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FEDERAL TRADE COMMISSION

In the Matter of:)
WORKSHOP ON SECOND REQUEST AND)
MERGER INVESTIGATION BEST PRACTICES)
-----)

JULY 10, 2002

Room 332
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

The above-entitled workshop came on for comments,
pursuant to notice, at 2:03 p.m.

1

2 APPEARANCES:

3

4 ON BEHALF OF THE FEDERAL TRADE COMMISSION:

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6 Economics

7 MICHAEL G. COWIE, Assistant Director, Bureau of
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9 GABRIEL H. DAGEN, Acting Assistant Director for
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13

14 PANELISTS:

15 MIKE DENGGER, ESQUIRE, Gibson, Dunn & Crutcher

16 MEG GEURIN-CALVERT, Economists, Inc.

17 RICHARD HIGGINS, LECG

18 TIM DANIEL, NERA

19 JOHN WOODBURY, Charles River

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FEDERAL TRADE COMMISSION

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1 informal, so we just ask that as people speak, that you
2 identify yourself and who you work with and speak up so that
3 the court reporter can hear what you're saying.

4 Okay, I'm just going to start by introducing
5 folks. I'll start out with Mike Denger. He is at Gibson,
6 Dunn and Crutcher and he's worked in the antitrust field for
7 many years, has done work on merger investigations over that
8 time frame and he has prepared a proposed short PowerPoint
9 presentation which, I think, is out in the -- as you walk in
10 in the hallway.

11 MR. DENGER: Do you want me to come up there or --

12 MS. COLEMAN: No; you can just speak from your
13 seat.

14 MR. DENGER: I always find it hard to speak with
15 my back to the audience.

16 MS. COLEMAN: You are welcome to -- whatever makes
17 you comfortable.

18 MR. DENGER: I haven't tried that.

19 I always feel nervous when they ask a lawyer to
20 come and talk about financial data and syndicated data and
21 cost data. I guess I probably don't do too well as a lawyer,
22 if they have me here on the data issues.

23 And what I want to talk about a little bit is what
24 I think is the advantages in cooperation and data-sharing
25 with the antitrust enforcement agencies during the merger

1 review process.

2 And I think from the standpoint of a party to a
3 prospective merger, there are some advantages to working
4 closely with the agency in this area.

5 First of all, I think you can get a common frame
6 of reference if you understand the data that they want and
7 need and the format that they're looking at.

8 I think it helps both the respondent understand
9 the focus and concerns of financial analysts and economists
10 and the staff at the agency and it helps for a more
11 constructive dialogue where you do not have two trains
12 passing in the night, so to speak, on data issues.

13 It also allows the FTC, if they have the same data
14 that you're working from, to replicate the type of work that
15 your economists or financial analysts may do, and I think
16 that is always helpful in establishing the credibility of
17 counsel.

18 I think if you work with the agency, you will also
19 reduce the cost of compliance oftentimes limiting the
20 production of duplicative or unnecessary information.

21 For example, in a retail merger, if one party has
22 IRI data and one has Nielsen data, if you can work together
23 and sort of agree, get everybody that's concerned with we'll
24 either use Nielsen or IRI, you're establishing a common
25 framework from which you can have the dialogue.

1 I also think it reduces the merger review time.
2 It takes away a lot of time when it is focused on compliance
3 issues and things that are not really the substantive issues
4 and focuses of the staff.

5 And I think ultimately what a party's counsel and
6 probably his economist and financial analyst have to offer
7 imparts their credibility and if you cut out the Mickey Mouse
8 work and try to get to a common set of data that you can both
9 work from, I think that helps.

10 For example, let me focus first on producing
11 syndicated data. I would advocate providing early samples of
12 data in the form used internally by the company, explaining
13 what you can provide and what you can't provide, provide them
14 some samples explaining the limitations.

15 It oftentimes results in the narrowing by the FTC
16 staff of the information that they seek.

17 You know, I can probably say I've never met an
18 economist or a financial analyst who didn't have data that he
19 wouldn't like or she wouldn't like if they had their choice,
20 but I think that the staff will be realistic if you can
21 explain what they're going to waste their time on, as well as
22 you wasting your time on in trying to find a meaningful data
23 set.

24 We had a case in a recent merger where we were
25 allowed to directly communicate with the FTC analyst and

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And don't always view the FTC staff as the enemy who is out to get you, which lawyers sometimes have a tendency to do.

The FTC employees just have a job and we expect them to do it thoroughly. You also, I think if you cooperate with them, can avoid a lot of waste, unnecessary duplication, looking at data that is really not going to advance the analysis on either side.

So I guess that's what I would say. And I guess our philosophy in all of this has sort of been like the philosophy we have in litigation.

And I will say I've tried a fair number of preliminary injunction merger cases over the years, but when you try to be hard-nosed and fight over every point, all you do is waste your client's money and annoy the agency.

As every firefighter knows, blaring the siren can be fun, but the point of the job is to douse the flames. In this case, the point of the job is to try to get the merger through in an economically viable form. And we can fight over the substance all we want, but I think it really pays to try to work with the agency to get the data and the basic facts set out so then you can have a substantive dialogue. Thank you.

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1 time understanding the kinds of data that were available in
2 firms somewhat better than I had when I had been in the
3 division the first time.

4 So I had more of a sense of what was out there,
5 but at the same time came to a little bit more of a
6 perspective of that don't ask for what you can't use.

7 And so I guess I have six words to present to think on
8 the topic of transactional data: testable hypotheses,
9 critical loss and don't assume.

10 And what I would like to put the perspective in is
11 I think that there's a common goal between the private
12 parties and the government agencies that are reviewing a
13 given merger.

14 The common goal is essentially to have a review
15 process that hopefully ends in a significant review of the
16 appropriate issues and from the party's perspective, a
17 resolution of those issues and the mergers proceeding or from
18 the government's perspective, to the extent there is a
19 significant anti-competitive concern, having a strong
20 litigation base built up such that you can go to court and
21 demonstrate persuasively to a court that the merger actually
22 does present a problem.

