

FEDERAL TRADE COMMISSION

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FEDERAL TRADE COMMISSION

In the Matter of:)
WORKSHOP ON ELECTRONIC RECORDS.)
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JUNE 3, 2002

Room 332
Federal Trade Commission
6th Street and Pennsylvania Ave., NW
Washington, D.C. 20580

The above-entitled workshop came on for
comments, pursuant to notice, at 2:05 p.m.

1 APPEARANCES:

2

3 ON BEHALF OF THE FEDERAL TRADE COMMISSION:

4 MICHAEL G. COWIE, Assistant Director, Mergers IV

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13 PANELISTS:

14 JANET MCDAVID, Hogan & Hartson

15 MARC SCHILDKRAUT, Howrey, Simon, Arnold & White

16 ROBERT COOK, Drinker, Biddle & Reath

17 JAMES W. LOWE, Wilmer, Cutler & Pickering

18 RICH KORBIN, Applied Discovery

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

2 MR. COWIE: Good afternoon. Good afternoon.

3 This is the first of seven merger best practice
4 workshops. This is a great turn out. We're also going
5 to have a merger remedies workshop on June 18.

6 The mergers workshops are a response to
7 criticism about the burden, the burden of the second
8 request process. We are seeking ways to reduce the
9 burden while at the same time ensuring that the FTC gets
10 the information it needs to make an accurate and
11 reasonably complete substantive assessment of proposed
12 mergers.

13 Today's workshop will focus on electronic
14 records. This session is being transcribed. We welcome
15 comment, including criticism, from all of you. If you
16 do you have input, we would appreciate you identifying
17 yourself and the company or organization you're with,
18 and you could stand up to share your remarks or you can
19 come to the podium, if you feel more comfortable that
20 way.

21 Leading this workshop on the FTC side is Greg
22 Brown, an information technology management. He has the
23 benefit of not being burdened with a law degree or
24 economics degree, so he could have some original
25 insights for us.

1 Bruce Hoffman is associate director for the
2 regions, and Dennis Johnson is an attorney in the Bureau
3 of Competition with substantial second request
4 experience.

5 MR. HOFFMAN: Well, hello, everybody. As Mike
6 said, this is the workshop that we're doing on
7 electronic records. What we wanted to do today was
8 discuss specifically kind of two aspects of the world of
9 electronic and electronic records and the second request
10 process.

11 And we've actually broken this down a little
12 more, but in general what we wanted to talk about was,
13 on the one, hand the impact of the increasing volume of
14 electronic documents including Email, word processing,
15 spreadsheets, presentations, databases, et cetera, on
16 the process for complying with the second request,
17 including how people search for records and obtain them
18 and some of the issues that have seemed to come up with
19 increasing frequency in the actual production process.

20 So on the other side of the coin of the
21 electronic records is how -- or really not so much
22 records but the role of electronics is how people
23 produce things to us, i.e., the format a document
24 originally existed in, whether electronic or paper, how
25 we're getting it in terms of producing by way of

1 electronic image or by file or paper production of
2 electronic documents, electronic production of paper
3 documents, whatever it may be.

4 Our goal here today is to listen to your input.
5 We've identified some specific sub topics. I think
6 we've now reduced it to three that relate to these
7 issues, so what we're going to do is quickly outline
8 those, kind of lay each of them on the table.

9 And then after we introduce these general issue,
10 we're going to turn the discussion over to you, starting
11 by calling on some individuals who we know have had some
12 recent experience with these issues, who we asked to
13 come here today to share some of their thoughts on these
14 documents and then opening up the floor to a more
15 general discussion.

16 And then we're going to try to hold each topic
17 to about half an hour. We have about an hour and a half
18 or so.

19 As Mike said, when you speak, please identify
20 yourself so that we know and so that the court reporter
21 can keep track of who's talking so we can get all this
22 transcribed, and we can then use it in the future to try
23 to hopefully get some good outcomes and make our process
24 work a little bit better.

25 Let me briefly introduce folks who we've

1 specifically asked to prepare to address these
2 topics: Janet McDavid from Hogan & Hartson; Marc
3 Schildkraut from Howrey Simon; Bob Cook from Drinker,
4 Biddle; Jim Lowe from Wilmer Cutler; and Rich Korbin
5 from Applied Discovery.

6 With that note, let me go ahead and introduce
7 our first topic, which is the impact of electronic
8 documents on the search process, and after I
9 lay it on the table, I'm going to ask our five sort of
10 starting speakers to share whatever thoughts they may
11 have, and we'll see if we have something to add.

12 This general issue is: How should parties
13 search for electronic documents? I don't think it's a
14 secret here obviously that the second request process
15 has generated or appears to be generating in some ways
16 almost exponentially larger productions because of the
17 fact that people have exponentially larger sets of
18 documents lying around and most of those things are in
19 the forms of various kinds of Email word documents, et
20 cetera, that people store that are very hard to get rid
21 of.

22 Searching for these things, as you all know
23 better than I, can be really difficult, and it raises
24 sort of the question of do you do it by term searches?
25 Do you do it by physically reviewing everything that

1 exists on a company's servers? How do you physically go
2 about finding the documents, and what should the role of
3 the Commission be?

4 And that one specific issue that comes up, if a
5 party wants to do a term search as opposed to reviewing
6 every document that appears on his server and in the
7 hard drives of laptops of its employees, should the FTC
8 be proposing the terms or granting formal modifications
9 of the second request to specify that searches conducted
10 using certain protocols, certain systems, certain terms
11 will be substantially compliant, or should the FTC
12 simply review the terms and point out deficiencies
13 without saying anything else about it or have no role at
14 all?

15 All these things have almost an infinite number
16 of possibilities, and having set that out on the table, I
17 would like to now turn it over to our first set of
18 speakers to say what they may have to say about this
19 aspect of the electronic documents, if anything. I
20 don't know if you all have any particular order you
21 would like to go in.

22 MR. COWIE: Why don't we hear from Marc
23 Schildkraut from Howrey Simon.

24 MR. SCHILDKRAUT: I think in my experience, we
25 have done this three different ways, and I tried it a

1 fourth way, and that hasn't worked.

2 Three different ways that I think I've done this
3 is, one, I've just had everything printed out, and it's
4 then reviewed as a document. The problem, of course,
5 with that is the expense. In some cases the expense has
6 been absolutely enormous to do something like that.

7 The second way I've done it is have essentially
8 staff attorneys basically review everything on screen.
9 If we have the software that's capable of doing that, we
10 can then select off the screen and, in fact, give it to
11 the FTC in electronic form if necessary.

12 The third way I've done that is, I've done this
13 once, it wasn't in a merger matter, is I essentially
14 said, I will just give you all my Emails and I'll give
15 you a search engine and I'm not even going to search for
16 privilege, and it's a small company. They didn't have a
17 lawyer in-house. There wasn't going to be much
18 privilege anyway, and I just gave the FTC three
19 gigabytes of data, and they can do whatever they want
20 with it.

21 The fourth way I proposed. And I've never had
22 anyone accept this, is we come up with search terms that
23 the FTC would agree to and I was -- I've been unable to
24 get the FTC to come up with those search terms, and I'm
25 unwilling to take the risk myself of doing something

1 with search terms, so I have to -- you have to do a full
2 review under the circumstances of all the Emails.

3 A substantial problem with most of these
4 approaches is duplicates. If you send an Email out, an
5 Email can go to 20, 30 people at a time. I never
6 attempted to eliminate duplicates, but it turns out that
7 that means that the FTC is getting potentially hundreds
8 of thousands, I guess in an extreme case, I haven't
9 counted -- it could be millions of documents that are
10 duplicates.

11 MS. MCDAVID: This is Janet McDavid Hogan &
12 Hartson. We have used the two techniques that Marc
13 described first. I've never been willing to try the
14 third because of the issue of privileges. Most of my
15 matters have involved companies with in-house counsel or
16 had other ongoing litigation, and I don't want to risk
17 waiving the privilege.

18 We have proposed using search terms, and it's an
19 irony that here we have a giant database capable of
20 being searched by term in a way that might reduce the
21 burden on both the company and on the staff, and we've
22 never been able to arrive at a way of doing so.

