FEDERAL TRADE COMMISSION

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FEDERAL TRADE COMMISSION

In the Matter of:)
WORKSHOP ON BEST PRACTICES)
FOR MERGER INVESTIGATIONS.)
_____)

JUNE 12, 2002

Stimson Room
New York Bar Association
42 West 44th Street
New York, New York

The above-entitled workshop came on for comments, pursuant to notice, at 12:02 p.m.

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MEG GIFFORD, Proskauer, Rose
JOSEPH LARSON, Wachtell, Lipton, Rosen & Katz
ARTHUR BURKE, City Bar of New York
KEITH SEAT, Mediator & Arbitrator, Former General Counsel of Antitrust, Business Rights and Competition Subcommittee of the Senate Judiciary Committee

P R O C E E D I N G S

MR. ROONEY: Good afternoon. My name is Bill Rooney, and I am chair of the antitrust and trade regulation committee of the City Bar here, and we are very pleased to host this FTC workshop on the merger review process. The committee in the past has participated in improvements that the agencies have made over the years in the review process, and we are particularly pleased to host today's workshop, and we are equally appreciative of the FTC personnel who are here to take time out of their busy schedules and to hear the comments of the Bar on the review process.

I would also like to take just a moment to alert or remind you of a conference that the City Bar is sponsoring with the ABA which will occur tomorrow and Friday on mergers and acquisitions, getting your deal through in the current antitrust climate. There are still some places available for the conference, and we have a table right outside the door here for registration.

If you would like, there is a government and an academic discount for the program and full

CLE credit is available. The conference will cover both the HSR filing process as well as every aspect imaginable of the substantive merger review process.

With that I am very pleased to turn the session over to Joe Simons, the director of the Bureau of Competition, who will introduce today's panel as well as the format. Thank you very much.

MR. SIMONS: Thank's, Bill. Good afternoon, and I want to particularly thank everyone here for coming and particularly thank Bill Rooney and David Starr from the City Bar Association antitrust committee. For those of you in the audience who are my age or a little older, you have been hearing or not hearing but so much as experiencing the complaints about the second request process for a very long time, and I have personally experienced that myself, the frustrations and the burdens and the expense of this process. And it seems to have gotten larger and more burdensome as the years have gone by.

I have also been on the inside at the FTC previously and I'm there now, and there's a lot

of frustration there as well. So what we thought we would do is launch this program where we would encourage an active dialogue between the outside Bar and ourselves so we could get a better understanding of what the problems were and see if we can get some solutions and suggestive criticisms from the people who are experiencing these issues directly.

This is one of five sessions like this. We held one in San Francisco earlier and we have another one planned for Chicago next week and then the following week in Los Angeles and also another one in Washington. We have already gotten a fair amount of response and input both in the sessions that we've already had and also in writing.

We don't really care how the criticism or the suggestions come in. We just care that they come in. So if something happens during the workshop here today and you go back and it triggers something else and you have suggestions, please, you can call any one of us or send us e-mail. We will take it in whatever form you find most convenient.

The panel here with me today are folks who

have had a fair amount of experience on our side in this, and we have got Barbara Anthony, who is the director of the New York office, I guess we call it the Northeast Regional Office now. We've got Steve Bernstein, who is the deputy assistant director in Mergers I, and we have Rhett Krulla, who is the deputy assistant director in Mergers II. And between the folks on the panel, not so much me but them, there is a wide range of experience of dealing with the Second Request process.

Before we go any further, I particularly want

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that. But first, I would like to call on Arthur Burke who on behalf of the committee on antitrust and trade regulations for the City Bar Association provided us with a very well thought out written suggestion, so if you want to kind of summarize that, that might be helpful to start things off.

MR. BURKE: Thank you very much. Again, thank's to the FTC for the opportunity to chat about these issues. I think it's a very constructive process and a useful dialogue. My name is Arthur Burke. I am with Davis and Polke, and making a brief summary of the issues the City Bar want to highlight, and also Joe Larson from Wachtell who also helped to prepare these comments.

In connection with the written submissions there is a few points we felt we wanted to emphasize. Two of the most burdensome aspects of complying with second requests, I think at least in our experiences, relate to significant -- the data requests that are often included in the multifaceted and multi time period data requests. And also the use of the requests for electronic data. And I want to

facilitate the compliance with the second request process is to focus on data as it exists and is as maintained by the company and not so much focused on creating new databases and searching and creating new form of data that are not maintained in the ordinary course of business.

Another issue that we wanted to just emphasize out of this list is the electronic data, and I think many of our experiences today, the volume of electronic data, and by which that I mean e-mails, power point presentations, Word Processing, Work Perfect, Microsoft Word DOT, exceeds by several factors the volume of paper documents, and I think that's inevitable and appropriate. Certainly there's a lot of useful information that the agency has every right to look at and will want to look at in the course of reviewing a merger.

However, given the potentially enormous volume of the materials, there are I think a number of useful limitations that the Commission has often been willing to agree to and we hope that will continue and perhaps be institutionalized. Some of those include,

is an agreement as a general matter that be produced in a common consistent format. Sometimes in individual circumstances it may be necessary to produce an Excell spreadsheet in its native format, but the rules should generally be that we can produce it in one homogeneous format.

So those are just some suggestions and thoughts relating to the second request process. A few of the things we wanted to emphasize were with respect to the appeals process. I think everyone, at least to our knowledge, knows that it has not been utilized particularly frequently, but I don't think the Commission should necessarily conclude as a result of that that there aren't potential problems out there that create real disincentives to parties availing themselves of the appeals process. And because of that -- and that's probably inevitable to some extent. You can talk about a client using an independent arbitrator or mediator to resolve those issues, but ultimately to resolve some of these issues there will be a need for guidance from the top because in some sense parties are always going

to have significant disincentives for trying to fight with the staff too much about these issues. So those are just a few of the issues that I wanted to highlight. I think Joe is going to point out a few other points from our list. Thank you.

