

ANTITRUST MODERNIZATION COMMISSION

PUBLIC MEETING

Thursday, July 15, 2004

Rayburn House Office Building  
Committee on the Judiciary  
Hearing Room 2226  
Washington, D.C.

The meeting convened, pursuant to notice, at 2:58 p.m.

PRESENT:

DEBORAH A. GARZA, Chairperson  
JONATHAN R. YAROWSKY, Vice Chair  
W. STEPHEN CANNON, Commissioner  
JONATHAN M. JACOBSON, Commissioner (via telephone)  
DONALD G. KEMPF, JR., Commissioner  
DEBORAH P. MAJORAS, Commissioner  
JOHN H. SHENEFIELD, Commissioner  
DEBRA A. VALENTINE, Commissioner  
JOHN L. WARDEN, Commissioner

ALSO PRESENT:

ANDREW J. HEIMERT, Executive Director and General  
Counsel

HON. F. JAMES SENSENBRENNER, JR. Chairman,  
Committee on the Judiciary U.S. House of  
Representatives

These proceedings were professionally transcribed by a court reporter. The transcript has been edited by AMC staff for punctuation, spelling, and clarity.

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

CHAIRPERSON GARZA: The meeting of the Antitrust Modernization Commission will come to order. We have a quorum. In addition to the Commissioners that are present, we are expecting Debbie Majoras to come in at some point. She has a foot in a cast. So she is probably making her way slowly here. And we may be joined on the telephone by three other of our Commissioners, Jon Jacobson, Makan Delrahim, and Sandy Litvack.

I would like to welcome everybody to the meeting. We are honored to have with us Chairman Sensenbrenner, who will start with some remarks. I would also like to recognize members of the staff of the House Judiciary Committee and members of the Senate Judiciary Committee as well, and I would like to thank public for coming here, for showing your interest to the Commission. Your input is important to our work, and we look forward to working with you as we go forward.

With that, I will recognize the chairman and allow him to make some remarks.

CONGRESSMAN SENSENBRENNER: Well, thank you, Madam Chairman, and welcome to the House Judiciary Committee where

the idea of modernizing our antitrust laws and having a commission of experts was hatched and nurtured and sent over to the Senate, and then it was nurtured some more and some more and some more. It finally ended up being signed into law by the president as part of the Department of Justice authorization bill in November of 2002. We thought we had it made then. Then we had to have an argument in getting you folks funded. We were finally successful in doing that.

I am glad to welcome you here and see that the Commission is now off and away doing its business. The Committee on the Judiciary has exclusive jurisdiction of America's federal antitrust laws and competition in our free market economy. As chairman of the committee, I have rigorously examined their implementation across a broad range of industries. As you know, America's federal antitrust laws are periodically amended by Congress. The recent passage of the Standards Development Organization Act of 2004 provides an example; however, I believe it is now time for a more searching examination of whether the antitrust laws continue to advance their fundamental goals in a modern economy that bears little resemblance to the economy of a century ago when those most of these laws with initially passed.

Antitrust enforcement agencies and the courts are charged with adapting their interpretation of essentially static antitrust statutes to rapidly changing economic circumstances. This has led some to question the relevance of existing antitrust law in the information-based economy. I believe that the antitrust laws must not only retain their – but also their vitality. For this reason, I am pleased to have introduced and secured passage and funding for the Antitrust Modernization Commission, which formally commences its important work today.

As you know, the legislation creating the Commission does not establish a highly detailed road map for its work. We've left that to you. As the principal author of this legislation, I appreciate the opportunity to clarify some of the areas that I believe deserve attention.

First, the antitrust laws must be calibrated to reflect the modern economy. The emergence on an increasingly information-driven digital economy and the centrality of technology to America's economic strength requires careful consideration of how the antitrust laws may be revised to promote competitiveness in the new economy.

Second, the intersection of the antitrust and intellectual property laws has been the focus of

Congressional considerations on both sides of the Capitol, at federal antitrust enforcement agencies, and in academia. To ensure that antitrust laws and those protecting intellectual property rights operate in a complementary rather than a conflicting manner, the Commission should carefully examine whether the antitrust laws should be amended to forcefully defend IP rights while promoting effective competition in this field.

Third, the global reach of American industry has given rise to conflicting antitrust enforcement regimes that subject American businesses to multiple and potentially discriminatory enforcement burdens. The development of a multilateral antitrust framework at the World Trade Organization that may substantively alter U.S. antitrust laws is a cause for similar concern. I do not want to see antitrust laws become a trade issue and disputes over antitrust enforcement be determined not by our enforcement agencies, but by the World Trade Organization or other non-U.S. agencies.

I am increasingly concerned that foreign antitrust authorities have applied their antitrust laws in a discriminatory manner that unfairly advances foreign commercial interests at the expense of American businesses

and American jobs, and I want to cite two examples of that.

First, the proposed GE-Honeywell merger was approved by the Justice Department. It was not consummated because the European Union determined that, despite the fact that both GE and Honeywell, both American-based corporations, secured the approval of U.S. antitrust enforcement authorities, it did not meet the European standards.

Second involves the *Microsoft* case. As we all know, the Justice Department and Microsoft reached a settlement, and that settlement was approved by the court where the antitrust enforcement action was pending; however, it appears that the European authorities do not accept the settlement, and as a result of that failure to accept the settlement, there is a different antitrust case that presently winding its way through the European Union enforcement mechanism. And there has to be some type of comity involved, and I would hope that the Commission would look into this very serious issue because if this type of discriminatory treatment is allowed to continue, American-based industry is put at substantial risk, and American jobs are placed in jeopardy.

While America is not the source of all knowledge,

international antitrust convergence must not require the U.S. to abandon its antitrust laws in favor of poorly defined non-economic models that unfairly penalize market success.

Fourth, the relationship between federal and state antitrust enforcement efforts is another area of interest. While I believe that the States have a vital antitrust enforcement role, interstate commerce may be adversely affected by the divergent and sometimes inconsistent antitrust standards.

Fifth, the continued application of the antitrust laws in regulated industries is a fertile area for the Commission's inquiry. Over the last several years, the courts have sometimes ignored explicit antitrust savings clauses and legislation enacted by Congress, principally the Telecom Act of 1996. The antitrust laws provide a pro-competitive bulwark across a range of regulated and non-regulated industries and their dilution or circumvention by judicial fiat is a troubling development.

In a similar vein, competition advocacy by the Antitrust Division of Justice and the FTC Bureau of Competition during regulatory proceedings undertaken by other federal agencies, such as the FCC, is a productive

area of inquiry.

Finally, the extended periods of time required for civil merger and non-merger investigations at both federal antitrust agencies are also a source of concern. While I recognize that complex issues are often presented, protracted delays during enforcement actions may hinder the ability of innovative companies to bring competition and choice to consumers. I trust that the Commission will examine these issues and offer recommendations that will improve the institutional capability of our antitrust enforcement agencies to implement the antitrust laws in a timely manner.

As you commence the Commission's work, you can be assured that the Commission's conclusions will be carefully reviewed by Congress. While this is not the first federal commission to study the antitrust laws, the caliber of those chosen for this Commission has created heightened expectations that I have every confidence will be either met or exceeded. I appreciate your willingness to serve and look forward to working with you in the coming months.