23 We proposed search terms for staff and offered
24 them to allow whatever terms they would like. In one
25 recent matter we estimated that it would have reduced

1 the burden of Email production or the volume of Email
2 product by approximately 25 percent.

3 But I agree with Marc that in the absence of
4 agreement I essence on the part of staff that this would
5 constitute substantial compliance, no one is prepared to
6 take that kind of a risk so one will have to go back and
7 do the search again.

8 MR. COWIE: All right.

9 MR. COOK: This is Bob Cook Drinker, Biddle. I
10 guess my experiences are very similar. One thing that
11 we found is that the practice of actually searching can
12 have a big effect on the ways of searching.

13 There's two ways of searching someone's E mail.
14 One is get a bunch of people in a room with computer
15 screens and read it to see if it's responsive. That
16 ends up being much more time consuming than having the
17 person there helping you go through the Email.

18 It's very difficult to get that kind of
19 involvement in other types of electronic documents
20 because you know if you have folders where you have X
21 subject and it has nothing to do with the subject on the
22 second request, it's highly unlikely that -- you can
23 certify. If you as a person can certify that that's not
24 responsive, then you don't have to go through every
25 document in that folder.

1 And then whereas if you have just people coming
2 and looking at your Email, they have to look at every
3 document in there in order to determine if it's
4 responsive, and that ends up being a huge burden and
5 then in the system, increases the number of documents
6 that have to be processed and searched for things like
7 privilege, which can again increase. Having to search
8 for privilege increases the burden tremendously in
9 complying with the second request.

10 So every document that is put into the system
11 must be reviewed by somebody to determine if it's
12 privileged. If it were not for that, I think it would
13 be an easy matter to go ahead and just produce
14 everything, so that every extra document creates this
15 extra time, and it ends up being a huge burden and a lot
16 of I guess friction in a sense in the engine to make
17 people produce documents that don't have to be produced
18 and arguably are necessary.

19 MR. COWIE: Am I understanding you three
20 correctly that we should think more flexibly about
21 accepting Email productions based on defined search
22 terms? Is that what you're proposing as a solution to
23 this problem?

24 MR. SCHILDKRAUT: I don't know that there's any
25 one solution to the problem. I think search terms are

1 important, are one potential way to go. Another way to
2 go is simply to cut down very substantially on the
3 number of people who's Email you're going to look at.

4 You can only look at so many people's Email in
5 any event. I mean, I think if you just try to cut that
6 down in terms of number of Emails, people's Emails
7 you're going to look at, you will cut down radically on
8 the size of the second request response.

9 MS. MCDAVID: You could also significantly cut
10 back perhaps on the time period covered for Emails
11 without cutting back on the time period for other
12 textual sorts of documents.

13 For example, for strategic planning documents,
14 it may be perfectly reasonable to go back for a longer
15 period of time. Emails tend to be much more likely to
16 become stale since they tend to deal with ongoing
17 current events, so you have a shorter search period. It
18 might also significantly reduce the burden, although I
19 do endorse Marc's notion of reducing the number of
20 custodian searches.

21 We have also had some recent experience in using
22 technology to de-duplicate E mail production files, and
23 only to eliminate absolutely identical Emails because as
24 has been pointed out, the exact same Email will show up
25 in the files of every recipient either as a to or cc or

1 even a BCC, and that reduced production in one estimate
2 by as much as 30 percent but at some fairly significant
3 expense.

4 MR. HOFFMAN: My question about that, Janet,
5 is: Does the benefit to you, of the parties, of
6 producing duplicate justify the cost that's involved?

7 MS. MCDAVID: I don't know the answer to that,
8 Bruce. I think it's quite possible.

9 MR. SCHILDKRAUT: There is one reason with me --
10 I've never done it, but there was one reason we thought
11 of doing it, and it's an ironic sort of reason. If you
12 have 20 Emails saying the same thing and it's a
13 privileged Email and you have different people reviewing
14 for privilege, you could stop the 19th time and 20th
15 time, it will still get through, so that's the reason
16 we've actually thought of doing it. It has nothing to
17 do with the money.

18 MS. MCDAVID: Plus you have to log it 20 times
19 on your privilege log.

20 MR. LOWE: Jim Lowe from Wilmer Cutler. We've
21 had experience de-duping where it was about a 30 percent
22 cut as Janet said, and in a large production the most
23 expensive thing is the reviewing time. People are more
24 expensive than the technology, and it is therefore --
25 you can save a lot of money for the parties in review

1 time and obviously the privilege issue that Marc and Jan
2 raised.

3 The issue that was raised to us by the staff,
4 and we ultimately didn't do it, was the issue of being
5 able to find documents for the individual who sent them
6 because you don't know which copy is going to get
7 re-dupped and which copy is actually ultimately going to
8 be reproduced.

9 At least the output, the output is a recoverable
10 problem because the medi-data is readable, and
11 indexable, so you can simply create an index from all
12 Email from X person even if they're showing up in Y
13 files. Particularly if you're producing electronically,
14 that information will be available to the Commission.

15 MR. BROWN: I think when we're talking about
16 duplicates, I want to mention, everybody has to be
17 talking about the same thing, and to just throw out the
18 term generically duplicate, I don't think it is
19 necessarily accurate to say the text is the same and
20 that electronic message is the duplicate.

21 I think there are some vendors here probably
22 that may be able to speak to that. At some point we can
23 talk about what truly -- what are we considering when
24 we're saying it's a duplicate. Are we saying it's the
25 same text? Are we saying the medi-data throw, that out

1 and we're just looking at the text, the relationships,
2 the time at which someone may have opened an Email?

3 Those may or may not be factors, but we should
4 at least make sure that we're talking about the same
5 things when you get to a discussion.

6 MR. COOK: Well, our experience de-dupping is
7 the same, but sitting hear listening to this
8 conversation, I think there may be another way of
9 addressing the Email, and I reserve the right to say I
10 was completely insane when I said this because it just
11 came to me.

12 But for people who are not at the highest level
13 of the organization, this same technology that allows us
14 to de-dup would allow you just to produce for lower down
15 people the Emails that were to or from or copied to
16 certain people within the organization rather than all
17 Emails they have because frankly the Email traffic among
18 people that are three or four tiers down within say the
19 sales organization is not going to be necessarily very
20 probative on an antitrust matter.

21 It's going to be the stuff that get circulated
22 higher up, and that may be a way of filtering
23 information without having to rely on things like search
24 terms that make people uncomfortable.

25 MR. JOHNSON: What you're saying is to do

1 something like Marc Schildkraut was suggesting,
2 basically reduce the number of people you're searching
3 for.

4 MR. COOK: Even if you didn't completely reduce
5 the number of people, you could search completely the
6 top level of the organization, and then for levels down
7 you could take only the Email that has someone at the
8 top level of the organization or one of your key people
9 that's been selected in the negotiating process, only
10 those Emails and not Emails that involve persons who
11 aren't on the hit list assuming that the hit list has
12 been agreed to.

13 That would be a way of reducing the amount of
14 raw Email that was produced and has to be processed.

15 MR. COWIE: We have a question from the back.

16 MS. LLEWELLYN: My name is Virginia Llewellyn.
17 I'm a colleague of Rich Korbin Applied Discovery, whom
18 you introduced.

19 I think the thing that's interesting about this
20 conversation is the fact that something that surprises
21 me -- actually it sounds like a lot of people having
22 this discussion have already made that leap from talking
23 about paper document review to talking about some form
24 of electronic review, and the type of service that a
25 company like ours provides is well the state of the art

1 technology that allows the review team to get through
2 this information much more efficiently than the old
3 paper review but also accomplishes some of the things it
4 sounds like you're trying to accomplish with what is
5 sort of a halfway there electronic review, it sounds
6 like.

7 And certainly correct me if I'm wrong, but it
8 sounds like most of the people in the audience who are
9 trying some form of electronic review are doing that in
10 the native format, of the file type, so I think Outlook
11 Email is the most common example. A lot of people use
12 that in a Microsoft program and try to use the
13 functionality or the features of that software to get
14 through the review. Now, I think that that's one step
15 further than the paper review, but it still presents a
16 lot of problems.