MR. LARSON: Thank's, Art. Joe Larson from Wachtell, Lipton. Sort of divided this up. As Art said, we both worked on this list, and there are a couple of points where I wanted to add a little color commentary. I guess as an initial matter, which was not in our list but something we wanted to applaud the Commission for is the recent policy that was adopted whereby the staff that issues the second request has to sit down with the party and set forth their issues and their theories and enter into a substantive discussion early on in the process. I think that's been extremely helpful.

It really focuses issues. It really stops the phenomenon of the two ships passing in the night when parties are submitting letters or white papers that I think happened all too frequently in the past, and we applaud that. And so far our experience has been that the

staff has taken that very seriously and has been helpful and extremely forthcoming in that process.

As to the second request, on the production by specification, as we said in our written comments, the results of doing this are, very generously speaking, a delve for accuracy. The logistics of producing several thousand or reviewing several thousand boxes with multiple attorneys, multiple views of what the issues are, what documents may mean, results in a mess in terms of trying to put a primary specification.

In addition, the specifications are often overlapping, so it's difficult to know which is primary, which isn't. I have never used that column in the document log when I have been looking for documents, and I have always warned the staff not to rely on that when they are looking for documents. I think what's much more helpful is the person's name and their title, which will give you an indication what types of documents they are likely to have.

I think notably as well, the Department of Justice does not require production by

specification, and I think that should just be eliminated because it does produce a material burden on the parties in terms of slowing down the document review because of the need to write-down the specification on each control sheet.

For the cutoff dates and updated searches, with the proliferation of e-mail it has made it even more difficult than in the past to meet the 45 day for foreign language documents, 30 days for most specifications and 14 days for some of the other specifications. It's just not practically possible to review the volume of documents in those time frames, even if you do an update search.

In a recent matter with a relatively small company, after the initial production, two months later we did the update search, we came up with another 800 boxes, mostly e-mails. It just doesn't work, and the staff is generally an update search.

It's unlikely that there will be any material evidence that would come forth that would not otherwise come forth by just having the default rule be you search people once. And parties have a strong incentive to produce the documents as quickly as possible because the goal is to get into substantial compliance and start the second waiting period. So on the one hand the parties will have a strong incentive to produce the documents as quickly as possible, but the 45, 30 or 14 days is really just not practical in today's environment.

In terms of negotiating modifications to the second request, there's been a trend recently that we've heard much more from the staff in terms of timing arrangements and rolling productions. A presumption that parties have to roll and the presumption that parties have to grant more time, now I think it is, everyone would agree, that it is usually almost always in the party's interest to negotiate these issues with the staff, grant more time, but it should be a negotiation process.

You know, Congress just recently reviewed the statutory framework for the review and the

review periods, and that is the default rule. And again, it should be a process of negotiation between the parties and the staff as to a give and take in terms of setting the production schedule and setting the review schedule as opposed to a presumption which can often lead to sort of bad feelings in a sense of bad faith on the staff side to the extent parties don't just automatically agree to this.

And I guess finally, access to transcripts. I think there's sort of a split within the Commission. In some matters we will get transcripts at the same time that the staff does. In other matters we don't get them at all. In other matters we get them at sort of the end of all the depositions. I think there should be one policy. And again, in terms of having the issues truly join would militate in favor of making the transcripts available to both sides whenever they are available.

MR. SIMONS: Generally what happens in that situation is you bring somebody in, an associate or paralegal and they take copious notes anyway, right?

MR. LARSON: But it's never perfect.

MR. SIMONS: It's expensive.

MR. LARSON: And if you try to bring a secretary in, a lot of times staff will just throw them out. Finding an associate who knows shorthand these days is not easy. Thank you very much for the opportunity to speak. I think this was a very good idea and hopefully it will be helpful.

MR. SIMONS: It's been very helpful so far. Thank you very much. Keith Seat wanted to say something too. Go ahead, Keith.

MR. SEAT: You are hearing lots of concerns and problems, and I'm here to offer a potential solution. My name is Keith Seat, and I'm an independent mediator and want to talk about the use of mediation in the second request process and how that can help to streamline the negotiations and disputes that arise between parties, private parties and the staff at the FTC or for that matter DOJ is equally there.

My background is as an antitrust litigator. I cut my teeth at Howard and Simon. I am former general counsel for the subcommittee on Senate Judiciary, and I've been in back in the private sector as in-house counsel and now begun a

parties to reach their own agreement about what is best for resolving the disputes at hand.

And so if that is brought into the second request process, then that can be very helpful to provide the smoothing out of the relations between the parties so that they will be able to work towards resolution of the disputes, both at the second request and then later on through the process, to reach a favorable outcome hopefully for all sides in satisfying the goals of halting the anticompetitive mergers but making sure decent transactions go through.

And the big benefit of mediation is to allow both sides to deal in confidence with the mediator who can then be brokered between the two sides without revealing their confidential strategies, can help see if there's aes0hen latesian t 0 TDh4

private parties the bona fides or lack thereof without revealing what the strategies are.

And so my proposal for the FTC is to actually encourage mediation whenever there are negotiations in the second request process that cause frustration to the parties involved and that the FTC ought to affirmatively offer mediation as a way of working through those disputes to get things going and to help reduce the frustration level overall. And then once the private sector is familiar with the process and more accustomed to it, then it may well take off and be able to proceed on its own, and it may be useful to start off with a pilot project that would allow a certain number of cases to be mediated in this way and then analyzed to determine how useful it has been and what the experience of the parties and staff have been and then publicized to the wider antitrust Bar.

And lots of benefits and really very little downside. It's not very costly or doesn't take much time. And if the mediation is not successful, then the parties are able to proceed with all the same remedies that they had previously. If the appellate process is

desirable or seen as desirable, they can proceed with that. But I think in most every case the mediation process would be very helpful in at least narrowing the disputes, if not resolving. I think a paper has been brought that was circulated around, but I can help answer questions through the process.

