

FEDERAL TRADE COMMISSION

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In the Matter of:

MERGER BEST PRACTICES WORKSHOP
SAN FRANCISCO

JUNE 5, 2002

901 Market Street
San Francisco, CA

The above-entitled matter came on for hearing,
pursuant to notice, at 12:05 p.m.

For The Record, Inc.
Waldorf, Maryland
(301)870-8025

FEDERAL TRADE COMMISSION

I N D E X

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1 JUNE 5, 2002

12:05 P.M.

2 P R O C E E D I N G S

3 WELCOME

4 MR. KLURFELD: My name is Jeffrey Klurfeld
5 and I have the honor and privilege of being the
6 Director of the Western Region of the Federal Trade
7 Commission, and I'd like to cordially invite you to
8 our Merger Best Practices Workshop which we are
9 having here in San Francisco.

10 So again I thank you very much for coming
11 here. We are looking forward to your sharing your
12 views. We are very interested in listening to what
13 you have to say. Thank you.

14 INITIAL WAITING PERIOD

15 MR. WIEGAND: Our first topic this
16 afternoon is the use of the initial waiting period,
17 and Allison Davis is going to speak to this
18 subject. And we asked her to come because a merger
19 case that we worked on several years ago in this
20 office, she was very energetic about wanting to
21 accomplish a lot during the initial waiting period
22 and we have really taken her approach and used it
23 in other matters, so there was no better person to
24 have speak on it than Allison.

25 MS. DAVIS: Thank you, John.

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1 I did a little outline, just jotted down
2 some ideas, I want to make sure that there's enough
3 copies up here, and I'm -- there's not going to be
4 enough copies for everyone, but I'm happy to
5 provide copies later, it's just some way to give
6 myself a road map so I don't talk for too long
7 because that would be my wont.

8 The initial waiting period is really
9 important for a couple of reasons. And we were
10 talking last night about doing -- what are the
11 problems, what are the issues that can up during
12 the initial waiting period and what can the agency
13 do and what can the private bar do to help
14 facilitate a more efficient review process during
15 that 30 days.

16 And I think the big problems and issues is
17 delay, of course, your clients are always saying,
18 "When are you going to close?" The biggest
19 question is, "When do you think we'll get early
20 termination and when can we get out of here?"

21 Uncertainty by the agency about how to
22 address the antitrust issue, do they want more
23 information, do they want a second request, do they
24 need outside information, will an economist help,
25 how best can we get information to them, it seems

1 like an unending problem of who's going to get
2 clearance to review it -- thank you, Senator
3 Hollings.

4 And what I call the guise, a fishing
5 expedition in the guise of an antitrust issue,
6 we've had several second requests that had nothing
7 to do with the transaction itself, it had a lot to
8 do with the agency wanting to learn more about a
9 market and use the transaction to do that.

10 And also it's important that the agency and
11 the parties match the urgency and the timing. If
12 it takes three weeks for clearance to come and then
13 they have to question, it's good for the agency to
14 realize that we'll probably want to fly to
15 Washington the next day to meet with them and the
16 economist and everything else.

17 So that being said, what can we do to help
18 push this forward and make it more efficient? What
19 can we do to rise this to best practices?

20 And I think there's two sides, of course,
21 because there's two sides to the parties, there's
22 the agency side and the practitioner side, and
23 you'll see that the second page of my outline, if
24 there's enough to go around, has ways that I think
25 we can help from the private bar.

1 But let's talk a little bit about some
2 solutions and suggestions, and I'm just going to
3 put them out there because I'm sure people have
4 opinions about these.

5 But at or prior to the filing it would be
6 good to have some procedure for a preliminary
7 inquiry. Now I have used this on an informal basis
8 by calling somebody that I knew and said, "I'm
9 going to submit this, I think it's going to raise
10 some red flags, I don't think there's some
11 constraints, what do you suggest I do? Who else
12 maybe should get a copy of the HSR, who would like
13 a white paper, who do you think -- where do you
14 think I should go with this?"

15 It's good to be able to have a procedure,
16 to have a preliminary inquiry because you've got a
17 statutory time period and you can cheat a little
18 bit by putting some time on the front end. It
19 happens in situations, for example, where the
20 parties figure out that there might be a red flag
21 but there's really no constraint, so it's important
22 to get information to the agency. They want a
23 decision in the first 30 days and they want to make
24 sure that it happens that way, and how can that --
25 how can we bring that about. A little preliminary

1 inquiry could help.

2 There's some mechanism we need to get the
3 analysis done quickly, what's the most efficient
4 way to get to the point where we need to be, and
5 then the idea of jurisdiction, which I think has
6 been beaten to death and I'm not going to go into
7 it.

8 If the inquiry comes late, I have had some
9 inquiries -- and I call them inquiries because they
10 don't become second requests, you know, until after
11 some negotiations -- it comes like the third week,
12 it's important for the agencies to understand that
13 at that point your client is apoplectic, and so
14 there has to be some accommodation I think. Early
15 face-to-face meetings are really important, in my
16 view, it's trying to define and narrow the issue as
17 fast as possible to stay within the 30 days.

18 And the fishing expedition that I'm
19 referring to is, I had a transaction held up for
20 about 90 days while we gathered information off the
21 internet and provided it to the agency -- it was
22 not anybody here, it was not an FTC inquiry -- but
23 we were astonished at the end of the day that they
24 asked no information about the parties themselves,
25 they were only making inquiries about the market.

1 It had to do with the green power market in
2 California. And everything we gave them was public
3 document, everything we gave them we did research,
4 but it was nearly everything on the internet and it
5 took us about 60 days to get it through. They
6 said, "Thank you very much, this is all very
7 interesting, and now you can close your
8 transaction." I was, like, "What? What is this?
9 Why am I doing this?" We're happy to provide you,
10 you know, an information service and do the
11 research, but don't do it on the time line, the
12 transaction time line.

13 You know, come to us in some informal
14 proceeding or have a workshop like the wonderful
15 workshop the FTC had on deregulation of the
16 electricity market a couple of years ago in

1 where I don't believe there's any antitrust
2 problem, but there is an explanation that may be
3 required with the agencies. And so I'm, like, work
4 with me, let's just go another 30 days and then
5 let's continue on a negotiated informal basis.

6 It would be good to know from the agencies
7 how severe they see the problem to know if that's a
8 worthwhile road to take, or if we should really go
9 into the second request and spend our time
10 negotiating in that vein, because that takes us in
11 a whole different direction.

12 So it's again, it's go -- it's defining
13 issues, it's trying to figure out where the
14 concerns really are. The more narrow you get the
15 faster the solution and the more effective I can be
16 in providing information.

17 And sometimes it just takes another 30 days
18 to narrow the issue. Sometimes the agency's just
19 not going to know and it's going to take you some
20 amount of time -- we had an issue in the tech area,
21 and so again this was justice, but we -- it took us
22 30 days to explain the issue, and that was okay.
23 We used people, we used technicians to talk to the
24 reviewers and spent a little time bringing them up
25 to speed, and once they understood what the issues

1 was and the technology that was there, and once I
2 understood it, we could explain why the concerns
2 weren't really there, d theowsyv 91nyncerns
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1 somebody in the agencies and get the issue out on
2 the table as soon as possible. Don't sit there and

1 And then lastly, just remain flexible.
2 Remain flexible. Don't put your back up.
3 Understand that there's a couple different ways to
4 go and keep your options open.

