

ANTITRUST MODERNIZATION COMMISSION

COMMISSION MEETING

Friday, June 16, 2006

Federal Trade Commission Conference Center
601 New Jersey Avenue, N.W.
Washington, D.C.
Merger Enforcement Issues and Patent Reform Issues

The meeting convened, pursuant to notice, at 9:34 a.m.

PRESENT:

DEBORAH A. GARZA, Chairperson
JONATHAN R. YAROWSKY, Vice Chair
W. STEPHEN CANNON, Commissioner
DENNIS W. CARLTON, Commissioner
MAKAN DELRAHIM, Commissioner
JONATHAN M. JACOBSON, Commissioner
DONALD G. KEMPF, JR., Commissioner
SANFORD M. LITVACK, Commissioner
JOHN H. SHENEFIELD, Commissioner
DEBRA A. VALENTINE, Commissioner
JOHN L. WARDEN, Commissioner

ALSO PRESENT:

ANDREW J. HEIMERT, Executive Director and
General Counsel

SUSAN DESANTI, Senior Counsel

WILLIAM F. ADKINSON, JR., Counsel

NADINE JONES, Counsel

MARNI KARLIN, Counsel

ALAN J. MEESE, Senior Advisor

CONTENTS

Merger Enforcement (Substantive Merger Law and Hart-Scott-Rodino) and Patent Reform Issues

<u>ITEM</u>	<u>PAGE</u>
Welcome	4
Substantive Merger Law.....	6
Hart-Scott-Rodino Act.....	106
Patent Reform Issues.....	173

These proceedings were professionally transcribed by a court reporter. The transcript has been edited by AMC staff for punctuation, spelling, and clarity. All Commissioner votes and views transcribed herein are subject to change or modification.

P R O C E E D I N G S

CHAIRPERSON GARZA: I want to welcome all our Commissioners, staff, and members of the public in attendance today. We have some very interesting and, in some cases, challenging issues to discuss – and a lot of them. So, we want to start as soon as possible.

We'll start today with merger enforcement issues, first addressing substantive standards and then addressing procedural issues. After that, we'll move to discussion of certain patent reform proposals that have been made by the Federal Trade Commission and others, some of which are now pending in Congress.

Really quickly, a few words on how we'll proceed. This is partly for the audience and partly for the record. To assist the Commissioners, the staff has prepared memos on each of the three subject areas we're covering today. These memos are an attempt to summarize the testimony and comments to the Commission. And the staff has also prepared what we call a discussion outline, which is a proposed outline of potential recommendations and findings for the Commissioners to discuss. This is meant to assist the deliberations;

it's not meant to be exclusive as to what might be recommended.

For members of the audience, as we go through we start with what we call a straw poll, just for the Commissioners to get a sense of where we all tentatively are on issues before we engage in deeper discussion. So, you may hear us refer to numbers and letters. I gather from a program that the ABA had that that has been a little bit mysterious for people who have been trying to read the transcript and figure out what we're talking about. There are copies of the discussion outline available, and if you look at that, that's where you see the numbers and letters what we're referring to.

Finally, I will just remind the Commissioners to speak into their microphones so that the court reporter will be able to pick up everything that you say. Wait to be acknowledged by me or Andrew Heimert, the Executive Director and General Counsel, before speaking. And also, it is important to use the microphones because the blowers in the back of the room make it difficult for the audience to hear you otherwise.

And with that, Andrew, do you want to start on

mergers, substance?

Discussion Of Merger Enforcement Issues:

Substantive Merger Law

MR. HEIMERT: Sure. We'll start with mergers, substance. I'll note that we have a quorum of Commissioners. Commissioner Burchfield is not here today, and Commissioner Kempf is not here, although I expect him later. We nonetheless have a quorum.

Commissioner Carlton, would you care to begin on merger substance issues, please?

COMMISSIONER CARLTON: Okay. Let's see.

On item 1, I would vote yes.

Under the in particulars, I'd vote yes on 1(a), yes on 1(b), and yes on 1(c).

Regarding the next ones, this indicates – the way it's phrased, it says greater consideration. That must mean greater consideration than they currently give. My own view is that efficiencies are very important, and I think I say a little later on some of my votes, they're already giving consideration to efficiencies.

That would be my same comment on (e), that they already give consideration to innovation, and they should

continue to do so.

On (f), I had a slight question. It says that the DOJ and FTC rely less on concentration presumptions, *et cetera*. And my question is, is that less than they currently do, or does it mean that they should rely less on concentration presumptions and more on something else, such as detailed studies of the industry?

My own sense is that they do not rely all that much on concentration presumptions and do rely on detailed industry studies. So, therefore, I would vote yes on (f), if it were to say, continued to, but relied less on concentration presumptions, *et cetera*. And then more on detailed studies of the individual industry.

On (g), I would vote yes, with the caveat that I didn't like the word "unilateral." I would take that word out because I don't want to get into a discussion of unilateral versus coordinated effects in this proposal that I'm voting on here.

I would vote yes on the next one, item 5.

I would vote yes on (a), and yes on (b). On (c), I think it's important that we change (c) –

COMMISSIONER CARLTON: One on page two – under

one - the one that begins "finite merger enforcement policy would benefit - I'm just not voting yes on it. So, I'd vote yes on 5, yes on 5(a), and yes on 5 (b).

On 5(c) I would recommend making a change. I think this is an important change. Instead of the word "concentration," I think it should be much broader, and it should be the relationship between market characteristics and market performance. And let me just explain why.

As you might recall, several of the economists testified that no - well, a few industrial organization economists continue to study cross-sectional relationships between concentration and pricing. Instead, people do industry studies over time. And therefore the way this is phrased, it could be interpreted to mean we should go back and do those studies that, actually, the profession has by and large abandoned. What is interesting is to study the relationship between market performance and a whole variety of different market characteristics, not just concentration, but R and D, technological change -

So, with that caveat, I would vote for (c).

Under II, I would vote yes.

On number 6, I would vote yes.

On number 9, as long as we have – and I don't think it's anywhere else – there are certain cases in which you can cast an innovation market analysis in a different way, so that it's a future product that's coming into existence. For example, in a drug case, you can see the pipeline of drugs coming into the market. I would prefer to say that they abandon the use of innovation market analysis in merger cases and replace it, to the extent that we're going to use it, with a future product analysis, if that can be done. And I hasten to add that that can only be done in very few cases; drugs are one example.

I would vote yes on number 11. I think number 11 is very important, especially in industries where innovation has a cycle. Two years may not capture the cycle.

Under III, I would vote yes on number 13.

And, in particular, I would vote yes on 13(b).

Under number 14, I would vote yes, that a total welfare standard should be adopted. And I think it's

important to point out – and I don't think this was emphasized at the hearings, in some of my questioning, I tried to emphasize it – you cannot simultaneously have a consumer-only standard and oppose monopsony. And there is a logical inconsistency if we vote for consumer standards and yet implicitly still want the antitrust clause to cover monopsony.

So, I'm voting for total welfare. If anyone else votes against that, they – at least, I urge in our write-up, that we say that we're not abandoning applying the antitrust laws to monopsony. But I would vote for the total welfare standard.

I'd also point out that in most transactions you have corporations on both sides of the transaction, both the buy and sell side. So, it's odd to give credit to one side but not the other.

In IV, I would vote yes on 15.

And on 17, (a), (b), and on 18.

MR. HEIMERT: Thank you. I'll note that Commissioner Kempf has arrived, so we now have 11 Commissioners.

Commissioner Garza.

CHAIRPERSON GARZA: Okay, on I, I would say yes to number 1.

And, in particular, (a), (b), and (c).

And (d) and (e), although the only reason is, as Dennis indicated, I think the DOJ and FTC already do give consideration to efficiencies and to innovation, but, as I assume we'll discuss when we come to those issues later on, I do agree with some of the recommendations, both on efficiencies and on innovation.

So, for that reason, I say yes on (d) and (e).

I agree with Dennis's revision to (f).

Also, on I, I would say yes to 5(a), (b), and (c), although I agree to Dennis's revision to refer to market characteristics.

On II, I would say yes to 7.

On III, 13(a) and (b).

And also, on 14, for the reasons Dennis mentioned, I do hope that we will discuss today whether or not it makes sense to focus exclusively on a consumer surplus standard. And I do think that one of the anomalies of doing that is the monopsony issue that Dennis raised.

And I think that it's also somewhat difficult, conceptually, to go with a strict consumer surplus standard and still take account of innovation effects and other kinds of efficiencies that we've been discussing. So, I look forward to a robust discussion of this issue — how we should think about the welfare standard. I think it's important to focus on that and be very clear on it, because it could drive a lot of the other policy decisions.

On IV, I would say to 15.

Yes. To 17(a) and (b).

And yes to 18.

MR. HEIMERT: Commissioner Kempf, would you like to drop back a little bit or would you like to begin now?

COMMISSIONER KEMPF: No. I'll just stay in the queue where I am.

MR. HEIMERT: Fair enough.

COMMISSIONER KEMPF: On number 1, I would say no.

1(a) is difficult to answer, because I don't think that we really sought that. It says we weren't

presented with enough evidence. I'm not sure we really sought evidence on that specifically.

(b), I would say yes.

(c), I don't know where I am. I'm probably leaning towards yes, but I'm interested in the discussion before addressing that.

(d), yes.

(e), undecided, leaning toward yes.

(f), yes.

On (g), I don't know what to make of that. It seems to me that the statute requires that – lessening of competition in any product – or any line of commerce or section of the country. Those strike me as geographic and product markets. So, I don't know how we can say we should de-emphasize the importance of those. I would think we would want to emphasize the importance of getting them correctly rather than de-emphasizing them. So, I think that there was change needed and warranted, but I don't think it's to de-emphasize something the statute requires.

On 2, I would say no; 2(a), no; 2(b), no.

3, I'm undecided. I'm leaning toward yes. I

have the same comment that I had on 1(a), which this is something that I'm not sure that we have an adequately developed record on.

On 3(a), I don't think the issue is aggressiveness. I think it's misguided enforcement, not aggressive versus less aggressive enforcement. So, while I would not be in favor of that, that they enforce the antitrust less aggressively – I'd say more thoughtfully. I think that the problem is not one of over-aggression; it's a problem of not being well thought through.

On 3(b), I would say yes.

(c), I want to hear more discussion, but I'm inclined to yes.

On (d), I would say yes.

4, I'm undecided, and, obviously, it queues to some of the other things that we've had.

On 5, I would want to discuss that more. And I put some stock in the suggestions that former head of the Antitrust Division, Hewitt Pate and others have made about further study, and would think that there's some wisdom in some of the suggestions that he and others have made along those lines.

5(a), I would say yes, but they should outsource it. It shouldn't be done internally.

5(b), you know, I'm not sure what that means, and so, I sort of have some ambivalence about it.

(c), I'm undecided, but leaning toward yes.

In II, on 6, I say no.

On 7, I say no.

On 8, 9, 10, and 11, I'm undecided; I want to hear more discussion.

Turning to III, on 12, I would say no; on 13, I would say yes.

I'm undecided on 13(a) and 13(b). I'm probably leaning toward yes.

And I would add a 13(c), which would be all efficiencies. In other words, not saying, gee, they didn't give greater credit to R and D or information, or this, or that or fixed cost. All efficiencies ought to be considered more.

14, yes.

Turning to IV, I really found I had a double-barreled answers to several of the questions here.

