FEDERAL TRADE COMMISSION

In the Matter of:       

WORKSHOP ON BEST PRACTICES) 
FOR MERGER INVESTIGATIONS.)

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

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

If you would like, there is a government and an academic discount for the program and full
CLE credit is available. The conference will cover both the HSR filing process as well as every aspect imaginable of the substantive merger review process.

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

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

I have also been on the inside at the FTC previously and I'm there now, and there's a lot
of frustration there as well. So what we thought we would do is launch this program where we would encourage an active dialogue between the outside Bar and ourselves so we could get a better understanding of what the problems were and see if we can get some solutions and suggestive criticisms from the people who are experiencing these issues directly.

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

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

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

Before we go any further, I particularly want to thank Bill and David Starr of the committee for setting this up and Susan Raitt of the New York office for putting all this together. Thank you.

This hearing is being transcribed and we want to keep it as a record as something we can look back on while trying to come up with our recommendations. So when you talk, please talk loudly -- one person at a time, and say your names.

The way we're going to do this is we've got a few people who ahead of time told us that they have particular issues they would like to raise, so we're going to go ahead and let them do

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

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

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

With respect to the data request to interrogatories, it's obvious that many companies maintain very detailed electronic data related to sales and costs, and I think most companies can somewhat readily produce the preexisting electronic databases they have, but the most difficult and second requests is their request that there be additional data compiled, data that's not really maintained in the ordinary course of business, that's not maintained in a centralized fashion by companies but which has to be gathered perhaps from far flung regional offices and created and melded into a kind of new database. That kind of process is often difficult and time consuming.

It often results in somewhat inexact results and requires a lot of guesswork to actually put the data together. I guess you can compare the situation with civil litigation. Normally if someone serves an interrogatory on you in civil litigation, you are obligated to create new data to produce data that exists in a form that already exists. So that would be one suggestion that I think would significantly accelerate and
facilitate the compliance with the second
request process is to focus on data as it exists
and is as maintained by the company and not so
much focused on creating new databases and
searching and creating new form of data that are
not maintained in the ordinary course of
business.

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

However, given the potentially enormous
volume of the materials, there are I think a
number of useful limitations that the Commission
has often been willing to agree to and we hope
that will continue and perhaps be
institutionalized. Some of those include,
obviously where possible, not requiring a review
of backup tapes. Obviously there may be unique
circumstances where that's necessary, but
certainly as a general rule we hope that can be
a limitation that's usually granted.

And additionally some sort of limitation as
to the scope of the individuals for whom
electronic data must be reviewed that is a
narrower group of people perhaps than the scope
for paper documents. Yet given the potential
number of times, the volume of electronic
documents, it's helpful if we can perhaps
identify a smaller, quarter of people who must
review electronic documents that's perhaps not
as large.

In a similar vain, it's helpful if you are
willing to agree to shorter time periods for
electronic data, so that while the time period
for the paper documents might be from '98 to the
present, electronic documents might only be
produced for 2000 to the present. Again, I
think, a reasonable limitation that we encourage
in the future.

And I guess finally with respect to the
electronic documents, another useful limitation
is an agreement as a general matter that be produced in a common consistent format. Sometimes in individual circumstances it may be necessary to produce an Excell spreadsheet in its native format, but the rules should generally be that we can produce it in one homogeneous format.

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

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

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

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

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

I think notably as well, the Department of
Justice does not require production by
specification, and I think that should just be eliminated because it does produce a material burden on the parties in terms of slowing down the document review because of the need to write-down the specification on each control sheet.

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

In a recent matter with a relatively small company, after the initial production, two months later we did the update search, we came up with another 800 boxes, mostly e-mails. It just doesn't work, and the staff is generally very understanding in negotiating limitations on certain cutoff search dates, which I think is an indication that in the period between the issuance of the second request and the production of the documents, it is not indicative of normal business conditions.
It's unlikely that there will be any material evidence that would come forth that would not otherwise come forth by just having the default rule be you search people once. And parties have a strong incentive to produce the documents as quickly as possible because the goal is to get into substantial compliance and start the second waiting period. So on the one hand the parties will have a strong incentive to produce the documents as quickly as possible, but the 45, 30 or 14 days is really just not practical in today's environment.