5 MR. WIEGAND: Thank you, Allison.

6 People want to come up?

7 MR. KLURFELD: At the risk of committing an
8 act of lese majeste, I think I committed an error
9 in terms of not recognizing Mike Cowie's new title,
10 which recognizes his considerable talents and the
11 asset he is to the agency. He is an assistant
12 director of the Bureau of Competition. So I
13 apologize.

14 MR. COWIE: While we're doing the subject
15 of titles, could we identify the speaker by their
16 company, organization?

17 MS. DAVIS: Sure. I'm with Thelen, Reid,
18 Wiele and Priest, I'm an antitrust lawyer there,
19 I'm a litigator. We have national offices, been
20 doing HSR work for about 13 years.

21 MR. HOFFMAN: Did anybody else want to say
22 anything about the initial waiting period? Any
23 comments about things that we could do better? Or
24 that we do well? If you're going to comment just
25 at least tell us who you are and --

1 MR. OLEANNA: Is there a move towards a
2 more standard access letter, sort of for the
3 initial letter that you get from the agency when
4 they -- it's not clear it's determined a problem
5 and they want customer list information, customer
6 names, volumes, et cetera? It would be good if
7 that was more standard, because I've gotten letters
8 both from the FTC and DOJ in the past, like, two
9 years that have been pretty different. And it's
10 stuff that I try to drill into my business people
11 to prepare during (inaudible) deal so that we have
12 it, but when you then get a request that you didn't
13 anticipate it's awfully hard to get that quickly.

14 MR. COWIE: That's a good question, and
15 it's something we've thought about. Rhett, do you
16 want to try that? Because there's been some
17 thought we should have a model posted on our web
18 site.

19 MR. KRULLA: We are internally, among the
20 shops, exchanging drafts of initial access letters.
21 With their October 2001 announcement DOJ has
22 affirmatively indicated that they want to make
23 greater use, more effective use of the initial 30-
24 day waiting period, and we're discussing with them
25 types of things that we routinely seek in the

1 would seek.

2 And also preliminary market share or
3 competition share information in terms of what are
4 the overlap products. If we ask for market share
5 we get a debate, well, it's not a market, who knows
6 what the market is, we don't track market shares.
7 Well, most companies have an estimate of what the
8 universe sales figure is.

9 And depending on the nature of the product,
10 we'd also be interested in capacity and production
11 figures, identify who the competition is, i.e. who
12 are the people that do that stuff. And do you have
13 estimates of what their capacities are, what their
14 production is, what their sales are, and from that
15 we can calculate market shares. Or maybe you don't
16 have those figures but you do have market share
17 guesstimates, and then we can talk later about what
18 the basis of those is and how reliable they are.

19 MR. COWIE: Gil, do you regret having asked
20 that question? Because it sounds like Rhett wants
21 a C-O (inaudible).

22 MR. OLEANNA: That's the other question, is
23 the concern is that (inaudible) suggested
24 (inaudible).

25 MR. KRULLA: We try to keep these short,

1 the time frames are shorter than for a second
2 request. But in any given transaction we may have
3 had another transaction in the industry say four
4 years ago, we may want to go back and look at what
5 the competitive environment was prior to and
6 following that transaction, so there may be a
7 particular reason in that first 30-day period to
8 look more deeply at a particular case.

9 MR. HOFFMAN: Anybody else have any
10 thoughts on the initial waiting period? Or we can
11 turn and talk a little bit about the second request
12 itself. Mike, I'll lay it on the table.

13 MR. COWIE: Well, the main purpose here is
14 to get criticism and this certainly won't -- we
15 deal with the subject of the content and scope of
16 the second request, that's an area where I expect
17 some of you have some concerns or criticisms or
18 recommendations.

19 Are there issues concerning the second
20 request instructions, the type of information we're
21 asking for, the nature of the records we're asking
22 for that any of you think is overly burdensome and
23 not worth the effort? We'd be interested in
24 hearing about that.

25 MR. SUTIS: Bob Sutis from Hewlett Packard.

1 Certainly back-up detail systems are, from
2 Hewlett Packard's point of view I think asking for
3 backup e-mail system tapes is pretty much an idle
4 exercise. There is no way to search those backup
5 archive systems by the nature of those systems, and
6 so you spend an enormous amount of time and energy
7 in trying to produce those systems for almost no
8 return.

9 MR. COWIE: Well, why we maintain that,
10 what we're encountering, Bob, are situations where
11 companies are becoming more sophisticated at
12 imposing involuntary e-mail deletion programs. So
13 in other words, employees have no choice but to see
14 their e-mail every two or three months be deleted.
15 So we're facing situations where companies have two
16 or three months of live e-mail, that's all, yet
17 they're telling us they have these backup tapes
18 where someone's taken a picture every three or four
19 months of everything they have and then maintaining
20 them.

21 MR. SUTIS: I suppose I have two comments.
22 First is, you know, there may be companies -- and
23 I've worked for Hewlett Packard for a long time so
24 I'm unfamiliar with the practices of a lot of the
25 other companies -- but I doubt that their e-mail

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1 by company. And I know that even with companies
2 divisions will very often have different systems in
3 place.

4 One of the things that we have recently
5 encountered is that on big productions where
6 there's a continuing obligation to produce
7 (indiscernible) current within 30 days, every time
8 you take a snapshot of that system you're capturing
9 sort of what came before, and so there's a lot of
10 detail in programming associated with sorting, to
11 producing a current production and then sorting out
12 the material that's unique.

13 So what you need to do is work with the
14 agencies about -- in terms of what they actually
15 need to see, what they're really interested in
16 getting at, whether it's a limited number of
17 sources or whether it's a particular kind of
18 document.

19 But to technically comply with the
20 obligations of the continuing second request
21 production requirement -- and this gets to the
22 instruction about how current your production has
23 to be at the end -- it just raises all sorts of new
24 sort of practical problems when you throw in the
25 electronic production piece of it, because it's not

1 static. And it's not just a question of somebody
2 not throwing their material away, it's a question
3 of the system taking the damn picture over and over
4 again and sort of recapturing all the same
5 information.

6 So I would commend to those agencies taking
7 a sort of broad and creative view, and maybe
8 soliciting more practical experience from folks
9 about how they've specifically solved that problem.

10 It's confounded several clients of mine
11 lately, not actually the FTC, but probably delayed
12 an ultimate production by about a month just
13 dealing with that issue on -- so.

14 MR. HOFFMAN: Well, is that issue, for
15 example, eliminating the requirement that people
16 update (indiscernible) records? Or, I mean, do you
17 have any sort of general best practice type of idea
18 that we should do?

19 MS. SILVERMAN: I think that arriving at a
20 cut-off date that if, if anything's updated that
21 it's updated for a limited number of sources
22 identified up front so that you're not dealing with
23 sort of a wholesale production each time. And it's
24 really just a volume of records issue.

