

FEDERAL TRADE COMMISSION

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FEDERAL TRADE COMMISSION

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

JUNE 12, 2002

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

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

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APPEARANCES:

ON BEHALF OF THE FEDERAL TRADE COMMISSION:

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

P R O C E E D I N G S

1
2 MR. ROONEY: Good afternoon. My name is
3 Bill Rooney, and I am chair of the antitrust and
4 trade regulation committee of the City Bar here,
5 and we are very pleased to host this FTC
6 workshop on the merger review process. The
7 committee in the past has participated in
8 improvements that the agencies have made over
9 the years in the review process, and we are
10 particularly pleased to host today's workshop,
11 and we are equally appreciative of the FTC
12 personnel who are here to take time out of their
13 busy schedules and to hear the comments of the
14 Bar on the review process.

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

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

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

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

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

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

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

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

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

25 The panel here with me today are folks who

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

12 Before we go any further, I particularly want
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1 that. But first, I would like to call on Arthur
2 Burke who on behalf of the committee on
3 antitrust and trade regulations for the City Bar
4 Association provided us with a very well thought
5 out written suggestion, so if you want to kind
6 of summarize that, that might be helpful to
7 start things off.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6 For the cutoff dates and updated searches,
7 with the proliferation of e-mail it has made it
8 even more difficult than in the past to meet the
9 45 day for foreign language documents, 30 days
10 for most specifications and 14 days for some of
11 the other specifications. It's just not
12 practically possible to review the volume of
13 documents in those time frames, even if you do
14 an update search.

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

1 It's unlikely that there will be any material
2 evidence that would come forth that would not
3 otherwise come forth by just having the default
4 rule be you search people once. And parties
5 have a strong incentive to produce the documents
6 as quickly as possible because the goal is to
7 get into substantial compliance and start the
8 second waiting period. So on the one hand the
9 parties will have a strong incentive to produce
10 the documents as quickly as possible, but the
11 45, 30 or 14 days is really just not practical
12 in today's environment.

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

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

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

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

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

25 MR. LARSON: But it's never perfect.

1 MR. SIMONS: It's expensive.

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

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

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

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

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

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

13 And the big benefit of mediation is to allow
14 both sides to deal in confidence with the
15 mediator who can then be brokered between the
16 two sides without revealing their confidential
strategies, can help see if there's a solution that

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

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

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

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

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

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

1 documents and make that designation is very
2 substantial.

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

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

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

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

13 MR. SIMONS: It's certainly mine.

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

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

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

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

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

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

17 MS. ANTHONY: With the help of a mediator.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 There are some litigations that e-mails would

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

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

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

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

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

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

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

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

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

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

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

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

3

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

4ent. MR. KRULLA: Frequently the parties will

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

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

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

studies that can help shed further light on. So

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

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

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

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

25 At times the FTC appears to be using the

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

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

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

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

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

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

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

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

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

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

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

9 MS. ANTHONY: Is that a true story?

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

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

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

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

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

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

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

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

25 But to Bates stamp electronically you have to

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

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

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

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

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

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

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

1 becomes troublesome when you are doing
2 electronic production.

3 So what I suggest is that the FTC agree, and
4 this isn't tested but I think there's data that
5 we think this would be okay, the FTC agree that
6 documents inadvertently produced isn't a waiver,
7 and maybe if it's an agreement the court will
8 this i just force that agreement.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 MR. SIMONS: The suspense is just killing

1 me. What happened?

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

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

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

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

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

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

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

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

1 paper versions of all this.

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

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

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

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

8 You can determine whose files you get it from
 9 and all that, and I would respectfully submit if
 10 you can't make a case based on that, it's
 11 because there ain't a case to make. If the key
 12 decision-makers don't have the documents or the
 13 people they off-load their documents onto, and
 14 chairmen don't have those documents but someone
 15 has the chairmen's documents, through chairmen
 16 and product manager for the relevant products,
 17 that kind of thing, I think a suggestion was
 18 made a little earlier of control group plus key
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1 much, much, much worse than the last time a
2 reform effort was undertaken, and at some point
3 it's necessary for the government to say enough
4 is enough. We know we can control the process,
5 we can pick the people whose files you search
6 and we can control the specs, you can get it.

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

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

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

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

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

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

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

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

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

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

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

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

STj -100. which we offered toucebe ab tal0. SIMONS: It's gotten p SIME

data23. One of the problecheck7

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

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

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

1 reasonable effort, it's substantial compliance.

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

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

5 MS. ALBERT: Not asking to produce by spec.

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

11 Bruce, did you want to say something?

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

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

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

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

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

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

1 Commission is looking at econometrics and if
2 they are looking at economic analysis, they
3 ought to be willing to share that. I mean, the
4 purpose here as I view it, and maybe even after
5 25 years of doing this I still have a degree of
6 idealism that remains, is to try to get to an
7 appropriate result.

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

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

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

1 for a very useful session.

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

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

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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 CASE TITLE: WORKSHOP ON BEST PRACTICES FOR MERGER
3 INVESTIGATIONS

4 DEPOSITION DATE: June 12, 2002

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

10 DATED: JUNE 13, 2002

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STEFANIE GERBER

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