MR. SIMONS: Thank you very much. We got your package. The next person who wanted to say something was Meg Gifford. Is Meg here?

MS. GIFFORD: Yes. My name is Meg Gifford from Proskauer, Rose. Thank you for the opportunity to address the panel. I would actually like to begin by taking just a moment and commenting on a couple of the proposals that have been made. I can't endorse wholeheartedly enough the recommendation to eliminate the requirements to produce documents by specification. And I would add to the proposal on that that it is, I think, not only not useful but essentially counterproductive to require that. I certainly view it as counterproductive for those of us who are trying to do the production because the time that is required for young lawyers to go through the vast amount of

documents and make that designation is very substantial.

And if it had some real benefit, I suppose we might agree that some degree of this was useful, but I really seriously doubt that it has much benefit because the tendency and I think the incentive in making these designations is to designate as many specifications as one can possibly imagine to protect yourself from some claim that, you know, you didn't tell us this document related about. And I see lots of productions that have designations, five, six, seven, eight specifications, and I cannot imagine that's very helpful to staff in tracking down important documents.

With respect to the concept of mediation, I think that's intriguing, and I -- as Mr. Seat is an experienced mediator I take, at least to some degree, his word that it can be done promptly. But that is my major concern about it because we are working under very tight time frames here. It would be interesting to do a pilot program, but I think one of the key determinates in whether that pilot is deemed successful has to be a very close examination and a close

evaluation of the degree to which the process accomplishes the goals that it seems to me it may accomplish but without changing the time frames of the parties involved. I think that's critical.

I would like to make a few comments, some of which I'm sure others will make, because with all due respect to the Commission, I think that some of these are so obvious that we all are overlapping on some of these. I would actually like to make a brief comment on the clearance procedure, our favorite subject at this point.

MR. SIMONS: It's certainly mine.

MS. GIFFORD: But I will say something anyway. The cases of which I'm speaking I think are quite rare, but when they happen, it is a real problem, and that is where you have got a transaction that is in an industry or line of business where one of the two agencies has handled matters in that industry previously but perhaps a few years ago, perhaps not yesterday

industry in which the other agency has clear, acknowledged expertise.

From my own personal experience, I have run into this situation twice and thankfully only twice where the agency where the recognized expertise in the downstream industry has claimed the transaction but the other agency dealt with a transaction say three years ago.

And in one instance we used up about a third of the 30 day waiting period, and in another case, to everyone's extraordinary anxiety including the staff, we used up 12 of a 15 day waiting period in a cash tendered offer. And I won't go into the details of how we managed to get it through in 15 days and the staff did extraordinary things, but it was very scary to deal with that.

And I would suggest that there be a presumption. I mean, I think that a protocol ought to be established that where the other agency has expertise in a downstream market, that does not overcome or at least there is a presumption in favor of the agency that previously handled the matter and that that be institutionalized.

In what I hope are the nonexistent or at least extraordinarily rare cases where that presumption might be reversed after, at the end of the clearance process, I would suggest that it would be useful for the agencies to agree to a process whereby the agency with the presumptive authority can go ahead and talk to third parties, because that's the real problem is not being able to talk to third parties before that clearance process is completed, as you know. But can go ahead and talk to third parties, do interviews, collect information. And if they lose in the end, it all gets transferred to the other agency. I'm sure reasonable people can work this out. Let me move --

MS. ANTHONY: With the help of a mediator.

MR. SIMONS: A mediator isn't sufficient. We have to get an arbitrator for that, seriously.

MS. GIFFORD: Perhaps it's worth it because although they are rare cases, when they happen, they are real problem cases.

MR. SIMONS: I am very attuned to that. Literally the first day I showed up in the FTC

in June of last year I was confronted with four or five matters that had been pending for almost a year, and the degree to which both staffs were dug in, it was unfathomable. I can't believe it.

MS. GIFFORD: Rules in advance often help in that situation.

MR. SIMONS: Although we tried, and as you know, all good deeds need go unpunished.

MS. GIFFORD: Maybe some different rules. Comments on everyone's favorite issue, electronic document discovery. I join in the discussions that some regularized, institutionalized procedures be developed for, beyond what exists today for the handling of electronic documents. And again, e-mails are what used to be the major problem, I think Arthur made the point, that today frequently it is beyond e-mails. It's all the other electronic documents that are so difficult to gather, to identify and frequently are, if not repetitive, marginally relevant to the ultimate issues.

There are, I think there are a number of different ways that a protocol in this area

could be developed. I will make just one suggestion, and that is that a sort of control group approach be used to the merging party's documents, not necessarily limited to those same people whose documents were already searched for CC documents but building on that concept, particularly in larger companies.

The notion being that outside of those persons who knew about and were actively working on the transaction plus what I call, I know some companies refer to them, as the seniors, the senior VPs or the VPs or the relevant directors of various groups such as marketing sales, production and perhaps some others, whether they were aware of and worked on the deal or not, one would assume that there are likely to be relevant electronic documents in the files of those persons.

But beyond such a group and their direct assistants, that e-mail and other electronic document production either be severely limited in time frame or, I would prefer, deferred or eliminated all together. Deferred I suppose is not an unreasonable conclusion given that you might find something in what's already been

produced that obviously leads you to come back and say we've got to look at the e-mails and electronic documents of a lot of other people.

Some alternative to that or a combination might be to work with a sort of controlled group concept of whose electronic documents are being produced. And then add to that documents by defined categories that you might nevertheless expect to find in other people's E files, such as industry analyses, production plans, that sort of thing, and come up with some combination of those concepts. It gets you what is really relevant and what is going to be useful to both sides in this process.

Keeping in mind that this is, one hopes in most of these processes that that point is not yet litigation and frankly I think should not be treated as such.