17 The real state of the art technology would
18 encourage you to review all file types no matter what
19 type of document it is, whether it's an Outlook Email, a
20 Word document, an Excel spreadsheet, no matter what it
21 is, review all those electronic file types in one
22 standard format.

23 And the most common format and the format that's
24 accepted by courts, should you have to go to litigation
25 at one point, is PDF, and the good thing about

1 searching, and the reason that's really relevant to this
2 first topic that we're discussing, is the fact that PDF
3 preserves 100 percent of the text of every original
4 document.

5 It doesn't matter whether it's an Email, a memo,
6 a letter, a spreadsheet. It doesn't matter what it is.
7 You can search all of that material very quickly with a
8 sophisticated search engine. You can search the
9 medi-data. You can search the text. You can narrow
10 down the scope of the documents you have to review very
11 quickly by simply entering a search term and pressing a
12 button instead of conducting a manual review.

13 So while certainly it's ideal to narrow the
14 scope of the custodians you're looking at, narrow the
15 scope of the time period, the fact is the technology
16 exists to really allow you to do that much more cheaply,
17 much more efficiently than a lot of the processes that
18 are currently in use.

19 MR. COWIE: In that regard, let me assert a
20 proposition and invite some you out there to tell me why
21 I'm wrong or oversimplifying things. It appears to be
22 the case that companies for risk management reasons are
23 becoming more effective in forcing employees to delete
24 Email.

25 Companies are getting better at imposing

1 involuntary record retention systems. As a result,
2 we're often confronted with situations where a company
3 has only two or three or four months of Email.

4 At the same time, it seems like a number of
5 companies have relatively sophisticated back-up or
6 storage systems. Sometimes these are situations where a
7 company is essentially taking a picture of all the Email
8 at different points in time.

9 So we might be gathering fact pattern where we
10 evaluated a second request negotiation and we see the
11 company has two or three months, only two or three
12 months of live Email. Yet they have two or three years
13 of information on back-up or storage tanks.

14 That being the case, it seems rational if not
15 perfectly sensible for the FTC to insist on looking at
16 the storage records as well as live Email. Is there
17 something flawed with that approach?

18 MR. SCHILDKRAUT: Well, Marc Schildkraut. It's
19 the cost. Most of the time over the last I would say
20 half dozen years, the FTC and the DOJ has not required
21 search of the back-up systems because every time I've
22 gone through this, the cost estimates of what was
23 required to do that are absolutely enormous.

24 This requires restoring back-up tapes, then
25 reviewing those back-up tapes and what you have when you

1 have back-up tapes some people are doing back-up tapes
2 once a day, some once a week, once a month, and they
3 have to rest the system so you may have daily back ups
4 for 30 days and then monthly backups and then semiannual
5 and things like that.

6 You get, first of all, an enormous amount of
7 duplication because people haven't deleted things from
8 their system and it's backed off every day. You can
9 have the exact same chain of Emails 30 days in a row.
10 The last time I had to go back ups and go to the back-up
11 tapes, the company had multi years of back-up tapes.

12 I had to build a computer center, of course,
13 several million dollars. I had 30 to 40 computers in
14 that center. I had 30 to 40 people manning those
15 computers continually, and their only job was to push a
16 button that basically said print, and it then went to
17 hundreds of staff attorneys in order to review that
18 information, most of which was going to be duplicative
19 of other information.

20 The good news is people don't do that much
21 anymore. It tends to be the case now that when I talk
22 to companies, they only have about 30 days worth of
23 backups, and the purpose of the back-up is essentially
24 to restore from a catastrophic loss, not to create an
25 archive so that people can go back to these back-up

1 tapes in almost all systems.

2 People find Emails that they want to save, they
3 can save them themselves to their hard disk, and those
4 we've always offered to provide to search if people had
5 thought it important enough to save a particular Email.

6 The extent of doing back ups is just so enormous
7 I find it hard to believe that the benefit for the FTC
8 is great enough to force that cost on people.

9 MS. MCDAVID: Let's remember that this is not a
10 cartel investigation. We're talking about a merger
11 investigation, so let's keep it in context. All the
12 points that Marc made are absolutely valid.

13 The issue of back-up tapes comes up not just in
14 the circumstance you've posited, Mike, but also in the
15 situation in which the company has purged its Emails,
16 has Emails going back a year, two years, three years,
17 and you can understand that the back-up tapes are a
18 great big bin into which everything for that time period
19 has been thrown, not just the Emails of the 35
20 custodians that you want to have searched but
21 everything.

22 And therefore you first have to restore the
23 back-up tapes and then go through the process of
24 identifying the custodians whose data are on those
25 tapes.

1 There also have been, in my experience, fairly
2 significant technological problems in restoring these
3 back-up tapes adequately. In at least one instance
4 where a client attempted to restore a back up tape, they
5 found to their horror that they didn't actually contain
6 anything usable after some significant expense of
7 attempting to do so.

8 MR. JOHNSON: The back-up and archive issue is
9 sort of the second topic that we wanted to get into
10 here, and it's already been sort of introduced, but let
11 me try to lay out in general the issues we would like to
12 have people focus on here if we could.

13 With the increasing prevalence of back-up and
14 archive copies of electronic materials now, along with a
15 wide variation among companies and document preservation
16 policies, what we would like to try to figure out is
17 what the Commission's general approach should be to
18 letter searches of back-up and archive materials and in
19 particular what kind special or unusual circumstances
20 might warrant a departure from those general approaches
21 one way or the other from whatever they might be.

22 We would be interested in focusing you on how
23 the Commission should evaluate party claims and value of
24 expense. Clearly you've indicated those are issues we
25 need to be thinking about clearly.

1 We would like to know how likely it is important
2 information will exist only in back-up tapes or are
3 they -- is the information accessible in other -- in the
4 regular files as well, and are there approaches that can
5 account for both the parties' interest in avoiding
6 unnecessary burden and expense in this regard and the
7 Commission's need to make sure it has access to all the
8 important information and documents that we need?

9 Just on a related note, we would be interested
10 in finding out how the Commission should handle
11 situations where a party -- at some point in the
12 relatively recent past we upgraded or changed its
13 information system resulting in some documents that had
14 data that resided only on legacy systems rather than on
15 existing system.

16 Bob?

17 MR. COOK: This is Bob Cook. I would just give
18 you my opinion on the back-up issue, and I would think
19 the legacy system issues are very similar, similarly.
20 All that's really appropriate I think in the second
21 request context, my opinion, is to have a tape or a
22 closed set of tapes that should be maintained.

23 There may be back-up tapes. There may be
24 hundreds of back-up tapes for various systems within a
25 company. It's not practical to search them. It could

1 never happen. And there are -- the real interest to the
2 investigation is an uncovering I think things that are
3 related to the transaction in the second request context
4 because if in the ordinary course of business people do
5 not maintain a certain type of document, that wouldn't
6 be preserved anyway, and it's part of the document
7 retention policy that all companies have.

8 It's reasonable to want to go back at some point
9 and look for it, and that's why maybe a monthly back-up
10 tape, whatever the main back-up tapes are, to have those
11 preserved, but to require companies to stop overriding
12 any back-up tapes on an ongoing basis could be very
13 burdensome as far as the cost of the tape itself.

14 And the new back -- the new Email, people aren't
15 generating Emails once the second request goes out that
16 say, Let's increase price and reduce output, so it's
17 really only for a second request. Documents that are
18 immediately prior to the antitrust lawyers getting
19 involved are really the only ones that could possibly be
20 interesting in my opinions, and measures to have huge
21 document retention obligations or huge searching
22 obligations other than that I think are simply adding
23 cost.

24 MR. HOFFMAN: Let me try to make sure you're
25 trying to propose -- you're saying, what we ought to be

1 doing is whether it's in tape form or whatever mag tape
2 or whatever the format is, whatever the last snapshot is
3 prior to the HSR filing, you just kind of hold on that
4 while the company goes ahead with its standard practice
5 of reviewing further archives as part of second sweeps.

