efficiencies in the context of horizontal mergers since the early 1970s, and changes in the philosophy of antitrust law over subsequent decades suggest it would now take a more accommodating position.[49] In other antitrust contexts, the Court has shown an increasing recognition of the importance of efficiencies.[50] Such developments indicate that, in relying on outdated Supreme Court precedent, the panel's skepticism of the efficiencies defense was misplaced.

Despite declining to formally adopt or reject the efficiencies defense, the panel nonetheless conducted its own analysis of the hospitals' purported efficiencies, determining that they were "insufficient to rebut the presumption of anticompetitiveness."[51] In articulating the requirements of the efficiencies defense, the court largely adopted standards previously espoused by other appellate courts and modeled on the Merger Guidelines.[52] But the Third Circuit emphasized an additional requirement: clear evidence that the benefits from claimed efficiencies will ultimately be passed on to consumers. While a handful of district court opinions have indicated such a requirement,[53] no appellate decision prior to *Penn State Hershey* had so explicitly embraced a strict consumer pass-through condition.[54]

The debate over a consumer pass-through requirement for cognizable efficiencies has divided economists as well as antitrust law practitioners. Many — including several experts within the antitrust agencies[55] — have argued for a "total welfare" approach to efficiencies, which would view all merger-generated efficiencies positively, whether

---

[49] *See* Joseph Kattan, *Efficiencies and Merger Analysis*, 62 ANTITRUST L.J. 513, 516–17 (1994) (noting that "[t]he three 1960s-vintage Supreme Court cases," *id.* at 517, discussing merger efficiencies "clearly reflect the philosophy of another antitrust era," *id.* at 516–17, whose "dismissive attitude toward merger efficiencies has given way to acceptance of efficiencies as a relevant factor in merger analysis," *id.* at 517). Even the *Penn State Hershey* panel, in a footnote, acknowledged scholarship contending that "because the efficiencies defense has never been squarely presented to the Supreme Court, the issue has never been definitively decided." *Penn State Hershey*, 838 F.3d at 348 n.8.

[50] *See, e.g.*, Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 54–55 (1977) (acknowledging that allegedly anticompetitive restrictive franchise agreements can nonetheless "promote interbrand competition by allowing the manufacturer to achieve certain efficiencies," *id.* at 54).

[51] *Penn State Hershey*, 838 F.3d at 349.

[52] *Id.* at 348–49 ("[E]fficiencies . . . must be merger specific, verifiable, and must not arise from any anticompetitive reduction in output or service." *Id.* at 349.).

[53] *See, e.g.*, United States v. Long Island Jewish Med. Ctr., 983 F. Supp. 121, 149 (E.D.N.Y. 1997); FTC v. Staples, Inc., 970 F. Supp. 1066, 1090 (D.D.C. 1997).

[54] *Cf.* FTC v. Univ. Health, Inc., 938 F.2d 1206, 1223 (11th Cir. 1991) (requiring that a successful efficiencies defense show "significant" efficiencies and equating efficiencies that would benefit competition with those that would benefit consumers).

[55] *See, e.g.*, Ken Heyer, *Welfare Standards and Merger Analysis: Why Not the Best?*, COMPETITION POL'Y INT'L, Spring 2012, at 146 (former Economics Director of the Department of Justice Antitrust Division); Robert Pitofsky, *Proposals for Revised United States Merger Enforcement in a Global Economy*, 81 GEO. L.J. 195, 221 (1992) (former FTC Chairman).

or not they would be immediately passed on to consumers.[56] Alternatively, a "consumer welfare" approach would count efficiencies only to the extent they would be passed on to consumers.[57] Such efficiencies would principally take the form of lower prices, but could also consist of higher-quality products or improved service. While the Merger Guidelines prioritize efficiencies that enhance consumer welfare,[58] they "reject[] a rigid requirement that cost savings be 'passed on' to consumers"[59] and suggest an openness to recognizing longer-term efficiencies that do not necessarily benefit consumers in the short run.[60]

Adopting a seemingly stricter standard than the Merger Guidelines, the panel's commitment to a consumer welfare approach pervades its efficiencies discussion. Indeed, in rejecting the hospitals' bed-tower efficiencies claim, the panel concluded that the purported savings were unverifiable because the hospitals failed to provide "clear evidence showing that the merger will result in efficiencies that will offset the anticompetitive effects and *ultimately benefit consumers*."[61] And in addressing the defense that the merger would improve contracting with payors, the panel specified that "the Hospitals must demonstrate that such a benefit would *ultimately be passed on to consumers*."[62]

The court's insistence that "[a]n efficiencies analysis requires more than speculative assurances that a benefit enjoyed by the Hospitals will also be enjoyed by the public"[63] raises practical difficulties for proving an efficiencies defense.[64] Given the panel's observation that "patients, in large part, do not feel the impact of [healthcare] price increases,"[65] it is unclear from an evidentiary standpoint how a merging party could convincingly show that an efficiencies-generated price de-

---

[56] Kolasky & Dick, *supra* note 45, at 230. Canada, for example, has adopted a "total welfare standard for mergers under which predicted harms are to be balanced against cost savings from the merger, whether or not those savings are ultimately passed on to consumers." Daniel A. Crane, *Rethinking Merger Efficiencies*, 110 MICH. L. REV. 347, 371 (2011).