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

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

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

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

MR. LARSON: But it's never perfect.
MR. SIMONS: It's expensive.

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

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

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

My background is as an antitrust litigator. I cut my teeth at Howard and Simon. I am former general counsel for the subcommittee on Senate Judiciary, and I've been in back in the private sector as in-house counsel and now begun a
But I am very enthused about the many benefits that mediation can offer to disputes, and there are inherently disputes that arise in the second request process between the staff and the parties, and there's a great deal of frustration that I think you have been hearing about and will hear more about in the private Bar about how hard it is to deal with the voluminous requests that are put out there and the need to try to work things out, and often times that goes successfully.

When I was in private practice, I often had good experiences negotiating with staff at FTC and DOJ, but sometimes it doesn't work out so easily. And in those cases I think bringing in an independent mediator can provide great benefits for everyone involved and that that would be a voluntary process where the parties would agree to use of a mediator, and it would not undercut the authority of staff because it would not result in a decision.

The mediation process doesn't have the mediator rendering any judgment the way an arbitrator would, but simply has the, helps the
parties to reach their own agreement about what is best for resolving the disputes at hand.

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

And the big benefit of mediation is to allow both sides to deal in confidence with the mediator who can then be brokered between the two sides without revealing their confidential strategies, can help see if there's areas of overlap where the parties would be able to reach compromise without disclosing the confidential information or strategies of the staff to the private parties or vice versa, and also to be able, if the mediator has a sufficient antitrust background, to be able to test the strategies and the theory on which the staff is seeking documents and be able to help convey to the

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

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

And lots of benefits and really very little
downside. It's not very costly or doesn't take
much time. And if the mediation is not
successful, then the parties are able to proceed
with all the same remedies that they had
previously. If the appellate process is
desirable or seen as desirable, they can proceed
with that. But I think in most every case the
mediation process would be very helpful in at
least narrowing the disputes, if not resolving.
I think a paper has been brought that was
circulated around, but I can help answer
questions through the process.

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

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

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

With respect to the concept of mediation, I think that's intriguing, and I -- as Mr. Seat is an experienced mediator I take, at least to some degree, his word that it can be done promptly. But that is my major concern about it because we are working under very tight time frames here. It would be interesting to do a pilot program, but I think one of the key determinates in whether that pilot is deemed successful has to be a very close examination and a close
evaluation of the degree to which the process accomplishes the goals that it seems to me it may accomplish but without changing the time frames of the parties involved. I think that's critical.

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

MR. SIMONS: It's certainly mine.

MS. GIFFORD: But I will say something anyway. The cases of which I'm speaking I think are quite rare, but when they happen, it is a real problem, and that is where you have got a transaction that is in an industry or line of business where one of the two agencies has handled matters in that industry previously but perhaps a few years ago, perhaps not yesterday or six months ago, and where the possible consequences, the possible effects of the transaction, if there are possible potential effects, are going to take place in another
industry in which the other agency has clear, acknowledged expertise.

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

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

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

MS. ANTHONY: With the help of a mediator.

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

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

MR. SIMONS: I am very attuned to that.

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

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

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

MS. GIFFORD: Maybe some different rules.

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

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

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

But beyond such a group and their direct
assistants, that e-mail and other electronic
document production either be severely limited
in time frame or, I would prefer, deferred or
eliminated altogether. Deferred I suppose is
not an unreasonable conclusion given that you
might find something in what's already been
produced that obviously leads you to come back
and say we've got to look at the e-mails and
electronic documents of a lot of other people.