23 To get there, I think it's the same process. You
24 need full integration from the beginning and up to the
25 decision-making point of the data with the analysis, you need

1 consistency of the data analysis and the data work with the
2 documentary review, the depositions, and so on, and you
3 obviously need time limits.

4 And I think in any industry, essentially what that
5 means is you need clear theories to be spelled out on both
6 sides as early on very specifically as to what are the
7 concerns, the product, geographic entry and competitive
8 effects.

9 I think everyone knows the merger guidelines and
10 what needs to be laid out in-house very clearly in the
11 government and the agency, particularly by the economists and
12 lawyers working together as what is our theory of the case,
13 what are the two or three things on which this particular
14 case turns.

15 That leads them to the next thing, again in-house,
16 which is what are the testable hypotheses.

17 And that is why I agree with Mike completely that
18 that's where the dialogue starts between the FTC staff and
19 the outside parties as to, "Here are our hypotheses. Here
20 are how we would like to test them. Here's the information
21 we're looking for," and then I think you can focus lastly on
22 what are the results of the analyses.

23 You may differ on theories and have a dialogue;
24 you may differ on the tests and have a dialogue; you may
25 differ on the reliability or the meaning of the results and

1 you can have a dialogue.

2 And let me briefly talk about three types of areas
3 in which it plays out in different ways. There are three
4 kinds of transactional data that I think occur -- a context
5 in which they occur.

6 The first is what I would call industry-wide,
7 where both parties, private parties and the FTC or the
8 government agency have access to industry-wide databases.
9 This occurs largely in healthcare, in airlines, in banking,
10 in electricity. Essentially anything that was or is
11 regulated has some pretty good data.

12 Everybody has transactional-level data down to the
13 zip code and the DRG, or whatever, with which to work.

14 And as a result, you can focus. The outside
15 economists can start much earlier, can do a full-scale
16 analysis. They'll know what the issues are, and the dialogue
17 can proceed much more quickly to very specific kinds of
18 analyses and discussions.

19 And so I think that is a case where everyone, more
20 or less, has a level playing field, but where it's very, very
21 critical that when the agency staff have particular concerns
22 about a narrow product market or are particularly concerned
23 about the standard by which one defines the geographic
24 market, inclusion or exclusion of certain kinds of zip codes,
25 that they articulate it so it can be discussed and tested.

1 The second area Mike dealt with in terms of
2 standard data, so I won't go into more other than to say that
3 there I think the issue is much more so, not the availability
4 of the data, but the methodologies that are applied or what
5 the testable hypotheses are and the debate over the nature of
6 the results. But I agree with Mike completely that having
7 productive dialogues helps that.

8 I think the hard world is the third one which is,
9 unfortunately, most of the transactions. It is the one of a
10 kind deals; it's almost every manufacturing industry merger.

11 When you think about it, the private parties have
12 extraordinary access to their own data. They have a good and
13 detailed set of every transaction, most likely, that they
14 ever did, although it's surprising to some extent in the
15 computerized world how little data certain companies have
16 electronically and how much they have in hard copy, but where
17 the agencies have the advantage of having third party
18 discovery and third party data sets.

19 And I think I'd give just some basic pointers to
20 talk about. I think that this is an area particularly where
21 the advanced work that the consulting economists or the
22 consulting legal team can do is to sit down and work with
23 their clients and identify what are the likely dispositive
24 issues, what are the testable hypotheses, what are the key
25 issues, is it private or is it geographic market, to set up

1 evaluation of critical loss as to how many consumers would
2 have to leave to discipline pricing and then to work very
3 well with the people inside of the company to identify what
4 kind of data is available, who is knowledgeable about it and
5 to get as far up the learning curve as possible about the
6 data.

7 I think that will help them ultimately when the
8 staff at an agency wants data, that there is better
9 communication in terms of what is available.

10 I do think what is useful, though, having been an
11 assistant chief and worked on a very large number of mergers,
12 the approach I found I took after a couple circumstances of
13 unfortunately having asked for data and received it and then
14 found that we did not even have time to process it before the
15 decision had to be reached, before a recommendation had to go
16 out is I found what worked -- and this works on the outside,
17 too -- is to sit everyone down before the second request goes
18 out and ask two questions.

19 One is what are our testable hypotheses; what is
20 the key issue in this case. And if we had unlimited data,
21 unlimited computer resources, unlimited time, what would you
22 want to get to test those hypotheses;

23 And then to pose the second question, which is
24 then, we have a budget and a time constraint. What is the
25 minimum sufficient data that you need to address that.

1 What I found consistently is that when everyone
2 focused together, oftentimes it was the case that people
3 could look at just the top 50 customers, what they had done,
4 who they had bought from, whether they had switched it or
5 not.

6 In a very large number of cases, one did not need
7 huge transactional databases of every single transaction that
8 anybody had ever done in the industry.

9 The other thing I found is that it served also to
10 meld the staff economists and the staff managers better with
11 the legal team.

12 Oftentimes there is a tendency in very complicated
13 industries where there is huge transactional data for the
14 economists to be doing a lot of empirical analysis that is
15 running on a separate track from the data and the documentary
16 -- the documentary and the evidentiary kinds of evidence.

17 And I think if you focused earlier on testable
18 hypotheses and minimum sufficient data, answers would be
19 available.

20 The last thing I say is one advantage that private
21 consulting firms have that the government typically does not
22 have is a lot of research assistants who are very skilled at
23 manipulating huge amounts of data.

24 And so to the extent, early on the FTC had to
25 identify testable hypotheses data and asked that it be done,

1 to the extent it is doable, because more likely a lot of
2 processing could get done with results being given.

3 In conclusion, I would just agree completely with
4 Mike. I think the process works best if there is a clear
5 dialogue, and that's my last set of words of don't assume.

6 I think there is a sense, because there is a very
7 good respect on both sides of the table for people, that
8 outside economists will understand or divine what the theory
9 of concern is.

10 I think the more that the staff early on can say
11 here specifically is -- you know, we are worried about -- if
12 I could fill in the blank -- price discrimination of this
13 sort, geographic market of this scope, customer concerns of
14 this type, the more it is that the outside economists can do

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1 in more detail the issues that arise not only in the
2 collection of standard data, but how it is used throughout
3 the merger review process.