I would also like to make a comment with respect to one other issue that is far less susceptible to rules and protocols and process and is more the result of some of the processes and the time pressures, and that is the inadvertent and sometimes careless disclosure of information in staff interviews of parties that

reveal third party sources of information, of particular information or even of the fact of a compliant by a third party. And this is something that causes great concern for third parties that are otherwise willing to cooperate on an informal basis in a staff second request investigation.

The other side of this coin, of course, is staff interviews of third parties that reveal confidential information of the merging parties or that convey distinct views of a staff attorney concerning the merging party's operations, some aspect of the transaction. In some cases in both of these situations the effect is to harm the merging party's or in some cases third party's reputations.

I have particularly noticed this, and again I want to emphasize this is not frequent, but when it happens it's a major concern, I have noticed in staff discussions and interviews relating to potential third party purchasers of assets in a settlement context, that some of the questions that may get asked in the rush of business have the result, have the effect of providing a certain view of say a third party's reputation

in the business to the other parties that staff is talking with.

And they may, and I have seen some evidence of this, accelerate the departure of personnel and customers from the merging parties. I think I acknowledge and I'm sure others would agree with me that this concern cannot be eliminated all together and it can't be eliminated by specific rules, but I do suggest that staff, no matter how pressed for time, really must be trained to be acutely conscious of the potential effects of their communications on parties and third parties and that such effects can arise from more than just a slip of the tongue that names a third party or a statement, a slip of the tongue, a statement that merging parties assert X.

Occasionally those things happen. I know staff is very careful to not make those slips of the tongue, but the effects that I'm referring to do arise I think far more often from more subtle statements and from not thinking through how a question should be asked with that care to keep confidential information foremost in the minds of the staff.

And whatever consideration Commission can give to this issue, I think it would facilitate the process of the second request analysis, and I'm quite confident that it would lead to reduced friction and reduced tension among the various parties to the process. Thank you for the opportunity to make these comments.

MR. SIMONS: Thank you very much, Meg. That was very helpful. We have Dan Abuhoff.

MR. ABUHOFF: Thank's. It's Dan Abuhoff. I'm with Debevoise and Plimpton, and I also thank you for the opportunity to make these comments. I agree with a lot of things that have already been said. I won't repeat those specific suggestions.

I think, just to step back for a moment, because we all practice in this area and sometimes we all lose perspective. The thing I would like to emphasize, it's not a specific suggestion, is the government asks for way too many documents, way too many documents. Let me give you the perspective from which that comes.

I deal, as do most of us here, in civil litigation. Aside from that work, the most burdensome document requests I deal with by far

are second requests. Another reason, a better reason, the fact that we all know this that a lot of deals are abandoned because the government issues a second request. The lawyers throw up their hands, and on their lawyer's advice, and we tell them, you can't afford it, you can't respond to the second request, which is, among other things, uneconomical. Because a lot of deals are presumably efficient deals and they don't go forward because people cannot pay for the second request process.

And the third reason I know it's too burdensome is because it's too burdensome for the government if you got everything you asked for, you would have too much stuff, and as a matter of fact, I know that you have too much stuff anyway. The most aggressive way, and I have seen this happen, for a private practitioner to deal with the FTC, DOJ and second request process is to give them everything they ask for and bury them with paper.

And I have seen this done, and it's effective because I can't imagine being on the receiving end of that. And the clocks are running and it

takes the government extremely long to negotiate. So I wish I had an easy solution to all of this. I think the specific suggestions that have made are helpful. To me it --

MR. SIMONS: I think they all go, all these suggestions go to that problem.

MR. ABUHOFF: I think they certainly do, and I would like to see them all implemented, and I'm hopeful that they would help. There's one other aspect of this, and this is perhaps out of the ambit governing all our collective authorities, and it seems to me sometimes responds to second requests get tied up with the timing issues. Most often, most obviously when it's time to certify with substantial compliance, and I think we've all had experience with substantial compliance. And the government comes back and says well, maybe not, although it's maybe not in a single-spaced, three-page letter, document number 4475 is a bad copy and you have like 50 complaints like that.0d5e1j -64.570 TD 3

seems to me if we were sitting down setting the rulings or at least if I was setting the rules, things would be such and such a way that we would get half as many docs and twice as much time to look at the deal, but that's not what we have, and I don't know how we move in that direction.

Well, the best suggestion I have really, general suggestion is I think it behooves the FTC and Department of Justice to do more balancing when asked for retrieval, not to just ask for anything that's arguably relevant, and I don't believe the government insists on everything that's arguably relevant. In terms of the spectrum of being very spare in terms of what you ask for and just about everything that's way over the side of the spectrum to ask for everything.

And I think the government has to balance the need and natural desire to have everything that's arguably relevant with the cost that it imposes on the private parties. Again, when you explain to a client, not my perspective but a client's, the first time what the second request process is and how much it's going to cost, they

are dumb-struck, and often what follows is a speech how they are American citizens and how they pay their taxes.

And I think we have probably all had situations in the past where we have all huge productions at enormous cost. I remember dealing with the copying costs themselves were so unconscionable at one point, we stopped copying. One thing, the client cannot afford to copy anymore. Another thing, we were confident that what we were sending was so irrelevant to the process that we didn't need a copy of it and we could wait for the transaction to clear to

the organizational chart, that to me has as much to do with the scope of the search and the burden imposed by the search as anything. And we've all heard well, we would like to hear from these people anyway even though they're subordinates and they probably have the same thing in the files as their superior. It means something that it's in their files also. I said well, it doesn't really mean that much, is it really worth doing.

It's that kind of thinking that we really need. It's that kind of production we'd rather go into statistical aspects or technical aspects of electronic production. A lot of the arguments here in principal is whether the government need all this stuff. Generally speaking the government doesn't need this stuff. And the reason I say that is these are economic analyses. They're not going to be decided on an e-mail, a so-called smoking gun with somebody who is out there in the field and says we can beat their pants off if we lower the price by a nickel. It can't be that the economic analysis is going to turn on that e-mail.