On 15, the first sentence I'd say no; the

second sentence I'd say yes.

On 16, I'd say yes on the first sentence, which I would end at the word "levels" in the second line, and then no on what I would then make the second sentence.

On 17, no on (a).

On 17(b), no on the portion ending with the word "data" in the third line, and yes for the balance of it.

And on 18, no.

[Laughter]

COMMISSIONER JACOBSON: That will make FTC watch.

COMMISSIONER CANNON: Did you get all that, Andrew?

MR. HEIMERT: I'm sure our court reporter has it.

COMMISSIONER KEMPF: Well, I'm happy to go over any of them at any time.

MR. HEIMERT: Commissioner Warden.

COMMISSIONER WARDEN: I find myself in general agreement with Dennis, but not complete.

I vote yes on I-1.

Yes on (a) under 1. Yes on 1(b). Yes on 1(c).

On (d) and (e), I think these matters deserve substantial weight. I'm not sure there's evidence that insufficient consideration is being given to these, with the one small exception, which is why I think I vote yes on (d). There was expressed concern that insufficient consideration was given to efficiencies in fixed costs, and I think that certainly should be considered.

I vote yes on (f), as revised by Dennis.

No on 2. No on 3. No on 4.

Yes on 5. Yes on 5(a). Yes on 5(b). Yes on 5(c), as revised by Dennis. Yes on 6.

I nonetheless vote yes on 7.

No on 8. No on 9. No on 10.

Yes on 11.

Yes on 13(b). I'm not persuaded that there's a record that insufficient weight is given to R and D and innovation efficiencies. I could be persuaded.

14, I heard Rick Rule said. I respect Dennis's expertise on this subject, but I am reluctant to vote yes on 14, because I don't think that we've been presented with compelling evidence that the difference is outcome

determinative in any instances that I'm aware of. And the consumer welfare standard is accepted. It's well established in the law. It is, if you'll excuse the expression, good PR for antitrust, as opposed to putting more money in the pockets of capitalists, a group that I generally espouse. I don't think it's good from a PR standpoint.

And it applies in areas of antitrust other than mergers. So, I vote no on 14 for those reasons.

I vote yes on 15.

Also yes on 16. I do think that if you put together everything in the first sentence of 15, you do have a pretty good notion of what enforcement policy is. But I see no reason to continue outmoded HHI measures in the guidelines. By outmoded, I mean ones that are clearly not being followed by the enforcement agencies.

I vote yes on 17(a), with an emphasis on significant investigation. I don't think this should become a routine requirement.

I vote yes on 17(b).

And I guess my basic inclination is to vote yes on 18, although I'm not sure that that is a burning issue

today.

MR. HEIMERT: Commissioner Jacobson.

COMMISSIONER JACOBSON: Let me state preliminarily that I would do what the Supreme Court does in dismissing the writ as improvidently granted. I believe that the number of issues here – the complexity of the issues, and the likelihood that anything that we can say will be long-term, constructive, and useful is small, and that we could devote our energies to better matters.

So, I continue to believe that we erred in voting to consider this broad panoply of very, very significant issues. My concern being that the contributions of the Antitrust Modernization Commission to this constantly evolving subject are necessarily going to be meager, although I hope I can be proven wrong.

With that, since a majority of the Commission voted to address these issues, I will give my votes, and I will pause to comment on 14. I'll just use Arabic numbers.

1, yes. (a), yes. (b), yes. (c), yes. (d), no. (e), no. (f), no. (g), no. 2, yes. 2(a), yes.

2(b), yes. All of 3, no. All of 4, no.

All of 5, yes, subject to the change in (c) articulated by Dennis.

Yes to 6. Yes to 7. Yes to 8. No to 9. Yes to 10. No to 11. Yes to 12. Yes to 13(b). No to 13(a). No to the broad proposition of 13.

A strong no for 14, which I'll come back to.

15, yes. 16, no. 17, yes. (a), yes. (b), yes. 18, yes.

On the welfare standard, I think we will talk about this further. I completely respect the argument that consumer welfare is a difficult standard to apply with regard to buyer mergers. I believe it is a myth for reasons I have published and stated at length. There needs to be symmetry in the treatment of buyer versus seller issues. I believe application of a consumer welfare standard, largely for the reasons set forth by Bob Landis – his superb paper is necessary and appropriate in all aspects of antitrust that study seller behavior – that, with regard to buyer behavior, the standard necessarily should be different, because the market characteristics of concentration in buyer

industries have different implications, which I will be happy to elaborate later.

MR. HEIMERT: Commissioner Shenefield.

COMMISSIONER SHENEFIELD: I will state the numbers I vote for. The ones I don't mention I'm voting against.

1, 1(a), 1(b), 1(c), 1(d). 5, 5(a), 5(b), 5(c), 6, 8, 10, 13, 13(a), 13(b), 15, 17, 17(b), and 18.

MR. HEIMERT: Commissioner Delrahim.

COMMISSIONER DELRAHIM: I'm voting yes on (a), (b), (d), (e), (f), and (g), as modified by Commissioner Carlton.

5(a), 5(b), 5(c), 7, 9, 11, 13(a), 13(b), 14, 15, 17(a), 17(b), and 18.

MR. HEIMERT: Commissioner Yarowsky.

COMMISSIONER YAROWSKY: Okay. I(1), yes. 1(a), yes. 1(b), yes. 1(c), yes.

d) and (e), I like what Commissioner Warden said about changing the word "concentration" to "substantial weight," so I want to consider that as we talk about it.

Noes on the rest of those subsections.

2, no. 3, no. 4, no. 5(a), yes. 5(b), yes.

I like, also, Commissioner Kempf's of, in some way, outsourcing. I'm not saying it should be exclusively outsourced, but it would be good to have some outsourcing of that evaluation.

5(c), yes. 6, yes. 7, yes. 8, yes. 11, yes.

Moving over to III. 13(b). 14, no. 15, yes. 16, no. 17(a), yes. 17(b), yes. 18, yes.

MR. HEIMERT: Commissioner Valentine.

COMMISSIONER VALENTINE: I(1), yes. (a), yes.

(b), but I think we need to be very careful about how we phrase that. When the FTC announced why it did not sue in *Boeing-McDonnell Douglass* and talked about things like the scope and scale to compete in global marketplaces, it was read as fostering national champions, and I would far prefer that simply to say to obtain efficient scope and scale, or scope and scale needed to compete in regional, national, and cross-border marketplaces. But not make it look like we're simply trying to create national champions.

(c), I agree with.

And the rest I would not vote for because I

think the FTC already gives adequate and ample consideration to efficiencies and innovation.

And I think that, particularly on (g), we consistently heard that, while one always moves beyond market definition, the simple focus on market definition is a very critical, disciplining tool when you are doing merger analysis.

2, no. 3, no. 4, no.

On 5, I am most interested in (b). I think we – it's so easy to say do more retrospective studies and make them public. There are great confidentiality issues and time issues in all of this. If we're really going to recommend that, and we want the agencies to do something useful, I think it is then incumbent on us to say exactly what it is we expect them to do and with what resources and how.

6, yes.

7, possibly yes. That is the one area where we actually heard people saying that perhaps the guidelines were not adequate. It was how they evaluated impacts on innovation.

8, yes. 10, yes.

In III, I would vote for 12. They do adequately consider efficiencies.

For those of you who are voting for 13(a) and (b), I would respectfully request that you read the latest commentary on the Merger Guidelines and say exactly what you think should be added to the Merger Guidelines with respect to how the agencies treat innovation – improved product, improved quality, and fixed-cost efficiencies. I think they are actually quite good. There may be one sentence they could add to fixed-cost efficiencies, but I think they are very good.

In IV, yes for number 15. No for 16. Yes for 17(a). Yes for 17(b). Yes for 18. And I think 18 may well become increasingly important. I'm somewhat with John Warden here, should the European Commission go ahead and do guidelines for vertical and conglomerate mergers.

COMMISSIONER KEMPF: With your comments on 13(a) and (b), do you vote for those? I'm not sure where you come out on that.

COMMISSIONER VALENTINE: No. I think that anyone who is voting yes ought to first read the recent commentary on the guidelines that the agencies have

issued. I am not voting for them. I think the agencies have adequately addressed those issues. And I think that most of the people who made statements about those things made statements before the agencies had issued the recent commentary on the guidelines.

COMMISSIONER KEMPF: And what was your vote on 14? Was that no?

COMMISSIONER VALENTINE: 14 is no. And there, I actually think that Commissioner Warden made a very thoughtful comment, which is that the entire reason we have such a nice bipartisan consensus on antitrust policy and why antitrust has succeeded so well in this country as opposed to other countries is that it does have a consumer welfare standard. I think that is critical to its political acceptance in this world. And I would strongly recommend against adopting a total welfare standard, particularly in isolation for one aspect of one branch of analysis in all of competition law.

I would also note that the one country that has really used the total welfare standard – admittedly, New Zealand has it, as well – but Canada is the one that has a total welfare standard. It's because they have much

thinner markets and are much more subject to competition by trade, and, obviously, are worried about being able to develop some industries vis-à-vis the United States.

Their total welfare standard allowed a merger to monopoly. They are now rethinking that standard. And while they may not totally abandon that standard, they are certainly saying it should never be allowed if it were to create a merger to monopoly.

MR. HEIMERT: Commissioner Cannon.

COMMISSIONER CANNON: Okay. On I(1), yes, obviously.

(a), yes. (b), yes. (c), yes. I really – I think legislation change is necessary.

5, yes.

(a), (b), and (c), I guess I do wonder a little bit about how this gets done and who really should do this. And the outsourcing comment by Don, I thought, was a good thing to think about.

COMMISSIONER VALENTINE: Seconded by Commissioner Yarowsky.

COMMISSIONER CANNON: Okay. Great. Well, everybody thinks it's great.

Okay, under II, 6, yes.

8, yes. 11, yes.

And under subsection III, 12 –

And then, for 14, I believe I'm going to vote no on that. I do want to hear more about it. I've read everything. I've read what Rick has written and others. But right now, I think I'm going to cast a no vote on that.

Under subsection IV, 15 is yes.

And then for 17, (a), yes. (b), yes.

18, yes.

COMMISSIONER VALENTINE: I'm sorry. How did you vote on 12 and 13?

COMMISSIONER CANNON: Yes on 12 and no on 13. And 14, I'm voting no.

MR. HEIMERT: Commissioner Litvack.

COMMISSIONER LITVACK: At the outset, just as a general proposition, I want to associate myself with Commissioner Jacobson's views. I too think this whole go-around has almost proven the point. We probably have bitten off more than we can chew, and I'm not sure about the long-term contribution we're making.

But, having decided to take a swing at this, I'll cast my ballots accordingly.

I, too, would vote yes on 1, yes on (a), yes on (b), yes on (c), and yes on (d).

I have hesitancies about (e), (f), and (g), and so will reserve on those.

No on 2. No on 3. No on 4. Yes on 5.

Yes on (a). Yes on (b). Yes on (c). Yes on 6. Yes on 7. No on 8. No on 9. No on 10. Yes on 11. Yes on 12. No on 13.

No on 14, for the reasons articulated by Commissioner Warden and seconded by Commissioner Valentine.

Yes on 15. Yes on 16. Again, as to that, adopting Commissioner Warden's reasoning.

Yes on 17(a). I'm less certain about (b).

Yes on 18.