4 MR. HIGGINS: Well, actually, I was watching you
5 very closely, because that's the first I heard of what I was
6 to do. I thought I was just going to wait and comment on
7 John.

8 MR. WOODBURY: Oh, really.

9 MR. HIGGINS: So far I don't have anything to say
10 about what was said before, except that I disagree with Mr.
11 Denger about agreeing on IRI versus Nielsen. I like the idea
12 of disagreement.

13 And I mean, there are a lot of parties to mergers
14 and I just can't imagine getting them all in the same room
15 and telling them what data set they should be using.

16 And there are only two companies thanks to you all
17 -- that is to say, there would have been one had it not been
18 for you all.

19 And I wanted to also ask a question. Panel data
20 is something that the Nielsen people and the IRI people have
21 and I've never gotten to use it. And I just wondered if you
22 all ever asked for those data.

23 I've not seen the second request, which was asked
24 for, and I have found that the IRI and the Nielsen people are
25 becoming a lot more jealous of what they own and, in fact,

1 are a lot of good economists, so I'm sure they could work
2 something out.

3 MR. DENGER: Mary, could I ask one thing?

4 MS. COLEMAN: Sure.

5 MR. DENGER: On panel data, I know it's been
6 requested because I believe we've provided it.

7 MR. HIGGINS: Oh, you did. Oh, okay.

8 MR. DENGER: In fact, we've even provided it in
9 the case Richard was involved in.

10 But panel data can be useful because they'll
11 measure what consumer purchases are in a particular point of
12 time, say a six-month period, and what happens, say, a year
13 later and you can track brand-switching and elasticities and
14 look at the changes in price and look at not only couponing,
15 but other things, and see how particular consumers react to
16 changes in price or other developments with regard to the
17 brand.

18 It can tell you how they move from one type of
19 outlets to other types of outlets. It can tell you, for
20 example, the degree in which brands are particularly close
competitors of other type -- of other sp from one j 39 -24.n0.75

1 MR. WOODBURY: It's not -- I agree that there are
2 some utilities with that kind of panel data, you know, the
3 switching analysis that Nielsen and IRI can provide -- and
4 I'm guessing. I don't want to put words in Richard's mouth -
5 - but I mean, it would be great if you could have access to
6 the underlying individual data that's contained, because then
7 you could do -- there are some problems, but you could do,
8 you know, consumer level demand analysis directly using
9 individuals, rather than cities, as observations.

10 And as Richard says, the problem with getting
11 access to the data, as far as I can tell, is -- the hurdles
12 are unsurmountable because they will never give it out.

13 We thought occasionally about talking to IRI and
14 Nielsen about providing a demand analysis, of course, at our
15 specifications, but we never see the data. But we get them
16 to do it for us. So I mean, we've never gotten that far, but
17 --

18 MR. HIGGINS: Yes. I think they've become quite
19 competitive providing their own analyses and that's one
20 treasure they have that they're holding close and then
21 request a particular study to be done.

22 MR. WOODBURY: One thing to be leery of, which I
23 discovered recently, is that if you look at the switching
24 data, you can actually derive market shares based upon the
25 data that Nielsen and IRI give you.

1 And if you compare those data to the national IRI
2 and Nielsen data, you will find that there's usually a
3 substantial difference. It turns out those panels are not
4 representative, so you have to be really careful about how
5 you use those data, even in switching studies.

6 MR. DENGGER: And there's also issues as to sample size and
7 all of that sort of thing in switching data. But I think
8 that the data can give you some insights.

9 And I agree with, Richard. If you're talking
10 about the underlying IRI/Nielsen data, it wasn't provided.
11 But there are lots of switching studies, and so forth, based
12 on that data that can be very useful, I think, at least in
13 giving certain insights that you might not otherwise draw.

14 MS. COLEMAN: In those cases, have you had
15 documents of Nielsen and IRI to understand what it is that
16 they did to do the switching studies and information or did
17 you get the data -- even if it was aggregated, the data in
18 enough detail yourself to understand what was done?

19 MR. HIGGINS: I have had conversations with
20 business people, marketing people, but I don't think I ever
21 understood what was done.

22 MR. WOODBURY: I mean, we've had direct
23 conversations. I mean, I've had direct conversations with
24 IRI and Nielsen about some of the switching studies so I can
25 understand, particularly when I discovered that I was getting

1 market shares that looked a lot different from national
2 shares, what I thought was going on and how the sample was
3 collected, and all of that.

4 Yeah, but I think -- you know, they're certainly
5 happy to talk to you about it, about how those samples are
6 constructed.

7 MS. COLEMAN: I think that those -- I do think
8 those types of data, it's interesting, can be useful to get
9 at issues, but it encourages helping us to -- you know, as we
10 get that data, helping us to understand what the collected
11 data is and how it's collected and how these studies were
12 done.

13 MR. DENGER: But all data has, you know,
14 limitations --

15 MS. COLEMAN: Right.

16 MR. DENGER: -- and we all have to be aware of
17 them and have to understand to effectively use the data.

1 standard data is are you ever going to ask for it anymore?

2 MS. COLEMAN: Yes.

3 MR. COWIE: I have one question. Why do you
4 disagree with Denger that you have to see if the parties will
5 use the same --

6 MR. HIGGINS: Oh, I just think if I were working
7 for a party that was opposing the merger, however incredible
8 that may be, that you wouldn't -- they should be able to use
9 what their client has.

10 MR. COWIE: But you agree that the parties to the
11 merger and the FTC --

12 MR. HIGGINS: Yeah, but that means you have to do
13 it both ways because God knows what the third party will
14 show.

15 And the data are different. John will probably
16 talk about the geographic areas are different, Nielsen and
17 IRI, and how they do it. I don't really know, but we do get
18 different results from time to time using the two. I
19 prefer to try to comment on whatever he says.

20 MS. COLEMAN: Okay. Well, with that, I guess
21 we'll move to John who is with CRA. He is going talk about
22 customer data.

23 MR. WOODBURY: Well, actually, I thought I was
24 talking about the vulnerable consumers.

25 MS. COLEMAN: Right, right.

1 elasticity consumers are potentially exploitable if a
2 hypothetical monopolists can discriminate between those two.

