COMPLAINT COUNSEL’S RESPONSE TO MOTIONS
FOR LEAVE TO FILE AMICUS CURIAE BRIEFS

Pursuant to 16 C.F.R. §§ 3.22 and 3.52(j), Complaint Counsel respond to the motions of
the Advisory Board Company, the Joint Commission on Accreditation of Healthcare
Organizations (the “Joint Commission”), the American Hospital Association (the “AHA”), the
Business Roundtable, and the City of Highland Park to file amicus curiae briefs.

The motions to file amicus briefs should be evaluated against the backdrop of the
regulations governing Part 3 proceedings. When a case is pending before the administrative law
judge and the administrative record is open, the parties share the protection of important
procedures and evidentiary rules – the opportunities to take discovery, to present rebuttal
evidence and to cross-examine witnesses, and the hearsay rule, to name a few – each of which is
vital to the integrity of the adjudicative process. To guarantee the efficacy of these rules, the
regulations also specify that the administrative law judge must close the record upon the
completion of the hearing. See 16 C.F.R. § 3.44(c).

These general principles should guide the Commission in its consideration of the amicus
curiae briefs of the Advisory Board, the Joint Commission, and the AHA. The Advisory Board makes numerous factual representations now insulated from rebuttal. The Joint Commission submits out-of-court statements now immune to cross-examination. And, the AHA presents a thirty-four page brief rife with unsubstantiated assertions it hopes will counterbalance sworn testimony that weathered the tests of discovery and trial.

Notably, Respondent itself has always enjoyed ready access to the resources of these three “friends-of-the-court.” One executive of Respondent is a director of the Advisory Board and another is a director of the Joint Commission; both of these gentlemen testified at trial. And, Respondent itself is a dues-paying member of the AHA. Thus, Respondent easily could have developed this evidence for trial — through either informal business contacts or formal discovery — subject, of course, to the applicable rules of procedure and rules of evidence.

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1 Although Complaint Counsel disagree with their views, the Business Roundtable and the City of Highland Park have filed amicus briefs that do not compromise the evidentiary and procedural protections afforded the parties and, therefore, we do not oppose their motions.

2 E.g., Advisory Board Company’s Amicus Curiae Brief at 6 (bald assertions that studies were based on data that are “insufficient” to draw any general conclusions).

3 E.g., Amicus Curiae Brief of the Joint Commission on Accreditation of Healthcare Organizations at 3 (assertion that JCAHO data may have limited probative value).

4 E.g., American Hospital Association’s Amicus Curiae Brief, at at 8 n.8 (unsubstantiated assertion that patient flow analysis is determinative factor in defining geographic markets for hospital services, notwithstanding record testimony to the contrary); id. at 12 n.12 (unsubstantiated assertion that patient flow data is better than survey data in defining geographic markets).

5 Advisory Board Brief at 1; Joint Commission Brief at 1.

Complaint Counsel appreciate the Commission's commitment to considering the views of amicus curiae but that commitment should not extend to amicus briefs that present evidence, untested by the litigation process, that a party had the full opportunity to present at trial.\(^7\) If the Commission grants these motions of the Advisory Board, the Joint Commission, and the AHA, Complaint Counsel respectfully suggest that the Commission should duly consider the portions of these three memoranda that truly serve the traditional purposes of amicus briefs but give little if any consideration to the portions of the briefs that sidestep the Commission's own evidentiary and procedural rules.

Dated: 12/30/05

Respectfully submitted,

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\(^7\) Complaint Counsel notes that amicus briefs filed by a third party affiliated with a respondent can effectively trump other rules governing proceedings before the Commission. Section 3.52(b)(2) — and, in this case, the Commission's Order dated December 8, 2005 — set specific word limitations on the briefs of both Respondent and Complaint Counsel. Here, however, Respondent's brief and these three supplementary amicus briefs, together, exceed the Commission's exacting word limit by more than 50 percent.

Complaint Counsel also notes that amicus briefs that present new evidence may compromise the process beyond the proceedings before the administrative law judge and the Commission itself. The Commission's final decision may be reviewed by a court of appeals. See 15 U.S.C. § 45(b). Obviously, the Commission will be wary of the procedural and evidentiary defects in the amicus briefs in this case, but an appellate court might be less cognizant of these problems if the amicus briefs are made part of the record.
CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing papers was served today

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