Thank you for opportunity to come here today.

[Ms. Majoras enters the meeting at 3:06 p.m.]

CHAIRPERSON GARZA: Well, thank you very much.

With that, I want to basically welcome you all again, and I don't think there is any need to go into much elaboration on the purpose of the Commission. Chairman Sensenbrenner has pretty well laid that out.

As people know, I'm sure, the Commission was established to examine whether the need exists to modernize the antitrust laws and to identify and study issues. We are, among other things, to examine whether the need exists to modernize the antitrust laws, to solicit views of all parties concerned with the operation of those laws, to evaluate the advisability of proposals and current arrangements with respect to any issues that we so identify, and to prepare and submit to Congress and the President three years from today a report that contains a detailed statement of our findings and conclusions together with any recommendations that we have.

The AMC has called this meeting pursuant to our authorizing statute and to formally launch that process today. The agenda for this meeting, first will be to have a brief briefing on administrative matters from our Executive Director and General Counsel, Andrew Heimert; secondly, to discuss procedures for identifying issues to study sort of the first phases of our Commission's work; and then after

that, we will have a brief period to take questions from anybody in the audience that wishes to ask a question.

So the first order of business would be to ask Andrew to report on the work that he's been doing to establish the Commission's infrastructure so that we are in a position to move full speed ahead.

Andrew.

MR. HEIMERT: Thank you. We have accomplished a significant amount in the six weeks since I was appointed as Executive Director and General Counsel. It is neither easy nor fast to establish a new federal agency, which is what in essence we are doing. Unlike many Federal Advisory Committees, this Commission does not have a sponsoring agency. So we don't have structured support from an already established federal entity. We have to create a lot of things from the ground up that others do not have the burden of doing. I have been working hard with the assistance of the Chair and the General Services Administration to assemble many of the basic components for a federal agency. Much of that work is still in the process of being completed. I am hopeful that most of the projects will be finalized in the coming weeks.

In particular, I expect that the Commission will

soon enter into a lease for an office space. We have been looking at a number of different places, and I think we have got a good space that we should be able to work out a lease with. That will allow the Commission to establish an actual physical presence with its own offices and own computers and whatnot. It will also allow us to start hiring staff and making other arrangements for the Commission. We have not yet hired any staff. We are in the process of reviewing résumés and will continue to do so for the various positions that we are considering once we have finalized our staffing plan.

I also have been working on more mundane tasks, things like obtaining Commission letterhead and business cards, establishing credit card accounts for Commission travel, entering into agreements with GSA to handle payroll, accounting, and human resources support, and setting up E-mail accounts. None of these tasks are exciting. They DO take time to complete and they often require substantial paperwork to get completed as well.

As a government entity, we have to work through the government channels quite frequently and through very specific procedures. So that adds somewhat to the time from what one might observe in the private sector.

Finally, there are two significant accomplishments that we have already made. The first is to have this public meeting, which is a big first step and has taken a fair amount of arranging, not only to coordinate the schedules of Commissioners, but also to make sure that the public would be aware of the meeting under the requirements of the Federal Advisory Committee Act.

Second, we created a Commission web site, [www.amc.gov](http://www.amc.gov). It is now up and running and available to the public. I encourage everyone to take a look for additional information. It currently does not have a tremendous amount of information because the Commission has only begun its work. It does have information about the Commissioners, also some of the background materials on the Commission, such as the statute, its charter, as well as press releases and the Federal Register notices for this meeting.

CHAIRPERSON GARZA: And, Andrew, I assume as we go on, things will be posted onto the web site, so everything will be accessible.

MR. HEIMERT: That is correct. My expectation is that the web site will be the principal means by which the public will be informed or be able to get information about the Commission and Commission activities. Obviously there

will be Federal Register notices and press releases.

CHAIRPERSON GARZA: Can you repeat the address again?

MR. HEIMERT: It's [www.amc.gov](http://www.amc.gov).

We are hopeful it will be useful and we do welcome comments from the public on the web site and ways that it might be improved. As I said, it only has a little bit on it now, but as the Commission generates work, that will be posted on the web site.

The one ministerial note that I wanted to mention, there are index cards on the table toward the back of the room. If members of the public do have questions of the Commission, I know the Chairwoman wishes to take some questions at the end of today's meeting. If you have a question, please fill out the card with your name, affiliation, and subject matter of the question. I guess a good place might be this table or this television, and I can order them so that when we get to that point, we will be take able to take the questions.

And with that, I turn it back to you.

CHAIRPERSON GARZA: Okay. Do any of the Commissioners have any questions for Andrew?

What I would like to do now that I should have

probably done before, but we wanted to let Chairman Sensenbrenner make sure that he had ample time to make his remarks before he had to go off and do something, I do want to recognize that in the audience today, we have several staff of the House Judiciary Committee. Specifically, we have Phil Kiko, Joseph Gibson, and Rob Tracci.

And, Rob, I want to thank you in particular because I know that you provided us with extensive assistance in coordinating this meeting and getting the hearing room and a variety of other things. Also, from the staff of the Senate Judiciary Committee, I think we have – let me see if I've got this right. I am going to ask you.

VICE CHAIR YAROWSKY: Okay. I'm glad to jump in.

We have got from the Senate Antitrust Subcommittee, representing Chairman DeWine, we have the chief counsel and David Boley, counsel. From Ranking Member Kohl's office, we have the Honorable Jeff Miller, chief counsel, and Seth Bloom, counsel; and from Ranking Member Conyers' office from the House Judiciary Committee, I see Ted Kalo and Stacy Dansky. I don't know if Perry Apelbaum is in the room somewhere, but I don't see him.

These are the – Chairman Sensenbrenner talked

about working together on this Commission and referred to a bill that was just signed into law on June 22nd. That was a bipartisan effort by all the members that were just mentioned, because the way antitrust policy has really been done the last 10 or 20 years in this committee and the committee on the Senate side has been some very bipartisan cooperative method, and that is why the policy is so well safeguarded, I think, and we start with a very safe environment. So I just want to salute all the folks that have participated.

CHAIRPERSON GARZA: The next order of business is to discuss, as I mentioned, the process by which we will begin our work and in particular against the framework of a memorandum that Jon and Andrew and I sent to the Commissioners dated July 14 proposing for discussion a sort of straw-man process for soliciting public input and proposing a time line for the preliminary identification of issues for the Commission to study. And I believe that a copy of that memorandum is on the table for the public, on the table next to the door as you came in.

I want to take a minute to give a little give a little bit of background to this memo, which is short, to explain briefly the thinking behind the proposal before I

turn to Jon to allow him to give his thoughts and then open it up to a more general discussion by the Commissioners. First, this memo largely reflects the recommendations of the working group established at the time of the Commission's first non-FACA organizational meeting, April 2. The working group members, John Shenefield, Jon Jacobson, Debbie Majoras, and Debra Valentine, undertook to consider the best way for the Commission to decide at least a preliminary agenda of issues to study with the understanding that that process importantly would include the consideration and solicitation of input from the public.

We may not have done that, the recommendations of the working group, all due justice, but they are all here to comment on that.