3 He can discriminate between those two with two
4 conditions. One is the monopolists can easily identify which
5 consumers are which and, second, the monopolists can prevent
6 -- hypothetical monopolist can prevent an arbitrage between
7 the two.

8 So you find yourself in a relatively
9 undifferentiated industry where there are some groups that
10 have a relatively low elasticity with product. The first
11 thing to do is just basically apply the SSNIP test, the
12 standard, you know, market definition test to the lower
13 elasticity group and ask whether they constitute the same --
14 if they constitute their own antitrust market, so you conduct
15 a merger analysis on that basis. The other two
16 possibilities are -- well, I call them over-aggregation
17 vulnerabilities, but they actually just may be market
18 definition mistakes.

19 In the undifferentiated product context, you might
20 find that, gee, you know, in looking at a particular input
21 some materials, you know, some chemical compound, you know,
22 we might conclude that the demand -- the antitrust markets
23 all supply us with that compound and all of the customers of
24 that compound are in the same antitrust market, but it may
25 turn out that for reasons that may have to do with differing

1 technologies, there is some subset of customers that, in
2 fact, can't use all of the material available, that their
3 range of choice is much more limited in that case, we've
4 identified another potentially vulnerable consumer group.

5 Similarly, if you're talking about geographic
6 markets, you might think that for some products that most
7 consumers are able to, say, input purchases or able to
8 purchase from anywhere in the United States because transfer
9 costs are relatively low, but in fact, there may be some
10 subset of purchasers for whom transport costs are pretty
11 severe and, again, their of alternatives are pretty limited.

12 And again, I call those over-aggregation mistakes,
13 but you know, they expose another set of vulnerability.

14 And the differentiated product contents of the
15 over-aggregation could arise because of our effort to try to
16 make the analysis trackable. And if you think about some
17 retail products, such as, you know, candy or cereals or
18 shampoo, the number of SKUs, you know, at the market level
19 can literally be in the hundreds, if not thousands, because
20 they come in different flavors, they look different, they
21 smell different, there are different package sizes.

22 So in an effort to make the analysis trackable,
23 you start aggregating up as some sort of mega-brand that
24 encompasses the whole slew of different package sizes and
25 different types of products.

1 come back to this in a second.

2 Now, the anti-climatic part of this topic, since I
3 ignored those last vulnerability concerns, the
4 unmentionables, it seems to me that the second request as it
5 is now structured is actually a pretty good vehicle for
6 identifying vulnerable consumers because it solicits the kind
7 of information that at least lets you initially get a hold of
8 an estimate of who those consumers might be.

9 You know, in the three pieces of information, I
10 think that's solicited by the second request for documents,
11 they're data that could be used for econometric analyses and
12 they're surveys. Let me deal with this briefly one by one.

13 In the case of documents, this is, you know, the
14 usual suspects, there are planning documents, there's

1 price cost margin differs across those consumer groups.

2 For undifferentiated goods, we would be looking
3 for things in the documents that either talk about the
4 ability to arbitrage between, you know, low elasticity groups
5 and high elasticity groups or frustration at the inability of
6 resale from the guys that get it at a low price to the guys
7 that are going to be victimized by higher prices.

8 In terms of data -- and the data, again, can come
9 in a variety of flavors. One is the standard data that we
10 talked about which allows for direct estimation of own price
11 elasticity, but it also enables us to look if we're

1 In virtually every industry there are
2 unanticipated events that will affect pricing. These can be,
3 you know, the sudden exit of a player, a firm. It could be
4 the disruption of a distribution pattern or a temporary plant
5 shutdown, all of which can generate price increases.

6 And those allow you to determine, you know, are
7 there any difference in price effects felt by different
8 consumer groups; again, a signal that there may be more,
9 difference in price effects, such as the disruption of a distribution pattern.

1 For example, there could be buyer strategies that
2 could counter any attempts to engage in price discrimination.

3

4 But there is still something important, I think,
5 finance and policy questions, and I don't have any answers,
6 about how we weight some of these differences.

7 Let me give you the clearest example. I mean,
8 suppose that there is a merger between an upstream firm that
9 decides to acquire one of its customers and it's that
10 customer that has been in an undifferentiated market, has
11 been playing the role of arbitrageur between the high
12 elasticity groups and the low elasticity groups.

13 So to eliminate that arbitrageur, the upstream firm
14 acquires the downstream firm. The post-merger effect is that
15 we'll have higher prices for the low elasticity guys, but
16 we're going to have lower prices for high elasticity guys.

17 The question is, well, how do we balance those --
18 the gains versus the losses and should that play a role in
19 policy formulation, as opposed to sort of when we go forward
20 legally in court.

21 And to give another example, suppose that there
22 are two firms that produce, you know, products A and B and
23 they merge. And as a result of the merger, there are
24 variable cost synergies with production of product A.

25 And as a result, the price falls and the cost

1 of things.

2 MR. WOODBURY: I think it would start to do things
3 like ask a party to identify -- take a list of potentially
4 disrupted events, say, plant shutdowns, recent plant
5 shutdowns, firm exits, sudden shortages of input and supply
6 and ask questions about have any of these occurred in the
7 past X-years and that will give you a basis to start.

8 MS. COLEMAN: And what kind of data would you
9 think --

10 MR. WOODBURY: Well, if you're doing econometrics,
11 I mean, you think about doing before and after studies where
12 we look at the price before and after the event.

13 But it doesn't have to be econometrics. You can
14 simply look at averages because you can learn a lot of other
15 things. But it would be insightful effort to look at some of
16 the outcomes of these natural experiments even in somewhat
17 statistically more crude terms.

18 MR. DINGER: The only thing I would say, Mary, is
19 you may not ask for it specifically, but I think you pretty
20 adequately if you understand the second request bring within
21 the scope these natural experiments and other events in the
22 marketplace.

23 You may not know what they are unless you review
24 the documents, but I think that to the extent that there are
25 these events in the industry, you will pick them up.

1 MR. WOODBURY: Oh, yeah, that may well be true.
2 You do it for the second -- if I'm sitting with this guys, I
3 do a second request.