25 And the problem is, if anybody's ever done

1 this -- and several colleagues back here have done
2 too much of it -- but if you read an e-mail,
3 they're just time-consuming to process from a
4 review standpoint, and so it's a little bit of the
5 waterwheel problem, which is you have to read them
6 backwards and to print them out and decide whether
7 this stream went left or right and how is it going
8 to read from the last one and so forth. So, I
9 mean, it just raises unique issues.

10 So I would confine the updating requirement
11 to a limited number of sources or a time frame that
12 is sensible, or a topic that's searchable in the
13 subject line, or some -- it'll be a very practical
14 solution but -- and it will probably need to be
15 customized by event. But it's worth giving it some
16 attention.

17 MR. COWIE: Karen, are you referring to a
18 situation where you were telling the companies to
19 cease deleting e-mail when the system is
20 overloading, or are you just talking about --

21 MS. SILVERMAN: Well, that --

22 (The parties simultaneously speak.)

23 MR. COWIE: -- searches in general?

24 MS. SILVERMAN: Well, that's part of the
25 problem. And also different systems are capable of

1 different backup functions.

2 And there are people sitting here who know
3 a lot more about than I do but -- some of whom have
4 designed these systems.

5 But they -- there's a requirement not to
6 delete which sort of creates this accretive
7 problems (inaudible) behind it. But there's also
8 the problem that on any given person's drive
9 they're keeping threads and strings that are sort
of lesser-included.9

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1 MR. COWIE: -- for other types of
2 duplicates the argument has been made that I want
3 to know what was in his files --

4 MS. SILVERMAN: And that -- right.

5 (The parties simultaneously speak.)

6 MR. COWIE: -- and when I'm deposing a CEO
7 or the V.P. of marketing I want to know what was in
8 his files, therefore need to produce the duplicates
9 for the --

10 (The parties simultaneously speak.)

11 MS. SILVERMAN: And my feeling is if you
12 can come up ahead of time with some stipulations
13 that say, listen, if the re line, if the cc line
14 says that you were copied on the e-mail and it
15 didn't actually come out of your in-box, let's
16 assume you got it.

17 MR. COWIE: Right. Yes.

18 MS. SILVERMAN: You can probably get
19 stipulations along those lines.

20 You can probably arrive at a list of filter
21 terms so that if you were to run a generic search
22 for everything having to do with, you know, green
23 widgets, plus about 40 other terms, you're going to
24 get most of the e-mail you care about, you're not
25 going to get the softball schedule and, you know,

1 some of these high school play obligations and
2 things like that.

3 MR. COWIE: Right.

4 MS. SILVERMAN: Because all that stuff has
5 to be printed and read. I mean, and it's just
6 enormously burdensome.

7 So, I know it's a topic for other speakers,
8 but I think there are some standard sort of
9 parameters that could be --

10 MR. COWIE: Yeah. Well, we could have a
11 standard --

12 (The parties simultaneously speak.)

13 MR. COWIE: -- second request saying it's
14 unnecessary to produce duplicates in the case of e-
15 mail. For non-e-mail --

16 MS. SILVERMAN: Right.

17 MR. COWIE: -- there's been some debate for
18 the reasons I've stated. But just thinking out
19 loud it's hard to articulate a reason why you would
20 need duplicate e-mail given that you have a very
21 clear record of who are the recipients.

22 MS. SILVERMAN: And I think it's -- the
23 systems are -- many of them capable of, if you
24 compare the recipients, the date and the size of
25 the file and the subject line, you can pretty

1 quickly identify almost mechanically where you have
2 duplicates on your hands. So if you can come up

1 the agency would up-front any -- they'll invite you
2 in to modify and they will be prepared to modify,
3 but the operative document, and the document that
4 will determine when you're in compliance and when
5 you can actually start clocks running on doing your
6 deal, is the same document we all see all the time,
7 and you can pull it up off the web this afternoon.

8 What changes are the definitions, first. I
9 will tell you that when a second request comes in
10 there's a parlor game that we play, and we compare
11 it to the model and figure out sort of where we are
12 to be surprised, and what's different about this,
13 and we probably read too much into the differences
14 between the model and the actual request that comes
15 over. But frankly, there aren't usually that many
16 differences.

17 The model is a great tool for educating and
18 preparing clients, particularly in deals where you
19 know you're going to get an investigation. It's a
20 great device to use to help them understand sort of
21 what the breadth of their obligation is going to
22 be, and even start preparing for it in some
23 instances. Many instances.

24 But that's it, when it arrives it is still
25 a -- I don't want to say it's a meaningless

1 document, but until you really understand the
2 definitions and how specifically they are going to
3 apply to your case and your parties and the
4 individuals identified, it's sort of inoperable.

5 You know, and so we'll get to modifications
6 in a little bit, but some of my recommendations for
7 best practices really go to the modification
8 process, because I don't know that you can get
9 around the need for a broad second request given
10 the agency's --

11 MR. HOFFMAN: Well, let me ask you about
12 that.

13 Should we abandon them all, or should we
14 have it just as an educational or structuring tool
15 for people to look at in advance, but when we
16 actually do a second request, assuming that it's in
17 a situation where we've had some first 30-day
18 communications and perhaps it's an industry we know
19 a little about, you know, should we be doing second
20 requests that are really just narrowly focused on
21 whatever the issues are at the time?

22 And one of the ways this comes up is we've
23 heard -- we started to hear that, you know, the
24 agency uses the second request process to not only
25 get everything that we need to make our decision,

1 but also to get everything that we need to litigate
2 in the, frankly, extremely unlikely event that
3 things actually ever go in front of a judge.

4 And one possible suggestion is that we
5 restructure the second request to not seek those
6 litigation-type things but instead to focus in on

1 And we've had some interesting -- I think
2 the staff has lately become pretty creative in how
3 it gets here or depart from the actual model second
4 request, you know, we've been through deals where
5 we have completed the investigation and no one ever
6 referred again to the second request after the day
7 it arrived, because we were answering separate
8 questions that actually did go to the substantive
9 issues, but as a result nobody ever knew when we
10 were done. You know what I mean?

11 And so we would -- there was a very
12 unsettling -- I mean we had a very good
13 relationship with staff, it worked in that instance
14 because we talked and we understood, you know, the
15 crux (phon) and the -- and the expectations for the
16 crux and everybody lived up to their
17 representations in that regard. But we had to
18 advise the client that they were taking it on faith
19 that, you know, on day X, you know, we'd be
20 determined to be finished with the production.

21 It didn't come because we --

22 (The parties simultaneously speak.)

23 MR. HOFFMAN: -- when you gave that advice?

24 MS. SILVERMAN: And that has happened too.

25 But, I mean, so there's -- it shouldn't have to be

1 taken on faith. And I don't think it ought to be
2 the device that we use to run the schedule.

3 And one of the recommendations I would have
4 for the modification process would be to put
5 calendar on there. I mean it doesn't have to --
6 you know, we can even do it binding or non-binding,
7 but have a set of expectations and dates set out
8 where, you know, if we produce, you know, on June 1
9 we can be expecting to, you know, at meetings on
10 June 15 and, you know, we're -- or whatever, you
11 know, we draw one and sort of set out a calendar
12 that everybody can start to work with and build
13 into their own internal plans.