MR. HEIMERT: Why don't we, at the suggestion of the Chair, conduct the discussion just on the overall assessment first, and then we'll do the other pieces subsequently to keep it a little bit more organized.

COMMISSIONER JACOBSON: So the discussion first

is on I?

MR. HEIMERT: on I. And then we'll proceed to the other portions as we go.

COMMISSIONER WARDEN: Let me ask this – this is really for the Chair, not for me – but there were so few votes in favor of some of these things. I don't see why they should be discussed. 2, 3, and 4 barely got on the board.

CHAIRPERSON GARZA: But, John, with all due respect, there are some things that people may want to discuss on I.

COMMISSIONER WARDEN: Oh, on I. I agree.

CHAIRPERSON GARZA: I think that's we were talking about. We'd like to proceed with overall assessment –

MR. HEIMERT: I meant Roman 1.

COMMISSIONER WARDEN: Oh. All right. I beg your pardon.

MR. HEIMERT: Commissioner Garza.

CHAIRPERSON GARZA: I just wanted to clarify why I think, contrary to Commissioners Jacobson and Litvack, that it is a worthwhile exercise for the

Commission to consider substantive merger policy. And, although I was one of the people who thought it was a good idea to do so in the beginning, I think even more that it is important to do so, because, over time, what we've seen is, when we first embarked on this endeavor, I think everybody said, well, gee, there seems to be such a consensus on merger policy, what would be the point.

But what we've seen since then is, on the one hand, the *Wall Street Journal* taking shots at the Department of Justice-FTC merger enforcement policy. But there's also been a move on the Hill to change merger enforcement policy, at least for a single industry, the oil industry. And my concern is that when there are that many questions about the current policy, it's worthwhile for us to look at it and to say what we think about the current state of enforcement policy, including whether the goals that we're pursuing are the right ones. I think even if the conclusion were that it's generally right, there's a value to saying that – value to those who might, in the future, decide that it's not right, and that there should be substantial change. So I wanted to make that point.

Also, I voted for I(1), but I also voted for I(5), and the two, to me, go together, because while – One is the general consensus that the basic framework is sound, and 5 is, would it benefit from further study? So, my voting for 1 is really qualified by my voting for 5, because while I don't think that we have any empirical basis to say that the current policy is adversely wrong, there are transactions that we can point to that shouldn't have been blocked or that should have been blocked.

I do think that there's a strong need for the agencies to continue to study, through retrospective studies and through empirical research, *et cetera* – I think we have to keep confirming that the policy is right and making sure that it reflects the newest learning. And, in this regard, I daresay that if this was 1968 or 1969 and we were looking at merger policy, we probably would have to say, after all our witnesses and commenters, yes, there's a general consensus that it is just fine.

But when you look at the staff memo, which I thought did a very good job of showing us the progression

of merger policy, we've come quite a long way from 1968 in our merger policy. So, I don't think that we should just assume that there won't be further changes to it. I do think that I like where we are today better than where we were in 1968. And I think there's no basis to say it is broken, but I really do think it's important to pair 1 with 5.

And I do agree with Debra's statement about 1(b), the national champion point. I think it's important to clarify that that's not what we're talking about. I may have some other comments later, but I really wanted to make those points.

MR. HEIMERT: Commissioner Carlton.

COMMISSIONER CARLTON: Two comments. On I, item 5, we were talking about studies. To follow up on something that Commissioner Kempf alluded to, Hewitt Pate's suggestion on studies, I think it is useful to point out that, obviously, retrospective studies are valuable, but any antitrust policy has an effect not just on the particular cases that get litigated or get studied but on the activity of the economy of people who take as given the antitrust policy and then react to it.

That can be much more important to understand than whether you got an individual case correct or incorrect. It's obviously important to see whether you are applying your criteria in a sensible way, and you can do that by retrospective studies of individual cases.

A much harder question, and this really is what I think Hewitt's comment raised, at least in my mind, was, when you study antitrust policy, it's not just retrospective studies of individual cases; it's what its the effect has been on the economy as a whole. You have a Justice Department that stops mergers. It's not just the individual mergers it stops that you're going to find have imposed a cost, but the fact that all merger activity in the United States changes.

So, I think we should think about adding some item to at least allow that type of study to be done, that someone should be thinking about that. I actually think that's a much harder study to do. I think, in part, that's why we did not articulate how it should be done when Hewitt Pate suggested it. But that's certainly something people should be thinking about in the agencies.

The other point I wanted to follow up on was 1(b), and it was really Debra's comment that triggered this thought. If you read 1(b) – I'm actually not sure what 1(b) means. What does it mean to insure that U.S. companies remain efficient? They can innovate, so we'll have mergers that allow them to do that while considering the concerns of U.S. consumers.

I assume what that means is, I'll allow a merger if it benefits consumers, but not if it lowers the cost of the firm and those costs don't get passed on to consumers. I'm trying to think, is that what it means? If it means something else, I think we should say that. This will, I think, come up again when we talk about which standard to use.

But when you use a total welfare standard you automatically count all efficiencies, fixed costs, marginal costs, scope efficiencies, and efficiencies from R and D. If you have a consumer standard, and you're only looking at the effect on consumers, you have to ask yourself the question, will consumers benefit from it? If they don't benefit from it, I'm trying to figure out what 1(b) is saying.

Now, maybe you want to clarify 1(b) to say that you'll consider consumers benefiting in the long run, over a longer period of time than the Department typically gives weight, because of the savings in fixed cost and R and D. Eventually, our economy is pretty efficient. So my view is, if I see fixed-cost savings, even if they don't get passed on immediately, especially in a dynamic industry, consumers eventually will win out. And that's often how you make the total welfare standard quite consistent with the consumer standard. In a sense I agree with John Warden. There may not be that much difference between the two in the long run.

But if that's what we want to say, I think maybe we want to sharpen the language a little bit.

MR. HEIMERT: Commissioner Jacobson.

COMMISSIONER JACOBSON: Thanks. I completely agree that we've come a long way from 1968 and merger policy in that time. But we've done so through the established structure, through the regime of checks of balances that we have through the common law process that we have. And, notwithstanding *Wall Street Journal* editorials, which most enforcers, I think, take these

days as a badge of honor, you really haven't done much if you're enforcing the antitrust laws unless you generate at least two or three strong *Wall Street Journal* editorials attacking you. Notwithstanding that, I think there is a broad consensus that what the agencies are doing is appropriate in large. Lots of people have disagreements with particular cases, but we had extensive hearings on this.

We had, really, two hearings – the substantive merger hearing and the roundtable with the economists – and we're presented with no evidence, that I saw at least, that there was something fundamentally or even significantly wrong with U.S. merger policy today. I personally think – I think I'm the sole vote for item 2, because I personally think that there's insufficient merger enforcement today.

But I think it should be considered on the record that we've established that certainly there's been no showing of any significant problem with merger enforcement, and hence I think the rule of “first, do no harm” is particularly appropriate here.

MR. HEIMERT: Chair Garza.

CHAIRPERSON GARZA: I promise not to beat the dead horse after this, Commissioner Cannon, but I just have to clarify. When I say *Wall Street Journal*, what I really mean is for it to be representative of the business community. You know, I have to say, I haven't been at it that long, but over 20 years, and I don't think I've ever represented parties to a merger where they didn't tell me that they thought our merger policy didn't make sense or was flawed. And so, from that, I've developed a feeling that, though there may be consensus within the Antitrust Bar, it's not clear to me that there's broad consensus in the business community – the merging community – that our policy is right.

And therefore, I think it is incumbent – we'll talk about this when we talk about transparency – on us to take a look at it, and where we think it's right to say so. And to help the dialogue by explaining where and why we think it's right.

So, you know, I think it probably is clear from the way I voted, but my belief that it's appropriate to look at this issue isn't because I think that the merger policy is wrong or needs to be changed, but it is because

I think it's worthwhile that we have clear understanding and dialogue.

The only other thing I wanted to say is on 5, on the studies – Dennis, the kind of study that you were talking about, is that different from 5(c)?

COMMISSIONER CARLTON: If you can interpret what I said – if you think that's incorporated in 5(c), I'd be happy with that. I just want to make sure that it is.

When I read 5(c), what it triggers in my mind is that people are going to look at the relationship of market prices, particularly concentration, uncertainty, things like that. I don't think they're going to do a study of merger policy.

To study merger policy, you need different regimes of merger policy. So, you have to look at merger policy during a time period when it was easy versus one when it was hard. You want to see what effect that has on the economy. That's very hard to do because you have to control for things over time.

You can do it across countries, but there have not been as many studies as you might think. And in part

that's because there aren't that many different regimes across countries until relatively recently.

But that's the type of study. The study of policy is much more difficult than to study individual decisions. And the macroeconomists kind of realized this in the 70's and the 80's, and in part that's why Robert Lucas won a Nobel Prize, and he said, you can't just look at whether you're getting a decision right or wrong in a particular case when you're trying to evaluate an entire policy. That's very hard to study, but I think it's important to study. And that's where there are big payoffs.

CHAIRPERSON GARZA: Okay. Thank you for the clarification.

And then my last point on 5(a) - people have mentioned outsourcing. I think there might be hurdles to that because of the confidentiality concerns, but I do agree that there is some benefit to doing it in such a way that people from outside the agency are able to help to test the analysis of it.

COMMISSIONER CANNON: Deb, in your remarks, did you say that you had always been told that there were

issues, that there was a thought process, or that you had never –

CHAIRPERSON GARZA: No. My point was that I think every time that I've ever worked on a merger, I haven't found a single one that didn't – well, let me say – every single one, I think, at some point in the process has said, I really don't understand this. This doesn't make sense. This is crazy.

Now, I'm not saying that, because I say that, therefore it is crazy and there is something wrong, but what I say is, it tells me that there is a need for clarification and a reason for us to address it.

COMMISSIONER VALENTINE: Could I respond to that?

MR. HEIMERT: Commissioner Valentine.

COMMISSIONER VALENTINE: Deb, I understand your concern, and I think, actually, that the staff memo put that issue very well when they said that panelists applauded the fact that merger policy has become stable and bipartisan, affording a sense of gravity that was previously lacking. The panelists acknowledged that members of the public may not share the panelist's

general comfort with current enforcement policy, as evidenced, for example, by recent editorials and legislative initiatives characterizing current policy as both too relaxed and too restrictive. In some instances, the public's perception may arise from insufficient communication about the goals of merger policy or the rationale of enforcement decisions. One other instance is it may simply reflect the populist distrust for big business or an inherent skepticism of governmental intervention in the marketplace. Panelists agree that enforcers could improve the transparency of decision-making.

All right. I agree with all of that. The problem that I think we're going to have is that if you want provide clarity and give the public comfort, there is a real rationale for merger policy. You're not going to accomplish that if we do a chapter in which half of us are voting one way and half of us are voting another way. I think it's going to come out as incoherent to the public as it currently is.

And so, I think that it's either very important that we focus on consensus here or possibly consider

abandoning the enterprise, because I don't see how we're going to convey a clear and robust and well reasoned rationale for current merger policy if we've got votes all over the lot the way we do.

MR. HEIMERT: Commissioner Kempf.

COMMISSIONER KEMPF: Yes. I want to make some comments. First of all, with respect to Chairman Garza's comments, you know, there's an old saying, 50 million Frenchmen can't be wrong. And if there is a widespread perception among the business community that the merger laws don't make a lot of sense or aren't soundly based, I think that's something we ought to reflect further on.