4 And you know that we on the other side would be
5 looking for those things.

6 MS. COLEMAN: Does anybody have any --

7 MS. GEURIN-CALVERT: I think one of the things,
8 too, is that this is an area where we're assuming that what
9 is going on consecutive with the second request is a lot of
10 meetings between -- or phone calls between the economists and
11 lawyers within the agency and the economists and lawyers on
12 behalf of the merging parties. It would seem,
13 again, what is useful is to identify events that people think
14 really are representative natural marketing experiments.

15 And I think where the -- what I would say as well,
16 is it is oftentimes very difficult at that point for anybody
17 to have sufficient data to be doing really good econometrics
18 in the sense that the merging parties in most industries do
19 not have a complete data set.

20 They've got their own data which can give some
21 insights, but oftentimes is not sufficient.

22 The agencies probably are not at a point to have
23 had the full data set either, and so the more people can come
24 up with what it is they expect the natural market experiment
25 to be showing, what it is they're looking for and, as a

1 result, where information can be brought to bear that is
2 empirical in terms of actual data analysis, but also
3 documentary, and so on, would be, I think, be very helpful to
4 try and potentially reach some closure as to whether or not
5 the next stage needs to be occurring.

6 MR. WOODBURY: Actually, let me step back. I
7 think that's absolutely right.

8 I focus on experimental -- you know, natural
9 experimental context for identifying vulnerable consumers.

10 But obviously, a natural experiments, you need
11 some referrals including data entry, looking at substitution,

1 least one complaining customer; you know, show us for each
2 customer grouping in the context of a natural experiment for
3 others why it is they have a plausible alternative other than
4 the merging parties.

5 I think again the more you can move from what
6 inherently is a customer database to the key issues, it helps
7 both sides.

8 MR. DANIEL: I would -- in a similar framework or
9 frame of mind, I would hope there would be open dialogue and
10 frequent dialogue between the agencies and the parties if the
11 vulnerable consumer issue is at work because it's a little
12 bit at odds with the Meg's point, which is maybe you can
13 learn all you need to learn from maybe the top 50 customers.

14 You can learn a lot from the top 50 customers, but
15 if there are 200 or 500 customers, you might be able to find
16 some down there that would not have as many alternatives.

17 But allowing for those discussions as early and as
18 frankly and as openly as possible animated with whatever
19 support you can share with the parties, given the
20 confidentiality of information, would really be helpful
21 because oftentimes those vulnerable customers pop up
22 relatively late in the process and then you try to figure out
23 how can we analytically track where they are and what their
24 options are.

25 MR. DINGER: That's why the interviews with the

1 customers is so important to understand if they feel
2 potentially victimized or why they feel vulnerable and the
3 source of that vulnerability.

4 MS. COLEMAN: Okay, thank you.

5 MR. WOODBURY: Richard.

6 MR. HIGGINS: I just want to know what an example
7 is of a vulnerable customer. You must have worked those
8 numbers.

9 MR. WOODBURY: I've never found a vulnerable
10 customer -- no.

11 You know, it's the usual. It's the residential
12 versus business consumer, and for example, a long distance
13 company.

14 I mean, at least there's the conventional wisdom
15 that a residential consumer is more at the mercy of long
16 distance companies than the business consumer.

17 It's the leisure versus business travel with the
18 airlines, you know, those kinds of distinctions.

19 You know, it's the generic versus brand-named
20 drugs, those preferring the generic when the generics come
21 out, then the prices rise.

22 MR. HIGGINS: I thought it was something new.

23 MR. WOODBURY: No.

24 MR. HIGGINS: All right, thank you.

25 MS. COLEMAN: Next up is Tim Daniel from NERA He's

1 going to talk about a different type of data.

2 MR. DANIEL: Thanks, Mary. Thanks for the
3 opportunity to be here.

4 Switching gears a little bit, I guess, and what
5 Mary has asked me to talk about involves mergers where the
6 competition arises in bidding- or auction-kind of
7 environments.

8 In looking at some of the second requests that
9 we've worked on where auction or bidding issues have arisen,
10 the bid specs, if there are such things, they can be pretty
11 sparse and limited and I don't think that's necessarily a
12 failure of the second request so much as a recognition, if
13 you will, that when bidding is involved -- what I'm thinking
14 of here is not so much bidding in a formal process, as the
15 government tenders, where you're going to know exactly what
16 the bid is for, but rather, competition that occurs for a
17 durable product in the medical business for a CAT scan or a
18 purchase of electric generation equipment by a utility where
19 it puts out a request for bid in a less formal sense, but the
20 competition is very much in that kind of framework where the
21 sellers are negotiating with the customer, and vice-versa,
22 and that's how the competition is described.

23 The data on that kind of competition are often
24 pretty idiosyncratic to the firm at issue and sometimes even
25 within the firm are very different qualities of data

1 collected across different product lines and divisions and
2 geographic areas.

3 And I think that what I would take from that at
4 least in the process of doing a merger investigation is that
5 there's even a bigger benefit early on after the parties and
6 the government sit down and try and understand what data the
7 companies do, in fact, have when the competition occurs in
8 that kind of a bidding environment because it can be very
9 spotty in certain areas, it can be quite incomplete and it
10 can be quite frustrating down the road.

11 If the expectations are higher, I mean, I think
12 that the parties would keep good records on their bidding
13 competitions, good records on what their rivals are bidding,
14 good records on why they won or why they lost certain bids,
15 when, in fact, that's not the case.

16 One option I think that I would entertain early
17 on, therefore, is if you do have those dialogues and discuss
18 what is available in the companies is if you do hone in on a
19 particularly rich set of data, be it on a limited product
20 line or a limited time period or a limited geographic area, I
21 think the discussion could ensue at that point as to whether
22 or not a careful analyses of the good data might provide
23 enough of a basis to generalize to the markets what are at
24 issue.

25 That's a potentially difficult discussion to have,

1 but I think one worth thinking about. It's essentially the
2 same, I guess, as to whether you can take a sample of the
3 data.