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

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

I would also like to make a comment with
respect to one other issue that is far less
susceptible to rules and protocols and process
and is more the result of some of the processes
and the time pressures, and that is the
inadvertent and sometimes careless disclosure of
information in staff interviews of parties that
reveal third party sources of information, of particular information or even of the fact of a compliant by a third party. And this is something that causes great concern for third parties that are otherwise willing to cooperate on an informal basis in a staff second request investigation.

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

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

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

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

Occasionally those things happen. I know
staff is very careful to not make those slips of
the tongue, but the effects that I'm referring
to do arise I think far more often from more
subtle statements and from not thinking through
how a question should be asked with that care to
keep confidential information foremost in the
minds of the staff.
And whatever consideration Commission can
give to this issue, I think it would facilitate
the process of the second request analysis, and
I'm quite confident that it would lead to
reduced friction and reduced tension among the
various parties to the process. Thank you for
the opportunity to make these comments.

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

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

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

I deal, as do most of us here, in civil
litigation. Aside from that work, the most
burdensome document requests I deal with by far
are second requests. Another reason, a better reason, the fact that we all know this that a lot of deals are abandoned because the government issues a second request. The lawyers throw up their hands, and on their lawyer's advice, and we tell them, you can't afford it, you can't respond to the second request, which is, among other things, uneconomical. Because a lot of deals are presumably efficient deals and they don't go forward because people cannot pay for the second request process.

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

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

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

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

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

And you really get the feeling when you get that letter that it's really not about compliance. It's really about timing, which I don't blame the government for. I mean, it
seems to me if we were sitting down setting the rulings or at least if I was setting the rules, things would be such and such a way that we would get half as many docs and twice as much time to look at the deal, but that's not what we have, and I don't know how we move in that direction.

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

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

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

So even though it's an amorphous suggestion,
I think the most important thing is the people
in charge all the way down through the staff
have to use their discretion and judgment to
think hard about whether what they're imposed in
terms of burden is worth the cost, and it starts
with the most important, central aspect of the
second request process, which is the list of
people who get searched. When you sit down with
the organizational chart, that to me has as much
to do with the scope of the search and the
burden imposed by the search as anything. And
we've all heard well, we would like to hear from
these people anyway even though they're
subordinates and they probably have the same
thing in the files as their superior. It means
something that it's in their files also. I said
well, it doesn't really mean that much, is it
really worth doing.

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

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

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

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

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

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

MR. ABUHOFF: I agree with that. I think
the issue is, and this plays out in civil
litigation too, you are always responsible to
produce anything in your possession, custody and
control. If you take a box of documents and say
to your investment banker, hold onto this box,
that's within your possession, custody and
control. And I think that has to be produced,
whether it's specifically done by the investment 
banker or not because it's really a document 
held by the company. 

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

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

MR. ABUHOFF: Well, I think that's a fair 
way to approach it. You should realize when you 
go to a law firm and ask them to produce 
documents and the company goes to the law firm
and says produce those documents, the company
has to pay the law firm often to do that. So
it's not something -- it's not just a matter of
taking things lightly. It's a serious decision
that a company has to be make about how much
energy is going to be put into this and how much
it's going to require from its various agents.
And that's not a factor for one law firm but a
factor when you deal with 14 law firms. So it's
sort of -- it comes into play. The
justification I have heard from this, and I may
be wrong, in terms of having this requirement,
at least one justification I have heard, is that
the FTC or DOJ wants to be sure it receives
documents that reflect any agreement between the
parties as to what deal might be satisfied -- in
other words, their fall-back position. If
there's an agreement, they might make a side
agreement and have some investment bankers, some
other law firm work that out with someone else,
and they're saying look, the deal will go
forward as long as we don't have to divest more
than 10 percent of the assets. At least it's
been explained to me by one person, and that is
the focus in part of those requests, which
brings me to another point, which is I don't think the government should ask for that document.