14 You know, one thing, as I was talking to
15 some of our folks internally about this that was
16 sort of so notable to me is that the fact of the
17 matter is that when you go to pull documents from
18 your client and review documents from your client
19 the 18-page second request is easily reducible to
20 one page. You know, spec seven or whatever it is,
21 it says "All documents related to competition in
22 the following 17 ways," is all documentation
23 related to competition, right? I mean that's what
24 you tell your young attorneys, that's what you tell
25 your client and that's what you collect and

1 produce.

2 So I think that a lot of the language
3 that's there is unnecessary. I mean I know why
4 it's there and I know that, you know, that there
5 are competing interests in the agency, but it would
6 be helpful to get a little recognition of that when
7 you're coming up with the definitions that are
8 really going to inform how you go about making that
9 a reality. Because otherwise you're just, you
10 know, it's infinite.

11 And so the model is useful there to, as I
12 say, instruct your clients that they have a very
13 serious issue, but in terms of how it's going to
14 get done it almost bears no, you know, resemblance
15 ultimately, so it swallows itself.

16 You know, and like I said, I have been very
17 pleased lately with the ability to work with staff
18 on modifications and to creative solutions, they're
19 given very open to understand, you know, the
20 technical electronic problems and were -- you know,
21 it's unreasonable to have to search, you know, 40
22 people who all have basically the same job, we can
23 use the sampling technique or -- I mean, they're
24 being a little bit more creative and flexible in
25 how that goes down, and then ultimately what the

1 size and shape of the second request ends up being,
2 so...

3 MR. HOFFMAN: Thanks.

4 MS. SILVERMAN: Okay.

5 MR. COWIE: Any other comments on the
6 subject of the content and scope of the second
7 request? Alec, you must have something to say.

8 MR. CHANG: I think what Bruce said is
9 actually very interesting and definitely a step in
10 the right direction, because again, if we go back
11 to the underpinnings of this, it's to give the
12 agencies notice that if there is going to be a
13 problem they have time to go to court and do
14 something about it.

15 It's not necessarily to give the agencies
16 time to wrap up their case and figure out who their
17 witnesses are going to be, know where they want to
18 file, know which theories, which arguments are
19 going to be the primary arguments, which argument
20 is going to be their secondary arguments. But, you
21 know, HSR is a notice, it's a notice but not a
22 precomplaint discovery, precomplaint preparations.

23 So I mean I think that's a very positive
24 and a good thought. Because the second (inaudible)
25 need to be modeling the -- everybody expects to get

1 fixes the problem.

2 And then there are those cases where we
3 then need to litigate the matter. And when we
4 present the initial investigation of the matter to
5 the Commission, say, "Well, we have to be in court
6 tomorrow, we need to get a TRO, that TRO will be
7 good for 20 days, assuming it's 10 days ---- again
8 for 10 days, and then we need a preliminary
9 injunction order. The Commission's going to ask
10 us, "What evidence do you have in hand?"

11 Now in one scenario, as suggested today, we
12 can tell the Commission, "Well, what we got was
13 enough to tell us that we should be doing something
14 but, frankly, looking at some of the legislative
15 history, taking it out of context, we didn't think
16 that we needed to start preparing our case until we
17 got into court."

18 MR. COWIE: Alec Chang told us --

19 MR. KRULLA: Yes. So Alec's assured me
20 that in the next 20 days I could (inaudible) my
21 investigation.

22 MR. CHANG: Discovery (inaudible) in those
23 20 days, as any other litagee would have, and I
24 don't know why necessarily the Federal Trade
25 Commission should be somehow a special class.

1 MR. KRULLA: Well, again, the whole process
2 of the second request, and this is a preamble to
3 negotiation, is to educate us. The goal as we see
4 it is not compliance with the request, the goal is
5 to get us the information we need.

1 themselves to disposal relatively quickly. During
2 the second request we didn't have enough confidence
3 to eliminate those, we can eliminate those.

4 Then there's one or two products where
5 there's a clear fix that can be -- deal with the
6 problem. And there may be an inkling on our part,
7 maybe a recognition on the part of counsel
8 undisclosed to us that the parties are prepared to
9 fix that problem.

10 And then there's that other one out there
11 where the parties say, "Well, you may have an
12 antitrust concern but we're not willing to fix the
13 problem." So we're at an impasse. And when we're
14 at an impasse and where the path at the end of the
15 road is we've got to go to court, then
16 notwithstanding procedures for getting discovery
17 and litigation, we have to show the Commission --
18 D.O.J. has to show the Assistant Attorney General
19 that they've got a case. They'll ask, "What is
20 your case?" and we have to have that case in hand
21 to be able to demonstrate to our decision-makers
22 that they should send us into court.

23 And so I think the -- considering what the
24 scope and breadth of the needed modifications are
25 in order to get through the process, the earlier

1 firms come to the recognition that they may have to
2 fix a problem they'd rather not fix the earlier we
3 can shortcut the process and get to the bottom
4 line, which is do we have the documents and
5 information we need to identify the problem and to
6 ascertain that the fix is correct.

7 When we go into a second request process
8 where from day one the parties say, "There's no
9 problem in any area, we defy you to find one, and
10 we're not particularly going to help you understand
11 the industry, help you understand where the problem
12 is because we think -- we don't think you're going
13 to be able to develop that record." And the only
14 thing the parties are offering is, "But I need
15 modifications, there are all these burdens in the
16 second request and I need them modified because it
17 costs too much for me to find these documents and
18 you don't need these documents anyway because you
19 would only need them if you go to court and
20 there'll be plenty of time in the 20-day period to
21 get discovery, and it would take us months and
22 months to produce those now, but in the 20 days we
23 assure you we'll do what we can to get them to you
24 under the circumstances."

25 Well, we're looking at a confrontational

1 scenario that we can address that through a
2 negotiated modification of request. That the
3 earlier the parties come to recognition as to where
4 is this headed, is this -- "Hey, look, I've dealt
5 with you before, I think I can show you there isn't
6 a problem," well, show me, I'm here to be shown.
7 And I can't present a case to the Commission that's
8 not a case.

9 But in conducting the investigation, if I'm
10 looking to assemble the documents and information
11 not only that will guide me in ascertaining is
12 there a problem, is there not a problem; not only
13 to ascertain whether should a fix arise out of the
14 blue, and it often arises in the 11th hour, is that
15 fix adequate.

16 But also I've got to prepare my case, and
17 that's the direction I'm going when the agenda on
18 the table is only, "Look, we need a modification to
19 this request, I'm not going to talk to you about
20 substantive issues. I don't think you're going to
21 be able to make your case at the end of the day,
22 please grant me concessions and modifications.
23 We'll be as reasonable as we can be under the
24 circumstances."

25 MR. HOFFMAN: In terms of talking about

1 that way," and it creates a real frustration and a
2 real disconnect. And it creates for a lot of time
3 in the negotiation process to go back and say, "You
4 know what, we don't keep it this way."

5 And I think one of the problems that has
6 developed is that once it is written in the second
7 request as "this is what we want" then it becomes
8 "you must have it then this way because this is how
9 we would like to see it." And it's a little
10 psychological shift there that takes place.