[57] Kolasky & Dick, *supra* note 45, at 230.

[58] MERGER GUIDELINES, *supra* note 15, § 10.

[59] *More than Law Enforcement: The FTC's Many Tools — A Conversation with Tim Muris and Bob Pitofsky*, 72 ANTITRUST L.J. 773, 813 (2005); *see also* Herbert Hovenkamp, *Roger Blair and the Goals of Antitrust*, 61 ANTITRUST BULL. 382, 389 (2016) (noting the "quasi-consumer welfare approach" of the 2010 Merger Guidelines).

[60] *See* MERGER GUIDELINES, *supra* note 15, § 10 n.15 ("The Agencies also may consider the effects of cognizable efficiencies with no short-term, direct effect on prices in the relevant market.").

[61] *Penn State Hershey*, 838 F.3d at 350 (emphasis added).

[62] *Id.* at 351 (emphasis added).

[63] *Id.*

[64] *See* Dennis A. Yao & Thomas N. Dahdouh, *Information Problems in Merger Decision Making and Their Impact on Development of an Efficiencies Defense*, 62 ANTITRUST L.J. 23, 42 (1993) ("As a practical matter, the evidence needed to provide a strong degree of direct proof of a consumer pass-through seems rarely available.").

[65] *Penn State Hershey*, 838 F.3d at 342.

crease would sufficiently pass on a "tangible, verifiable benefit to consumers."[66] Nor is it clear whether a showing of lower prices to *insurers* resulting from efficiencies would suffice. Such challenges in surmounting the consumer pass-through requirement suggest why former FTC Chairman Robert Pitofsky referred to the requirement as a "killer qualification."[67]

Penn State Hershey thereby creates two layers of uncertainty for parties contemplating an efficiencies defense in the Third Circuit. First, the panel's nondecision on adopting the defense leaves market participants in the dark on whether merger efficiencies will be granted *any* consideration whatsoever. Second, even if a court were to accept the defense in the future, the precise contours of the difficult-to-satisfy consumer pass-through requirement remain unspecified. As a practical matter, the impact of litigated merger cases — which tend not to be reflective of the majority of merger matters brought before cies[68] — plays out in negotiations between the merging parties and the agencies during the merger notification process.[69] Although efficiencies claims are considered and sometimes lead to the agency deciding not to challenge a merger,[70] the Third Circuit has given antitrust agencies more leverage to confidently raise their requirements for cognizable efficiencies — for example, by insisting on a stricter showing of consumer pass through than suggested by the Merger Guidelines. The functional impact of *Penn State Hershey* on the future of the efficiencies defense will therefore largely depend on how antitrust regulators exercise their increased discretion in assessing proposed efficiencies.

---

[66] *Id.* at 350.

[67] Pitofsky, *supra* note 55, at 207.

[68] *See* U.S. Dep't of Justice & Fed. Trade Comm'n, Merger Enforcement Workshop 82–83 (Feb. 19, 2004) (statement of Robert Pitofsky, Former Chairman, Fed. Trade Comm'n), https://www.ftc.gov/sites/default/files/documents/public_events/ftc/doj-joint-workshop-merger-enforcement/040219ftctrans.pdf [https://perma.cc/ZG2E-T3FA].

[69] Roger D. Blair & D. Daniel Sokol, *The Rule of Reason and the Goals of Antitrust: An Economic Approach*, 78 ANTITRUST L.J. 471, 491 (2012); D. Daniel Sokol & James A. Fishkin, Response, *Antitrust Merger Efficiencies in the Shadow of the Law*, 64 VAND. L. REV. EN BANC 45, 47 (2011) ("Indeed, most 'action' in mergers generally and in merger efficiencies specifically occurs in dynamics between the agencies and outside counsel . . . in various stages of the merger notification process.").

[70] *See* MALCOLM B. COATE & ANDREW J. HEIMERT, MERGER EFFICIENCIES AT THE FEDERAL TRADE COMMISSION 1997–2007 (2009); Deborah L. Feinstein, Dir., Bureau of Competition, Fed. Trade Comm'n, Antitrust Enforcement in Health Care: Proscription, Not Prescription, Fifth National Accountable Care Organization Summit 2 (June 19, 2004), https://www.ftc.gov/system/files/documents/public_statements/409481/140619_aco_speech.pdf [https://perma.cc/4KHD-A8AC] ("In every investigation of health care provider transactions, [the FTC] carefully consider[s] evidence that the transaction will benefit consumers through improved quality, new services and/or decreased costs.").