MR. KRULLA: Frequently the parties will claim, they will have attorney involvement and claim attorney/client privilege for such a document, the investment banker, that umbrella is again under the agency concept. I think some of the other things we've seen is where an investment banker helps a company identify who the right buyers are or what the value of the deal is or the effect of the deal is, and they've done underlying studies to develop that information.

So the final report is in the possession of the company but the underlying studies, surveys, questionnaires, information from customers that's been collected is only in the hand of this outside agent, consultant or whoever it is. And we're certainly very interested in seeing that because, as Meg talked before about the embarrassment to customers or complainant if staff misstates or is too incautious about how statements or concerns are characterized and customers may be more candid in talking to a
consultant retained by a company than they will be reporting to the government where there's a perception of the government and the company are adversaries.

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

MS. ANTHONY: I think one of the things we're going to hear today is not every shop operates in the most consistent way, and I know in my regional office, we do subpoena them to do it quickly, and the burden is on us to get the information. And it's not for the reasons that you necessarily just articulated, but it may be more of an issue of product market, geographic market. It's backup information with respect to
studies that can help shed further light on. So it's a good faith effort to acquire information, particularly if you're having a disagreement with the parties over one definition of product market or geographic market, not necessarily what was the deal they thought they could get through.

MR. ABUHOFF: I think that's a much preferred approach. The point about those agreements which have been in the news quite a bit with GE Honeywell in terms of what's the fall-back position, what are the issues. Those are sensitive subjects because I know there are companies that do not enter into these agreements because they're concerned they will have to produce to the government, giving their negotiating position away, I'm not blaming the government for that but I will say that's a bad result.

I mean, it's inefficient to have parties not entering into agreements like that. They ought to -- it's important they address that risk, and it doesn't necessarily indicate what is anticompetitive and what is not. It's just what is a reasonable business deal under the
MR. BERNSTEIN: Can I make just one suggestion for how to deal with this agent issue. Often if you come in with the list of agents early in the process, you sit down and talk to us about why did we have this agent, what did they do for us, we're usually able to narrow down the ones we are even interested in in the first place. So that's just one way to really cut back in that area.

MR. ABUHOFF: Fair enough. But that's all I had. Generally speaking, again I wish I had more specific suggestions. To get to the core of the problem, I think it's a matter of judgment and expression. And I thank you for the opportunity to speak.

MR. SIMONS: Thank you very much. We found that very helpful. And one other person has comments. Lauren Albert.

MS. ALBERT: Thank you for providing me the opportunity to speak today. My name is Lauren Albert and I am a partner at Axinn, Veltrop and Harkrider. I have a number of specific suggestions today for modifications to the second request process, particularly those relating to electronic discovery, and I will
probably repeat unfortunately what everyone else has said to some extent.

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

But it appears we've strayed from Congress's original intent and the second request process is now being used by at least some government lawyers as an opportunity to prepare for trial. As a result the second request process is far more adversarial than intended by Congress, and it provides a disincentive to keep people from complying with the second request and prohibits the process from being a productive and cooperative one.

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

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

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

MS. ALBERT: I ask the FTC do the same.
You have your Commission Practice Rule number
five, which says, I think it's rule five, meet
within five days of issuance of the second
request, and that's great. But what happens is
because you are in your adversarial mode and they're not forthcoming on their issues we're not forthcoming on ours either and we don't want to give you our argument if you are going to spend the next two months figuring out how to poke holes in them.

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

Now, as to my specific suggestions. One big problem is response time on modification requests, and I suggest 48 hours. What happened in our experience has been that we ask for modification. A week later we hear back from the staff only to ask more questions, not to give or grant our modification request. So what happens is we say let's just produce, it's just not worth asking for any modifications, and so we produce. It costs our client a lot of money but at least we get it done with.

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

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

Maybe there should be some rule book that
says these are the kinds of thing we are usually
willing to modify. Also, another problem we had
was, we would ask for a modification. We were told no, it's FTC policy, we never render modification, and we would say but we got that last year in another second request, and we were told prove it. So we had to find the file, which took another week, find the letter, fax it to you or to the FTC and then we were told sorry, you're still not getting it so . . .