11 And I guess I'm not sure what the solution
12 to that is. I mean ideally it would be a good
13 start for there to be more discussion between the
14 staff that's writing the second request and the
15 parties that are receiving the second request about
16 how data is actually kept. And not so much that
17 you're not going to give it to them but how can you
18 cut it in your database and how can you report
19 capacity, and what capacity can we report before
20 the second request is issued.

21 If that's not possible then I think that
22 there should be some more strict deadlines on the
23 staff's responding to requests for modifications in
24 that area, because you're not asking them to
25 eliminate a product or eliminate a geographic area

1 or eliminate a category of documents, but literally
2 coming in and saying, "This is how our data is
3 kept," and if you believe us then there should be a
4 modification of how you're going to get the data.
5 That's on the data side.

6 On the document request side I think the
7 age-old problem of we really don't want to produce
8 a million documents in every second request, and
9 the tension between what the agencies need and what
10 the parties need to conduct an efficient merger
11 review is problematic.

12 And my person experience has been that at
13 the end of the day, in most of the cases that I've
14 worked on, the documents that are important or
15 useful or are going to establish the case are a
16 very limited number of documents, and they usually
17 come from a limited universe of executives or
18 people on the org chart. And even if you produce a
19 million pages a lot of times the universe of
20 documents that are important are 500.

21 And I guess one thing that I would be
22 interested in seeing is the FTC, and DOJ for that
23 matter, conducting some kind of retrospective on
24 some of their old cases either that they've
25 litigated or that they've recommended a case, to

1 sort of see how many documents did we ask for, how
2 many documents did we get, and at the end of the
3 day how many documents -- and from whom, who's
4 files -- did we use to convince the Commission, and
5 then did we actually use litigation.

6 And that if there -- you know, maybe after
7 conducting something like that there would be less
8 of a sense that I need to get two million because
9 who knows what's in there, knowing that, you know,
10 generally we all tend to recognize which documents
11 are the important ones, and who's going to keep
12 them. And is a e-mail from one salesperson to
13 another sent five years ago really going to be a
14 make-or-break on any particular merger case.

15 MR. HOFFMAN: Let me ask you this though.
16 Let's assume that we could probably all agree that
17 in 95 percent of cases the stuff that's important
18 is the stuff that comes from say the top 20 people
19 in the company. So it seems to me that what you're
20 really talking about is that we use as a standard
21 procedure rolling productions that start at the top
22 of the org chart and then work their way down if we
23 need them.

24 But the downside to that, it seems to me
25 from a party's perspective, is that that could

1 extend the length of the second request if it turns
2 out that we think that we're going to need to get
3 further and further into the org chart because
4 you're not out there preparing at once, everyone is
5 being searched or searching incrementally and
6 producing incrementally. I mean, it seems to me
7 like that would probably be an efficient process
8 and produce a lot less documents and still enable
9 us to make good decisions most of the time, but
10 also as a tradeoff to the parties, in that they
11 might face a longer back-end --

12 MS. ALMIRANTEARENA: Sure. And I think
13 that's a huge tension, because most of the time you
14 are under incredible pressure to substantially
15 comply. And clients aren't really in to this
16 whole, "Well, we'll just give them now," they just
17 want the clock to start on the government's end
18 usually because they have reasons to want to move
19 forward, business reasons to want to move forward.

20 But I mean sometimes -- and again, I don't
think this is a solution, but for many of us't

1 rules. No. But a lot of us are paying for the
2 sins of the few, if that makes any sense. I mean
3 for every one case that's litigated or every one
4 case that's challenged there may be 15 transactions
5 where the scope of what's being produced is
6 probably much broader because you're worrying
7 about, you know, that one...

8 The thing is, this is my sense of what the
9 universe of important documents are in every case,
10 but I just don't know whether there's ever been any
11 empirical work done, or anything done that would
12 actually -- people would look and say, "Oh, wow,
13 you know, we haven't been missing the smoking
14 guns." So that's my two cents on that topic.

15 MR. SUTIS: At least from Hewlett Packard's
16 point of view and in a large-scale transaction, I
17 would not like to see a rolling production starting
18 at a managerial level and working down out of sight
19 because the logistics of gathering documents is
20 enormous if you've got to keep visiting a site. A
21 negotiated, you know, site-by-site or entity-by-
22 entity discussion with the agency about whose
23 documents to produce is the most efficient I think
24 for both parties.

25 MS. SILVERMAN: To echo sort of what both

1 of you are saying, I think one of the frustrations
2 is that we each, from a private standpoint, have
3 our own perspective on what's occurring, and how
4 the sense of the agency has a much broader sort of
5 vista.

6 And the impression that I get is that of
7 the 12 important modifications that you eventually
8 get and negotiate six to eight of them are

1 know, the standard second requests -- is it 30
2 days? No, it's 14 days or something? Your
production has to be current within 14 days. okhTj -ug12gw

1 different. But having a menu of sort of
2 acceptable, sort of this has worked in the past,
3 maybe we can improve on it here sort of options
4 that both parties bring to the table, as opposed to
5 putting all the burden on private parties
6 (inaudible) and start complaining right out of the
7 blocks. Because I think everybody understands that
8 we're not there to complain, we're there to make it
9 fit the actual organization (inaudible) sort of
10 comply list.

For The Record, Inc.
Waldorf, Maryland

1 So that I think that there's -- I think
2 what Karen's saying is that some of this stuff, you
3 sort of look at it and you're like, "Okay, well, I
4 know I'm going to have to go in and get that," but,
5 you know.

6 MR. COWIE: How realistic do you think it
7 is that there will be meaningful dialogue about the
8 form of data the company maintains within the
9 initial 30-day period?

10 MS. ALMIRANTEARENA: Well, I mean, if you
11 got clearance on day two you could have a lot of
12 dialogue. I mean, I don't know. You know, it's a
13 very hard line to walk.

14 I don't know if there's been any dialogue,
15 but I do think that not having any has a big
16 downside.

17 Now I realize it's a timing thing -- right?
18 -- like why talk to you about it before --

19 (The parties simultaneously speak.)

20 MS. ALMIRANTEARENA: -- second request, we
21 can just talk to you about it afterwards, after the
22 second request is issued.

23 MR. COWIE: But you're trying to issue the
24 second request, and I say to you, bring your
25 controller in to tell me about your cost

1 accounting, financial accounting systems, you know,
2 what do you say in response?

3 MS. ALMIRANTEARENA: Well, the thing is in
4 most -- I think they're -- in most transactions you
5 pretty much know whether the staff is going to --

6 (The parties simultaneously speak.)

7 MS. ALMIRANTEARENA: -- the staff is going
8 to recommend it or the staff is not. I mean there
9 are some places where you're in the middle, but
10 most of the time either people understand it's
11 coming or it's not coming. And so how much of the
12 initial waiting period you're -- you know, you
13 spend trying not to get one, and in some cases you
14 know you're going to get one anyway, so that also
15 varies.

16 I mean I would rather spend the time in the
17 initial waiting period trying to narrow the scope
18 of the request or tailor the scope of request that
19 I know I'm going to get, because I'm not going to,
20 probably not to convince you not to give it to me.