6 MR. COOK: Typically these things are rotated.
7 You might have 12 tapes that you rotate through a month
8 or through a year, so you wouldn't jump in necessarily
9 right away. You would still have the grace period
10 because that snapshot would be preserved because you
11 would be overriding the one from before you even
12 considered the transaction the day say before the second
13 request was issue the day after.

14 MR. HOFFMAN: You're talking about physically
15 removing that tape.

16 MR. COOK: You have to take it on the rotation.
17 These tapes aren't cheap because in itself, but because
18 that's burdensome but less burdensome than trying to
19 store an entire company's Email system.

20 MR. HOFFMAN: You said your proposal is a search
21 -- that it's not required to substantially comply.

22 MR. COOK: I would suggest not. I would suggest
23 that it would be more appropriate to have it available.
24 If, in fact, litigation commences it would be necessary
25 to do the discovery.

1 MS. MCDAVID: It seems to me that the
2 presumption should be against back-up tape restoration
3 absent some extraordinary circumstance that justifies
4 some deviation from that presumption.

5 MR. COWIE: Janet, this is Mike Cowie again. It
6 sounds like we're hearing two reasons for the
7 presumption. One is you suggested that Email should be
8 used only for cartel investigation.

9 MS. MCDAVID: No, I didn't suggest that. I said
10 remember that this is a merger investigation, not a
11 cartel investigation in which you're looking for
12 evidence of coordination between the companies.

13 MR. COWIE: The implication is that Email might
14 say, Meet me in the hotel room so we can fix prices, and
15 for a merger investigation we should be less interested
16 in that kind of chatty Email type conversation. That's
17 the premise that we might pause to consider.

18 Arguably people are using Email today to make
19 presentations to senior management, to make high level
20 sales pitches to customers, to summarize expansion
21 plans, so that's one issue, how are people using Email
22 and is Email merely something we should use for cartel
23 investigations or are they pertinent to mergers
24 investigation?

25 MS. MCDAVID: I never said use it only in

1 cartel. You're being a good litigator, but you've
2 misconstrued what I said. What I said was let's just
3 remember the context here. This is not a criminal
4 proceeding.

5 The point I made was that Email tends to be more
6 time sensitive and are less likely to be the place in
7 which a company will memorialize truly important
8 business discussions, which are more likely to be found
9 in other kinds of the electronic or written documents.

10 And under the circumstance, I didn't say ignore
11 Email all together. I said try considering a shorter
12 time period for your search for Email than you might
13 have for a three-year time period that is the norm for
14 document production in response to a second request.

15 MR. COWIE: Janet, your view has been stated
16 repeatedly by others to us as well, and I certainly
17 don't intend to minimize its importance. There is a
18 serious view for merger investigations we should be
19 focused on data, not Email. I think that is something
20 worth considering.

21 The other reason I heard for presumption
22 articulated by Marc Schildkraut is just the cost, is the
23 cost. It's too costly to do back-up tapes. That seems
24 to be an empirical question.

25 I would be interested in hearing from any

1 vendors or Greg Brown, from Greg Brown or anyone else
2 that has any input in this data empirical question.

3 MR. KORBIN: Rich Corbin for Applied Discovery.
4 What we typically see for back-up tapes ranges in a
5 thousand dollars per restoration of the tape. It can
6 take longer obviously depending on hourly billables that
7 are in systems.

8 One of the things you have to keep in mind
9 though is that back-up tapes are not just for Email.
10 They're also for the server, and the server could
11 contain all different kinds of lose files which would be
12 Word documents.

13 A lot of people do back-up their information not
14 to much on their local hard drive but on the server of
15 the company, so it's just Emails. Keep that in mind.

16 I do agree with Bob Cook though that it's not
17 necessary to go back and look at all the back-up tapes
18 for a year. What we typically do in our cases is we do
19 weeklies and we can de-dup off. If you're doing
20 dailies, you're just piling Emails on for a new day on
21 top of that last back-up tape.

22 And we can go and take off all the old data so
23 you're only getting the new data off of that new back-up
24 tape so we recommend to our clients to do it about once
25 a week or if they're going back six months, do the

1 monthly tapes but usually that cuts down the cost and is
2 more sensible to the clients.

3 MR. BROWN: I would like to mention I think in
4 general we've had these discussions of burden, and we've
5 run across a situation where there is a claim this is
6 too oppressive a task to take on. It's been my
7 experience that we do go through some level of
8 negotiation in trying to reduce the cassette tapes,
9 trying to target a particular time frame that may give
10 us the snapshot that we're looking for.

11 Ultimately you have to have knowledge of what an
12 organization's policies are, what their retention
13 policies are, what their back-up policies are, what
14 their disaster recovery plans are if you're going to
15 make the genuine effort at negotiating some of this
16 burden down, and I would just like to say that many
17 cases are unique for a variety of reasons, but the most
18 important thing to me would be that in the process, that
19 the IT people responsible for these back-ups or
20 responsible for the underlying support services for the
21 organization could talk with the IT people here and come
22 to an understanding of what is possible, what is
23 reasonable, what maybe can get us to this point together
24 where the agency can feel confident that they are
25 getting the data they need to perform the investigation

1 and the burden that is placed upon the parties to
2 minimize as much as possible.

3 MR. LOWE: Jim Lowe again. I want to address
4 the latest question because we haven't touched on this.
5 In the post Y2K situation, we have a lot of companies
6 that completely switched out their systems in a
7 relatively recent period of time, and in many cases we
8 have found there are no people left at the company that
9 know how to operate the prior systems, and those systems
10 are not available to the company either at all or
11 certainly not in the ordinary course.

12 And I think that the Commission should be --
13 should very rarely and even then have thought very
14 carefully about asking for people from systems where the
15 computer does not have access to those terms in the
16 ordinary course, namely that for them to restore them
17 for themselves could be enormously burdensome. That is
18 asking a tremendous amount of the company to restore
19 those systems when they would not have access to that
20 data anyway because they no longer have the employees or
21 the systems to locate that data themselves.

22 They just are pack rats and happen to keep tapes
23 around from a preexisting system which for whatever
24 reason, I think many of us have found that companies do
25 even when you say to them, why did you keep the tapes

1 and they say, because, and there is no reason.

2 And I think that that same question goes in some
3 way as to the back-up tapes. There is increasingly a
4 distinction between back-up materials that are available
5 depending whether you want to call them a hot site or a
6 semi hot site which is intended to be backups that are
7 available to restore the system should there be a
8 crisis.

9 Of course back-up tapes that are stuck in some
10 warehouse somewhere do require often more burden to load
11 than the stuff that is back up for a hot site or
12 equivalent set up, and there may be substantially
13 different costs in those things and some explorations
14 can be done of that.

15 I agree with the notion of having the
16 conversation very early between technologically
17 knowledgeable people rather than the lawyers can be very
18 useful to get this resolved, but it does not to get
19 resolved.

20 And one of the things Marc and Jan was getting
21 at earlier, one of the reasons why a number of us have
22 not tried the search term method is that the notion of
23 negotiating for a long period of time over the search
24 terms without any clear notion that we'll be able to
25 reach agreement, and meanwhile time is passing, it is

1 simply not worth it to most of our clients to sit there
2 and spend that time.

3 They would rather go ahead, print the stuff out
4 and have us review it than have us say, We don't know
5 whether we can reach agreement on that, and it may take
6 three or four weeks to have this discussion. That will
7 never occur unless the Commission is prepared to make
8 decisions and put them on people and say, We are going
9 to stand by this in terms of substantial compliance.

10 MR. COOK: Following up on that, this is Bob
11 Cook again, it's important to remember when we're
12 dealing with electronic documents that the pipeline
13 takes longer for the documents to go through before it
14 gets to the Commission because more processing is
15 involved. Paper actually you can go through pretty
16 quickly once you collect it and copy it and reviewing
17 papers and having people review it and then producing it
18 on paper. That probably could be done in a week to ten
19 days relatively easily.

20 The pipeline for electronic stuff could be done
21 in maybe ten days to three weeks. It takes maybe two
22 weeks. It takes longer. You need really -- often you
23 get accommodations on what I call the 14-day refreshment
24 rule in the second request because it can take longer to
25 process documents electronically and prepare them for

1 production in electronic format if you're doing that.