There are some litigations that e-mails would

be critical. Generally speaking here, no. That doesn't mean the government should not get any e-mail, but I think it tells us you need a different perspective in terms of how wide a scope of electronic production ought to be.

The closest I can come to a specific suggestion has to do with the request of information from agents of the party, and the way this works its way through the request is the definition of the company in a standard request always includes not only the company but its agents, which includes its investment bankers and its lawyers, etcetera. And I don't know what the practice of everyone else in this room is, but I know our practice at Debevoise and what we do is that causes us to have to contact other lawyers. They have to be listed in terms of the list of agencies and then contact all of them second in a second request and say that technically you were an agent and your documents are called for.

We don't have power to make you do anything. The documents normally aren't in our custody and control, which is why the request shouldn't be there anyway, but here it is and the government

wants it, so please put it together. And sometimes they do and sometimes they don't.

We don't police them particularly. I haven't had too much feedback from anyone at the FTC or DOJ about that. As a matter of fact, I would be curious what the thought is from the FTC, as to whether that is something you will seriously follow-up on or you're just happy to get anything from those people. I mean, what is the policy?

MR. KRULLA: Frequently. It's not a mechanical exercise in terms of okay, all these sales agents out here, those may technically be agents or not, but certainly the investment bankers, the people involved in the deal, the law firms involved, those should not be places to hide documents.

MR. ABUHOFF: I agree with that. I think the issue is, and this plays out in civil litigation too, you are always responsible to produce anything in your possession, custody and control. If you take a box of documents and say to your investment banker, hold onto this box, that's within your possession, custody and control. And I think that has to be produced,

whether it's specifically done by the investment banker or not because it's really a document held by the company.

But when you are talking about going to the investment banker files and ask them to produce their own files, how going to a law firm that's not involved in the transaction and say go search your files, now you are asking someone else for their documents, and we don't have to worry too much about this now, it seems to me it's difficult time to find this balancing of production --

MR. KRULLA: Good faith effort that the respondent has made to get the material. I think the one interpretation approach you suggested which is to draft a request, throw it over the transom and not worry about it may be less than what we would hope for in terms of a good faith effort to get the material. We are always prepared to back stop that with a subpoena or CID to the outside source as well.

MR. ABUHOFF: Well, I think that's a fair way to approach it. You should realize when you go to a law firm and ask them to produce documents and the company goes to the law firm

and says produce those documents, the company has to pay the law firm often to do that. So it's not something -- it's not just a matter of taking things lightly. It's a serious decision that a company has to be make about how much energy is going to be put into this and how much it's going to require from its various agents. And that's not a factor for one law firm but a factor when you deal with 14 law firms. So it's sort of -- it comes into play. The justification I have heard from this, and I may be wrong, in terms of having this requirement, at least one justification I have heard, is that the FTC or DOJ wants to be sure it receives

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brings me to another point, which is I don't think the government should ask for that document.

MR. KRULLA: Frequently the parties will

consultant retained by a company than they will be reporting to the government where there's a perception of the government and the company are adversaries.

MR. ABUHOFF: That's fair. It seems to me if that is the basis, the way to produce is to subpoena the investment bank because what doesn't seem right is to have the government's desire for documents from this independent company, investment bank somehow interfere with the timing of the transaction and what the company's ability to claim a substantial compliance. So it seems to me a subpoena would get you to the same place probably even more directly but not that holed up in this compliance thing.

MS. ANTHONY: I think one of the things we're going to hear today is not every shop operates in the most consistent way, and I know in my regional office, we do subpoena them to do it quickly, and the burden is on us to get the information. And it's not for the reasons that you necessarily just articulated, but it may be more of an issue of product market, geographic market. It's backup information with respect to

studies that can help shed further light on. So

probably repeat unfortunately what everyone else has said to some extent.

But there's something I want to talk about first before I get to my detailed suggestions, and it relates to the FTC's posture during the second request process. According to the Senate, the agency was designed to require the parties to share with the government data they had assembled and analyzed, analyzing the transaction at issue. And once the agencies determined that the merger did expose anticompetitive concerns and full-fledged discovery would begin under the aegis of the court.

But it appears we've strayed from Congress's original intent and the second request process is now being used by at least some government lawyers as an opportunity to prepare for trial.

As a result the second request process is far more adversarial than intended by Congress, and it provides a disincentive to keep people from complying with the second request and prohibits the process from being a productive and cooperative one.

At times the FTC appears to be using the

second request process as a fishing expedition as a means of delaying the parties from certifying compliance. Given the extraordinary power that Congress has given the agency, the FTC has an obligation of public fiduciary duty to use this burden judiciously and not to go whole hog as we have unfortunately seen in some cases.

For example, in one case we have a gazillion e-mails to review and asked for modification we were told no, e-mails are what made the Microsoft case, you are not going to get the modification on your e-mail search. And I understand, from the perspective that a lot of us in the private Bar are adversarial more than you, so it may be a case of the chicken and egg problem, and I will give in on the side of my firm. That's all I can --

MS. ANTHONY: He's getting ready to mediate right now.

MS. ALBERT: I ask the FTC do the same. You have your Commission Practice Rule number five, which says, I think it's rule five, meet within five days of issuance of the second request, and that's great. But what happens is

because you are in your adversarial mode and they're not forthcoming on their issues we're not forthcoming on ours either and we don't want to give you our argument if you are going to spend the next two months figuring out how to poke holes in them.

And one meeting isn't enough. We need lots of meetings where the staff is told you need to be forthcoming, tell them you have a problem with this, but hey, this looks good here, and we need to have a continuing open dialogue.