Secondly, it will be clear from the memo it assumes that the Commission will approach its work in phases, that is rather than launching immediately in hearings covering potentially the entire landscape of antitrust and distilling issues at the back end of the process, the procedure proposed in the memo assumes that the Commission will proceed first to identify a set of issues for further study. The procedures set forth in the memo for those members of the public who haven't been able to read it

breaks down into four parts. The first part is that as soon as practicable after the meeting, assuming we have a consensus of the Commission members, the Commission will publish a public notice requesting comment from the public.

Attached to the memorandum is a draft proposed Federal Register notice that contains some of the details that we propose, requests that comments include a short, say 300-word summary, of the issues and why they are being recommended. Other materials certainly can be provided to the Commission as attachments to the comments.

The second step is that the Commission will continue and intensify its outreach to members of the public, for example, academics, business, consumer, other groups. We assume that this process – oh, I should say that the first part of the memo suggests that the public comment period formally would end September 30. That doesn't mean that that is the last input from the public, of course. That is the date that we set to try to get initial public comments in.

Beyond that point, the Commission I think will continue to intensify its outreach efforts going beyond the September 30 date, certainly, which might include follow-up discussion with some commentators and will also include

outreach to people that have been identified by the working group for outreach. We can talk about this, but it is a flexible process which people, I assume, will be inside and outside of Washington where groups of Commissioners will talk with groups of people, for example, several members of academia, and economist communities and may talk to them about specific issues that the Commissioners have identified that warrant going out and conducting outreach. Part of what we would propose is that we have some discussion today amongst the Commissioners as to how we want that to proceed, to potentially put it back to the working group to ask them to basically incorporate those discussions and efforts and try to solidify our outreach targets and propose a plan for going forward with outreach.

While I refer to a list, I hope it's clear to people that it is necessary in order to proceed to have a list; however, our intent isn't to preclude input from anyone and it shouldn't be viewed that way. Through the comments procedure, we'll put in place the ability to contact the Commission through the web site and to contact Andrew and the Commissioners. It should be clear that there are no closed doors to any interest party at all who wants to provide input to the Commission. The third step would be

that the Commission staff would summarize and analyze issues proposed by commentators and raised by Commissioners in a report. The memo says that will be due no later than November 30, 2004, although the staff may report on specific issues before that time. And then, finally, the memo proposes that there be a meeting of the full Commission, the memo proposes in early January, to discuss and decide issues for study, although it notes that the Commission might choose to meet before that.

I know that a number of the Commissioners have some thoughts on elaborating or modifying the proposed procedure. So I would like to, at this point, throw it open to the Commissioners to comment on how they would like to proceed.

Jon?

VICE CHAIR YAROWSKY: I will say a few brief remarks. I think, just as committees in Congress operate, probably our most important function here is agenda setting. It's a difficult job, both short-term, midterm, long-term. Results and analyses flow from the agenda we set. So, to me, it is very important at this very preliminary stage to make sufficient outreach to all different communities and interests, which are great and diverse, and I know that

there is a sufficient amount of time allocated in this first period until September 30th. I think that will be well spent by all of us on the Commission if we can make that.

So I'm in favor of the general time intervals that you've set.

CHAIRPERSON GARZA: Okay.

COMMISSIONER SHENEFIELD: Madam Chairman, may I say a word?

First of all, I think we are all grateful to you for the work and to the Executive Director for the work that has gone into preparing for this meeting. Having chaired one of these some years ago, I am very mindful that what is apparent in public is representative of hundreds and hundreds of hours of work behind the scenes. So I want to thank you for that.

Second, I also am generally in favor of the basic skeletal proposal. I would like to suggest a modification or perhaps an addition more or less along the following lines: We do need ideas from all of the interested parties, and the outreach effort is essential. Notwithstanding that, the Commissioners were appointed, I think and appropriately so, because each of them have substantial experience in this general area and, indeed, has formed conclusions on many of

the larger issues that we will be asked to address.

And I think there are a few topics we already know we want to address, at least I would suggest there might be, so that there could be a parallel track, it seems to me. We move ahead with the general outreach. We get the ideas. Perhaps the staff summarizes them. Perhaps that isn't necessary. We don't know yet.

But there may be some few subjects that we could actually get started on and sink our teeth into right now. As an example, and I would suggest I assume we know we want to look at the issue, one of the issues that Chairman Sensenbrenner mentioned, exemptions and immunities. Without specifying any particular exemption, we could get started in the business of asking, let's say, a committee of qualified economists and names like Fred Kahn and Paul Joskow and Jim Miller all come to mind as experts in that area, to give us their thoughts on exemptions that today in 2004 are net consumer welfare disadvantages, so that at least you could have some of that started. That is an example.

Another example is the issue of remedies. I think we all know that we are going to get to that issue in due course. Is the treble damage remedy sensible? Outmoded? Is state enforcement sensible? Outmoded? Is indirect

purchaser enforcement sensible? Outmoded? Perhaps there are some things in that area. We may decide they are just fine, but those are questions we are going to be asked why we didn't examine them if we don't. There may well be others along those lines.

So I would like to suggest that maybe the Commission think out loud a little bit about what some of those obvious points are that we can get started on so that by November or January, we would already have moved down the path of accomplishing those.

CHAIRPERSON GARZA: John, just as a point of clarification, would the notion be that this initial effort would be to determine the extent to which the Commission wants to further study on these things, or are you suggesting that these would be issues that we ordinarily would agree at some point are going to be part of our agenda and our report?

COMMISSIONER SHENEFIELD: The latter. Very much the latter.

CHAIRPERSON GARZA: Any comment on that? Anybody else that would like to -

COMMISSIONER WARDEN: I'll make one brief comment. I assume in talking about whether treble damage actions

still serve the purpose they were intended to serve and do so properly, subtopics such as burdens of proof, contribution, joint and severable liability, and so forth would be subsumed.

COMMISSIONER SHENEFIELD: I would assume.

COMMISSIONER WARDEN: Well, I think that—I happen to agree with John Shenefield that that has got to be front and center in our consideration.

COMMISSIONER VALENTINE: Why don't we — I assume one of the reasons this is coming up is that it seems as if not meeting again until January 10th is not terribly ambitious and there may be very productive ways of filling up this time and that this would be then structured into a schedule, because certainly the outreach to the public is going to be critical, and we wouldn't want to preempt issues they are raising with ours. I assume they would be sort of parallel tracks, and conceivably we would even want to structure it so that if what we are getting back from the public is effectively meshing and matching with the things we are coming up with, we could even conclude earlier than November 30th with a, quote-unquote, summary and begin even earlier than January with a meeting.

Is that a fair summary or suggestion?

COMMISSIONER SHENEFIELD: The public may never --

CHAIRPERSON GARZA: Could I jump in for a second?  
I thought I may have heard a voice on the telephone.

COMMISSIONER JACOBSON: Hello?

CHAIRPERSON GARZA: Andrew, is there a way to put  
the phone by the microphone so we can hear Jon better?

MR. HEIMERT: No. The cord is not long enough.

COMMISSIONER KEMPF: John, can you hear us?

COMMISSIONER JACOBSON: I can.

CHAIRPERSON GARZA: Bear with us, Jon. We'll try  
to speak loudly so that so you can hear us. I apologize for  
the inconvenience.