2 And it's also more cumbersome to make changes
3 midway, so once you start talking about not knowing when
4 you start what you're going to be doing can get into
5 more trouble when you're dealing with electronic
6 documents even than you do with paper.

7 MR. HOFFMAN: Let me turn back to the search
8 terms again for a second because we sort of went around
9 that a little bit. There's a lot of advocacy for search
10 terms, and I've seen cases recently where search terms
11 have been used with varying results but I would ask this
12 to everybody.

13 Obviously with second requests there's
14 information asymmetry between what the parties know and
15 what the Commission staff knows. We deal with that when
16 negotiating scope of search by people, by focusing on
17 people whose titles we can recognize and talking to the
18 parties about what they do and so on and so forth so
19 that a relative short period of time and also with
20 additional industries that we're more familiar with, for
21 example, in theory we ought to be able to reduce the
22 scope of the search pretty quickly and pretty
23 effectively.

24 Term searches to me seem to be a little more
25 difficult in that regard because particularly as the use

1 of electronic documents and Emails has mushroomed, the
2 terms that people use to describe things have changed
3 pretty fast, and I don't have a lot of confidence that
4 we have a great deal of understanding about the internal
5 terminology that we use to describe things, and for
6 example, where parties refer to their rivals by like
7 their stock ticker symbols and stuff like that and you
8 have a very difficult time thinking of a term search
9 that would come up with critical documents.

10 On the other hand, it seems to me that a
11 physical review of a number at the gigabyte set of
12 servers every single time you do second request would be
13 pretty burdensome. How do we reconcile these two
14 things? How do reapply the lessons we've learned about
15 scope of search reductions for people to come up with
16 some methodology for using term searches that we can
17 live with that wouldn't put large risks on the
18 Commission? We would be agreeing to things that we
19 really frankly would have no way of knowing whether we
20 were after it or not.

21 MS. MCDAVID: Certainly one possibility which is
22 also relevant to all of the negotiations or the scope of
23 the second request is the extent to which the parties
24 have been cooperating with the staff prior to the filing
25 and prior to the 30 day waiting time.

1 If the staff has been given a lot of data by the
2 companies during that period to get them down the
3 learning curve, then they are in -- they are in a
4 position to agree on a set of terms than they would be
5 if they were totally in the dark, and anything in
6 between might be possible, but in a circumstance in
7 which there has been production from a substantial
8 number of documents in advance, witnesses may have been
9 available for interview, counsel have been available on
10 the phone along with business people, over the 30-day
11 time period, it seems to me to be more reasonable to ask
12 staff to add to a set of search terms.

13 Bob made an interesting point, which I think we
14 didn't hadn't focused on here and that is 14-day
15 refreshment rule. That is a bigger issue for electronic
16 documents than it is for hard copy documents. If you
17 from a requirement to refresh your search, which is
18 something that I also find fairly objectionable in
19 circumstances in which we are undertaking production of
20 documents, but let's park that for a moment.

21 You can leave a box on the executive's desk and
22 tell them to put things in it as things happen over the
23 period between when they were searched and when you have
24 the refreshment, you can't do that with electronic
25 documents unless you ask them to print everything so it

1 requires revisiting the clients' offices and researching
2 their files at significant additional expense and cost
3 and time and it's certainly something you should take
4 into account in terms of the refreshing requirement of
5 electronic input.

6 MR. COOK: On that 14-day rule, I have twice at
7 least been able to convince people here at FTC and also
8 the DOJ that if we're going to do a rolling production,
9 which is better for the agencies but it's more costly
10 but it's cheaper to do it as one production, then it's
11 reasonable to say once I produce Jane Doe's files and
12 they're complete and fresh, when I produce them then,
13 that I shouldn't have to go back and research Jane Doe
14 although there may be certain people within the
15 organization that they're going to want refreshed.

16 I mean, I personally think that few people start
17 to create nasty Emails and documents after the second
18 request goes out so I'm not sure if it serves a great
19 function anyway. It might be for the top three people
20 in the company, but I'm not sure that that's a really
21 useful thing. It's probably more of a hardship.

22 MS. MCDAVID: There probably needs to be some
23 understanding that compliance would be in a reasonable
24 time frame so all production is reasonably fresh, but
25 under those circumstances I agree with Bob completely,

1 and in fact the merger process handbook that the ABA
2 wrote with the assistance of the agency describes this
3 no requirement to refresh as a modification that is
4 routinely granted but it is is an act.

5 MR. LOWE: In response to Bruce's question, I
6 think one of the things that the Commission might think
7 about is identifying certain people in the search group,
8 particularly lower level people that it is willing to
9 accept search terms searching for because those people
10 are less likely to have responsive Email or that any
11 Email they may have that is of import from a perspective
12 of the investigation would be found in the Email of
13 higher level individuals where you might not accept
14 search term searching for those individuals.

15 But it's important to note and this is the
16 context of the back-up tapes. The burden on the Email
17 is not the production of the Emails. It's also in the
18 review of the Email for responsiveness and privilege
19 where enormous expense comes in, so the effort to reduce
20 that not only reduces the volume of paper that the
21 Commission gets which as people noted here is often in
22 the Email case duplicative across all the individuals in
23 the search group, but also reduces the volume of the
24 paper for both sides to deal with at the end of the
25 process.

1 MR. HOFFMAN: Recognizing that, it sounds to me
2 like what the general consensus is for Commission staff
3 to be willing to agree to a modification along the lines
4 if you run a search in your database, whatever form it
5 may be, using the following terms and connectors and if
6 you need some software to run the search because you
7 have cross platform searches, that sort of thing using
8 this software, that would be deemed substantially
9 compliant without regard to what you might find.

10 In other words, it's kind of a methodological
11 search that says even for example -- the underside of it
12 is if we were wrong about these terms, and we have
13 missed huge categories of important stuff, that's okay,
14 you're still going to be in substantial compliance.

15 There is a significant risk there. I think what
16 Jan is suggesting is a way to alleviate that risk, but I
17 have some question about how well that will work, and I
18 would like to get as many people's thoughts on that as
19 possible.

20 Another possibility is to say the Commission can
21 take the position -- staff lawyers can take position on
22 particular transactions that this is kind of be at your
23 own risk type method which I know has generated some
24 negative feedback, so far but I want to hear more of
25 about this.

1 We won't rule out a term search and if you feel
2 reasonably comfortable, the parties feel reasonably
3 comfortable you're going to capture the bulk or
4 sufficient documents to be in substantial compliance,
5 that's fine, and we'll work with you to formulate it to
6 the extent that we can, but we can't sign off on it as a
7 modification because we don't have enough information to
8 know if the terms to which we are agreeing are the terms
9 set out at the beginning point of the production leaving
10 aside again what you could do with the first 30 days.

11 Which of those two approaches, let me ask this,
12 is the second approach workable at all or is it simply
13 never going to work?

14 MS. MCDAVID: Never going to work.

15 MR. SCHILDKRAUT: You have to understand what
16 substance compliance is. It's full compliance unless
17 you have an excuse and which the agency accepts. I
18 mean, how is our using a search term going to be an
19 excuse which the agency will accept? So I don't see how
20 you can do that.

21 MS. MCDAVID: The risk to the parties in that
22 circumstance is the next day or worse three weeks later
23 into the 30-days the staff comes back and says, Got
24 you. Now, go do it again.

25 MR. GLEKLEN: John Gleklen from Arnold &

1 Porter. I think the thing missing from this entire
2 discussion is something in particular in front of the
3 Commission that this is not the same thing as civil
4 discovery. This is not the last time you're going to be
5 able to produce these documents.

6 The point here is to find enough information to
7 know whether you should be able to go to court and
8 particularly given the standard applied in the case of
9 the Federal Trade Commission for getting preliminary
10 injunction, the idea that there might be one three year
11 old Email out there that you're not going to get if you
12 do search terms, you're not going to go to court or not
13 go to court based on finding that one Email.

14 Doing a reasonable list of search terms, there
15 are ways we can do this. In regular civil litigation
16 what the parties agree to do is, Look, we will give you
17 all of the documents for let's pick five people in
18 different areas of the organization. We'll give you all
19 the documents and we'll use these documents to agree
20 upon a search list, so you'll know if the parties are
21 using stock ticker symbols or acronyms and things like
22 that.