And I would also make a remark that I made previously. And that is that I'm concerned that too many of our panelists and too many of our Commissioners are what I call part of the inside-baseball antitrust crowd, and they don't have a sufficiently broad worldview, perhaps. Maybe that's something we ought to reflect on.

In other words, stated differently, there's a reason that there's a disconnection between panelists and Commissioners and those who operate in the real world, and we ought to focus on the reason for that. It may be

that the business community is screwed up. I'm not –

COMMISSIONER VALENTINE: Are you suggesting that we don't operate in the real world?

COMMISSIONER KEMPF: Yes. Not in a sense that we don't all function in the real world, but that we not have a real worldview of the real world.

[Laughter.]

COMMISSIONER KEMPF: Let me comment on some of my remarks, because I've added another yes/no split one, and I'm troubled by a lot of the questions. And let me tie this to some of the remarks that Commissioners Litvack and Jacobson have made.

For example, as I now reflect on II(6), it's one that I voted no on, but as I reflect further on it, for reasons that both Commissioners Litvack and Jacobson have said, I would break this one into two sentences, and I would say, I find that no substantial change to merger enforcement policies are necessary to account for dynamic innovation driven industries. Period. I think that's something I would subscribe to.

But it is certainly because the guidelines and policy are flexible to address these issues. I just

think that's totally wrong. So, if I break it in half, I might be in favor of continuing to leave it in the hands of the courts. But not because I think that the back end of that sentence is right.

For example, my comments, I think for a piece that was done six or seven years ago by Dick Posner, which was something like "Antitrust and the New Economy," in which he focuses on all of the problems of trying to get together neutral, competent economists to address some of these things. The difference between what I think he calls law time and real time in addressing new economy issues – and a host of other problems.

At the end of that he says, I recommended no change. I think we need to try to work our way through these things. And I think that's where I am. The reason that I don't want any substantial is not because I think that the back end of this sentence is correct. I think it's totally wrong, but I would still, as Posner did, leave it to be sorted out other ways.

A couple of my other ones at the back end – well, let me go back to item number 1, where I think I'm either the lone ranger or close to it. And that has to

do with the Guidelines. It says here, the basic framework is sound. I count the Merger Guidelines as a big piece of the basic framework. And I think, as I said earlier, the Guidelines are a trap for the unwary.

Anybody who looked at those would never do the Whirlpool-Maytag transaction, for example, which, if you take it at face value, is, if not impossible, nearly so, to reconcile with the Guidelines. And yet, that is a very sensible transaction that the Department of Justice wisely refrained from attacking, in my judgment.

So, I think that a key building block in what I would view as the basic framework has no respectable intellectual underpinnings and is a trap for the unwary. And that is why I come out where I do on number 1. Again, that does not necessarily carry me to the point that we ought to have wholesale legislative fixes, but I'm certainly not going to sign on to something that I think has no intellectual respectability as hunky-dory.

Let me go to item 3 for a minute. Actually, it's IV.

CHAIRPERSON GARZA: Don, can we wait? We're on I.

COMMISSIONER KEMPF: Just I right now?

CHAIRPERSON GARZA: Yes.

COMMISSIONER KEMPF: That's fine.

MR. HEIMERT: All right. Commissioner Warden.

COMMISSIONER WARDEN: In response to Commissioner Valentine, let me say that I thought -- I don't keep this box score, as I refuse at the bridge table to score if anyone else is scoring.

[Laughter.]

COMMISSIONER WARDEN: I'm happy to do it if I'm the only one, but I thought we had a very substantial degree of consensus. And all these things may not be worded perfectly to Commissioner Kempf's satisfaction or, for that matter, to my satisfaction, but in response to what he just said, I think number 15 lists the framework, and it includes lots of things other than the Guidelines. And people don't do mergers without consulting competent counsel. Then they get the proper advice. It's not like some do-your-own-will project.

[Laughter.]

COMMISSIONER WARDEN: Now, with respect to Dennis's study idea, I can testify from personal

experience, having given merger advice during the late 60's and 70's, that there were a hell of a lot of mergers that made economic sense and would have been good for the economy in terms of efficiencies that weren't done, because – you know, I'm sure that I'm not exaggerating in saying that my advice probably killed 30 over that period – What was the point? You want to go beat your head against the wall, spend millions of dollars on lawyers and then divest? That made no sense whatsoever.

But we really have come a long way. And I think to do the kind of study that you're talking about would be worthwhile, if it could be done. But what you need to do it across time or across regions, I don't know, how hard either of those would be to do. But even within a single time period, you need absolute candor from the business community in saying that I considered this, but I didn't do it because this was challenged, or I chased this deal and did it after the XY deal was allowed to go through. I would think that's the kind of information that you would have to have.

Now, maybe economists can study this in a different way just by looking at the levels of macro-

activity. I'm not sure, because it would take a lot of regressing to eliminate all the factors, like the cost of money, the degree of prosperity, the outlook for the industry, and so on. And business executives are notoriously sensitive to the short-term outlook of the industry in deciding what kind of deals to do. That's why, you know, there's a huge expansion of mines, let's say in copper – whenever copper is selling for a whole lot of money – and there's no expansion at the bottom of the business cycle to get ready for the next time when copper is selling for a whole lot of money.

And one final comment on consensus. On many of these things that I may have voted one way or the other, if there's a consensus, I might well join it, even if it is contrary to my initial vote.

COMMISSIONER VALENTINE: That's fair.

MR. HEIMERT: Commissioner Delrahim.

COMMISSIONER DELRAHIM: I first wanted to echo what Commissioner Valentine, and now Commissioner Warden, said, as far as having as much consensus as we can for this. I think it's important to show that.

But, I also see that the voting – we've fine-

tuned these things in such fine slices. The fact that –
I don't know; I don't keep scores –

COMMISSIONER VALENTINE: I'm not sure what we
voted for, but –

COMMISSIONER DELRAHIM: Well, you know, 2, 3,
and 4, I don't think anybody voted for that, and I don't
think –

CHAIRPERSON GARZA: Well, except for
Commissioner Jacobson.

COMMISSIONER DELRAHIM: And then we had 15,
which I thought was almost unanimous. Those point to the
fact that there's almost virtual agreement on this
Commission, except for a few things that, if they weren't
there, would I really care to vote for them? No. But it
says, recommend that the DOJ and FTC continue to seek to
insure – it's just such fluffy language. It all sounds
great. Why vote against it?

So, we're not recommending that they do
anything. And my guess is that DOJ is going to look at
this and say, great, we will continue to do that.
Thanks.

[Laughter.]

COMMISSIONER DELRAHIM: Recommend that DOJ give greater consideration to efficiencies. Sure. We're doing that now. Nothing is hard, and so I think, by and large, we have general agreement. If there's any disagreement, I agree with Commissioner Warden and Valentine that we might want to visit that and see if it's pronounced well enough for us to give any kind of an appearance that there's a large division. And there might be one or two or whatever. But I think, by and large, this process has shown that, in fact, there is a lot of consensus here.

MR. HEIMERT: Commissioner Jacobson.

COMMISSIONER JACOBSON: Very briefly. Business people do, in my experience, understand merger policy. It's a short discussion with them. You tell them merger policy is designed to prevent the merged firm from raising prices to its customers. They generally understand that.

They don't like it if they are the merging party, but they like it a lot if their competitors are merging. And I think there is a basic understanding that that is the underpinning of merger policy. I think the

business community understands it. I think it is what the agencies understand. And that's why I think we will have a consensus, certainly, on item 1. The other issues, perhaps not so.

MR. HEIMERT: Chair Garza.

CHAIRPERSON GARZA: Really briefly, on the consensus point and whether we should, for some reason, not address the issue, I do keep score as best I can. It's not always easy. But I think the only - as people have said, we have 11 Commissioners here, and ten agree to 1, ten agree to 1(a), 11 to 1(b), nine to 1(c), and 11 to each of 5(a), (b), and (c). You know, when we get further down, we've also got areas of agreement, 17 and 18. We really do have substantial consensus. And in those areas where I think there's some uncertainty, innovation and efficiencies, yes, I think it would be a benefit if this document, which is a report to Congress and the President, did something similar to what the staff did the memo, which is to say, look, there is this debate on these important issues, and here is where the debate lies right now. And, you know, we'll see how it plays out. I think there is a value to that.

We'll say, basically, we all think it's on the right track. We want more study. We want more transparency on these issues people have raised, the pros and cons. And we expect that will continue to develop in the future, but the main benefit of addressing that is to tell the people who asked us to report what we found, so that they know. So that the folks on the Hill and, next time they have a proposal before them to amend Section 7 for a particular industry or in general, they may choose to pick up this report and look at it and find it to be beneficial to them in forming their policy.

And I would be distraught if, when they picked up the report, they had to go through and find out that there was no chapter on merger policy.

COMMISSIONER WARDEN: I agree with you. Is there strong dissent to that? I only heard two.

MR. HEIMERT: Commissioner Kempf.

COMMISSIONER KEMPF: Yes. In some respects.

Let me just comment on a couple of things. Commissioner Jacobson referred to the views of competitors, and my experience has been that they generally are hostile to mergers among competitors. Not

because they think prices will go up, obviously, but because they think that the reality is that the merger is an efficiency-creating one and will be good for consumers but harmful to them. And that's why they're against it. I think Frank Easterbrook, a long time ago, said that if all of the competitors are against a merger, that's a pretty good sign that it's procompetitive.

Commissioner Warden raised the possibility of input from the business community. I think that's very difficult to try to get a sense of why they do or don't pursue transactions. Let me give you something that I'll frame as a hypothetical.

Suppose, in the wake of the *Staples-Office Depot* merger, where the FTC took the position that there was a superstore market and that all of the other people that the merging parties alleged actually competed with that market, the Commission took the position that they didn't really compete at all. In the wake of that, it may well have been sound advice to say to the merging parties, given the Commission's immediately recent position, you ought to go out and gobble up all of your competitors in these other lines of commerce. We may

think that it is anticompetitive that they boxed themselves in, go ahead and do it.

Now, you can look at the history of what happened in that industry and decide for yourself whether that was, in fact, done or not. But I'm not sure anybody would come forward and say, we looked at what the Commission did, and we said it was nonsensical, but it gave us an opening, for example, to obliterate the home mail industry and just acquire all wholesale and eliminate all that source of competition and bring it in-house. I don't think they're going to say things like that.

COMMISSIONER JACOBSON: You're right.

MR. HEIMERT: Commissioner Litvack.

COMMISSIONER LITVACK: I just want to make two comments. While I did join with Commissioner Jacobson in his views regarding this topic, I agree with the Chairperson that, at this point, we are past that. We are into it, and there is consensus on a wide variety of issues. Indeed, virtually all.

Second, the notion – and it may be good, Dennis, that you go study what I call the ripple effect

of merger policy, people who didn't do mergers or propose mergers. I just have to both endorse and expand upon Commissioner Warden's view. I think there's virtually no way of doing that – and maybe there is via econometrics, but not in terms of going to the business community and asking them not merely for the reasons Commissioner Kempf cites, but also because, in point of fact, the further away you get from what happened, the more the reasons for what happened start to change over time and in absolute good faith. People don't know why they did or didn't.

And by the way, it really depends on what happened. If in fact, without the merger, things had been very good, then the reasons were one thing. If in fact, because of the merger, the companies have gone the other way that may be another reason.

So, I think, while in some theoretical world that would be nice, it's probably not a very fruitful exercise.