COMMISSIONER JACOBSON: That's fine. I'm only  
going to be on a few minutes in any event.

CHAIRPERSON GARZA: In that case, since we hear  
you now, would you care to say anything at this point?

COMMISSIONER JACOBSON: Sure. As discussed with  
Deb earlier, it was my hope that we could get the staff  
report a little bit earlier than suggested in the  
memorandum. In any event, irrespective of when we get the  
staff report, that we should be able to have at least one  
meeting in the first couple of weeks in December, maybe the  
first week of December. My own speculation is that the

items on the agenda is going to require several meetings and that there's no reason that we can't start at that point and hopefully have one in December and one or two in January and, you know, be in a position reach a conclusion as to the status of the agenda, you know, at some point early in 2005.

COMMISSIONER MAJORAS: Deb, may I?

CHAIRPERSON GARZA: Yes, please.

COMMISSIONER MAJORAS: First, I want to apologize to my fellow Commissioners for being late. My new mode of transportation is one that I am not very accustomed to yet, and I have to get my timing down. So apologize to you.

COMMISSIONER JACOBSON: I'm sorry. I'm not hearing.

COMMISSIONER VALENTINE: She is apologizing for her late entry.

COMMISSIONER KEMPF: Because of a broken leg.

CHAIRPERSON GARZA: Her new mode of transportation is crutches.

COMMISSIONER MAJORAS: I'll talk louder. I think that September 30th is a good date. I most certainly wouldn't want to move it up any sooner, because I think the public input is absolutely critical, and to tell you the truth, I don't think most people will really seriously focus

on this until after Labor Day, and that really only gives about three and a half weeks in any case. So I think that is right.

Jon, while I agree with you that it would be great in theory to get a staff report sooner, and perhaps we could get some preliminary report, I am loathe to commit to it when we don't even have a staff yet.

CHAIRPERSON GARZA: Well, we have Andrew.

COMMISSIONER MAJORAS: Okay. And we don't know how many public comments that we'll receive. I know and others know just from, for example, the number of comments that have started to come into the Justice Department on just, you know, one particular settlement that there is more and more interest in the issues, and when you are opening up the entire field, we can get an awful lot of comments. And we since we don't know how many there are going to be and or how much we're going to need to digest, I hate to short-circuit that process.

I'm certainly in favor of having another meeting before January if we can do something useful, for example, talk about some of the outreach that we have been receiving, and perhaps if we are on two tracks, we most certainly should have another meeting; but if we crunch our timing too

much on when we are raising expectations on particular reports, I think we might find ourselves coming up short and we may find ourselves with reports that are less than what we would want them to be.

CHAIRPERSON GARZA: I agree with that, and just to clarify some of my thinking, and, gosh, I have done lots and lots of thinking about this and looked at others', the experiences of other commissions that have been created to do things similar to what we have done, the bankruptcy commissions and other commissions, and I have had conversations with folks on the Hill and other places. One of the things that I have come away with is that the issues of selection process is probably the most important thing that we will do, at least as important as what the contents of our report are. The agenda for Commission is very important.

I am a little nervous about – and one of the reasons that I had actually wanted and agreed with the process of having public input and public outreach and staff analysis before we settled on our agenda was so that we could be very considered about it, and I am a little hesitant or a little wary about picking up issues on the fly. One of the things that I noticed, just John raising

the -- John Shenefield raising the issue of remedies and then John Warden brings up there are all kinds of sort of subparts of that, the burdens of proof, the contribution, all these other various issues.

And my only concern is that this is not a particularly good forum unassisted by staff work and everything to really frame the issue well. It is a good way to identify things that I think would organize the initial phase one outreach. For example, we could say, well, we know we want to look at remedies; let's work on framing that issue for study and figure out why we want to put it in our agenda, what is it that this Commission, thinking about it in the abstract, this Commission can fruitfully do in that area given what our charge is, how are we going go about getting input for it, that kind thing.

And that is only one of just a whole lot of other issues that are potentially for study. My only concern is that it would be nice to have some thoughtful analysis of them all as a group to narrow it down to what we want. So I think the double-tracking is a good idea to get things started, though I will say we have three years from today to do our work and that is quite a long time.

Another possibility to me would be to have those

things out there, to do the outreach, to have whether you call them hearings or whether you call them, you know, outreach with smaller groups of Commissioners to flesh out a little bit more when we say this is an issue that we want to study, what are we really saying about that and then how are we going to prioritize it and weigh it against other issues that are likely to come in, and that is sort of my concern about the process of how we do it.

I am a little loathe to rush too quickly into identifying issues before we have had an ability to look at the universe and, frankly, use the \$4 million and the three years and the staff that it will get us to help us consider those issues.

COMMISSIONER SHENEFIELD: Well, I'm loathe to rush too quickly into anything, I will tell you that. It seems to me that nothing is lost and something is to be gained, i.e., if we can do some of our work sooner. If, for instance, on the issues of exemptions and immunities, we were to do some of the study work, whether as a full Commission or as a subgroup or however you would like to suggest, so that when we get together for our next meeting, we would at least have winnowed out some of the materials from the vast mass of stuff that is out there that would

help us to the decision; otherwise, I fear we'll come to January or November, we'll have comments, yes, we should be looking at exemptions and immunities, and then we'll have to ask the question we could ask now, which is, is there a consensus in the economic community that Webb-Pomerene is no longer at all useful, or is there a consensus that whatever remains of regulation in the shipping industry is no longer sensible?

My guess is there some consensus about that, and it is waiting there to be discovered, and all we have to do is lean forward and we will find it.

COMMISSIONER MAJORAS: And I think that I would envision that that would be part of what the outreach would be. So I think we are on the same - exactly. You could basically say we want to talk to you, we want to talk to you specifically about these issues. My only thing is that it may be that at the end of the day, you know, where is it on our issues list. But I think you're right. You may decide there is not enough there; for a variety of reasons, this is not going to be an issue that we are going to focus on. So I don't disagree with that. I think that would be helpful to sort of in the process to have a process to make sure that that happens and happens in the way we want it to

and it gets to a decisional point.

COMMISSIONER VALENTINE: I think what I am hearing is that, in fact, everyone thinks that September 30th is absolutely appropriate, that it's not fair not to give the public at least that much time, that we have got August in between. Then the only issue is how do we not lose time and just sit and stall out until January 10th, and therefore by putting in a few more trigger points and incentives and markers, starting on issue identification, possibly meeting earlier, would be a fruitful way to make use of the time.

COMMISSIONER KEMPF: Can I talk?

CHAIRPERSON GARZA: Yes.

COMMISSIONER KEMPF: Jon, can you hear me?

COMMISSIONER JACOBSON: I can hear you better than everyone else.

COMMISSIONER KEMPF: That is because I have a courtroom voice.

You had some stuff in your memo. I know you're in Italy, probably overlooking the water with a glass of wine in your hand, but I have what I thought was a very thoughtful memo you had sent around. I think it captures some of these issues. If you don't object, I would read it. If you do object, I won't.

COMMISSIONER JACOBSON: No, of course not.

COMMISSIONER KEMPF: Okay. This was Jon's what I thought was a pretty measured reaction to the memo that Chairman Garza described. He made two points: Number one, and I am reading his words: "There is no reason why it should take the staff two months, September 30 to November 30, to summarize and analyze issues proposed by comments and identified by Commissioners.