23 MR. COOK: I would agree with that. One problem
24 is that it's possible in some cases at least that the
25 time required to negotiate the search term could be

1 perceived by the parties in the transaction as
2 disadvantageous because these are multi billion dollar
3 transactions often that get investigated through this
4 process and create these problems.

5 And although these are huge burdens and people
6 hate them, they would rather undertake the burden than
7 to see this huge deal crater, and at stake is often the
8 viability of the target because if you have a huge
9 second request, it delays things, a lot of uncertainty
10 and people start to leave, and then it doesn't go
11 through.

12 It can actually hurt the competitive bidder of
13 the target and end up creating harm to competition
14 because the transaction did not go through, so that's
15 something to consider.

16 MR. HOFFMAN: Why don't we switch gears on that
17 note to the third topic that we talked about a little
18 bit, which is the format of production,, hopefully we'll
19 be able to talk about that and have time after that to
20 get thoughts from anybody on all the topics, but I
21 wanted to have Greg lay out on the table some of the
22 issues that we've been experiencing on how things get
23 provided to us.

24 MR. BROWN: Over the past I guess several years,
25 we've been receiving productions that have been

1 increasingly electronic in their nature. We've gone
2 from entire paper in the traditional investigation to
3 investigations where the second request response has
4 some electronic files included along with the paper that
5 we had.

6 We've also moved to areas where we image -- the
7 entire production has been actually scanned and imaged
8 with graphic data captured by the vendor and provided to
9 the Commission. The graphic information are document
10 summaries and load files to be able to place it into a
11 litigation support application, for instance, like
12 summation. There are certainly repositories of
13 documents that have been used that are actually off
14 site. We've used that in some matters and we've used
15 proprietary software to look at the universe of
16 documents as they're imaged as in their native formats.

17 We have particular issues and discussions that
18 deal with Email and whether or not we get Email that is
19 printed or we get Email in its native format and how is
20 the child parent relationship preserved with
21 attachments. We've gotten some productions that are
22 entirely electronic and they're CDs of PowerPoint,
23 Excel, Outlook, Word files, anything that they've had
24 and they've just had hundreds and hundreds of CDs come
25 in.

1 We've attempted to shortcut this in some
2 instances by having productions made to large archives
3 that will send out -- give us information, but there's
4 issues of indexing, of how we know what's there, how you
5 know what you've given to us, how are these files usable
6 both to the Respondents and to the agency itself.

7 So we're looking for ideas for best practices in
8 this area, particularly when companies and Respondents
9 have realized the benefit of providing image in
10 electronic productions when they have to produce to
11 multiple parties or if the States are involved in some
12 say, certainly an opportunity to cut costs but how do we
13 get the information that we need to look at the
14 document, what kind of problems are you having in
15 producing those?

16 MR. COOK: This is Bob Cook. We did a massive
17 production that was paperless earlier this year and late
18 last year where I guess we had a consultant who is not
19 present here SV Technology which set up with a vendor
20 that they used an Internet site that the FTC staff could
21 use the Internet, log into a secure site.

22 I think we had two log ins and view documents
23 that were rendered in a format that was in appearance
24 similar to a printed say Outlook Email or just the
25 native Word format for spreadsheets, and these were also

1 electronic documents text searchable which relieved us
2 from our indexing requirements because of the text
3 searchability.

4 The feedback that we got was that this worked
5 for the staff. It worked for us because we were
6 reviewing documents in multiple locations, say three
7 locations, maybe four in the U.S., and if you've ever
8 done that and had to ship Fed Ex boxes all over the
9 place, it's \$100 a box, and they drop them and they
10 burst open and you have all kinds of nightmares like
11 this.

12 You really don't want to do that. It's very
13 expensive. If you think about every piece of paper
14 being copied costing a certain amount of money, it's
15 much better to do it electronically.

16 The primary advantage to me in negotiating the
17 second request modifications for the system that we use
18 which was Internet based was that it did not require
19 special equipment or special software on the FTC's side
20 so that it was something we could sell.

21 They could try it out. We also offered to
22 produce in the first batch paper as a fall back. That's
23 important too because nobody wants it if it doesn't
24 work, and it ended up that it did work.

25 I think the advantage for the government for

1 this is there's no paper, and everyone knows what it's
2 like going through those halls and seeing the paper
3 piled up to your shoulders and your head, and everybody
4 knows what it's like on the private side.

5 It's depressing being in the document room for
6 months at a time, and the documents accumulate, and it's
7 not conducive to good work habits I think, and ways of
8 eliminating the paper from the system are probably to be
9 encouraged.

10 MS. LLEWELLYN: Virginia Llewellyn from Applied
11 Discovery again. I think what Bob said and I think
12 taking that one step further is the concept that
13 everything is really moving toward the Internet and
14 again in speaking with the people at the Federal
15 Judicial Center who educate our federal judges and
16 talking about where the courts are going with this as
17 well I think most people have gotten over that initial
18 fear of is this secure, is this protecting
19 confidentiality, et cetera, I think we all know the
20 securities are there now just as they are in banking and
21 et cetera in the legal work.

22 I think taking what Bob has said one step
23 further, the place the Commission ought to go is the
24 place to one system accessed by both attorneys
25 representing the company and the Commission, the staff

1 attorneys who have to have a way to access information
2 very quickly.

3 And what everyone is offering here is saving
4 time and saving money, and that's the thing that's also
5 been different from litigation.

6 There isn't as much posturing in the same way,
7 and the concept of having one centralized location for
8 documents can be accessed really within a matter of days
9 through a secure access, as much security passwords,
10 tokens with numbers could change every 30 seconds,
11 whatever you need to make your client comfortable.

12 That technology exists and can save time or
13 money for everyone involved and it is really current
14 what's happening in a lot of cases in the private sector
15 and what ought to be happening here as well.

16 MR. COOK: One thing that we found in doing this
17 Internet production was that it was an issue that we
18 anticipated that would arise in negotiating with staff,
19 and it did arise. We didn't want you to know what we're
20 looking at so that what we did is we had a fire wall and
21 we had actually two servers that had the documents.

22 We had our server that we were using for review,
23 and then once documents had been reviewed, we could
24 redact for privilege on the screen and things like
25 that. Then these would be transferred over to the

1 production server which had an entirely different staff
2 at the vendor level so that we didn't have any access to
3 it, and this was good and the way to do it, it didn't
4 actually add time because it probably took a day to take
5 the documents and move them from one server to another
6 because when you are redacting it and marking documents
7 as entirely privileged, you have to make sure you're not
8 putting it on the production server.

9 And that took some time but that's what we ended
10 up having to do for a fire wall.

11 MR. COWIE: I take it the purpose of that is to
12 ensure the FTC can review and print without the parties
13 knowing.

14 MR. COOK: Exactly. That was the purpose of
15 that.

16 MR. JOHNSON: We've also had situations where
17 we've had submissions made on a number of CDs where
18 documents have been imaged and then OCR and then given
19 to us as part of our submission that way. I would like
20 to know what you think the benefits are and
21 disadvantages are of the two types of approaches that --
22 the one you just mentioned as well as providing us CDs
23 where we utilize submission or another software program
24 to read the data.

25 MR. COOK: My only experience with the CD thing

1 you're talking about was when I was at the FTC when it
2 was unworkable because it just didn't work
3 technologically but this was ten years ago. I don't
4 know at the -- it might work fine today. The problem
5 there I think is that it requires equipment to work, and
6 the distinction between that and the Internet based is
7 that all you need is a browser.

8 We did provide -- on loan we provided some
9 monitors that provided more real estate because it does
10 require a large screen to do this effectively. I think
11 we provided ten 17 inch LED monitors. I think what we
12 were using in-house though were 21 inch huge TV screens
13 just because it had more capability.

14 MR. SCHILDKRAUT: I think, Dennis, you were
15 describing my submission to you in Chevron Texaco.

16 MR. JOHNSON: Among others.

17 MR. SCHILDKRAUT: Which was all CD. The thing
18 that made that workable for us at the time, this was
19 last year, was the fact that we had to also provide
20 these materials to half a dozen states but otherwise it
21 would have been cheaper to produce -- it was only a
22 single production to the FTC. It still would have been
23 cheaper to do it all by paper.