COMMISSIONER CARLTON: Can I just address that, just for a second?

MR. HEIMERT: Sure. Commissioner Carlton.

COMMISSIONER CARLTON: I agree with, actually,

both what John was saying and what you're saying. In fact, I took what John was saying to be an endorsement. Such a study would be good; but if you did it in a particular way, it would be bad.

I would not suggest, you know, if a student came to me to write his Ph.D. thesis, that he's going to interview people about mergers they didn't do, I'd say go into a different field.

[Laughter.]

COMMISSIONER CARLTON: But John actually said something that is the way people do study it. They look at aggregate merger activity over time and see whether they can determine whether there has been an effect. No one has quite done what I think is a study comparing antitrust policies in recent times, either across time or across countries.

People, by the way, have done it, interestingly, around 1900, when you might be interested to know that some people have looked at the stock market boom and the decline in the stock market boom and attributed the decline to the *Northern Securities* case decision.

So, people have – whether or not you agree with that is a detail. But the point is, economists have looked at aggregate activity in mergers and that would be the way to look at it, not individual interviews. I would agree with that.

Let me just say one other thing on the consensus. I think it's very important to say something about merger policy, if we're in favor of it or not. And we have a consensus, I think, that what they're doing is right. But that really highlights in my mind that there are other aspects of antitrust where I don't think we'd agree so much.

And topics are going to come up later, perhaps on exclusionary conduct, where there might be more disagreement. And I really do think it's incumbent on us to say, on merger policy or cartel policy, we think you're doing a pretty good job, but on some of these other things, you have to think more carefully, or it's less crystal clear.

Actually, on this one, whether or not we've chosen too many questions is a separate issue. But I do think people think that, by and large, at least the

government agencies are doing a sensible job, and I think we should convey that.

MR. HEIMERT: All right. Commissioner Valentine and then Commissioner Kempf and then we'll try to move on to the next one, unless there are burning points people want to make.

COMMISSIONER VALENTINE: Okay. Madam Chair, I do also try to keep track, and I would agree that on 1(a), (b), and (c), on 5, maybe on 6, and on 15, 17, and 18 we have consensus.

What I find striking is that, in this area, unlike the panelists and most of the testimony that we have where there was strong, strong, strong consensus, there is actually greater divergence among us on some of the finer issues. The interesting issues - the innovation and efficiencies issues than there were among the panelists.

You know, if you are going to convey a clear message to the public, which I think is important, I think you're going to have to handle it very carefully. I really wonder if everybody went and read what the agencies just wrote about how they handle fixed costs or

improved product quality – I mean, what are we telling them to do more in addition to that?

And so I do beg those who are urging them to be clear about those issues to go and look at what they're doing. I mean, quite frankly, Tim Muris and Hewitt Pate were begging companies to come and present efficiencies to them and telling them how to document them. I don't think it's that they're not considering them. I think that, at the end of the day, either the efficiencies are not adequately documented and substantiated or the anticompetitive effects are such that the efficiencies don't prevail. I don't think it's going to be terribly helpful to send a message that the agencies aren't considering efficiencies when I haven't heard anything but begging to have them heard.

MR. HEIMERT: Commissioner Kempf.

COMMISSIONER KEMPF: Four quick things. In response to Commissioner Warden's thing about, gee, nobody does this on their own; they hire lawyers who are experienced. The whole origin of the Guidelines was as guidelines for the business community. And I don't see a thing in here— and part of the basic framework is you

hire a lawyer - that says the Guidelines don't mean what they say and you should ignore the Guidelines.

So, I don't think it's an adequate response to criticism of the framework. Like I said, well, nobody paints by the numbers on his own. They all go out and hire people who know that the Guidelines provide bad guidance. I don't think that's an adequate answer to.

Second, on outsourcing, a couple of comments. I think a number of people have embraced that observation of mine. I'm concerned - there was something published about 20 years ago where they did, like, half a dozen mergers or something, a couple of which I was involved in. I didn't even recognize the mergers until I was about halfway through the description of them. They just had it so bollixed up. I think that, in addition to that, there's also an element of dispassionate analysis that might be more credible if it was done on an outsourced basis.

Third, a number of people have said we seem to be going in the right direction, and I would subscribe to that, but that doesn't mean we've reached a good end point, necessarily. So I might be inclined to leave some

things alone for reasons I said earlier, that Commissioners Jacobson and Litvack have said. And it may be because, in part, I like the direction that things are headed, but that doesn't mean I subscribe to that the thing is great the way it is.

Finally, several Commissioners said, well, I'm not sure that use of the consumer welfare standard instead of the total welfare standard makes any sense, but it is a good PR stunt. And I would ask that there be continued reflection on that, because I would submit that it makes no sense at all.

CHAIRPERSON GARZA: Just to correct the record, I don't think the word "stunt" was used.

[Laughter.]

MR. HEIMERT: Commissioner Warden.

COMMISSIONER WARDEN: Don, in response to what you just said, I don't think the Guidelines are perfect and that's why I voted for 16 as well as 15. And I'm sorry Commissioner Valentine left, because the only other comment I want to make is that I think that she's chasing a ghost. I don't recall any condemnation expressed here to the effect that the agencies were not considering

efficiencies or potential increases in innovation.

I do remember one witness who was very concerned about his merger that had been stopped, which he thought would facilitate bringing to market an innovative product, but we can't get into single cases and have views about that. What I said, and I think it's almost as strong as anyone was as likely to be, was that I had a hard time making up my mind on 1(e), innovation, because I didn't know that more consideration was needed, but I thought substantial weight should be given.

Commissioner Valentine says the agencies - it is being given. On (d), my only reaction was to those witnesses who testified that fixed costs weren't given sufficient consideration, in their view. That did not seem to be axe grinding to me. I think that we should specifically endorse the notion that fixed-cost efficiencies are part of efficiencies. I wouldn't go any further than that. I'm not trying to chastise the agencies.

CHAIRPERSON GARZA: Well, before we move on to II and III, which deal with efficiencies and innovation, I did just want to clarify for the record and for the

audience really what John Warden said, which is that the staff recommendation that we are voting on in (d) and (e) is worded pretty carefully to say, give greater consideration to efficiencies, as specified below. And we look below, and we'll discuss it shortly - the two areas of efficiencies being discussed are fixed-cost efficiencies and innovation efficiencies.

So, to your point, John, it's not a recommendation that the agencies should consider efficiencies and they're not, but rather it's whether or not they should give greater consideration to the types of efficiencies listed in 13, where we actually had a fairly strong consensus. And innovation, I think, is referred to later on in II(7), where again we had fairly substantial consensus.

But, with that, let's move on -

COMMISSIONER DELRAHIM: Madame Chair.

MR. HEIMERT: Commissioner Delrahim.

COMMISSIONER DELRAHIM: I didn't want to prolong this any further, but as we were discussing some of the retroactive studies and comments about confidentiality, I think an excellent point has been made

about outsourcing and the cost and benefits of some of this information.

I'd just like to - I don't want to add another item, but the report should, perhaps, include - at least, this Commissioner, if anyone else might agree - Congress can and does require certain kinds of reporting and studying and data keeping. And perhaps with this recommendation of item number 5, when this report goes to Congress, a suggestion for them to consider, that maybe a GAO or an outside party in accountability, a party that might have the benefit of getting this information rather than just leaving it to the agencies with particular information - the record keeping and data, I think Chairman Muris and Hewitt Pate found in their study of trying to find the last five years and ten years of closing memos and record keeping, at the Justice Department, particularly - not as much so at the FTC - was just horrendous.

And, if Congress gave direction to the two agencies about what data they should keep for the purposes of retroactive studies, we might benefit from. That would be, I think, a strong suggestion by the

Commission and probably useful for the government process.

COMMISSIONER CARLTON: Can I just add - I don't want to prolong, but just to follow up on that. The GAO recently did a study of oil mergers, and it created some controversy. The FTC had a seminar about it. And all I would add is, if there is - I participated in it. They had three academics come just to discuss their views, the FTC version of the events versus the GAO.

If there is outsourcing, which very well might be a good idea, I think it should incumbent on the agency that's doing the outsourcing to, in a public forum, have a debate with whomever may disagree with them, the FTC or DOJ, and it should be open to the public. It could be an academic style conference. I know a lot of academics would be quite interested in hearing different views. And you can evaluate both studies to see, did someone do a good job, did someone not do a good job?

My own view was that I was disappointed that the GAO did not participate actively by making presentations in the seminar that was put on. And that just struck me as quite odd. So, if we do have a

recommendation about outsourcing, there should be something about interaction in maybe a public forum so that academics and the antitrust community can decide who's doing a better job.

MR. HEIMERT: Should we move on to II and III? Maybe we can cover those together, the innovation and efficiencies issues, which are fairly closely related.

Anybody care to start?

Commissioner Carlton.

COMMISSIONER CARLTON: Usually, I don't talk much. I just want to make one point, and that is, as I said earlier, a lot of these desires to have fixed-cost savings naturally flow from a total welfare standard, not from a consumer welfare standard. If you're asking for fixed-cost savings, and you're voting for it, you have to ask if that is consistent with consumer welfare. I'm happy to say that, eventually, it's consistent with consumer welfare, which is actually what I believe, but we should make sure that gets reflected if that's your vote.

The other thing I wanted to say is, I don't know how much, in practice, it matters whether you have a

total welfare or consumer welfare standard in individual cases. There may be some in which it does matter. I think the total welfare standard, for reasons I just articulated, solves the efficiencies questions. But if you do vote for a consumer welfare standard, and I am sensitive to what John Warden and Debra Valentine said about the political support for a consumer welfare standard – let me just point out, if you have a consumer welfare standard, what that means is that consumers basically don't get hurt by the transaction, however you define consumers.

Now, if you have a total welfare standard, that could allow, and there may be some rare cases, in which a firm benefits but the consumer doesn't, but, overall, one outweighs the other. Well, you can solve that problem by somehow having the benefits the firm gets – the firm, presumably, in this calculation, has earned enough money that it could, in a sense, pay off the consumers – That was one of Richard Posner's set of great insights in his 1960 article, as well as other economists.

And therefore, what I would recommend if the majority votes for a consumer welfare standard is that

the Department and the agencies be flexible in remedying harm to consumers by allowing firms, for example, to agree to do something – sign a long-term contract with their customers, so that the customers cease complaining. In other words, if a customer is complaining this merger is going to raise prices, to me, a solution to that is to give them a long-term contract and say, shut up, it's not going to. You just signed a long-term contract with a fixed price.

That is something that, I think, if you do vote for a consumer standard you should consider putting in the write-up. That's a way to solve these problems, and the Justice Department and FTC should be more flexible in doing that. And if you do that, they're going to – one reaction to that might be, well, that's good for the big guys. What about the little guys? And, you know, whenever you do merger policy, even if you have a consumer surplus standard just focused on consumers, some consumers always get harmed by anything, any action. Some consumers get benefited. We weigh the two.

Now, I think you might want to give a little slack in a situation in which there are efficiencies, and

you're buying off most of the consumers and to understand that maybe there is some subset of consumers, like in all transactions, who won't benefit from it, and that's not enough to stop a transaction.

COMMISSIONER KEMPF: I have a procedural question. I'd like to discuss something that Dennis said, but earlier when I raised some efficiencies studies you said, well, that's later.

CHAIRPERSON GARZA: No. That's where we are right now.