Candidly, I don't see any need for any staff summary. The Commissioners are a group of pretty experienced folks, and we should be able to read pretty well for others, especially since we are talking about proposals or issue considerations that are limited to 300 words.

If what is really contemplated is the staff synthesizing the proposals into a preliminary agenda for Commission consideration, I object more strongly. That is the Commissioners' business, maybe our most important business, and we neither need nor should we want any guidance from the staff.

I would either, A, skip the staff summary altogether or, B, have a true summary, in which event it would require about a week, not two months.

Two, consistent with the thoughts expressed above,

our first meeting to address the agenda should in no circumstances be delayed until January 10th."

Then he has, "It is a date that may well conflict with the ABA midwinter meeting in any event. The first meeting of what may be several should take place no later than the first week in November. Although Thanksgiving intervenes, I would hope that we could have no less than three or four meetings before Christmas so that we are in a position to announce our preliminary agenda and accept whatever public praise or flack may come by early January of '05."

He then says he may miss today's meeting, but if he had to have an up or down vote on the proposal, he would vote no.

Let me just give you my own thoughts, which I think I subscribe to much of what Jon says. I think the November 30th - I'm sorry - September 30th deadline is fine. I view that as a little bit like a fail-safe process. You want to ensure two things: One, you want to ensure that we don't overlook anything. As Jon points out, this is a group of people who have spent much of their professional lives thinking about these issues, and we could pretty well set our agenda with no input.

There is no patent on wisdom, however, and we all benefit from having everybody else provide us with their thoughts as to what we should cover.

Secondly, as several of the Commissioners have commented, we want to make sure that we do provide an opportunity for input from everybody who wants to have input, and so I welcome and embrace the September 30th deadline.

As for John Shenefield's comment, I would subscribe to it only even more so. I think that even before holding hearings and inviting whoever it is we want to invite, we could productively use some time now conferring among ourselves and in a public forum – there is no problem with that – as to what we think we ought to discuss and, indeed, what our thoughts are on some of those matters.

You have sort of signaled some of your own thoughts by the way you frame the questions, John.

And it strikes me that it is important that we have fully appropriate processes, but those are at the end of the day, in my judgment, to make sure that two things occur that we want to occur, one, that we don't overlook anything inadvertently, and, two, that everybody has an opportunity for input. But I see no reason to delay either

taking input on some of those subjects, as John suggests, or, indeed, beginning some preliminary discussions among ourselves.

From my own standpoint, it would be useful for me to have a sense of where people are coming from who are the Commissioners as I am listening to whatever input we provide. When I listened to your comments, for example, John, on exceptions and immunities, you know, I think of things like the dairy farmers price fixing, union protected price fixing, and I think if we are going to look at exceptions and immunities, we ought to look at all of them, not just one side of them. And so I would welcome that sort of thing.

But I am reminded when there was a rather public fight when Ross Perot stepped down from the General Motors board. They were asking him what he didn't like about it, and it was the time factor. He said two things I remember well. One was he said that, you know, down in Texas, if we have a snake in the tent, somebody steps on it and kills it, but at General Motors, they form a committee on snakes. Second, he asked them how long when they were working on the Saturn they thought it would take to develop the Saturn, and they said six years. He said, are you sure it's going to

take that long? And they said yes. He said, well, I would remind everybody that, you know, we did win World War II in less time than that.

I am really loathe to let so much grass grow under our feet before we start conferring about the issues that Chairman Sensenbrenner, for example, teed up today and others that we could productively think of on our own, and I'd just as soon start a dialogue among us and take input on things that you identified and others that might make sense to take a look at. I know in our very first administrative gathering, someone said, you know, maybe we should spend two or three days chatting, and it wasn't my idea, but I said, gee, that makes sense to me. We all recognize that much of our work will be done in the sunshine. I had no problem with that, but I think we ought to think about that. It struck me at the time as a good idea and still does.

That is all I have.

COMMISSIONER MAJORAS: In reaction to that and Jon Jacobson's memo, I don't think those things have to be independent of one another. In other words, I think we could front-load some of those right now in the way that's consistent with what Jon and Don are proposing, but at the same time, I don't know why that precludes having staff do

work on public comments so have them to synthesize them. We could get thousands, and for anybody who has ever tried to this, everybody on this committee still has a day job, and we are going to want to sink our teeth into this. There's no question about it, but on the other hand, we could have a lot of material to review in a very short period of time, and I just don't think we should lose sight of that because that is -- we all agree that is an important aspect, of getting that input, but it doesn't have to preclude us from getting going on our own thoughts.

CHAIRPERSON GARZA: Just to elaborate again on what I see the staff as doing, you know, I think about the way I would approach this if it were a project for a client, and maybe I'm just too corporate, too much like GM; but, you know, I would like -- because at the end of the day, what we have to do is make a report to the President and Congress, and in our little small world of antitrust, that's the most important audience I can ever imagine making a report to. So I want to make sure that -- you know, I think we have been given three years and \$4 million for a purpose, and that is to not only use the expertise, the considerable expertise, that we have here, but to do it in a way that, frankly, does justice to the project we have been given and does justice

to the stakeholders here, the people that were be considering our recommendations and whatnot.

What I see the staff doing, just to clarify, is –

COMMISSIONER JACOBSON: Deb, I am only hearing about one out of every six words. I did hear all of Don Kempf, and, unfortunately, I do have to depart.

I explained to Deb Garza my views, which are not all that different than hers. I agree with a lot of what Don said, maybe all of it, and I know you guys will come to a good determination; and, unfortunately, I have to beg out at this point.

CHAIRPERSON GARZA: Thank you, Jon.

COMMISSIONER KEMPF: Jon, we'll see you when you get back.

COMMISSIONER JACOBSON: Thank you.

CHAIRPERSON GARZA: What I see the staff as doing is not simply summarizing the comments that we get in, but also at the request – being basically resources for the Commissioners. Some of the Commissioners, obviously, are going to have a very good idea about some issues and others aren't about others, and just thinking of myself, there are some things I very feel very competent to address and other issues that I personally would want to have a little bit

more knowledge about. I see the staff as being there to basically respond in terms of giving maybe a little information on more of the legislative history, explication of case law, helping us to work through thinking about the interaction of certain issues, helping us to identify nuances.

There are numbers of things that the staff could do, the same kinds of things I have associates do when I have something to look at for a client. I think that's why we have been given the staff. So I want to make sure that we use them, and I think with the three years we have, we have the ability to use them. So I don't disagree with everybody's energy, and which I applaud and I am going to be reminding you about as we move forward, but I hope that we will use our staff well. And, again, I am a little bit - I don't want to not use them, because we have been given these resources and it is rare to be given that. So I want to use it, and I want to make clear that I did have something more in mind for our staff than simply summarizing.

The other concern I have, frankly, which is what Debbie mentioned and which I have encountered already is that you all have very high-powered practices and businesses and this is a part-time job, and we're all keenly aware of

the limitations on the amount of time that you can put into this. It is 60 days a year. Every time we spend any amount of time in a day, that is a day. So I don't want us to kid ourselves about how much you're going to be able to accomplish and how much assistance you are going to find that you need to balance your work and then also slog through comments, think about issues, go get someone who has research for it.