24 We OCR'd it as well as providing the scanned
25 version because both the agencies -- both the agency and

1 the States asked for the OCR as well as the scan, and we
2 provided the software, which was a cost to us, but the
3 cost was small compared to the cost of producing six
4 sets of a million documents, so that was the entire
5 reason we did it that way, and I have to say it's nice
6 however to walk through the FTC and see a clean hall
7 sometimes.

8 MS. MCDAVID: I think these guys have put their
9 hands on an important point. A second request
10 production, even in hard copy, is already grossly
11 expensive, and what we're looking at is something in any
12 way significant will increase that cost. We need to
13 think about that very hard, whether that to be something
14 that is an option for the parties to take on or an
15 obligation imposed by the second request.

16 We're talking millions of dollars for the
17 average second request already, and I don't know how
18 much more that costs, Marc, but if the break point was
19 you didn't otherwise have to copy six copies of a
20 million pages, that's a lot more money.

21 MR. COWIE: Jan, in assessing the cost, Dave
22 Scheffman made an interesting observation for me. His
23 informal view is the real cost is not in collecting and
24 treating and reviewing of the paper. It's in that
25 time.

1 Real costs to the company is the time associated
2 with the compliance process, so in his view it would be
3 a significant difference between say a 300 box second
4 request that could be done in two or three months versus
5 300 box production that takes seven or eight months.

6 MS. MCDAVID: I don't think those are the right
7 kinds of break points. I'm not sure how much time it
8 would save us at although by doing this in this way. My
9 guess is that it doesn't save significantly at all. We
10 have to still undertake reviews of the documents and
11 that's where the time comes from.

12 MR. COOK: It does have problems, too, because
13 if you're doing an electronic production and you're
14 someone like me who wants to change things as you're
15 going like, Well, let's do these people first instead of
16 these people and changing -- it's very difficult to do
17 when you have this series of information technology
18 processes that have to be performed on the information
19 before you get to the FTC because once it gets in the
20 pipeline, you can't really move up.

21 You have to go through. It's easier to make
22 changes than to be free formed with papers once you
23 start to do these it's more -- it was more time
24 consuming to do things like that.

25 MR. SCHILDKRAUT: I think there are two

1 responses I have to David's point. First is electronic
2 production simply is no faster. The massive amount of
3 time in the production is the review of documents, and
4 that's what costs the majority of the money. Now, it
5 doesn't save any time to do this electronically at all.

6 Second point is I was just sort of thinking back
7 over my second requests over the last half a dozen
8 years, and by and large, it was not the document
9 production that resulted in the time delays at the end
10 of the day. I would finish the document production, and
11 the staff still wanted to either investigate for six
12 months or I had to negotiate consent orders for six
13 months.

14 I mean, it was all those kinds of things that
15 ended up creating the delays in the process, and if
16 you're dealing with one of these very large mergers,
17 it's a minimum amount of time that staff needs to go out
18 and interview people, do depositions and things like
19 that, and it's not really the document review that's
20 forcing this thing to take a year rather than three
21 months.

22 MR. BROWN: I think I would be interested in
23 hearing from other folks who may have experience with
24 this about their feelings about the cost and the effect
25 in doing this electronically. I don't know that we are

1 equally applying technology in our particular cases, and
2 I'm certainly willing to say I'm in need of more
3 education myself because we're always looking to see
4 what's out there.

5 Technology is changing, so I think it's
6 important to have other people speak up who may have had
7 different experience and different opinions on this.
8 Rich?

9 MR. KORBIN: I just wanted to say that I may be
10 the only one in the room that thinks this, but we've
11 done quite a few of these cases, and I haven't see any
12 instances where doing it electronically hasn't been the
13 quickest and cheapest way to do this. I think if I have
14 done 15 million pages of printed documents and someone
15 said, Review these documents and produce them to the FTC
16 in 30 days, they would be pretty hard pressed to get
17 that done in a law firm today and we've done that.

18 We do quite a few of these cases, and we've seen
19 that the hard problem of what does it cost to print, in
20 New York City it's 15 cents, and our technology is
21 around the same price. When you're doing
22 electronically, I agree the review process make take
23 longer, but if you're reviewing paper documents, what's
24 going to take longer, reviewing every single paper of
25 the paper or doing a search term in a system?

1 It's hard to say that that isn't a faster way of
2 doing it when I could run five search terms and have the
3 two million documents that respond to that instantly.
4 There are other costs I know associated with that, but
5 we have seen productions through our system that have
6 never been done on paper, so that's why we can see in
7 the end that it was cheaper.

8 We've had people tell us "our very first second
9 request that we did the client told us they saved \$2
10 million on that request. They gave us those numbers
11 after the fact. We thought it was substantial. We've
12 seen that across the board. We've been doing it one
13 year. Paper productions are faster than electronic
14 productions.

15 I know everybody has their own opinion on that
16 but we're seeing some pretty hard facts in our company.

17 MS. MCDAVID: I think we have to distinguish
18 between documents that exist in native format in
19 companies files, in hard copy that are required for
20 production native format in the company electronics.
21 Those I suspect might be much faster to produce in
22 electronic form, but if you have got 500 boxes of hard
23 copy and to make them electronic one has to push them
24 through a machine and photograph them, then we're just
25 talking about a different version of the same

1 production.

2 And those documents will not be searchable in
3 that format unless they're scanned simultaneously in a
4 way that's probably not reliable for search, so I think
5 you have to distinguish between the time and the cost
6 involved as to what the nature of the for was.

7 MR. KORBIN: I agree with that. I was talking
8 about documents, originated form. Paper documents are
9 always going to be paper documents we've seen that
10 decreased over time as far as how many paper documents
11 are produced, but I can agree that it's a better way to
12 doing it versus paper production, but purely electronic
13 data starts electronic that takes into the system
14 directly electronically. That to us is no doubt faster
15 as opposed to printing.

16 MR. SCHILDKRAUT: Not substantially because the
17 vast majority of the time is reviewing it unless the
18 agency is going to allow something like search terms.
19 Most of the time in the process it is not the production
20 of the pieces of paper. It's reviewing those pieces of
21 paper, hiring -- sometimes I've had to hire up to 400
22 temporary attorneys to review these documents.

23 In one merger I had -- we essentially had to
24 create a site with massive warehouses with 20
25 port-a-johns with 300 attorneys at a single site with

1 golf carts that moved people back and forth across the
2 site with trucks on a particular schedule moving
3 everything around. That's what takes all the time is
4 the review.

5 MS. MCDAVID: The human -- someone has to review
6 each piece of paper and determine whether it is or isn't
7 responsive. That's the part of this that cannot be
8 avoided unless we can go back to search terms.

9 MR. HOFFMAN: But it seems to me even with
10 search terms you're not going to be able to eliminate
11 that problem. You just reduce the scope of terms to
12 which that kind of review has to be applied. My
13 experience with scanning productions is that they take a
14 little longer and cost a little more on the front end
15 actually than producing things in paper.

16 You get savings to some extent at the back end,
17 depending on how many times you're going to use them and
18 how much you're actually going to use them. After the
19 second request context, it might be never again. You
20 might never want to look at them.

21 The other thing you might be doing multiple
22 productions to different regulators, things like that,
23 that's where those things seem to be pretty cost
24 effective from a parties' standpoint leaving aside
25 accessible to the regulator.

1 Anybody else have any thoughts on any of these
2 issues so far?

3 MR. COWIE: Let me supplement that. Feel free
4 to address issues that are only loosely related to
5 electronic discovery but nonetheless related more
6 generally to second request process.

7 MR. SCHILDKRAUT: I have two proposals that I
8 think you ought to think about, and this relates to
9 electronic discovery and all other forms of discovery.
10 One is is I have found over the last half a dozen years
11 or so that we really haven't advanced the ball much in
12 terms of cutting back on second requests, and I think
13 that there needs to be more of a shared experience, and
14 I think the way the agency can do that is by doing
15 retrospectives in second requests.