4 If you happen to have data records that might be
5 complete, but they're on all paper and they're, again,
6 difficult to deal with, they're not Nielsen data, they're not
7 IRI data, they are just messy bid records, and you want to go
8 back five or ten years, or whatever time period you're
9 interested in, I mean, it might be possible early on to agree
10 to take a sample of those records.

11 When I was here at the FTC and doing consumer
12 protection matters and we talked about discrimination and
13 lending practices, that was a common occurrence when you had
14 a large number -- thousands and thousands of applications for
15 credit to just take a sample of those, work with the parties
16 to draw up a representative sample and then agree that those
17 are the data that are going to form the basis of the analysis
18 or for the decision at least up through the investigative
19 period.

20 One issue that I think is particular to an auction
21 or bidding environment that has to be taken into account is
22 if you look back at the economic models and ask what is the
23 likely price effects from a merger when two firms get
24 together in a bidding situation; is the expected price
25 increase from a unilateral context. It depends critically on

1 the costs and the offerings of the non-merging parties.

2 So to get the two low cost firms in a bidding
3 competition merged, your typical concern is they're going to
4 raise the price up to the cost of another third-level lowest
5 cost provider.

6 What that means is that very often there's an even
7 bigger asymmetry, I think, between the information available
8 to the government who can obviously subpoena and gather
9 information from all of the major players in the market and
10 the information immediately available to the parties.

11 That's not a gap that's going to be necessarily
12 closable, but I think it needs to be recognized and, again,
13 to me, at least counsels for as much open dialogue and as
14 much disclosure on the part of the agencies as to what's
15 animating their concerns, what's driving their analytical
16 framework and why they came and those competitions in those
17 situations of merger might be likely to raise prices.

18 Virtually, everything else I have on my short set
19 of bullets has been raised already, and so I think I'm going
20 to leave it there just with an endorsement of what Mike had
21 said about having open dialogue and discussions with the
22 agency as early as possible, agreement, if possible, between

14betweentheagencyandthebidders,whypost,wheretheagencyisn'tinformalbetweenthe

1 in any way changed their cost position from the last time the
2 bidding occurred or could not do so somehow post-merger,
3 there really is a circumstance where there is a reason for
4 concern.

5 I think the more it is articulated that the
6 concern is a cost difference as opposed to, let's say, a
7 likelihood of somebody even submitting a bid.

8 One of the things I think that I found both in the
9 antitrust division and outside is people spend a lot of time

1 merger result than if you -- or merger prediction than if
2 what happened in the last year is almost identical to what
3 happened in previous years.

4 So I would respond to Tim's statement a little bit
5 that in terms of viewing any sampling, it would be worthwhile
6 to give the parties an opportunity to address whether or not
7 the past is truly a prologue or not.

8 MR. DANIEL: In the natural experiment, again, I
9 would raise the same point.

10 A lot of the markets with large durable medical
11 equipment, electrical equipment have seen a lot of mergers in
12 the last half dozen years and someone might be able to use
13 that information and a change in market structure to see
14 whether or not past mergers, of which this current merger in
15 front of you may be somewhat similar in appearance, one might
16 be able to do some kind of prediction with these models.

17 MS. COLEMAN: Thank you, Tim. I'm going to switch
18 gears a little bit here and move more to the accounting
19 financial side.

20 David Painter with LECG, also formerly with the

1 I guess let me reiterate at the outset something
2 Mike said and I think everybody else has certainly agrees
3 with and that is that having been here for 30 years, the FTC
4 is not the enemy. The facts are the facts.

5 And I think that while I'm going to speak to
6 financial and accounting data, it can probably apply to
7 anything. And that is the best strategy, if I can call it
8 that, for merging parties to take is to provide the factual
9 information they think the Commission is seeking.

10 I think it behooves the Commission and certainly I
11 think the merging parties, the lawyers representing merging
12 parties should make every effort to have a sharing of

1 I'm going to limit my focus because so much else has been
2 said, as well, the use of accounting and financial
3 information for purposes of preparing an expert analysis,
4 such as a failing company and efficiencies or for that
5 matter, econometrics, or anything else.

6 And I guess I've been on the outside for five
7 years, but I was with the Commission for 30 and perhaps that
8 30 years is what's going to drive me to sort of suggest the
9 conclusion. It was a long time in trying to get there.

10 My experience at the Federal Trade Commission, and
11 it's confirmed I think in large part on the basis of my
12 experience on the outside, is that the underlying support
13 that is provided by the merging parties with respect to any
14 expert analysis is too frequently -- not always, but
15 frequently incomplete or inadequate for the Commission staff
16 to try, if they might, to be able to get a complete
17 understanding of the analysis in a way that says -- allows
18 them to say it's reliable. I mean, this is the key thing: is
19 it reliable.

20 And that isn't because there is some inadequacy in
21 the second request. The second request is as thorough as is
22 imaginable and, in fact, I just recently right before I came
23 here looked at the second request, the one that was received
24 by the merging parties in a case that I worked on, and
25 essentially it asked for the identification of all experts

1 and consultants retained by merging firms and all documents
2 and data that were provided to such experts and consultants
3 and also asked for all instructions, programs and other
4 documents that are necessary to use and interpret the
5 finished analyses prepared by these consultants and the data
6 that was used to prepare the finished analyses. And that
7 covers it all.

8 And yet, despite that -- and I'm assuming this
9 dates back certain years. It wasn't that exact language. It
10 was similar when I was here -- expert analyses often are
11 fruitless.

12 Efforts are made to submit them in a way that's
13 understandable. Efforts are made by the staff to understand
14 them in a way that allows them to factor it into the
15 decision. But somewhere along the way, something is lacking,
16 and my feeling is that what's lacking is the road map.

17 And I think we all might be able to better
18 appreciate this if you look at the Efficiencies Amendment,
19 the Efficiencies Amendment before it came out, before
20 submitting anything and everything that we could to try to
21 demonstrate efficiencies.

22 And we all had a sense that they had
23 practitioners on the outside, most of us that worked on the
24 inside what was needed with the Efficiencies Amendment and
25 sort of laid out a road map as to what is going to count with

1 respect to at least the efficiency claim and this could have
2 been applied.