MS. ANTHONY: Is that a true story?

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

MR. SIMONS: It happens in the reverse sometimes too. We never did that and we say well, what about...oh, yes.

MS. ALBERT: That partner is long gone, and which may be the case of what happened at the FTC.

MR. SIMONS: That's a matter of us talking to ourselves more.

MS. ALBERT: Electronic production. I know you have a whole symposium on that too. We just went through one of the most horrendous electronic productions in the history of mankind, so we have some suggestions for improving that. The first thing is that the FTC
have a group of electronic gurus. I think one of the problems we all have is we don't know enough about this. Designate a few techies to become the people who understand everything there is to understand about electronic production.

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

The second thing we found absolutely mandatory in electronic production was a search term list. And again, we have problems with the whole getting back to us on time process, so we ran our own search term list, which was then second guessed afterwards. So I think, you know, we do need to get it out there and do it up front so we don't have second guessing afterwards. But the problem is when you submitted it, the staff then come back and suggest corporate, sale, selling or dollar sign, which will be in every e-mail. That's not a
modification.

   So we have to come up with some kind of
ground rules for search term lists, and you have
to recognize that maybe you are going to miss
some documents, but that's okay because you will
still get 99 percent of them.

   But then you have to also be able to modify
the search material list as the process goes
on. And we can say look, we ran your search
term list and we got one percent were
responsive. Let's modify those three words out
because we're obviously putting up too many --

MS. ANTHONY: Lauren, I just want to
understand what you are suggesting here, that
the staff become involved in back and forth in
developing or would you rather do it yourself?

MS. ALBERT: I would rather do it myself,
but when that happened, then afterwards I
believe the staff asked for a list we get to
them, and they said oh, God, you didn't think of
this word, this word and this word. And I
didn't like the second guessing. I would rather
just do it up front. We can't run it more than
once. We were pulling e-mails from all other
countries, from people's laptops, home
computers, and you can't keep running different
search term lists.

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

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

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

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

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

And one of the issues was how to identify the document, if you have to Bates stamp them at a deposition or trial, and we suggest the following protocol: Each custodian's responsible to track documents that are produced on CDs, separate from documents, custodians. So there's John Smith's CD document and each CD is labeled Bates stamped with its own control number and his name and typed on Word Perfect, is it Word so you know what programs to use in opening it.
And then within each CD the title of PST file should be maintained, custodian's name and CD document control number. And then to identify it at trial or at a deposition you would, e-mail is identified by the document control number assigned to the CD produced, the custodian assigned to the CD and date and subject line of the e-mail.

So it's John Smith, CD number 123, so the e-mail Johnson is sent on number three, and electronic document not e-mail documents are identified again by the CD, the name but then within the CD it's the full path and file name on the document. So it's a little more complicated than Bates stamp but there are ways to identify each document.

Another suggestion other people have made is reducing the time, how far back in time you search. The second request usually require production going back four to five years, and unfortunately, probably more so after Arthur Andersen, clients are going to keep every piece of paper going back four or five years.

We recently searched 275 people's e-mails going back five years, which meant we searched...
through 12 million electronic records. And so what we suggest is, a lot of other people suggest, that you have control group and then either eliminate everyone else all together or just do them for a one year period.

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

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

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

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

And then on the continuing obligations requirement, I think Joe mentioned, this is just impossible to do with an electronic production. You are pulling out all the electronic productions out on your server, running your searches through it. It just can't be done. So my suggestion is you do 30 days from issuance of the second request and that's it.

That concludes my suggestions, and once again I thank you for giving me this opportunity. And I would love to be part of any future processes you have to streamline this process. If you are going to develop guidelines or anything, I would love to be a part of it.