16 And I think the way you go about doing that is
17 figure out as you went through the process what I cut
18 back, what you didn't cut back, and then what you
19 actually use and try to come up with a methodology that
20 you can apply second request after second request to
21 identify areas where you're requesting information and
22 then don't use it.

23 I don't know whether that will work or not maybe
24 every second request is actually sui generis, but it is
25 possible that you may find that there are ways of

1 cutting back that are not going to be particularly
2 harmful to you because at the end of the day if you're
3 -- you know, if you request that you get a thousand
4 boxes of documents, you're still only going to use
5 probably a thousand documents total that are going to be
6 useful to you in the investigation, so you've obviously
7 requested a lot more than you need, and there may be
8 better ways of doing it, so that's one idea that I think
9 people ought to think about.

10 A second idea that I think people ought to think
11 about though I'm not sure it will work is making the
12 appeal process more transparent. What I mean by that is
13 to encourage people to use the appeal process and then
14 to publish the decisions on the appeal process.

15 I can think of very few cases where I actually
16 would have used the appeal process, but there is one
17 where I would have used it and it was actually something
18 that actually led to there being an appeal process. So
19 there may have be a few occasions where people would use
20 it.

21 I think you should take the decisions that have
22 already been made and ask them, put them on up on the
23 Internet site. I know there are only a couple of them
24 now, but over time I think you'll see more of those, and
25 that will sort of spread the knowledge around where

1 cutbacks are acceptable, things that we can do.

2 MS. MCDAVID: An issue that is not even remotely
3 related to electronic production is the issue of
4 transcript of depositions, and it's a particular painful
5 point for the private bar, is extraordinarily
6 inefficient and costly for the parties and their counsel
7 to have to have associates sit in the room and take
8 detailed notes of a deposition.

9 It means that we are less effective in dealing
10 with you on the merits if when we prepare papers for
11 you, we are not able to cite to a page and a line of a
12 deposition, but simply paraphrase something that a
13 deponent may have said.

14 The only basis that has ever been articulated in
15 the Commission's rule which is quite notably different
16 than that applied by the antitrust division with
17 concurrent jurisdiction in exactly the same kind of
18 investigations, essentially assumes obstruction of
19 justice on the part of companies and their counsel.

20 Federal Courts have managed to lumber along
21 since the 1940s when Judge Clark first drafted the
22 Federal Rules of Civil Procedure by allowing parties to
23 have copies of transcripts in litigation.

24 The antitrust division "most other agencies do
25 so. I would urge you in the strongest possible terms to

1 revisit this question because it's inefficient, costly
2 and obvious issue.

3 MR. GLEKLEN: John Gleklen from Arnold &
4 Porter. At the risk of being the one who points this
5 out, I think the reality of a lot of the things that we
6 have discussed today is the Commission's fear that
7 parties are going to screw them at the end of day on
8 time and where a party comes to you up front and says,
9 We're not going to jam you up on time, we will give you
10 60 days or whatever you need in order to do your
11 investigation or a rolling 60 days or whatever, that
12 that is the time to be reasonable about searching
13 back-up tapes, about scope of search.

14 I have done thousand box productions and
15 received 950 of them back with the tape uncut, and that
16 is not because there's nothing interesting in there. It
17 was because the search list got extended because you
18 were afraid that you wouldn't have enough time. Where
19 the parties are willing to give you enough time and will
20 commit to that, why create money for the photocopying
21 vendors or the document imaging vendors and the contract
22 lawyers? Why not let's focus on what's important?

23 You'll have the time you need and instead of
24 just us all producing documents that we know will never
25 get read or back-up tapes that we know will never be

1 printed and read, that's my suggestion to you.

2 MR. COWIE: What is it that you think we're
3 focusing on that is not important?

4 MR. GLEKLEN: This is my experience. In my
5 experience there has never been a legitimate need to
6 look at back-up tapes in the second request. The scope
7 of search in terms of the number of people that need to
8 be searched, if the idea of a Hart-Scott second request
9 investigation is to figure out which products compete
10 which products constrain the price are one another,
11 unless there are 50 different products, it's just hard
12 to imagine how you need to search more than a couple
13 dozen people, and that is the exception rather than the
14 rule.

15 MR. LOWE: Mike, the other thing I would
16 strongly suggest is this is my best practices, that the
17 two agencies talk to another about these productions,
18 there's a divergence of products between the two
19 agencies, a modification of second request.

20 There's a divergence of practice on how issues
21 of compliance are handled on the back end, and the two
22 agencies need to get together and talk to one another
23 more than they clearly do or at least they need to agree
24 more than they clearly do on practices and responding to
25 the second request.

1 Other than the discussion among us this morning,
2 there was an agreement that there is a distinction
3 between the agencies and a number of these questions,
4 one of which is certainty of modifications upfront where
5 the division seems to be more willing to agree to
6 modifications and stick with them rather than to simply
7 defer things or also make decisions quicker that allows
8 more certainty and frankly results in them probably
9 receiving less paper because if we can't be certain that
10 a modification will be accepted, we're going to produce
11 rather than wait.

12 And there is a distinction and the two agencies
13 really need to talk to each other about these issues.

14 MS. MCDAVID: The division has recently adopted
15 a method of operating in which the parties and the
16 agency can agree with the schedule up front in which
17 specific dates are assigned to specific kinds of
18 events.

19 Dennis and I had a matter in which that kind of
20 schedule was used with some success and some lack of
21 success on the back end. It worked up until the
22 deadline at which point it fell apart. But in terms of
23 us doing things that we agreed to do by a certain date,
24 that worked.

25 The agency agreed to do certain things in terms

1 of telling us their issues of concern by a certain day.
2 That certainly it would be worth exploring with the
3 division the experience they've had since Charles
4 announced those modifications to their processes last
5 October.

6 MR. COOK: The one biggest difference between
7 the way the second request looked is the indexing
8 requirement where the FTC requirement is specification
9 by specification indexing, and I'm not sure how usable
10 that is.

11 I'm sure it's somewhat -- I know it's somewhat
12 useful, but I also know that the Federal Rules require
13 them to be produced as kept in the ordinary course of
14 business, and it is burden some to create that.

15 If you're going through, the one skill set for
16 people who are doing documents might be to spot one
17 that's privileged. That's not necessarily the same
18 person who is good at figuring out if it's an 18 A or a
19 7 B.

20 That's just -- that is more difficult to do it
21 and it does add time and it makes it more difficult to
22 produce them within 14 days or 30 days.

23 MR. COWIE: That's another difference between
24 FTC and Justice Department practice.

25 MR. COOK: Yes. Models of the two agencies

1 differ on that one point. The indexing requirement and
2 matter of production.

3 MR. GLEKLEN: John Gleklen again. In relation
4 to the normal course of business this is not something
5 I've had personal experience with, but I know other
6 attorneys in my firm have, and they asked me to raise
7 this, and that is the requirement that the parties
8 produce electronic information in the form in which it
9 is not normally kept by the parties.

10 In one case, in a supermarket merger they, were
11 actually told, We're not going to deem you to be in
12 substantial compliance unless you go out and buy this
13 data for us. That seems to me to be outrageous.
14 Parties should only have to produce data that the
15 parties actually have. If the Commission wants data
16 available from some third-party market research firm,
17 the Commission should go buy it.

18 MR. COWIE: All right. Does anyone else have
19 any comments or criticism, constructive or otherwise?
20 No?

21 MR. HOFFMAN: Don't be shy. Criticize Michael.

22 MR. COWIE: This was very helpful. As I
23 mentioned earlier there are other sessions as announced
24 on our web site. We also encourage written comments.
25 We're expecting papers from some large association

1 groups, and we would like to state anything in writing
2 that is welcome. Thank you.

3 (Time noted: 3:25 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

3 CASE TITLE: WORKSHOP ON ELECTRONIC RECORDS

4 WORKSHOP DATE: JUNE 3, 2002

5

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

11

12 DATED: JUNE 5, 2002

13

14

15 DEBRA L. MAHEUX

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

17

18 I HEREBY CERTIFY that I proofread the transcript
19 for accuracy in spelling, hyphenation, punctuation and
20 format.

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