I hope to use the staff to help you, frankly, so that we can use better, make more valuable use of your very scarce time. So I hope not to mention the staff and using the staff just to give them work or to delay us, but that I hope that we'll keep in mind that they're there. I think we are considering several people to help us as senior advisors and whatnot that can be pretty valuable to us. So I want to just say that I hope that we will be able to use them, and I'm all for moving ahead, and as long as people have time and energy to devote to it, I say by all means, and if that is going to peter out at the end, let's do more now and take advantage of our energy and enthusiasm at this point to move ahead and grab the initiative. That is fine with me as long as we don't - obviously, I'm going to be the tern in the punch bowl, to use a phrase of a friend of mine, but I am

going to do it because I am afraid that I don't want to -- at the end when I'm, frankly, going to be pulling together the report, I don't want to want to be left with a lot of Helter-skelter stuff that is going to be impossible to fold together.

So I don't want to hold you back, but I am always going to be in your ear and talking about process.

COMMISSIONER SHENEFIELD: I take it, Madam Chairman, that we also welcome the assistance of outside groups. I see representatives of the American Bar Association in the audience. I see representatives of the American Antitrust Institute in the audience. I see folks from the Department of Justice in the audience. There's no doubt there's people from the Federal Trade Commission here.

COMMISSIONER VALENTINE: There are several.

COMMISSIONER SHENEFIELD: And each of those and all of them together can be of enormous help in helping to focus us in, because each one of them has a special perspective and special experience.

CHAIRPERSON GARZA: I agree.

COMMISSIONER KEMPF: I do have some concern that we not be limited to what I would call the inside baseball crowd and we get some regular people giving us their views

as well.

CHAIRPERSON GARZA: Let's hear it for the regular people.

COMMISSIONER WARDEN: Do you really think regular people sit around and think about these questions?

CHAIRPERSON GARZA: There is no one regular up here.

COMMISSIONER VALENTINE: Actually, Deb, so we could maybe reach a compromise, how about we keep the end dates that you have set, but put in another meeting or two before January 10th? And the only thing that troubles me now, quite frankly, is that it says the Commission may also choose to meet prior to that date at the call of the chair. Now, you can veto all of us.

CHAIRPERSON GARZA: No, no, no. The object of that was to build this flexibility in.

COMMISSIONER VALENTINE: Okay.

CHAIRPERSON GARZA: So this should be perceived as a skeleton and that we would be able to fill in the middle. I think we've talked about the part from, say, tomorrow through whenever, November, December, whatever, which could be, I think, quite busy because I hope that groups of Commissioners, for example, will be able to go out and with

this outreach process that we're talking about and say we now have to work with Andrew to make sure that that gets done and it gets done according to what legal requirements we have to observe in terms of openness and whatnot.

But, for example, you know, I think there can be a lot of activity between now and then, meeting with groups with academics and groups of economists or groups of the Bar on certain issues in Washington, in Chicago, in San Francisco, wherever. So there is – actually, I don't think we were thinking about dead time. It was more of, basically, okay, we have got until July of 2007 to come up with a report; let's build in a process for basically building our agenda, getting the information we need, getting the analysis we need.

And in some sense, I frankly thought January – although I put January because I was concerned about the December holidays and the ability to get really focused in December, but I really did that so that we would have the time to go out and do that kind of stuff and get the staff work as we need it.

So I would propose, maybe, that we with all this input – I don't mean to cut off discussion now, but that it go back to the working group, Deborah that you are on and

Debra and John and Jon Jacobson, to take this sort of feedback and then propose more flesh. And I know you guys can work quickly because you worked quickly the first time, to basically kind of flesh out the middle part, the outreach part. And if people are available for a meeting in December, I am fine with that.

VICE CHAIR YAROWSKY: And that may reconcile a lot of these. It could be that there could be a public meeting before or after Thanksgiving, and that could be used. I mean, you all think about it in a subgroup, but as this other process is going on with the September 30th and November 30th dates, we could have a public hearing after Thanksgiving to talk maybe about top-rung issues.

CHAIRPERSON GARZA: Sure.

VICE CHAIR YAROWSKY: We could speak among us about what we think are the top-rung issues, not to be decided, but to at least get that conversation going so that certainly by the January meeting, that has already started moving along and then we'll catch up with other issues that may not be at the top rung.

COMMISSIONER MAJORAS: I don't want to speak for you, John. I'm just wondering if that is soon enough.

COMMISSIONER SHENEFIELD: Sure.

CHAIRPERSON GARZA: I think Andrew will reach out to folks and start getting dates, and so everybody try to – I mean, if this is what you want to do, that's great, and so let's make sure that can happen but right now getting – not right now, after this getting your calendars out and let's try to get as full a participation as we can and pick dates that no one is going to be unhappy about.

For public meetings, we need a quorum. I think Andrew can give guidance to us on our possibilities to have subcommittees, if you will, smaller groups of Commissioners going out maybe on particular issues, affinity issues, issues of particular concern to you where you have expertise, John, for example in remedies or something, and that will allow us, I think, to move forward more quickly if you don't have to have all 12 Commissioners. But I think Andrew and whatever staff we have should be of use to you to make sure we get that captured and distributed.

Steve, you can talk

COMMISSIONER CANNON: Not to be picky, but November 30 is just like the end date. So Andrew might have it done by October 1st or October whatever. So I wouldn't get too fixated on it.

CHAIRPERSON GARZA: No. It's his better get it

done by then date.

COMMISSIONER CANNON: Yes, but we're in agreement on September 30. So I think that we at least officially have to vote on getting this request for public comment out so that this can be done.

CHAIRPERSON GARZA: Yes.

COMMISSIONER CANNON: So can I move that?

CHAIRPERSON GARZA: You certainly can. Do I have a second?

COMMISSIONER KEMPF: Second.

COMMISSIONER SHENEFIELD: Second.

CHAIRPERSON GARZA: Well, those are the magic words.

COMMISSIONER CANNON: Take a vote.

CHAIRPERSON GARZA: We did take a vote. We had a second. So I guess the motion is adopted and Andrew will – if anybody – is the form of the Federal Register notice sufficient for people then? We're all in agreement on the September 30 date and everything else is fine? Okay. Then Andrew will take care of getting that into the Federal Register, and I think it will probably be Monday or Tuesday that it will appear.

COMMISSIONER KEMPF: I think when someone moves it

and seconds it, you still have to take a vote.

CHAIRPERSON GARZA: I'm sorry.

COMMISSIONER KEMPF: But I think I heard everybody second it.

CHAIRPERSON GARZA: Yes.

And, Andrew, you will also take care of the appropriate press and other things?

MR. HEIMERT: Yes, I will.

CHAIRPERSON GARZA: All right.

COMMISSIONER MAJORAS: Do we have an address yet?

MR. HEIMERT: We are working on that. As I understand it, the United States Postal Service is currently re-jiggering all of its post office boxes in the D.C. metro area and is not issuing any for another week.

CHAIRPERSON GARZA: So it may not be Tuesday or Thursday. It will be whenever -

MR. HEIMERT: We may be able to enter into a lease more quickly than that.