1 know, how do you -- put in a neutral term -- and
2 how do you keep sales data. And you may be at that
3 stage answering for 17 divisions of which three end
4 up being of any competitive significance.

5 But then when the second request arrives it
6 just reflects a little bit more --

7 (The parties simultaneously speak.)

8 MS. ALMIRANTEARENA: -- it's a request to
9 you, to the company as opposed to a request to the
10 world.

11 MS. DAVIS: I think the concern, too, is
12 the same thing I said in the initial waiting
13 period, and it happens all the time, is you want to
14 get to the issues faster. So, you know, if you can
15 narrow down what it is you want in the form that
16 you want to prior to the second request is good
17 because it gets you to the solution faster.
18 Anything that pushes it forward faster is going to
19 be better.

20 ELECTRONIC RECORDS AND FINANCIAL DATA

21 MR. HOFFMAN: The next sort of topic we
22 have deals with electronic records. I shouldn't be
23 surprised, especially here in San Francisco, that
24 most of what we've been talking about in general is
25 dealing with electronic records and e-mails and so

1 forth. So, you know, I think this is an issue
2 which kind of cuts across all of the boundaries of
3 the second request and, as a result, I don't want
4 to really limit it to just talking about
5 electronics.

6 I mean some of the points that we've
7 thought about in the context of how electronics
8 have affected the second request process deal with
9 whether searching for electronic documents creates
10 substantially different circumstances for companies
11 than the traditional search for physical documents.
12 For example, do you use term searches? And, if so,
13 what should the agency's role be in responding to
14 people's request to use specific kinds of
15 connector-type, you know, West Law-type searches as
16 opposed to physically reviewing everything that
17 exists on a company's server.

1 but that fall within the time period of the second
2 request.

3 And also in sort of related way, production
4 formats. You know, what should we be doing about
5 people giving us things, whether the documents
6 originally lived as electronic documents or paper.
7 You know, people giving us stuff either in
8 electronic and images and OCR'd or text-searchable
9 of old document form, or printing electronic
10 documents out and giving them to us in paper, or
11 giving us live files.

12 I've recently had an experience where we
13 had a production that involved a tremendous number
14 of live, active files. In other words, the
15 original Word documents in Word, e-mail in
16 Microsoft -- you know, I had this -- you know,
17 everything seems to be Microsoft. Excel, the
18 spreadsheets.

19 But there's sort of an infinite variation
20 in the way things can be produced to us, so I
21 wanted to lay those on the table, but also keep the
22 discussion open for anything that you all want to
23 address in terms of -- I guess this really
24 primarily deals with modifications, but anything in
25 the second request process.

1 OCR the documents. There is a procedure for taking
2 all those paper documents, turning them into OCR
3 images, but the search ability of them is a
4 reliability of only like 60 or 65 percent.

5 MR. HOFFMAN: Well, we were told the other
6 day that the error rate on OCR'ing is only 10
7 percent. But what that means is one out of every
8 10 letters is wrong. So when you think about what
9 that means in the document it's really not too
10 good.

11 MR. SUTIS: Yeah. And for the paper
12 production -- and in a large part the paper
13 production is duplicative of (indiscernible), at
14 least in our experience, of what (inaudible)
15 electronic document and it's origin. People print
16 out a version of something, tuck it into a paper
17 file. There aren't a lot of newly-created paper
18 documents that are floating around HP.

19 MR. HOFFMAN: Bob, you guys did this, if I
20 remember right, with an outside vendor who set up
21 essentially a web site. Am I correct about this,
22 that things could be -- that the agency could
23 access, had secure access to sort of one side of it
24 and you guys had access to the other side? Is that
25 right?

1 MR. SUTIS: Correct. We loaded everything
2 on a server and then the agency, Rhett and his
3 team, just examined it privately at their leisure.

4 MR. HOFFMAN: Is this a practice that you
5 would recommend us using a lot in the future? Was
6 your experience with this good or were there things
7 that --

8 MR. SUTIS: Oh, yeah, absolutely. It would
9 be -- we used a company called S.B. Technology,
10 based out of Los Angeles and San Francisco, and

1 the documents, especially being full-text
2 searchable on the remote server.

3 MR. KRULLA: I think in this experience
4 getting electronic copies of documents was a
5 positive experience for us, it was very
6 (inaudible).

7 We've had some cases in the past where
8 we've gotten productions on CD and we try to access
9 the documents, they don't open up, they want a
10 soft-pointer, and the clock is running. It has
11 just been a mess. So I think as the technology
12 evolves, as these contractors develop experience,
13 capabilities and provide these kind of services, I
14 think it's going to work more and more.

15 I think also as we learn often in our side,
16 or DOJ, it should be possible for the agencies to
17 receive material in electronic form or in CD form
18 in a form we're -- we'll have confidence that we
19 can in fact access it.

20 So that involves, again back to rolling
21 production or (inaudible) modification, involves
22 not a dump on the last day of materials that we may
23 or may not be able to access, but samples of
24 material or rolling production so that we can
25 report back to the submitting companies on how it's

1 working, what problems we're having, and if we have
2 some assurance and the companies are going to work
3 with us in enabling us to access that material then
4 we will be much more comfortable in experimenting
5 and saying, you know, we don't want hundreds of
6 boxes, you know, our hallways and move toward the
7 electronic format.

8 MR. SUTIS: And one of the things we did,
9 you just reminded me, is our I.T. characters worked
10 with the I.T. staff of the agency to make sure that
11 the marriage of their capabilities and the database
12 (indiscernible) tools the agency wanted to use
13 matched what we put on the servers so that, you
14 know, the access from the agency point of view is
15 seamless.

16 MR. KRULLA: Yeah. Our I.T. people are
17 available and eager to work with the companies'
18 I.T. people to make sure that we get a seamless
19 production.

20 MR. SUTIS: One just issue on scope, and
21 then I'll pass to Alec. One of the issues that
22 came up in this particular production was that when
23 you search a particular person's files what do you
24 do if they throw information on a web site. You
25 know, marketing department, we have something like

1 1500 internal web sites at HP or so and a lot of
2 people have access to web sites, and that can just
3 become a mushroom cloud of difficulty if you want
4 all the information from a particular person or all
5 the information they may have access to. And so we
6 worked through that issue and negotiated with the
7 agency as to what we had to produce from those web
8 sides.

9 MR. OLEANNA: Well, what do you do about
10 the fact that the content of those internet web
11 sites (inaudible) HP and CSCO are constantly
12 changing? That makes historical production pretty
13 difficult -- and it's pretty easy for individual
14 contributors to upload stuff to a web site.

15 It seems to me that that makes it awfully
16 hard to make representation to the agency
17 (inaudible) providing the complete web site for the
18 entire period searched.

19 MR. SUTIS: We simply negotiated with the
20 agency and explained the problem, that that was
21 impossible because those web sites are ephemeral
22 and they are not archived, and so we could only
23 produce what was requested from what we had in our
24 possession at the time that the second request came
25 in and forward --

1 (The parties simultaneously speak.)