On the question of the appropriate welfare standard, my reason for voting for 14 has essentially, I think, been articulated by Dennis better than I could ever attempt to articulate it. I agree that it's been useful – I don't think it's a stunt – but I understand the PR point about consumer welfare. And I think that is a useful focus, and particularly when you're talking about cartel enforcement.

But it strikes me that there are some things relating to considering fixed costs and savings and innovation where it doesn't fit comfortably to consider those things if you say we have an exclusive focus on

consumer surplus. It just doesn't – and if you're looking only at price effects –

And I think there should be an explanation as to why are we just looking at consumer surplus, and what happens then, when you do have another monopsony situation? Then we look at producer surplus? You know, there's something a little bit strange to me that says we are going to blind ourselves to the effect of a transaction on the rest of welfare.

Total welfare isn't anti-consumer. Total welfare is total welfare. It shouldn't be a dirty word. I think in other policy areas, in fact, total welfare is a standard that people look at in deciding whether or not policy is calibrated. I'm not sure why antitrust should be so different.

Now, having said that, I can also appreciate that it is difficult to make the assessments. You don't necessarily want trade-offs. And so I thought that in 1982 the reason that the efficiencies were set as a defense – and I could be wrong – was that, then, there was a thought that efficiencies were being considered in a total welfare standard. And if you thought that there

was going to be a price effect, an anticompetitive effect, you could consider these other efficiencies, but the language in the 1982 guidelines was fairly stringent. I think it used the word "extraordinary." It talked about the burden. But it didn't eliminate the possibility of considering them.

And now what we've come to since then is - the 1992 Guidelines, as modified by the 1997 efficiencies statement, and with the commentaries that were just issued - now we've got a situation where we consider efficiencies as part of the competitive effects analysis. But the only efficiencies that we consider are ones that go straight to price in our consumer surplus.

And I guess my preference, and it may be just because everybody prefers what they did, themselves, before, but my preference is for the kind of structure that initially was in the 1982 guidelines. And it's kind of ironic because I think, to some extent, people thought that the change that happened there was, people in business communities thought that we were being too restrictive in considering efficiencies - they called them a defense, *et cetera*. But I think the reason it was

appropriate is that there was a broader sense of efficiencies under a total welfare standard.

And I could be all wrong about everything I just said, but that's where I'm coming from.

MR. HEIMERT: Commissioner Jacobson.

COMMISSIONER JACOBSON: When we talk about a total welfare standard, we really don't mean that. We don't mean that, because a merger that reduces prices a small amount to consumers but that hurts competitors a lot fails a total welfare standard. I don't think there's a person in this room who would prohibit a merger that lowers price but its adverse effects arise because competitors are harmed.

Therefore, we're really talking about something different than a total welfare standard. If that's the case, perhaps we can reach a consensus on this issue that, by my tally, is seven to four, with one of the seven on the fence, along the lines, as the Chair and I were discussing before today's session began, articulated in the AAI piece on this issue that was sent us.

I prefer to think of that as consumer welfare, but in any event, I would agree that you cannot apply a

strict consumer welfare standard to monopsony cases, to buyer-power cases. The way I would operationalize that would be to apply consumer welfare, generally, to selling side cases, but on buying side cases, look at whether there is a deadweight loss that is going to be occasioned by that particular transaction. I would apply that stricter standard because true monopsony is truly rare. It can only exist in industries with upward sloping supply curves. And at typical output levels for most industries, that's not true. It's true in labor. It's true in agriculture. But it's not true in a lot of other industries.

And the degree of buyer concentration in our economy is vastly less than seller concentration. The example I tend to use here is, just go to McDonald's. There's one seller, and there are about, if the restaurant is doing well, 400 people there. That's not unusual in our economy, that the buyers outweigh the sellers.

So, I think you really do need to look at buying side effects differently. I don't think anyone has really answered those points that were raised some

years ago.

Fixed costs do need to be looked at in terms of a merger. There's no question about it. I don't think it's necessarily inconsistent with a consumer welfare standard to look at those fixed costs that are likely to generate lower prices to consumers over a medium term. They may not, depending on your definition of what's fixed and what's variable - almost definitionally they will not be passed on in the short term. That's through the mechanism of defining those costs as fixed rather than variable.

But if they are going to be passed because the firm is going to be more competitive with its rivals as a result of the merger, clearly those efficiencies should be taken into consideration. I think Commissioner Valentine was entirely correct to point out that the agencies have recently explained that, indeed, they do just that.

So, this is my longwinded way of saying that I think we should continue with the rubric of consumer welfare, but recognize those exceptions that make it operational, i.e., fixed costs that will get passed through in the medium term and a different standard in

terms of mergers on the buying side.

MR. HEIMERT: Commissioner Kempf.

COMMISSIONER KEMPF: Three things. One is just sort of a footnote. There is oftentimes a disconnection between what the agency will do on review and what they will say in court. And I don't mean to be critical of them in that regard. I remember talking to Chairman Pitofsky at the time of the *Staples-Office Depot* merger, and I said, when your people go into court, they will argue that the Court can't even consider this. And the reason they will is that they want to win the case, and there are some precedents that say that. And they would be remiss if they didn't take that position as good trial counsel. But it impacts the development of the law when the agency, in a desire to win a case, advances positions contrary to what they might do in-house.

Second, I would like to see if we can reach an accommodation on this dispute between total and consumer welfare. I'm not sure we can. I think of the simplistic notion of consumer welfare to be price reductions flowing from this. And I can say to myself, I can see three examples where the merging parties say, we aren't going

to lower prices a nickel, and we're going to provide great consumer welfare. We're either going to, a, take all the savings and build a new plant, which will lower unit costs and eventually lead to consumer welfare; we're going to, b, bottleneck the old plant and make it so we can lower unit costs, and eventually that will translate to benefits to the consumer; or we're not going to do either of those things. We're going to do research and development. We think we can come up with a cure for cancer. That will certainly benefit consumers.

And I'm hard-pressed to say to them, or to have a court or agency say to them, no, no, no, it has to be price reductions. I'd say those are all consumer welfare. The logical extension of what I'm saying is that whatever they do with it is consumer welfare. And, as Commissioner Carlton said, it eventually translates into benefits to the consumer.

I would think – and I would ask Commissioner Carlton to comment on this – that a necessary corollary to his observation is that if you block a merger because it results in total welfare rather than consumer welfare, you are essentially saying, we are going to hurt

consumers in the long run.

COMMISSIONER CARLTON: I agree with that. In fact, if you think about the harm that results from not creating a new product - you lose all of the consumer surplus under a demand curve. It's like the price is infinite.

So, a delay in coming out with a new product, or the failure to come out with a new product, imposes, typically, much more harm on consumers than just raising the price. And obviously our standard of living has been increasing not because prices of existing products have been coming down but because, rather, new products are coming into play.

But what this conversation is emphasizing is that it's easy to reconcile, in general, total welfare with consumer welfare in the long run, because I think we have a relatively competitive economy. So that's why I'm not sure - and especially with what Jon is saying - if we carve out exceptions to the consumer welfare standard, then you're coming close to total welfare. It may be a political decision how to do it best.

You know, my own view is that the total welfare

really solves it. The hard question is, let's suppose there are fixed-cost savings, and a firm is going to pocket that. What do you want the agency to do? I mean, you can articulate there's not that much difference. Therefore, what we do in this question may not matter that much in the long run. And in the long run we want you to pay more attention to what happens, not just two-year periods. Let's focus on the long run for consumers.

And that will reconcile things, and that will make the consumer standard closer to a total welfare standard. The real question on the total welfare standard is, to put it starkly, suppose that only – well, there are really two ways to do it. First, if the agencies, in adopting only a consumer welfare standard, fail to take into account longer term benefits, then it's much better for them to go to a total welfare standard, because that really will benefit consumers in the long run. I think that's Don's point. I agree with that.

And if you don't think that they will, we can recommend that they take longer run considerations to consumers into account. If you don't think they will do it, then I would certainly urge you to adopt a total

welfare standard.

The total welfare standard, though, starkly differs from a consumer standard in those cases in which the fixed-cost savings is going to be pocketed by the firm. And you have just got to decide. I understand there are political considerations, but that's saving the economy money. The economy is producing things and has more wealth as a result.

Now, it's true, producers have the wealth, not consumers. But, you know, producers buy things from other people. It makes the economy have more stuff. And that's why I like the total welfare standard. I understand that there are political concerns, and maybe the best way to deal with it is the way Jon said, and I'm just not sensitive enough to those political concerns. Jon's suggestion is, by making enough carve outs, you can turn consumer welfare into total welfare. Or maybe, I think, indirectly, the simplest thing to do is to adopt the total welfare standard.

COMMISSIONER KEMPF: Can I add two quick footnotes?

MR. HEIMERT: Well, maybe, Commissioner Warden

– do you have something very quick?

COMMISSIONER KEMPF: Well, it just ties into what Commissioner Carlton was saying. I could come back to it.

CHAIRPERSON GARZA: Commissioner Warden is next.

Will you yield to Commissioner Kempf?

COMMISSIONER WARDEN: Sure.

CHAIRPERSON GARZA: Okay. Thank you.

COMMISSIONER KEMPF: Okay. Just two quick things.

The phrase that Dennis used, pocketed – let me add a little to that. Whoever gets it, they don't literally put it into their pocket. They do something with it. And I would say that, whatever they do with it, whether it's paying a dividend, revitalizing a plant, lowering price, there is no such thing as pocketing it. It translates into consumer welfare via total welfare one way or the other.

And secondly, if you adopt a consumer welfare standard, the people who Jon recommends merging parties consult will of course tell the merging parties that they

should say to the agency, and in fact do, pass on the price reductions to consumers. What that may well then lead to is harmful economic decision of the kind Dennis talked about, because they say we really want to do this deal; it really is good, and if we have to do some goofy things along the way to get it cleared, we will do that. Although, in the end run, consumers who are getting the short run benefits are getting the long run harm.

MR. HEIMERT: Commissioner Warden.

COMMISSIONER WARDEN: Well, I agree with a lot of what Commissioners Kempf and Carlton have just said. But I want to make one little footnote to start, which is, I don't think that an acquisition that is neutral as to price is injurious to consumer welfare in any sense of the word. You have to be talking about increased prices before the subject comes up, I think.

The second thing is, I don't see how you can say you're applying a consumer welfare standard unless you look to the long term. And I think that I heard Dennis say an hour ago or so, and it seems intuitively correct to me, that efficiencies, by leading to lower costs of capital, reallocation of capital, or whatever,

always, at the end of the day, benefit consumers because the consumers are the people who consume what the economy produces.

MR. HEIMERT: Commissioner Valentine.

COMMISSIONER VALENTINE: I think that creating antitrust policy entirely by logic is not the way it has ever existed and will not exist going forward. And I do think that if we read the current efficiencies commentary, which talks about exceptions to the general economic rule that marginal-cost reductions are passed on in immediate cost benefits to consumers, and fixed-cost reductions may not necessarily be so.

It says, exceptions to the general rule, however, exist. For example, under certain market or sales circumstances, fixed-cost savings may result in lower prices in the short term. Selling prices that are determined on a cost basis can be influenced by changes in fixed costs. Contractual arrangements also may allow fixed-cost savings to be passed through.

The agencies consider merger-specific cognizable reductions in fixed costs, even if they cannot be expected to result in direct short-term procompetitive

price effects because consumers may benefit from them over the longer term, even if not immediately.