CHAIRPERSON GARZA: It will be whenever U.S. Postal Service can give us a post office box.

COMMISSIONER KEMPF: In the interim, you do have an E-mail address.

CHAIRPERSON GARZA: We do.

MR. HEIMERT: I do have an E-mail address.

CHAIRPERSON GARZA: People did not want to go out and have to look at our web site for the address to mail hard copies to, and so we hoped if we could – we would get the E-mail address and the post office address or a permanent address, which may be possible.

And can we also have a motion, then, to have the working group headed by John Shenefield come up with a further plan for proceeding?

COMMISSIONER CANNON: Second.

COMMISSIONER KEMPF: So moved.

CHAIRPERSON GARZA: Okay. Can we vote? So moved, and, John, that is what you'll be doing.

Is there any further business for the Commission to discuss?

COMMISSIONER SHENEFIELD: Just an observation that four of us are named and John and three of us are named Debra, and the record will be chaos unless there is a little bit of indication of which John or which Debra we're talking about.

CHAIRPERSON GARZA: Court reporter, do you have that?

Fortunately, Andrew had that covered, and so for

the audience, there will be a transcript of this hearing or meeting, as there will be every meeting, that will be publicly available, and depending on whether we can do it or not, we'll publish that on the web site. Is that right?

MR. HEIMERT: My hope is that we will be able to post it on the web site once the reporter has returned the transcript to us. It will also be available, I believe, for purchase from the court-reporting agency for those who want a hard copy of it.

CHAIRPERSON GARZA: Okay. Any other further business?

All right. Then if there is no further business, I think what we will do now, I guess, is take comments, questions.

MR. HEIMERT: I have received no cards from people to ask questions.

CHAIRPERSON GARZA: May I ask, is there anyone in the audience who would care to ask a question or say something?

Andrew, why don't we give them a minute?

MR. HEIMERT: Sure.

COMMISSIONER KEMPF: I will answer the question without the question.

CHAIRPERSON GARZA: The answer is?

MR. HEIMERT: It looks like there are three questions. The first is from Bert Foer.

Would you care to ask your question?

MR. FOER: Thank you. My question is simply, will the web site include an ongoing compilation of law review and newspaper and other articles that relate to the work of the Commission?

CHAIRPERSON GARZA: Do you mean, Bert, like your article?

MR. FOER: Or Jared Seiberg's or ongoing coverage, I think is what I'm looking after. I can read my own article. I'm more interested in seeing others.

CHAIRPERSON GARZA: And your web site is so good, frankly, why would anyone need to go to ours? But I think we can take that as a suggestion.

COMMISSIONER KEMPF: I would welcome that. I have already read yours and Ky Ewing's, and those are the only two that have come to my attention so far. The more of those I can read, the happier I am.

COMMISSIONER VALENTINE: But you don't want us to publish every article ever written on Section 1?

CHAIRPERSON GARZA: I take it he didn't mean that.

COMMISSIONER VALENTINE: Okay.

MR. FOER: No. I think coverage of the Commission's activities is what I had in mind.

CHAIRPERSON GARZA: Well, anything that anybody wants to send us on that. It will be helpful, I think, to bring it to Andrew's attention so that he can get it onto the web site. I don't see any reason why not to do that.

Okay.

MR. HEIMERT: I'll look into the feasibility of that.

CHAIRPERSON GARZA: Okay.

MR. HEIMERT: I think this is Charlie Cray that has a question.

MR. CRAY: Yes.

CHAIRPERSON GARZA: You're with an organization?

MR. CRAY: The Center for Corporate Policy here in Washington. I'm interested in learning more about the plans for outreach to consumer groups, family, farmers, the many groups that raise concerns about the media ownership rule proposal last year and other sort of grass roots perspectives on giantism.

COMMISSIONER KEMPF: On what?

MR. CRAY: Giantism.

CHAIRPERSON GARZA: Well, of course, obviously, those groups are welcome to submit comments in our comment period, and we think as our outreach efforts as they are developing will include consumer groups as well other stakeholders, and I am comfortable that there is not going to be lack of opportunity for those folks to express their views and anyone else.

COMMISSIONER SHENEFIELD: Well, it would be helpful so we're complete if you have groups you think should be on the list, if you could give Andrew a list of those groups so we can be sure to have them.

COMMISSIONER KEMPF: And I think that I would certainly welcome that input as well as the competing input from the large media companies, for example, for the issues they're particularly focused on.

MR. HEIMERT: We have a third question. It was submitted without a name. So I will read it unless the person who submitted it without a name wants to stand up and ask it.

Oh. Please go ahead.

MR. DELAMAJO: Steven Delamajo, Association for Competitive Technology. I was just anxious to learn the criteria that will be use or the process for figuring out

which of the suggested issues will make the priority list. You're bound to hear more issues than you can study even over three years. How will you determine which ones will be addressed?

CHAIRPERSON GARZA: Well, that's the \$64 million question. That is the big question. I mean, that is part of what we are going to be working through.

COMMISSIONER KEMPF: Arbitrarily by vote.

CHAIRPERSON GARZA: Yes. But I do think that, you know, one of the things that I think that the Commission will have to discuss in future meetings is that question, what are we perceiving as being the goals of our Commission, what do we want to see come out at the end, and what will be the benchmarks; and, frankly, that is part of the process that I had hope the staff would help us with and deliberate on in the next months coming forward, because we do need some bases by which to decide what of potentially hundreds of issues is useful for us to focus on. I know in talking individually to a lot of the Commissioners, there seems to be a consensus that if we try to tackle 200 issues, we would not be very effective in what we are trying to do. And so we have to find a way, I think, to narrow the issues and to get a framework that is going to make our work useful.

So that is a charge to the Commission, I think, to figure out how that is going to be done.

MR. DELAMAJO: Just to follow up on that, is it like that the criteria, then, would be something that would be published before the September 30th deadline?

COMMISSIONER WARDEN: I don't see how you can do that. It has got to be collective judgment of the Commission. I don't see how that is articulable. Each of us might have a different view.

CHAIRPERSON GARZA: And it won't be a point system.

VICE CHAIR YAROWSKY: I agree with John. I don't know if it's right or wrong. I think that is just part of the normal discourse of any collective group that has different individuals with different backgrounds. One has to believe we all come here in good faith with different backgrounds and hopefully clear minds and they have to reach a consensus about what that is going to be. That is what happens in this room every day. We just happened to be in this room, and I hope we can draw from that, but that is probably the hardest decision we have to make.

COMMISSIONER KEMPF: And when cert is denied, sometimes the dissenting justice will write something that

says, hey, this is something I would have thought about, but you never know.

COMMISSIONER VALENTINE: I also think that there probably are no criteria by which we could comparatively measure which particular proposals might contribute the greatest good to the future of the economy or the various constituencies within that economy, and what we will have to rely upon is simply our collective judgment as to those areas where we may have the greatest opportunity to make some constructive improvements. I mean, ultimately we could decide not to change anything, actually, but let's hope that we haven't invested money and three years of time in doing it.