MR. SIMONS: Thank you very much, and we do hope -- not hope. We are going to have some kind of output from this process. I think we
will have all this input. One of the things I wanted to specifically ask is I've heard Tom Leary said on many occasions when he was in private practice, I know other people do this too, they have a practice basically of trying to go through the second request process knowing in advance they're never going to comply.

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

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

But one thing I think you should do is if you want to call me or send me an e-mail and say I'm representing so and so in this case and we look
like we're kind of spinning our wheels a little bit in the second request process, maybe someone can take a look at it, and that doesn't have to get back to the staff.

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

So if we get some suggestion from the folks that are involved, that the natives should probably go look at this, then maybe we get a chance on it. Let's see what happens.

What else? There were a couple of things. The appeals. In terms of the backup tapes, what's kind of the experience been in the room, have folks had to do this or in the deals they've been involved in, what's about been happening. Bruce?

MR. PRAGER: Bruce Prager, Latham and Watkins. Most recently in the Libbey transaction, which many people are aware of, staff was extremely reasonable. The initial
request -- at least with respect to this issue of backup tapes. The initial request of course was written as broadly as it always is, and we found that in this case the company had totally independent servers, they did not have a centralized system.

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

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

And staff fairly quickly said forget it,
we're not going to put you to that. Now, we had
a couple of conversations with a few gulps and a
few nervous uncertainties on the part of staff
as to whether they were going to really forego
all of it. And in the end I think that they did
a reasonable job of weighing the imposition and
cost as against the burden and value and
ultimately just said forget it, we will do
without it unless we see something down the road
that indicates there's some gold mine that we're
missing.

And just to add a slight editorial comment to
that, in addition, to saying it was the right
decision, I think that it's reflective of the
fact that you don't really need all of what you
ask for in the second request. I mean, we can
quarrel about the outcome, but you successfully
prosecuted a preliminary injunction case in that
matter without having gotten any of those backup
files, and yet I can almost assure you if those
were paper files, people would have insisted on
going back the entire five years or whatever was in the request.

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

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

Let me just add a little definition of backup tapes. When I'm talking about backup tapes, there's two different kinds. There's searchable
tapes and non-searchable tapes, that is tapes that have to be restored to a system. I'm not talking about the searchable ones. Our view is basically we will negotiate those in the regular course. It's the ones that need to be restored.

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

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

MR. SIMONS: The suspense is just killing
me. What happened?

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

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

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

And that brings me to a frankly broader point, and I think it's a point that people have touched upon. And I think to some degree
mergers are not Microsoft and to some degree maybe they are. If Bill Gates has some comment to make about a deal he wants to do and I were you or Rhett or Steve or Barbara, I would want to know that, and I would want to use that and I understand that, okay.

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

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

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

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

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

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

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

But my frustration from having done this now on the outside of the government for almost 20 years is it's gotten worse continually. Every once in a while efforts are made to make it better. In the aggregate it is much, much, much worse than when I left the government. It's
much, much, much worse than the last time a 
reform effort was undertaken, and at some point 
it's necessary for the government to say enough 
is enough. We know we can control the process, 
we can pick the people whose files you search 
and we can control the specs, you can get it.

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

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

So it might be reasonable, I still would 
quarrel with it, but it might be reasonable to 
think to spec the documents this one relates to 
competition, this one relates to market 
definition, this one relates to entry. Even
then it's not that simple to do because a lot of
the documents relate to all of that, but the
problem is a problem --

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

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

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

MS. ANTHONY: Has there been an increase in
the volume of economic data or information
that -- I can say all this because I've only
been here for two and a half years, so over the
course --

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

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

MR. BYOWITZ: I think you are after Office
Depot, Staples. You are asking for far more
data from which you can do econometrics than
before. One of the problems is that I have been
involved in at least one case of which I can
think of in which we offered to come in early
and say look, what you are asking for is
unbelievably burdensome and you are not going to
be able to do anything with it, can't we talk to
you and figure out some mutually agreeable way
to reduce the burden. Absolutely not we
produced all the stuff. It was never used.