Now, as to my specific suggestions. One big problem is response time on modification requests, and I suggest 48 hours. What happened in our experience has been that we ask for modification. A week later we hear back from the staff only to ask more questions, not to give or grant our modification request. So what

who has to ask his or her boss who has to ask his or her boss. They then have to ask DC. And each person has more questions, and by the time they get them all back to you it's been a month and you might as well just produce. So my recommendation is there should be one person who the parties know. That one person has full authority to grant all modification requests. You go to that person, you don't talk to anybody else, that person doesn't talk to anybody else, and he/she has it back to you in 48 hours, maybe asking more questions. I mean, that is a fair thing usually, but let's get this moving.

The third suggestion is that we have uniformity in modifications. And Steve, you just mentioned something, if the parties came to you with the agent list at the outset, well, how do we know that? I mean, some of us know some of these things are normally done because we do it a lot. But Wachtell might always do this thing that my firm didn't do, and we didn't know about it, it never occurred to us to do it.

Maybe there should be some rule book that says these are the kinds of thing we are usually willing to modify. Also, another problem we had

was, we would ask for a modification. We were told no, it's FTC policy, we never render modification, and we would say but we got that last year in another second request, and we were told prove it. So we had to find the file, which took another week, find the letter, fax it to you or to the FTC and then we were told sorry, you're still not getting it so. . .

MS. ANTHONY: Is that a true story?

MS. ALBERT: Yes, it is, and I am not going

have a group of electronic gurus. I think one of the problems we all have is we don't know enough about this. Designate a few techies to become the people who understand everything there is to understand about electronic production.

Within five days of issuance of the second request, those techies meet with the party's lawyers and techies and sit down and come up with a plan. And hopefully the FTC's techies will have enough expertise to say this is how we would like to have it done and here's what may help you.

The second thing we found absolutely mandatory in electronic production was a search term list. And again, we have problems with the whole getting back to us on time process, so we ran our own search term list, which was then second guessed afterwards. So I think, you

computers, and you can't keep running different search term lists.

Everyone said this already, eliminate the requirement that you produce by spec. And that's especially true for electronic documents because you don't need it. You want all the documents about the market. You run the term market through the production and you will probably be more accurate than our paralegals and temp attorneys and all that than just guessed, come up with various synonyms.

Another problem we had is the Bates stamping on electronic documents. It's really very, very hard to do, and I understand the problem with keeping control of the documents, which I will get into, but it has to be eliminated.

And one of the primary reasons is electronic documents, to Bates stamp them -- and we wanted to produce an electronic format because to print everything -- literally for one production we blew the electricity in the client's building because we were printing so much. So obviously it saves trees and money and electricity not to print out everything.

But to Bates stamp electronically you have to

convert it to another format, and by doing that, at least in our production, it required converting that format, which meant you could use, FTC could search in the program to all documents about market, have the word market in it. You would have to pull up each document with the word market in it. So it's counterproductive.

Now, to insure the integrity of the documents produced and read-only format CDs, and I will not even try to explain it, somehow on a server where we would give FTC access to the server. But we did it on CDs. It was produced in the read-only format so they can't be modified.

And one of the issues was how to identify the document, if you have to Bates stamp them at a deposition or trial, and we suggest the following protocol: Each custodian's responsible to track documents that are produced on CDs, separate from documents, custodians. So there's John Smith's CD document and each CD is labeled Bates stamped with its own control number and his name and typed on Word Perfect, is it Word so you know what programs to use in opening it.

through 12 million electronic records. And so what we suggest is, a lot of other people suggest, that you have control group and then either eliminate everyone else all together or just do them for a one year period.

Privilege issues, right now as the second request is written you only have to log the documents in the law firm's, the outside counsel's law firms that weren't shared with the client or the other parties, and I suggest that exception be eliminated. If we write a memo for our client analyzing the merger, it shouldn't have to be logged. All those back and forth to the client, it's just so clearly privileged it shouldn't have to be logged.

Also, documents shared with the other party to the transaction pursuant to a joint defense agreement shouldn't be logged. This isn't a big burden because it's not that much, if I didn't have to simply produce my own files anymore.

And then there's a big problem with the electronic production with inadvertent production of privileged documents. So with DC I'm sure you all know better than I do has these quirky rules on waiver of privilege, which

becomes troublesome when you are doing electronic production.

So what I suggest is that the FTC agree, and this isn't tested but I think there's data that we think this would be okay, the FTC agree that documents inadvertently produced isn't a waiver, and maybe if it's an agreement the court will enforce that agreement.

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will have all this input. One of the things I wanted to specifically ask is I've heard Tom Leary said on many occasions when he was in private practice, I know other people do this too, they have a practice basically of trying to go through the second request process knowing in advance they're never going to comply.

Does anybody have any kind of experience like that or everyone in this room just sort of knows they're going to comply -- nobody, huh? Wow.

One of the things that I have been trying to do since I have back to the Commission is kind of monitor what's happening with these second requests and try to get a feel for whether something's going haywire on a particular one. And if I spot that, then I usually send one or more people from my office down to the staff and have them kind of insinuate themselves into the process. And I know on a few occasions that's actually been useful. So one thing, you know, I can't see everything and I know some folks are nervous about going over the heads of the staff.

But one thing I think you should do is if you want to call me or send me an e-mail and say I'm representing so and so in this case and we look

like we're kind of spinning our wheels a little bit in the second request process, maybe someone can take a look at it, and that doesn't have to get back to the staff.

And I think that would go a long way to heading off appeals because basically if we have an appeal, that means my office has failed because we were supposed to be supervising these things. But sometimes it's not possible for us to figure out all the problems that are going

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request -- at least with respect to this issue of backup tapes. The initial request of course was written as broadly as it always is, and we found that in this case the company had totally independent servers, they did not have a centralized system.