2 MR. COWIE: -- that may be another reason
3 to rethink the refreshing (cross talk).

4 Bob, did you have any complications in
5 dealing with our traditional instructions on
6 sorting and the like? In other words, the
7 documents are organized by individual and indicate
8 which specification is --

9 MR. SUTIS: I'm sure the attorneys that did
10 the work did, but I didn't have any.

11 MR. HOFFMAN: On that note, Alec, you did
12 that work? Because I think you did that work --

13 (The parties simultaneously speak.)

14 MR. CHANG: I did that work.

15 On the Compaq side our production was more
16 of a traditional nature, occasional paper and
17 touching on everything we've talked about today,
18 modifications and everything was done very
19 traditionally. Staff was very responsive and
20 proactive and helped us, you know, take products
21 off the, sort of the potential interest list, and
22 so we did narrow as time went on.

23 We were fortunate in one regard that timing
24 was not the primary issue. This transaction,
25 unlike many others, had some extra (inaudible).

1 If I can go back to the one that Legacy
2 systems and what will you do about -- how you think
3 about Legacy systems from, say from components of a
4 company that a current party may have acquired four
5 years ago but falls within the time period, one
6 suggestion there is if there's a Legacy system and
7 it hasn't been -- you know, if nobody's sort of
8 gone into it in three years or in two years, well
9 then it may not be that helpful to you, just as if
10 it's not useful to the business people on an
11 ongoing basis. Then what somebody else thought
12 about four years ago and nobody's looked at since,
13 you know, shouldn't really have much dispositive
14 sort of use to anybody today. So that's just one
15 thing on the Legacy system.

16 So on the idea about as parties and as the
17 technology improves so that there can be increased
18 production electronically, what would be helpful
19 also is to have some more standardization sort of
20 across shops. You know?

21 And obviously this will take time, as
22 individuals become more comfortable with and more
23 facile with the technology and what they can and
24 can't get and what they can and can't do, you know,
25 whether something comes across by e-mail or we

1 produce it, and DVD or in some kind of CD or
2 something like that, consistency and some
3 generalized standards would help, would help the
4 parties quite a bit.

5 MR. SUTIS: I just remembered one thing on
6 the electronic production, too, that was really
7 helpful. I think we certified the compliance about
8 January 14th or so and then after that we produced
9 at least two or three more white papers. And I
10 think the benefit, from HP and from the agency in
11 both producing and reviewing those came almost
12 exclusively from a electronic production, so that
13 we were able to -- you know, we got really expert
14 at string searches and pulling up relevant
15 documents to produce information to give to the
16 agency and that they would be able to review it.

17 MR. COWIE: Alec, consistency across shops
18 is certainly an important objective. With -- on
19 electronic records there was a practical problem
20 that, you know, there are
21 old-school people who want, you know, to get green
22 post-its and pink post-its and yellow
23 post-its, and they want to see the paper. So
24 there's...

25 MS. SILVERMAN: From the private site --

1 it's Karen again -- you know, I think a menu of
2 options is still a valuable thing. Because I, I
3 don't -- I mean in your instances, because of the
4 volume and everybody sort of knew what the
5 investigation was going to be like, I mean that
6 made some sense.

7 I think there have definitely been episodes
8 that I've been involved with where I would be
9 concerned -- well, first of all, just the review of
10 the documents on line is more difficult for the
11 attorneys who are doing it. So you end up very
12 often printing it out anyway so that you can have
13 your team of people reading things consistently.
14 Because we try to review consistently as --

15 (The parties simultaneously speak.)

16 MR. COWIE: -- that's a question, an issue
17 to be explored. Some of the people who did the
18 review on HP Compaq reported that was actually
19 quite friendly, it was in internet protocol
20 language. And as I understand it, it was sorted by
21 individual and you have the title, so if you want
22 to look at, you know, vice president of this
23 product line you would --

24 (The parties simultaneously speak.)

25 MS. SILVERMAN: -- and I could see how it'd

1 work. No, no, and I see, I see a great opportunity
2 for utility there, but I don't know that it's going
3 to fit again all situations.

4 And for instance, we had a situation
5 recently where we had a -- we had two review rooms
6 going, one was the hard-copy stuff and the other
7 one was a bank of computers where they were doing
8 the computer review but they could still be talking
9 to each other about making consistent calls about
10 what was in, what was out, what this meant, what
11 that meant. So you still have to do a very
12 collective review. And it may or may not work in
13 all instances.

14 The other thing I'm a little concerned
15 about is that if we default to the electronic
16 production there is a chance that a dynamic will
17 develop where the thought is, "Well, listen, you're
18 just getting it to us in bits and bytes so you can
19 produce everything." You know, I mean it takes the
20 pressure off, you don't want to know your records,
21 you know, in your hallway, and that's a good
22 discipline, I mean because you don't want to know
23 your own records. And I'm a little worried that if
24 it just means another
25 CD --

1 MR. HOFFMAN: We don't want them on our
2 server either, necessarily. Of course they're
3 doing it on a separate web site --

4 (The parties simultaneously speak.)

5 MS. SILVERMAN: Yeah. I mean so I think it
6 -- we just need to be a little bit careful about
7 how that plays out from a practical standpoint.

8 MR. CHANG: At the same time I think we
9 also need to be -- and this goes some to Mike's
10 problem -- we need to be careful that -- this
11 transaction was again kind of a unique one because
12 you had two computer companies who weren't afraid
13 of the technology themselves and, and HP could do a
14 lot of this work.

15 Nonetheless, out there in the real
16 world there's still lots of industries and
17 companies whose computer systems are surprisingly
18 primitive, and so they're not going to be
19 able to provide quite so easily, you know, and
20 getting you all the marketing materials or all the
21 financial materials, and it is surprising and
22 frustrating when we run across those kinds of
23 companies and those kinds of industries, but it's
24 still going to happen for some time until, you
25 know, the technology really takes over. Just as

1 it'll take time for folks at the FTC and folks at
2 various other firms to stop using the yellow post-
3 it for this and the pink post-it for that --

4 (The parties simultaneously speak.)

5 MR. COWIE: Just so the record's clear, HP
6 Compaq is not by any means the only paperless
7 production. We've had a number of notable oil
8 industry deals where we've had parties do paperless
9 productions.

10 MR. HOFFMAN: There have been a series of
11 internet mergers recently but it's
12 not --

13 (The parties simultaneously speak.)

14 MALE VOICE: But it's not just high-tech,
15 though, we've had some more traditional industries
16 proceed that way as well.

17 MR. OSTRAU: Mark Ostrau from Fenwich &
18 West.

19 I think that the more time we spend talking
20 about electronic mail and electronic production is
21 best here. Because the reason Silicon Valley -- I
22 mean, it is probably not an overstatement to say
23 90-plus percent of the documents are going to be
24 electronic, and a huge part of them are electronic
25 mail where the burden of reviewing and producing is

1 enormous. And really from the clients' perspective
2 they just want to know how much this is going to
3 cost, and they want to figure out how to get you
4 the information in the most efficient way possible.
5 And it strikes me that we kind of have only gone
6 halfway with the technology.

7 The notion of, the option of word searching
8 and gnashing our teeth about doing it is incredibly
9 antiquated. Everyone word searches. That's what
10 Google is. That's what Lexis is before that. And

1 all synonyms for the terms they searched.