I mean, it was just a tremendous waste of
time, tremendous effort. We had a lot of
checking to make sure everything was right on
the data we're producing and all. I wasn't here
at the very beginning, I don't know if it was made here, but there was a suggestion made that the requirement to give it this way, cut the data this way, slice it that way takes an enormous amount of time. And unless you're omniscient going in, you don't know what you really need.

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

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

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

MR. BERNSTEIN: One of the suggestions raised before, and I would like to get your response to this, is to have the company's financial accounting people come in in the first 30 days and just explain how they keep the data because sometimes we draft something guessing on the way you keep it. So at least if we understood it before we did the drafting, maybe we could come up with something that would make sense.

MR. LARSON: And then compare that with the group of specialists in the agency who are familiar with this and what other companies are able to do, maybe share some of that across.
MR. SIMONS: Let me ask another question. What's the experience of the folks in here in terms of the DOJ is doing that they are doing particularly well and we are not doing?

MS. ALBERT: Not asking to produce by spec.

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

Bruce, did you want to say something?

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

Number one, I think that too much of the strategy throughout the second request and the investigation is dictated by litigation considerations. The staff switches from an inquiring mode to a prosecuting mode in my
perspective far too early in the process, which tends to solidify positions unnecessarily, and I find that that extends way more than I think is useful to the inner play or lack thereof of the economists.

MR. SIMONS: In terms of that, it becomes a matter of timing. And once the compliance is certified, then you got a limited amount of time, you got to get ready for court, so that we have to have some way to deal with that. And if you want to have more time to kind of be in the mode where we're not preparing for court. It's a problem in terms of well, gee, if you're going to certify in a short period of time, then it's hard to keep that off the minds of the staff lawyers.

MR. PRAGER: You're right. There's clearly a tension, and the fact that you don't have unlimited resources early on, the ideal in my view would be to have almost two separate groups in the staff. If you have some people working on the complaint and how they would put the case together but leave some other people who are supposedly untainted by that who are going to actually make the recommendation to your office,
regardless of whether the litigation team thinks they can win or doesn't think they can win.

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

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

In both of my recent litigation experiences the Commission has chosen not to put on its own econometric evidence but rather only to shoot to the econometrics that the parties uncovered. Whether it's fought or not fought, I think at least in the pre-litigation posture that if the
Commission is looking at econometrics and if they are looking at economic analysis, they ought to be willing to share that. I mean, the purpose here as I view it, and maybe even after 25 years of doing this I still have a degree of idealism that remains, is to try to get to an appropriate result.

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

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

MR. HUDSPETH: Steve Hudspeth, Coudert Brother. I had a question on translations, and I must say my recent experience has been you have been pretty good about dealing with that issue. We did have one situation in the past,
we took up every translator available in the free-lance base in the entire city. It is a problem, and obviously there's no document that we are going to turn over to you that we haven't already gone over ourselves with people who speak the language, who read it or have it translated ourselves. But doing the translation orally with somebody versus having it done in written form is a very different process and extremely tedious when it's done in the written format.

If it is possible even for us to provide independent people that will do translation of you sitting there and reading the document to you so you can decide as we have it's meaningless, put it aside, let's not get a written translation and focus on translating the ones that are serious and we need to be looking at would be very helpful.

MR. SIMONS: I want to thank you all for coming. The suggestions were really very well thought out and we really do appreciate your time and effort.

MR. ROONEY: We would particularly like to thank the FTC for making themselves available

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(301)870-8025
for a very useful session.

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

(Time noted: 1:32 p.m.)
CERTIFICATION OF REPORTER

CASE TITLE: WORKSHOP ON BEST PRACTICES FOR MERGER INVESTIGATIONS

DEPOSITION DATE: June 12, 2002

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

DATED: JUNE 13, 2002

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STEFANIE GERBER