There was a tremendous amount of storage in backup. They did not have high capacity servers, and so there was not -- I don't remember what exactly the time period was, but it was maybe two years were current and everything else was on backup. And staff asked us to do some inquiry into what it would actually take technologically and in terms of cost to restore backups and do an electronic search.

And we sat down first with our internal people at Latham and Watkins and asked the client's people and then we went to some outside vendors to get in effect bids on what it would cost, and the figures were absolutely outrageous. I mean, I cannot recall now what it was going to be, but it was probably working sort of seven days a week, multiple shifts it was going to take something like three or four

months to restore the backups, and it was going to cost many, many hundreds of thousands of dollars.

And staff fairly quickly said forget it, we're not going to put you to that. Now, we had a couple of conversations with a few gulps and a few nervous uncertainties on the part of staff as to whether they were going to really forego

going back the entire five years or whatever was in the request.

You would have gotten hundreds if not thousands of more boxes than you got, and the point that I think it was Dan made earlier I think is really what's key here is that merger cases should not in my view be about that document. That's not what tells you whether this merger is going to have an anticompetitive effect or not. These are not section two cases, this is not Microsoft, and the fact that people may have said things in isolated circumstances ought not to be what leads you to decide to challenge a particular merger or not challenge it.

MR. COLLINS: Dale Collins, Sterling and Sterling. We've had similar experiences to Bruce's, and that's where we go in and basically give a staff, make available our technical people to talk to them about to talk to the staff about what would it take in order to do the backup tape.

Let me just add a little definition of backup tapes. When I'm talking about backup tapes, there's two different kinds. There's searchable

tapes and non-searchable tapes, that is tapes that have to be restored to a system. I'm not talking about the searchable ones. Our view is basically we will negotiate those in the regular course. It's the ones that need to be restored.

So as I said, we have had numerous instances where staff has been very reasonable. They basically understand this is enormous work on the parties, particularly when it looks like you are producing 800 boxes of other stuff. But we have had occasions and recent occasions when the staff was not going to give us a limitation. We went out and got vendor estimates. Our vendors, the quotes were in excess to $1,000,000 to restore the tapes, and it was going to take a lot longer than three months.

Basically we told the staff, we're happy to explain, we spent six or eight hours on the phone with them explaining the situation. We will talk to you as much as you want, we're not restoring the tapes. And like I said, we never got the limitation and we didn't restore the tapes.

MR. SIMONS: The suspense is just killing

me. What happened?

MR. COLLINS: Nothing happened. We put in a statement for noncompliance and the fact of the matter is, at least in my view and the Commission makes its own view on this, the likelihood going to court to compel the production in that circumstance is just about zero. So what we wanted to do obviously was reach an amicable resolution on this, but we couldn't.

MR. BYOWITZ: Mike Byowitz from Wachtell, Lipton. I have had very similar experiences to what Bruce and Dale described. The only difference I would say is I have run into precisely the same problem and what I then said is you want the tapes, I will give you the tapes. You can go out you think it's easier to do, do it yourself. I want the modification I would like it, but I will give you the tapes.

And then I get, you can't comply. I said why not, I haven't reviewed it, I don't know what's in it, I don't care what's in it.

And that brings me to a frankly broader point, and I think it's a point that people have touched upon. And I think to some degree

mergers are not Microsoft and to some degree maybe they are. If Bill Gates has some comment to make about a deal he wants to do and I were you or Rhett or Steve or Barbara, I would want to know that, and I would want to use that and I understand that, okay.

If Joe Blow, the marketing -- not the marketing director but the salesman rep in Cleveland said that, I don't think any of us need to be bothered with that. So that's point one, what do you reasonably need.

And the other point is what do the business people reasonably have access to. If I can, from sitting in my office if I'm the marketing director, call back a file, get it and use it, you should be able to search for that. If I can't, that should be cutoff then.

Now, that -- where I've heard concerns expressed, and there is a legitimacy to this, is people purging their files in advance of mergers. Well, if people purge their files in advance to mergers, I don't know anybody who has ever been able to do it. I don't know how to do it successfully. There's simply too much in too many places. The government -- and there's

paper versions of all this.

The government is always going to get the key stuff. I always operate on the assumption that the key documents that are bad, good or indifferent the government is to go to have and how long are we going to have to spend on our side producing it and are your folks going to have to spend weighing through it.

And I think a certain degree of suspicion on the part of the staff of folks like us is understandable. I wouldn't say it's appropriate but it's understandable. But I think the suspicion goes far farther than we have a capability of doing. You have done this yourself many years. When you show up at the FTC on day one, to a substantial degree you don't know what's in the client's files. You may know what's in their most recent business plans, the kinds of things you get asked for in the first 30 days, but you haven't done the in-depth investigation and there's no way to do it. It's only through the process where you find that stuff.

So some of it used to be, at least with people who haven't earned an extra special

degree of suspicion, and there are some I understand, with those people a little more credit ought to be given when they say we can't do this because. . . Because I think at the end of the day you want enough control in the process so you can determine what documents you get.

You can determine whose files you get it from and all that, and I would respectfully submit if you can't make a case based on that, it's because there ain't a case to make. If the key decision-makers don't have the documents or the people they off-load their documents onto, and chairmen don't have those documents but someone has the chairmen's documents, through chairmen and product manager for the relevant products, that kind of thing, I think a suggestion was made a little earlier of control group plus key managerst71.2.25 0 TD (18) Tj 71.25on't6a sugge-ef0 hcTj 171.2

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much, much, much worse than the last time a reform effort was undertaken, and at some point it's necessary for the government to say enough is enough. We know we can control the process, we can pick the people whose files you search and we can control the specs, you can get it.

MS. ANTHONY: Why do you think it's gotten worse? I'm curious. I know you have given it some thought but why has it gotten worse?