2 And we have had investigations recently
3 where, for example, we discovered that a company
4 had a practice of only referring to their
5 competitors by their stock-ticker symbols which,
6 you know, knowing that -- you know, if you knew
7 that in advance it would be quite easy to ascertain
8 with a term search, but it could be pretty darn
9 hard, you know, to find that if you were just doing
10 a term search. So there's obvious risks in term-
11 searching.

12 Now the agency can do a number of
13 things here. For example, people could come to us
14 with a request for a formal modification that says
15 if we conduct a term search using the following
16 terms and the following connectors, and if you're
17 doing cost platform searching, using the following
18 engine or whatever you want to do to search, that
19 will be deemed substantial compliance regardless of
20 what it produces.

21 Or parties can come to us and say, "We
22 would like to do term searches using these kinds of
23 terms and connectors, what do you think? Let's
24 work together to try to get it as best we can, but
25 we're not going to ask you to grant a modification

1 saying that this is necessary enough because you
2 don't necessarily know from, you know, the agency"
3 -- it's almost impossible for the agency to know,
4 at least at the outset, whether those terms are
5 really going to be the right ones. I mean, there
6 are some ways you can address that but, you know,
7 those are two ways you could approach term
8 searches.

9 Another one of course would be -- and I
10 know some shops that have done this in cases --
11 saying, "We won't accept term searches and, well,
12 being that you're not in substantial compliance if
13 we discover that you've done a term search rather
14 than physically reviewing everything that's
15 resident on the servers."

16 So how should we -- you know, which of
17 those three should we use as a model? Or is it one
18 of these situations where you're not going to be
19 really able to tell at the outset?

20 MR. OSTRAU: Well, I can tell you that the
21 third choice is be careful what you wish for.
22 Because what I know people would do is just give
23 you everything because it's too expensive to go
24 through and pull out the --

25 MR. COWIE: No, I thought that -- I thought

1 the third choice was do --

2 (The parties simultaneously speak.)

3 MR. COWIE: -- but don't tell them you did
4 a --

5 (The parties simultaneously speak.)

6 MR. OLEANNA: This is Gil Oleanna from
7 Cscoc, that's C-s-c-o if anybody's interested.

8 Let me make a point about the term searches
9 and what you know at the time that you're
10 negotiating the term searches.

11 Presumably at the time of negotiating with
12 term searches, assuming that it's day 29, is you've
13 already gotten some documents from the company.
14 You've gotten your field documents, you've gotten
15 the transaction documents, the actual contract, and
16 you've gotten the 4-C documents. By that point you
17 have a pretty good sense of the vocabulary used
18 within the A company and the B company to the point
19 where you can have intelligent conversation with
20 counsel for those companies about term searches.

21 So you're not totally operative on an
22 FYI slate at that point, you've seen a fair amount
23 of stuff on paper, you've gotten information from
24 the industry, you can probably -- we could ask you
25 what terms you would search out here, that would

1 probably do, and get information back.

2 So I think that that maybe offers a middle
3 leg.

4 MR. HOFFMAN: So I mean the idea here is --
5 and I would limit this just to the first 30 days,
6 you know, the more information that the parties can
7 provide early on in terms of constructing a search
8 and providing -- not just telling us but coming in
9 and showing things, you know, these are sample
10 documents, this is the way we talk about things, I
11 would think that would certainly be helpful.

12 But I guess what I'll go back to is should
13 our practice be -- you know, because we're doing,
14 trying to construct some best practice ideas here -
15 - should it be that we actually negotiate term
16 searches as formal modifications or should it be
17 that we work with and interact with the parties to
18 get a term search as best they can, but we don't
19 necessarily say that when you do this search it's
20 compliance even if it actually turns up zero
21 documents.

22 MR. SUTIS: Bob, again, at least for a
23 large-scale production I go back to the statement I
24 made earlier, and that is you really only go --
25 want to go to a person once.

1 So in your hypothetical number two, where
2 you have a best guess and then we'll go back and
3 see if we need more, there's this giant steamship
4 that's moving and very hard to steer back and go
5 get people, it's just enormously inefficient to do
6 that.

7 So my only recourse in that case would be
8 to gather everything from all those people anyway,
9 do the term search and then see if you have more.
10 So it's actually not a very helpful --

11 MS. SILVERMAN: And you can run tests. I
12 mean, you can, you can try your filter list, see
13 what you -- look at what it missed, review -- and,
14 you know, for one or two people figure out of
15 anything critical was overlooked and go back and
16 either add those terms.

17 I mean, there are ways to, I think, get
18 everybody comfort around the list and connectors
19 and protocols, whether it's the, you know, the
20 elimination of duplicates or the addition of
21 certain terms or whatever it is. But you can look
22 on a limited basis at the reject pile, if you will,
23 to evaluate how good a job that it's doing. You
24 know, until everybody's happy that it's doing a
25 good job --

1 (The parties simultaneously speak.)

2 MR. CHANG: Yeah, Bruce, you know, that's
3 really just a modification of your idea that, look,
4 we'll agree on the search terms. If it yields one
5 document that's substantial compliance; if it
6 yields a million documents that's substantial
7 compliance. Just rather than agreeing that that is
8 sufficient, you know, up front, build into that
9 process the test, you know, the test runs, the --
10 you know, you can pick three people maybe and do --

11 MS. SILVERMAN: And verifying --

12 (The parties simultaneously speak.)

13 MR. CHANG: Yeah, run the search terms and
14 see what you get.

15 MR. HOFFMAN: I think it's very helpful.
16 Because I mean I think from our perspective it puts
17 a tremendous burden and risk on the staff to say
18 agree at the outset that a particular term search
19 is going to constitute substantial compliance. I
20 mean, what happens if it comes back with virtually
21 no documents, then the staff is virtually out on a
22 limb, and I just can't imagine, you know, in the
23 abstract agreeing to that. But the kinds of
24 mechanisms you're suggesting might help.

25 MR. CHANG: I think staff have -- you know,

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1 litigation.

2 Essentially they're going to do a document
3 production, you -- and you're working on electronic
4 documents, e-mail or otherwise, you do word
5 searches, there is no other way to do it.

6 And you often negotiate on the other
7 side with archival issues as well, because
8 sometimes each side has not just one generation for
9 archival systems but sometimes several, and you
10 have to negotiate among how far back you're going
11 to go. And, frankly, what's possible, because it's
12 not always possible to go back two or three
13 generations, there is no way to search it --

14 (Multiple parties simultaneously speak.)

15 MR. HOFFMAN: -- punch cards still --

16 MR. FEINBERG: I haven't encountered punch
17 cards but I have encountered stuff that nobody else
18 has --

19 MR. COWIE: But you're saying in terms of
20 archives with backup takes, that is an issue in
21 private litigation?

22 MR. FEINBERG: You bet. Now I think that,
23 particularly why the companies, they systemically
24 archive. So, and there are
25 backup -- and there are multiple types of backups

1 too. Some people do system-wide backups, they do
2 flash backups

3 You have to understand what the other
4 sides' information systems look like before you can
5 have intelligent discussions about what's going to
6 5

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2 TITLE: BEST MERGER PRACTICES WORKSHOP HEARING
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