3 You could have an econometrics amendment or you
4 could have failing company amendment in some respects, and so
5 forth, but the bottom line to it was that -- what it said was
6 that, look, we know we're requesting everything in the second
7 request, it gets in everything, but despite that, independent
8 of the second request, we are going to tell you now that you
9 have to substantiate the efficiencies in a way that allows
10 the staff to verify it.

11 You know, I think it could apply it to anything, I
12 think, and that's the key.

13 And so I think that from my standpoint, I think
14 that there are lots of shortcuts with respect to accounting
15 information data.

16 We're all aware of -- that doesn't mean that
17 they're not -- that they can't be meaningful when put into an
18 expert analysis. It's a matter of explaining what the
19 shortcomings are and what the strengths are and coming to
20 some sort of a reasoned conclusion that allows the staff to
21 say yea or nay on it.

22 I will tell you that if all of you are going to
23 count on the outside with the submission of boxes and boxes
24 of documents that underlies the efficiencies claim, it's not
25 going to do the trick.

1 And the staff is not going to be able to uncover
2 it. I mean, I was here for 30 years and we tried desperately
3 to do that through depositions and investigational hearing.

4 You know, as cooperative as the merging parties
5 attempt to be and the lawyers representing the merging
6 parties attempt to be, it's just extremely difficult to sort
7 of get at the subtleties, get at the sort of fine-tuning of
8 what these analyses are all about in a way that allows you to
9 say, hey, it's reliable.

10 So here is what I am suggesting. I am suggesting
11 that the Efficiencies Amendment, whether formally or whether
12 on the outside, effectively use it as a tool, as a backdrop
13 for what we submit to the staff on other kinds of analyses
14 involving accounting and financial data be the -- be an
15 additional standard, if I can call it that, that standard
16 being a substantiation that allows the Commission to verify.

17 And I can tell you having worked on the Staples
18 case and having worked on the Heinz baby food case that it
19 isn't a matter of whether you are submitting five boxes of
20 documents or five hundred boxes of documents to support your
21 position; it's the road map.

22 On Staples, I worked, I'm sure, a thousand hours
23 trying to go through hundreds of boxes of depositions,
24 hearings, everything else to get to the truth.

25 And even there, half of the efficiencies were

1 effectively dismissed because there was no way of verifying
2 whether they were valid or not.

3 On the other hand, I worked on the Heinz baby food
4 case and there were a fraction, a small fraction of the same
5 number of documents and -- but there was a road map, I
6 believe.

7 Now, that doesn't mean that the Commission
8 accepted it. They didn't. We all know that. But at least I
9 don't think there was a dispute as to the numbers themselves
10 and what the numbers were saying.

11 There were theories that effectively refuted what
12 was being presented. And if we can get down to that, I mean,
13 then I think we can make some reasonable arguments for and
14 against.

15 So I think that if we recognize that what's needed
16 is a road map, what's needed is really some really crystal
17 clear explanation, we realize that most of these analyses
18 that we sent to the Commission were started long before the
19 initial filing even took place.

20 We recognized that we have the benefit on the
21 outside of talking to business people at length, ad nauseam,
22 you know, time and time again.

23 We were able to pick and choose based on those
24 discussions all of the documents we wanted. And we see what
25 these constraints are, time constraints are with respect to

1 Yeah, it may not be an absolute perfect two-way
2 street, but I don't think that -- since we want this merger
3 to get through, you know, it's just something we, perhaps,
4 have to face.

5 MR. COWIE: Richard, there are confidentiality
6 concerns that at times prevent us from telling you what kind
7 of rum Bicardi is planning to make.

8 The fact of the matter is it's very difficult to
9 share third-party information.

10 MR. HIGGINS: I've been bluffed by Mr. Newborn
11 enough times to know there's more to it than that. But I am
12 suggesting that it is an adversarial situation. It is a
13 contest and I don't see where we should --

14 MR. PAINTER: You know, again, I will tell you
15 from experience, I mean, obviously, this is a short --
16 everybody has their own view, but if it becomes a contest and
17 you have an economic analysis that can't be -- you know, that
18 the staff is unable to sort of discern whether it's reliable
19 or not, then your best case is going to court.

20 That's your best case because I don't think
21 they're going to accept it and go through, you know, without
22 an understanding of whether it's really, you know, an expert
23 analysis that's presumably supporting the arguments that
24 we're making to the staff and they're not sure if it's
25 reliable or not.

1 So, you know, maybe we can win in court and maybe
2 -- you know, I may be saying tomorrow the direct opposite,
3 but if we want to take our chances in court, then obviously
4 that's something that's factored into the overall strategy

1 in large transactions where there is not a Nielsen and an IRI
2 or an industry database where what you are working with is a
3 huge number of consumers, very large and messy transactional
4 or customer databases in the merging parties so that even as
5 the economists start six months ahead of time working with
6 the most accommodating client to say let's understand what is
7 going on here, to the extent -- and this just is picking up
8 on what John said -- to the extent for whatever reason,
9 whether it's third-party information, or otherwise, the staff
10 has a concern about a particular customer group that they
11 believe has inelastic demands and a particular other group
12 they view may have more elastic demands.

13 I think the sooner that that can get articulated
14 by the staff to say we are particularly concerned about this
15 kind of set of customer, then I think it is more feasible for
16 the economists on the outside to try to marshal the data and
17 put it together in as testable form as possible.

18 But I think it's frustrating for everyone if the
19 way a meeting or a set of meetings proceeds as we have an
20 overall concern about lack of availability of substitutes.

21 I think the more progressed in the direction is
22 something you indicate on the efficiency side where everybody
23 agrees on what are we looking for, the better in some
24 industries. It's very straightforward to do that early on
25 and it's more straightforward for the staff to ask for the

1 information in the second request.

2 And I would just say where you're having to ask
3 for huge transactional databases and it's a wide range of
4 industries it helps everybody to give more guidance from both
5 sides.

6 MR. PAINTER: Absolutely.

7 MR. DINGER: If I could add just one thing here
8 and it transcends data issues, but I think it's really
9 important.

10 I think the key thing is everyone wants to get a
11 sound merger policy and to do that, you have to have dialogue
12 on the issues that are of concern.