MR. BYOWITZ: Well, we'll follow the process from the model second request the last time the reform that was six, seven years ago, now maybe more than that. The first thing that happened was within a year we were getting second requests that had nothing to do with the model. The model wasn't being followed. I mean, the model was overly broad, but one of the nice things about it was it didn't have multiple subparts, it didn't have tremendous degrees of overlap among the specs.

So it might be reasonable, I still would quarrel with it, but it might be reasonable to think to spec the documents this one relates to competition, this one relates to market definition, this one relates to entry. Even

then it's not that simple to do because a lot of the documents relate to all of that, but the problem is a problem --

MS. ANTHONY: You mean we're asking for more?

MR. BYOWITZ: You are asking for more in the second requests. I used to write second requests. I still remember how I did it. I pulled out my most recent one either in this industry or something that seemed remotely applicable, I looked at it and I figured -- and by the way I'm smarter than that guy or woman so I will add three other things. And those three other things now become in the model. When the next person pulls it out, that person thinks of three more things and at the end of the year you have 20 things.

If we wanted to tell you stories, and I don't use the word pejoratively, we want to tell you entry going back about 10 years, whatever, you don't need documents about entry going back 10 years. It either happened or it didn't happen. That's the relevant fact.

MS. ANTHONY: Has there been an increase in the volume of economic data or information

that -- I can say all this because I've only been here for two and a half years, so over the course --

MR. SIMONS: It's gotten particularly bad within the last two years.

MS. ANTHONY: Of course you don't have any -- they were all at my house for dinner last night. Are we asking for more economic data, statistical data?

MR. BYOWITZ: I think you are after Office Depot, Staples. You are asking for far more data from which you can do econometrics than before. One of the problems is that I have been involved in at least one case of which I can think of in which we offered to come in early and say look, what you are asking for is unbelievably burdensome and you are not going to be able to do anything with it, can't we talk to

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at the very beginning, I don't know if it was made here, but there was a suggestion made that the requirement to give it this way, cut the data this way, slice it that way takes an enormous amount of time. And unless you're omniscient going in, you don't know what you really need.

What I think, from your standpoint, what you really want is to say give me the data, I will figure out some way of figuring out what the data is, and then you go do your thing, we will do our thing, you will have to show it to us, we will tear it apart. Hopefully to reach the right result you will show it to us before it's at federal district court, but if it's not we'll get our shot in federal district court. I think that would solve a lot of problems because that takes a lot of time.

I mean, I don't know how other people do this, but we've taken to using the economists to a very substantial degree because they're used to dealing with intense amount of data, to put together the data sets so that the data sets are at least accurate and you don't get gibberish when somebody prints it out, and it's a

reasonable effort, it's substantial compliance.

MR. BURKE: The irony is you end up in trying to re-format the data to format what you're asked for, you actually render it probably less reliable and useful. One would think the data as used by the company is probably the most usable reliable data that business people used when they're trying to evaluate performance of the company and when you

MR. SIMONS: Let me ask another question. What's the experience of the folks in here in terms of the DOJ is doing that they are doing particularly well and we are not doing?

MS. ALBERT: Not asking to produce by spec.

MR. SIMONS: Anything else? How are they working with this timing agreement thing that examples put out, whatever it was, six months or so, any experience with that and how that's working? No?

Bruce, did you want to say something?

MR. PRAGER: Unrelated to that I wanted to follow-up on the data issue, and it's a non second request point. It's a point related to the merger review process and its progeny to litigation. I've had too much experience, unfortunately, in the past three or four years in litigating with you folks. And probably the biggest criticism I have from that relates to the data and the economics which is twofold.

Number one, I think that too much of the strategy throughout the second request and the investigation is dictated by litigation considerations. The staff switches from an inquiring mode to a prosecuting mode in my

regardless of whether the litigation team thinks they can win or doesn't think they can win.

My perspective from the outside has always been that the person sitting in your seat and making that recommendation ultimately to the Commissioners is trying to make a decision that shouldn't be based on whether you can win the case or not. There should be cases that you can win that you pass on because it's just not in the public interest. There should also be cases that you may not think you can win but you choose to bring anyway because you think there is some good law to make.

But my specific narrow focus coming from the discussion of data, and this is a strong opinion that I have is that the staff too early on keeps the economist locked in a closet, does not allow for the free flow of information from your economists to the parties.

In both of my recent litigation experiences the Commission has chosen not to put on its own econometric evidence but rather only to shoot to the econometrics that the parties uncovered. Whether it's fought or not fought, I think at least in the pre-litigation posture that if the

Commission is looking at econometrics and if they are looking at economic analysis, they ought to be willing to share that. I mean, the purpose here as I view it, and maybe even after 25 years of doing this I still have a degree of idealism that remains, is to try to get to an appropriate result.

And if your people and the economists who are doing the work on your sides are free to talk to the parties more openly to share what they're finding, to share their data and what they're doing with our data, I think it makes it more likely that we can come to some understanding of whether what we're doing is wrong or right. I mean, sometimes you agree to disagree, there's no question. But there's a lot of ground that could be covered if there was more free flow of information from your side of the table.

MR. SIMONS: We're almost out of time. Does anyone have anymore comments? Yes, sir?

MR. HUDSPETH: Steve Hudspeth, Coudert Brother. I had a question on translations, and I must say my recent experience has been you have been pretty good about dealing with that issue. We did have one situation in the past,

for a very useful session.

MR. SIMONS: Please, if you have additional comments, get them to us in whatever form is convenient to you.

(Time noted: 1:32 p.m.)

C E R T I F I C A T I O N O F R E P O R T E R

CASE TITLE: WORKSHOP ON BEST PRACTICES FOR MERGER INVESTIGATIONS

DEPOSITION DATE: June 12, 2002

I HEREBY CERTIFY that the transcript contained herein is a full and accurate transcript of the notes taken by me at the hearing on the above cause before the FEDERAL TRADE COMMISSION to the best of my knowledge and belief.

DATED: JUNE 13, 2002

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STEFANIE GERBER