CHAIRPERSON GARZA: That's a good point. I mean, to some extent, recognizing that there is a consensus around a policy has some merit to it, because after all, with economic regulations, that is what antitrust law is. It needs to be largely self-enforcing and there needs to be a consensus that the policy that we are pursuing is the right one. So part of – I think part of it is if we conclude on certain issues that this is the right thing to do, I think that can be potentially a good, and it can be a good in terms of communicating with other enforcement jurisdictions,

outside this country, for example, why we think the way we're approaching it is actually a good thing.

So I don't think we're necessarily all focused on change. So we're doing what we are charged to do, which is study to determine whether it is working or it is not working.

COMMISSIONER SHENEFIELD: A variant of that is there may well be -- I won't mention any specific examples, though I have one or two in mind, but pieces of antitrust legislation that make no sense whatever, but there is absolutely no chance in hell that any of them are going to get changed. The question then is it worthwhile speaking truth in this forum--

COMMISSIONER KEMPF: The answer is yes.

COMMISSIONER SHENEFIELD: Even though it is going to have no effect.

COMMISSIONER KEMPF: Well, the answer is yes.

COMMISSIONER SHENEFIELD: Or should we go on to something where we have a chance to make a difference.

COMMISSIONER KEMPF: I'm sure we'll have a robust discussion about the Robinson Act.

CHAIRPERSON GARZA: But that is a valid point, John, and I think that one of the things that we have done

is looked at things like the bankruptcy commission and other commissions, and I think we can learn from that. There are some things we can get really bogged down about, and the question is whether it is worth it.

COMMISSIONER SHENEFIELD: I think a subject that has always amazed me is dual federal enforcement of the antitrust laws. I mean no disrespect.

CHAIRPERSON GARZA: That was to Debbie.

COMMISSIONER SHENEFIELD: That was to the person I hope—

COMMISSIONER CANNON: And she's on crutches, John.

COMMISSIONER SHENEFIELD: But the question is there any public policy justification for it that makes sense, but I think everybody understands that it is very unlikely ever to change, and so why bother?

COMMISSIONER KEMPF: Well, I think, you know, we are now evolving into what I said earlier I hope we would evolve into, which is a thoughtful discussion of issues. On that one, I would be interested to — there is some benefit, for example, for people who will fight to the death to preserve duality to have them testify and say why, and that may inform us to say — suppose we were unanimous that there should not be dual jurisdiction. That might be helpful to

know even though it might not lead to legislative reform. When I say even though, I mean it's a very small chance of that. But I don't think that makes it a fruitless exercise to put a little sunshine on whether it makes sense or not.

CHAIRPERSON GARZA: Any more comment?

Any other questions from the audience?

Yes. Do you mind saying who you are?

MR. SEIBERG: Yeah. Jared Seiberg with the Daily Deal. I was wondering if the meetings that the Commission is going to hold with agency officials and interest groups, whether those will be done in public, and if not, will transcripts of those interviews be made and disclosed?

CHAIRPERSON GARZA: We are going to proceed in the way that we are legally required to, and our general counsel has been hired for one particular reason, among others, to guide us in that.

Certainly, all meetings, all full meetings, of the Commission are open to the public and will be transcribed. Hearings will be open to the public and will be transcribed. I believe under the FACA rules, we'll get more guidance on that, that these individuals – that we have the ability to have smaller subcommittees meet with stakeholders in a non-public way.

We are basically going to develop a policy, and that is one of the reasons why we need to slow down a bit, because we do need to have an understanding of the policy and procedures that we are going to follow in that regard so we know and you know.

MR. SEIBERG: So it is possible that a subgroup meeting with stakeholders will be private and that there won't be a transcript on those?

CHAIRPERSON GARZA: It is possible. We have to look into that, although anything that gets submitted to the Commission for consideration or deliberation is a matter of public record.

COMMISSIONER KEMPF: Let me go to what may be driving your question, and that is, you know, back room deals-type things, undue influence or things like that. The composition of this Commission is very diverse. We have six people who were appointed by Democrats, six who were appointed by Republicans. They came from three different selectors on each side, and I think the composition ensures that there is going to be a healthy and robust discussion of virtually every issue that comes before us. So I am not worried that John Shenefield is going to sneak stuff by me. I'm not.

He and I have different perspectives, but I fully expect that there will be a full and frank discussion of everything. So I am not concerned that if the subcommittee that he is on and I am not is being – this thing gets sent back to them and they're going to pull the wool over my eyes in some way, or yours or the public's.

CHAIRPERSON GARZA: We're going to be largely transparent in the way that we operate, but we have to be able to operate in a way that actually we can move forward. But we'll have a policy about that and that policy will be public.

MR. CRAY: Charlie Cray with the Center for Corporate Policy again. Is there any—many – this is a question that you don't have the answer right now, but is there an intent to avoid conflicts of interest for people who, in their prior practice or otherwise, represent clients who may have pending matters related to issues being discussed would recuse themselves from those subgroups or from discussing those kinds of matters, or can we expect full disclosure any time that issue might arise?

CHAIRPERSON GARZA: I think it is important to understand that this Commission has the power to do nothing, which some would say is exactly what we have been doing, but

we'll put that aside.

We don't make decisions, and so I think you need to keep that in mind in terms of your question about recusals and everything else. We don't determine anyone's rights. We don't determine results of cases. We basically evaluate and make a Commission - Full Commission report. So I just want to be clear about that as you think about your question.

COMMISSIONER KEMPF: I can't speak for others, but I would hope, A, to participate in anything I have an interest in, and, B, if I have a conflict, to disclose it. Let me address one of my fellow Commissioners. To my left is John Warden. He has spent much of the last few years acting as counsel for Microsoft. I think we would be seriously remiss if we didn't solicit his views on all the important issues that that set of proceedings has given rise to. All of us know that he was counsel for Microsoft, and we can bear that in mind in any of his comments, but I want his comments.

COMMISSIONER VALENTINE: I believe, also, that as members of a Federal Advisory Commission, we will be subject to government conflict of interest laws. Most of us are lawyers and have legal standards that apply to us. And,

finally, I think that what you tend to find in commission bodies as opposed individual decision-making cases is that we will be thinking much more about general rules and policies that do not benefit any particular client or, in most likelihood, even any particular industry.

Antitrust is somewhat unique in that regard.

COMMISSIONER SHENEFIELD: Speaking only for myself, I will not vote on any issue that affects a major client of my law firm. Just to put it out in front, the best example of this, and I don't think we're going to get into this, is the baseball exemption. I'm unable to participate on any vote on that matter.

COMMISSIONER MAJORAS: May I just get a point of clarification?

I understand the baseball, but any change in any law that could affect any of your major clients of your firms, suppose there were a recommendation to significantly change Section 2 or Section 1 -

CHAIRPERSON GARZA: That's unusual. That is kind of what Debra was saying. That is what you're talking about, industry specific.

COMMISSIONER VALENTINE: Most antitrust is, in fact, cross - it's just the exemptions.

COMMISSIONER MAJORAS: Okay.

CHAIRPERSON GARZA: Any other questions, I dread  
to ask?

No?

Well, any other business by the Commissioners?

COMMISSIONER KEMPF: Has anybody heard anything  
about the Nomar trade to the Cubs?

CHAIRPERSON GARZA: Well, this meeting of the  
Antitrust Modernization Commission is adjourned.

[Whereupon, at 4:15 p.m., the meeting adjourned.]