I think that's also consistent with many of the statements that are captured in footnote 240 of the staff memo, which notes very interesting areas where you can have fixed-cost savings that will lead to lower prices in industries – you can think of CDs and various computer things where, in fact, pricing is often not simply related to marginal costs but often unrelated to marginal cost and may go towards recouping large investments in fixed costs.

I don't see why we can't stick with what is out there, with what is operative, and with what seems to be working and what the world seems to think is working, and to stick with a welfare standard that has stood the test of time, maybe if not with perfect, Nobel-prize logic.

And so I guess I have to disagree with some of the statements that have been made, and I would really urge you to reflect on the fact that when *Staples-Office Depot* was litigated, there were no efficiencies guidelines. Once the efficiencies guidelines existed, I was instructed to never not argue acknowledged

efficiencies in court. In *Heinz-Beechnut*, we specifically acknowledged efficiencies and the extent to which they would offset potential price increases.

When the agencies put something in the guidelines, I think they can abide by it, and counselors can counsel by it, and clients can operate by it. And it's really not playing games.

MR. HEIMERT: Commissioner Jacobson.

COMMISSIONER KEMPF: I think you're historically incorrect on that. I'll check on it.

MR. HEIMERT: Commissioner Jacobson.

COMMISSIONER KEMPF: It was the date of the timing. I think it was the eve of *Staples*, not in the wake of it.

COMMISSIONER JACOBSON: I personally would be skeptical if *Staples* said that we're going to take the benefits from the increased prices and develop the cure for cancer. I would be skeptical about that and would not justify the merger on that basis.

[Laughter.]

COMMISSIONER JACOBSON: And, more broadly, and less in a joking tone, in response to Commissioner

Kempf's comments, if parties are justifying a merger that leads to market power through commitments to lower prices as we've seen in some settlements with states on hospital mergers, I think the fact that the merging firms are committing to particular programs or pass-through programs is sufficient evidence that the merger will create market power that should be prohibited, that the evidence of the settlement is sufficient evidence to prohibit the merger.

MR. HEIMERT: Commissioner Garza.

CHAIRPERSON GARZA: You know, I come at this less concerned about whether I'm interested in shaking my finger at the agencies or particularly criticizing what they're doing now. And if what you're saying, Debra, is they already agree with us, that even though we use a consumer welfare standard that they'd be flexible and that some of these other things should be considered, I say that's fine.

But I don't see why we wouldn't articulate that and recommend it as the right policy in the report. The gloss of the commentary is fine. It's a gloss. It's not exactly what's in the guidelines. It's not binding.

It's not necessarily what they would argue in court. It's not necessarily what the policy will be after the next President is elected. And our recommendation is not only to the enforcers, but also the courts, as this is worded. And so I think that it may be useful for us to say, this is what we think should be considered by the agencies and also by the courts. And if they're already doing it, then I would expect them to say, great, we're already doing it. We'll continue to do it. And then, before someone decides to make a change or evaluates whether they want to make a change, then maybe they would consult the report.

So, I don't really look at it as a normative thing, as to whether or not we need to criticize or tell the agency that they're doing wrong. It's more a question of what the right way to go is.

And then, on the total welfare issue, to me, if you start off with a position that's not logical or that's a conceit, because everybody says, well, it's consumer welfare, but it means something different, then you're never going to have well informed policy. And you certainly aren't going to have transparency – that's what

we're going to talk about shortly.

So, to me, it's useful to talk about total welfare, but as an alternative to that, I would support saying the consumer welfare standard has been useful; it is accepted. But then talk about it with sort of the gloss that Dennis and others have mentioned and that the agency has used in the commentary – to say, but, in applying it, this is what you should do, recognizing that, in the long run, some of these other efficiencies do redound to the benefit of consumers.

And, after all, a lot of producers are also consumers in this economy. So, again, maybe we'll bridge the gap between those of us who prefer a total welfare standard and those who would not go that far.

COMMISSIONER WARDEN: Great suggestion.

COMMISSIONER CARLTON: I like that suggestion. I'm wondering if we could also phrase it a different way, which is, if we voted for the total welfare standard, we could explain why that is, in fact, the consumer standard.

CHAIRPERSON GARZA: Well I think – I think to the extent that there are a substantial number of

Commissioners that do advocate the total welfare standard, the report should explain the basis for that.

COMMISSIONER KEMPF: I think that if Commissioner Carlton is suggesting that the total welfare be relabeled consumer welfare and we all adopt that, I can support that as well.

CHAIRPERSON GARZA: That's the way it was in 1982. That's the whole point. That's why I woke up all of a sudden and said, what? consumer welfare isn't total welfare?

MR. HEIMERT: Are there any others on this comment? Can we move to transparency?

All right, why don't we move to IV, the transparency questions?

Commissioner Kempf.

COMMISSIONER KEMPF: Yes. I think I want to just go first because I gave some comments when we were going through the voting, where I voted yes/no on a lot of these things, rather than just yes, and explain that little of my difficulty - I don't think it's that I'm in as much disagreement as my fellow Commissioners on these as I am troubled by the phrasing of the questions

themselves.

Take number 15, for example. As I said, if I take that and break it into two sentences - I don't think that the Merger Guidelines, for reasons stated, and I don't see in the conjunction - the inclusion of John Warden's lawyer who's going to tell you that it doesn't mean what it says. That's why I voted no on the front half. But the back half, which says encourage the DOJ and the FTC to continue working on increasing transparency and heightening the basis for the important policy, I think, is a terrific idea. So, I'm torn between the two. It's not one I can comfortably vote yes or no on, because I think the first sentence I totally disagree with. And the back half, I totally agree with.

So, I would encourage the staff in fine tuning where we come out, to where we have these statements that we're voting on - and it really combines two very different things, to sort of try to break them out and find out what it is people are voting on. If what we're really voting on there is increasing transparency, then I'm very comfortable with the yes vote. But if the thing that's saying everything is really hunky-dory the way it

is now, I think that's wrong. And I find it a little bit difficult to reconcile that.

Similarly, on 16, I don't think the Merger Guidelines reflect current policy with respect concentration thresholds. I don't see how you can possibly reconcile that, for example, with *Whirlpool-Maytag*. So I think that I agree strongly there. But then the back half says that they modify to increase the thresholds to reflect current recent practice. I'm not so sure I would sign on to that. I think that's something that they ought to study. I, for example, think that one outcome of a study would be we ought to abandon concentration thresholds altogether.

So, I think some of these questions are a little too simple.

And then, if go down to – just one other comment on these – to 17(b), where I said periodical report statistics on merger enforcement efforts. My concern with those kinds of things, and I have in mind certain specific prior agency heads, where I always thought it was a numbers game. And I once addressed an audience at the Northwestern Corporate Council Institute

on merger enforcement where I referred to the department's then merger enforcement policy as the McDonald's approach – the quarter-pounder merger enforcement policy – the bad news was if you had a completely benign transaction, you had to have a consent decree that gave them a victory, but the good news was that, if you had a horrendously anticompetitive merger, you could still do it as long as you gave them the quarter pound.

And the agency got, in my judgment, very robust merger enforcement numbers through a combination of letting harmful mergers proceed and requiring benign mergers to have consent decrees. And anything that says we want your report on your statistics, I'm always fearful that will end up resulting in bad decisions just so that they get good statistics.

But the second half of it, that sentence – periodic reporting on what sort of factors they're focusing in on in deciding whether or not to challenge a merger, I think that's a very good idea. So, I think that my discomfort with this whole section is less than a discomfort with the discussion among us than with the

packaging together of the proposals in a way that I think yes or no is misleading.

My yes or no vote on any of these would be totally misleading because most of them combine two concepts, one of which I agree with and the other of which I disagree with.

MR. HEIMERT: A couple of Commissioners have asked that we take a brief break. So, we'll take a break for about five minutes and then resume on the transparency issues.

[Brief recess.]

MR. HEIMERT: Well, we'll go ahead and resume. Commissioner Kempf finished up on transparency. Are there other Commissioners that want to speak about transparency?

Commissioner Warden.

COMMISSIONER WARDEN: Well, very briefly, I don't understand how number 16 cannot be favored. Sorry for the double negative. It's absolutely clear that the HHI, the numbers in there, are not what are used today.

And, while I've voted for 15, because I think when you put everything together it's pretty clear and

sensible and useable, why would you not revise the Guidelines on the HHI threshold points?

MR. HEIMERT: Commissioner Litvack.

COMMISSIONER LITVACK: Well I, like Commissioner Warden, voted for that. And it's strange that we would not – we are on 18 – we're saying, on 18, and everyone has endorsed that, have the agencies revise the Guidelines to include an explanation of how they evaluate non-horizontal mergers.

Again, since the Merger Guidelines don't reflect current enforcement, it seems to me that the agencies should modify them and say in what way or how they are consistent with current practice. It just seems to me that it's pretty clear.

MR. HEIMERT: Commissioner Jacobson.

COMMISSIONER JACOBSON: The reason I voted no for that is convoluted.

[Laughter.]

COMMISSIONER JACOBSON: I completely agree that a six-to-five merger, which in theory is prohibited by the Guidelines as written, is one where you would advise your client that you're not likely to get a second

request, and your odds on getting an early termination are pretty good.

However, it is not true that the Guidelines are neutral as far as the agencies are concerned. Under the *Waste Management* decision in the Second Circuit, and as a practical matter, the Guidelines are admissions by the agencies that will be used against the agencies preclusively in court.

They can say all they want as they do that this is not an admission, that it cannot be used against us in court, but that's just not the real world. And we have Ralph Winter's decision in the *Waste Management* case to prove that.

So, there can be situations, given that market definition is as difficult as it is, there can be situations where a market, in theory, would be fairly broadly defined, but you would have unilateral effects arising in a market that has six players that's going down to five, but because the two merging parties have the substitutes for each other, that would give rise to a price effect that would be injurious to consumers and might even lessen total welfare.

So, at this point, since there is no damage being done by the Guidelines in practice, other than for the totally unwary who do not hire antitrust counsel but handle their mergers *pro se*, I would not change it, because I do think the agencies need the flexibility to deal with the problem that market definition is imprecise. And because there may be adverse effects in broader markets when you look at unilateral effect type issues.

MR. HEIMERT: Commissioner Garza.

CHAIRPERSON GARZA: I wanted to explain the reason I didn't vote for 16, but also so that – Jon makes a point that I haven't thought of, which is a good one, I think. Not that I would necessarily limit it to the unilateral effects kind of case, but your point being that the agencies can be held to the Guidelines standard and, given the unpredictability of market definition, *et cetera*, it could have the inadvertent effect of making it harder for them to succeed on cases where they should. I think that's a valid point.

But my reason for not saying yes to 16 was that – and now I'm thinking like Debra Valentine a little bit

- I don't know how else the agencies can say - it's a screen. It's just a screen. And if read the commentary, it's clear that's what it is. You have to have some sort of - it seems to me, for practical enforcement within a reasonable time, have some sort of mechanism to filter things out and to have a starting point for analysis. Although I guess now it's not necessarily a starting point, according to the commentary.

Secondly, if we told them to modify the concentration thresholds - to what? Were we just going to throw a dart at a dartboard? I don't what we would do. How would they explain it? You could say, well, based on the study, statistically, we had intended to challenge mergers at certain points, but that's not going to - I don't think the public will take much confidence in that. And they probably shouldn't.

