

FEDERAL TRADE COMMISSION

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In the Matter of:

MERGER BEST PRACTICES WORKSHOP  
SAN FRANCISCO

JUNE 5, 2002

901 Market Street  
San Francisco, CA

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

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

FEDERAL TRADE COMMISSION

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1 JUNE 5, 2002

12:05 P.M.

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

3 WELCOME

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

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

14 INITIAL WAITING PERIOD

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

25 MS. DAVIS: Thank you, John.

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(301)870-8025

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

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

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

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

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

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

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

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

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

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

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

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

1 inquiry could help.

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

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

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

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

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

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

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

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

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

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

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

5           MR. WIEGAND: Thank you, Allison.

6           People want to come up?

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

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

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

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

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

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

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



1 would seek.

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

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

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

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

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

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

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

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

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

25 MR. SUTIS: Bob Sutis from Hewlett Packard.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

21 MS. SILVERMAN: Well, that --

22 (The parties simultaneously speak.)

23 MR. COWIE: -- searches in general?

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

1 different backup functions.

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

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

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

4 MS. SILVERMAN: And that -- right.

5 (The parties simultaneously speak.)

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

10 (The parties simultaneously speak.)

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

17 MR. COWIE: Right. Yes.

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

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

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

3 MR. COWIE: Right.

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

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

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

12 (The parties simultaneously speak.)

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

16 MS. SILVERMAN: Right.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

21           It didn't come because we --

22           (The parties simultaneously speak.)

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

24          MS. SILVERMAN: And that has happened too.

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

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

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

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

1 produce.

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

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

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

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

3 MR. HOFFMAN: Thanks.

4 MS. SILVERMAN: Okay.

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

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

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

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



1 fixes the problem.

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

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

18 MR. COWIE: Alec Chang told us --

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

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

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

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

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

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

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

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

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

25 Well, we're looking at a confrontational

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

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

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

25 MR. HOFFMAN: In terms of talking about



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 MS. SILVERMAN: To echo sort of what both

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

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



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

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

For The Record, Inc.  
Waldorf, Maryland

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

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

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

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

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

19          (The parties simultaneously speak.)

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

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

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

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

6 (The parties simultaneously speak.)

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

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

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

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

7 (The parties simultaneously speak.)

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

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

20 ELECTRONIC RECORDS AND FINANCIAL DATA

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 (The parties simultaneously speak.)

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

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

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

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

13 (The parties simultaneously speak.)

14 MR. CHANG: I did that work.

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

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

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

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

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

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

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

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

25 MS. SILVERMAN: From the private site --

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

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

15                (The parties simultaneously speak.)

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

24                (The parties simultaneously speak.)

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

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

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

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

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

4           (The parties simultaneously speak.)

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

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

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

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

4 (The parties simultaneously speak.)

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

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

13 (The parties simultaneously speak.)

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

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

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

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

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

1 all synonyms for the terms they searched.

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

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

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

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

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

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

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

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

1 the third choice was do --

2 (The parties simultaneously speak.)

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

5 (The parties simultaneously speak.)

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

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

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

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

1 probably do, and get information back.

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

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

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

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

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

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

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

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

1 (The parties simultaneously speak.)

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

11 MS. SILVERMAN: And verifying --

12 (The parties simultaneously speak.)

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

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

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

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1 litigation.

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

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

14           (Multiple parties simultaneously speak.)

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

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

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

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

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

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

1 DOCKET/FILE NUMBER: P019503 CASE  
2 TITLE: BEST MERGER PRACTICES WORKSHOP HEARING  
3 DATE: JUNE 5, 2002

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7 COMMISSION to the best of my knowledge and belief.

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**14 C E R T I F I C A T I O N O F P R O O F R E A D E R**

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16 I HEREBY CERTIFY that I proofread the transcript for  
17 accuracy in spelling, hyphenation, punctuation and format.

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