13 And I agree totally with Dave to the extent that
14 we can learn from the parties to the mergers with respect to
15 what the concerns of the agency are early on. And I realize
16 that there are confidentiality concerns that you have to
17 protect.

18 On the other hand, you have to be careful that you

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1 to have a completely two-way street.

2 And you're right, you can't win the contest.
3 We're bound to lose it. But it's just frustrating that we
4 can't understand sometimes what's going on on the other side
5 in terms of why they find our results, you know, not
6 credible.

7 MS. COLEMAN: It's very clear from the discussions
8 that have been happening that the dialogue process is the key
9 to all of this and this is something that (inaudible) data
10 myself, trying to encourage as much as possible and as early
11 as possible, you know early discussion among the economists
12 and certainly the lawyers, as well, about the issues in
13 trying to come to agreement or at least an understanding of
14 what the theories are and what data tasks and other types of
15 analyses would be useful.

16 And also, we'll encourage to the extent we can,
17 given the confidentiality concerns, potentially where we are
18 in the process if it's got a very late date, this dialogue,
19 you know, the results that we're finding in as much detail as
20 we can so that those types of issues don't arise.

21 It's clearly something that both Dave and I have -
22 - are encouraging as much as we can. And we're going to
23 continue to encourage that.

24 Allen, did you have a comment?

25 ATTENDEE: One comment from the perspective from

1 someone on the inside.

2 So many times parties have come up with, let's

1 raised, nature of the data request and how long it takes to
2 gather the data particularly when we ask for it in ways that
3 the company's keep it and we end up getting the data
4 sometimes when the compliance happens and the data ends up
5 being a waste of everyone's time because by the time we get
6 the data, when it's that late, we can't do anything with it.
7 It's just too late in the process. So I wanted to
8 throw out a question about what can be done to encourage
9 people to submit data earlier as they get it and to enable
10 the process to be able to actually gather it early enough.

11 MS. GEURIN-CALVERT: One thing that may not work
12 in every case, but let's assume we're at the second request
13 stage or a point where there's been, you know, a voluntary
14 agreement for data, I think that is exactly the time to sit
15 down first internally and ask what exactly do we want, what
16 are we trying to test, what are our highest priority types of
17 information.

18 Obviously, in industries you've worked in before,
19 you know what you're looking for. In industries you haven't
20 worked in before, you're less likely to know. And then to sit
21 down and have that dialogue with not just the attorneys, but
22 also the economists on the other side, and to identify as
23 clearly as possible what kinds of levels of data you're
24 needing in the highest level of priority and have the
25 shortest turnaround that you can to get back -- either to

1 have a discussion just with that group again or to identify
2 the relevant business people. I have found it's
3 effective, both on the outside and in the government, to go
4 into the equivalent of a plant tour, to go do a data tour and
5 have people go down and see what are the forms in which the
6 data exist and that I have found expedites, even if it's on a
7 rolling production, data as quickly as possible in as
8 formatted a form as possible to get to you.

9 And I think that covers also the issue of the
10 white paper. Sometimes it is that the outside parties have
11 not gotten the data either in a form that's really usable
12 much in advance of the time frame in which the staff gets it;
13 and so, again, to the extent issues can be identified and the
14 data identified sooner.

15 But I think having conference calls and visits
16 with the data people is one way to expedite it and try as
17 quickly as possible, Tim's point, if sampling is going to
18 work, have somebody come up with an agreed-upon method as
19 quickly as possible if it has to be the universe.

20 I was in one negotiation a long time back when I
21 was an assistant chief and it turns out that the parties had
22 a very small data set that was exactly what we wanted, that
23 they were able to turn over on a diskette the next day.

24 But that we never would have found it if we hadn't
25 been kind of sitting and having that kind of dialogue. So

1 the dialogue going and here's what we got and here's what we
2 can do for you and then if we can't do this, what about this
3 as an alternative.

4 And I think sometimes the lawyers get in the way
5 and slow things down by not having the business people there,
6 and you can bring your accountants -- to tell you we looked
7 at the data and this won't work.

8 Give me this type of economic analysis and this
9 will work and I think that speeds things along and allows a
10 more meaningful focus earlier in the process.

11 MS. COLEMAN: Does anyone else have any questions?

12 MR. DAGEN: Just there aren't as many attorneys
13 here as maybe there might be, but is there a reason why a law
14 firm wouldn't want to engage in the process you're
15 describing, Mike?

16 MR. DINGER: Yeah, there are a lot of reasons.
17 One they can think they'll be in litigation with you and they
18 will think that information flow is a one-way street as you
19 sit there and you talk and you talk and you talk and you
20 don't get any dialogue coming back from the concerns.

21 There are a whole host of reasons why you wouldn't
22 do it. You would be worried if you bring some businessman,
23 there is always a risk that he or she could say something
24 that you may not wish that they would say and you might
25 rather have that occur in a context where you can control it

1 a little more.

2 But I think in balance, when you have to weigh
3 these, I sort of go back to the day that let's not start out
4 looking at each other as the enemy.

5 You've got a job to do and we have a transaction
6 we want to clear and let's try to see if we can have an
7 informed merging decision.

8 And the way to do that with the least burden and
9 the least cost on everybody I think is to step up to the
10 plate as early on the process. And it's got to be a two-way
11 step-up.

12 The agency has to be -- the personnel have to be
13 reasonably candid about what their concerns are as soon as
14 they have them keeping in mind the confidentiality respect.

15 MS. COLEMAN: Anyone else? Does anyone have any
16 questions or comments?

17 (No response.)

18 MS. COLEMAN: Okay. Well, thank you all for
19 coming. This wraps up the workshop sessions. We appreciate
20 your input.

21 **(Whereupon, the proceedings concluded.)**

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

2

3 WORKSHOP ON SECOND REQUEST/MERGER

4 INVESTIGATION BEST PRACTICES

5 DATE: JULY 10, 2002

6

7 I HEREBY CERTIFY that the transcript contained herein
8 is a full and accurate transcript of the recording/stenomask
9 taken by me at the hearing on the above cause before the