And there's a lot behind those statistics as to why particular mergers weren't challenged. So, if we recommended that, and then they came back and said, how would we decide what threshold to increase it to, I'm not sure how we would advise them to do that.

And I am concerned that the public would

misunderstand a sudden increase in the HHIs and would think what was being said was that we were changing enforcement policy and were relaxing it, when, in fact, people would be intending is to make it clearer. So, those are the reasons I didn't go for 16.

The other thing I would add is, if it were the case that, because of these screens tons of mergers were being subjected to extensive and unnecessary second request investigations, then it might be different. But again, it doesn't look from the statistics that that's what is happening.

MR. HEIMERT: Commissioner Carlton.

COMMISSIONER CARLTON: I agree with everything that Commissioner Garza said. The reason I didn't vote for 16 is that the implication of 16 is that the concentration threshold levels should determine enforcement. And if they are just a screen, then the actual HHIs that you enforce are going to be different than what the screen is.

And I think that's accurate. I think it's accurate that the HHIs they are challenging are different than the HHIs in the Guidelines. But I think it's also

accurate to say that the Guidelines are written in a way in which those HHIs aren't necessarily meant to be the determining factor of whether you get challenged or not.

It also is the case that, as far as I can tell, if they asked an economist what levels we should stick in if we changed the levels, I think that would be a very hard question for an economist to answer. Economists right now would have difficulty justifying the current screens.

MR. HEIMERT: Commissioner Litvack.

COMMISSIONER LITVACK: I'm hardly going to throw myself on my sword over this issue, but there's an inconsistency, a little bit, when Jon Jacobson says, if they put it in there, they're going to be stuck with it. Chairman Garza says, it's just a screen, so they're not stuck with it. There is a slight inconsistency.

But I would further say to you, it really comes back to the philosophy of the Guidelines. Despite all the nice words, the question is, are they supposed to be reflective of current practice, or are they not? If they are, they're not. If they're not supposed to be reflective, they're doing fine. And –

COMMISSIONER CARLTON: It's a screen. In other words, I agree with you; the HHIs that are challenged are much different than a blind reading. If they weren't interpreted as a screen but as the determination of whether you are going to challenge, I entirely agree with you.

But I thought the way the Guidelines were written, or rewritten over time, is that they were flexible enough now that those HHIs are just the initial screen, and then you go on.

COMMISSIONER LITVACK: No. I think you're right, Dennis, to some extent; they clearly are. And they're intended to be read that way. I'm not sure they always are read that way. And I think they do provide some semi-rigid guidance. And to that extent, I think it would be useful to make a recommendation.

As I said what I said at the beginning, I don't think this is a critical point.

MR. HEIMERT: Commissioner Kempf.

COMMISSIONER KEMPF: You know, as I listen to all this discussion, it carries me back to the very first question, where we say everything is hunky-dory. As I

listen to everybody talk, it does not sound all that hunky-dory.

The Guidelines are firmly misleading. They don't reflect agency practice. And I guess that several people said, well, that's okay, it's only *pro se* prisoners on death row who will be misled. Everybody else will hire a lawyer.

COMMISSIONER JACOBSON: There was no death row.

[Laughter.]

CHAIRPERSON GARZA: Let the record reflect death row was not said.

COMMISSIONER JACOBSON: Just *pro se*.

COMMISSIONER KEMPF: I must have misunderstood.

You know, 1800 is articulated as they were sure to sue, and I've had many economists tell me, no, actually 1800 is now a safe harbor. And how you can think that the business community for whom these were intended originally is anything but affirmatively misled by them - I don't understand.

Guidelines - I take the word to mean they're supposed to provide guidance, and they don't do that. It doesn't say it's a filter. It says it's a guideline. If

you're looking for a filter, you can just as logically and rationally say, well, flip a coin to decide which ones we're going to review further.

Commissioner Garza's point of, if we revise, how, is a very important one. That is why, in fact, I voted no on the back half of that question about thresholds, because I don't know what threshold we would raise it to. And I am among those who think that the whole use of them, the thresholds, is intellectually bankrupt. So, I'm not sure why I would be saying, well, let's do it from 1800 to 2800, or 3800, or whatever.

So, I think it requires radical cosmetic surgery if it's going to be addressed in that fashion. That's all I have.

MR. HEIMERT: Commissioner Warden.

COMMISSIONER WARDEN: Well, I, like Sandy, am not going to fall on my sword about this. But if something is intended to be a screen, it's perfectly easy to use the word "screen." These are tests that are screens to suggest the possible need for further inquiry. Well, fine, make that change instead of changing the thresholds.

I don't think this is terribly important, but normally, public statements should comport with reality.

COMMISSIONER KEMPF: I would just add one footnote, if I might. And that is, I can see a merger that does not go by even the current guidelines that I would be very comfortable with attacking. For example, Phil Areeda, in his text, at least when I used it, used to give the example of a decision to take out an industry maverick. There may be an industry with, say, ten competing firms, but they have a price leader who everybody tends to follow, and a maverick comes along and he is constantly forcing industry prices down because he is the maverick. And the industry leader says, I'm going to merge that company and take them out.

I would be very comfortable with an attack on that merger, even though it doesn't run afoul of the current guidelines. So, I think that there are a lot of things that could be done to improve them, and I'm not sure that raising the numbers makes sense.

I do like Commissioner Warden's suggestion that if these are not really guidelines but just a threshold way to look at something seriously, that doesn't mean

that someone like me has to subscribe to the fact that it makes any sense or not, but it does provide guidance. Right now, it does not provide guidance.

MR. HEIMERT: Commissioner Cannon.

COMMISSIONER CANNON: Yes. You know, I'm listening to this, and this is one of those times when I think debate matters. I'd voted no on it, but I tend to think that Commissioner Kempf and Commissioner Warden have the better argument.

You know, the answer to all this can't be go get yourself an antitrust lawyer. I mean, to me that's not a very satisfying answer and that's not what our job is here.

So, I'm in one of those moments, Andrew, where I'm going to switch my vote on that to —

MR. HEIMERT: So, we'll mark you as a yes in the 16 column?

COMMISSIONER CANNON: Yes. That would be good. And I'm sure that will change me somewhere else. I'll have to look at it over lunch and let you know.

MR. HEIMERT: We'll sort it all out.

COMMISSIONER CANNON: Thanks. That would be

great.

COMMISSIONER CARLTON: Just to clarify – I think what John said was perfectly sensible. If they're using it as a screen, they can say that. I would certainly favor that.

One other thing, people keep saying they should hire antitrust lawyers. How come they never say they should hire an economist?

[Laughter.]

COMMISSIONER CANNON: That's a given, Dennis.

COMMISSIONER LITVACK: Because there are 11 lawyers and 1 economist on this panel.

[Laughter.]

COMMISSIONER WARDEN: The first thing a lawyer will do is say hire an economist.

COMMISSIONER CARLTON: Thank you.

CHAIRPERSON GARZA: There's just one more point of business – well, there may have been some other questions, but I think what we probably need to have staff do is – working with the study group – to go back and revise, perhaps, some of the wording the best they can to try to reflect where we think there is a

consensus. There has been some discussion and movement around certain wording.

And then when we do our sort of wrap up later in July, we can have that in front of us to help us coalesce a little bit more.

COMMISSIONER VALENTINE: That's a good suggestion. Yes.

COMMISSIONER KEMPF: Yes. I think this strikes me as something, after we do that work that you discussed, that would be fruitful. I think that may be what you're saying. That's for another session.

CHAIRPERSON GARZA: Right. Exactly. So, we'll talk about it again.

Was there anything else that anyone wanted to –

COMMISSIONER DELRAHIM: Point of clarification. After lunch, what are we – have we already voted on this issue?

MR. HEIMERT: Yes. We're done with this. We go to the HSR issues and then the patents after that.

CHAIRPERSON GARZA: So, we will resume at 12:45?

MR. HEIMERT: 12:45. Yes.

[Whereupon, at 12:03 p.m., the discussion of Substantive Merger Law was concluded.]

Hart-Scott-Rodino Act

MR. HEIMERT: All right. Commissioner Valentine.

COMMISSIONER VALENTINE: Okay. If Commissioner Carlton would not interfere with the mic system for the court reporter, I'd be more than happy to start you off, even though I'm sure what he's saying about monopsony power is more interesting than what we're about to say.

COMMISSIONER JACOBSON: Vastly more so.

COMMISSIONER VALENTINE: Okay. HSR. I, I would vote yes for 1, recommend no changes to current HSR reporting thresholds, assuming that we continue to adjust them for inflation, as we seem to be doing.

I would be interested in some discussion on number 5, but I'm not going to vote for it yet.

And the rest I don't want to touch, either, I guess.

In II, I would vote yes for number 9. And if so, those reforms should include (a) – now, actually, for all of these recommendations where we're recommending

that DOJ adopt what the FTC did, one thing that I think might be helpful here is - I assume that DOJ is going to be coming out soon with its own proposals. I would actually recommend that, after they do that, we take a look at both of them, implement best practices between the two and/or some modification of our own, like the Jacobson proposal that seems to have just been passed around here, which also would address 9(a).

I would vote for 9(d), if it's a party and agency agreement, not just the parties, but I don't recommend that Congress amend the HSR Act to establish such a procedure. So, now I'm getting like Don Kempf, not the last part of that long, long clause. It's certainly not worth Congressional action for such a small number of cases.

I would vote for 9(f).

I don't quite understand what's meant by 9(g), so I'll abstain for the time being.

I would vote for 9(h), 9(i), 9(j), and 9(k), obviously, consistent with protecting confidentiality of third party data. And that's it.

MR. HEIMERT: Commissioner Kempf.

COMMISSIONER KEMPF: I would vote no on the first one. And just to explain that for a second, it's not because I like the current ones; it's just I'm not sure where we go from there, so I would discuss that more, but I would vote no.

On 2, I'd have probably a yes, and indexed, subject to some of the comments we had earlier, that, in lieu of that, if you changed the guidelines to just a screen, then I might be content with whatever the agency wanted them to be.

3, no. 4, no.

5, I have a hard time with. The example, five months, I would say no. The statute is less than two months plus your time. And to establish as a reform like that, the five months, strikes me as a little bit bizarre.

6 is another one where I'm a yes/no, in the sense that I - obligation to make a fuller filing upon request of the agencies, I'm yes. But with an extension of the applicable waiting period I'm a no.

7, I'm no. 8, I'm no.

9(a), I'm yes. And I'd like to discuss the

Jacobson proposal in connection with that.

(b), yes. (c), yes. (d), yes. (e), no. (f), yes. (g), yes. (h), yes. (i), yes. Undecided on (j). (k), yes. Undecided on 10. And I don't understand what 11 means; I just don't follow what it says. So, I don't know how to vote, because I don't think I understand it, really.

COMMISSIONER VALENTINE: I believe what it's trying to address is the fact that, in most other countries, initial filings are, in fact, notified. The fact of a filing is not a public matter. So, if you want to keep a merger confidential in the U.S. you can do so. And I think there are some transparency advocates who would say that we should all know when mergers are filed.

COMMISSIONER KEMPF: You know, for public companies I think there's an automatic disclosure. It's inconceivable to me that that's not a significant event in our history, whichever side of the transaction they're on.

So, I don't view that as a big thing, but I could go either way on it.

MR. HEIMERT: Commissioner Jacobson.

COMMISSIONER JACOBSON: In the I block, I would vote for 1, but not for 2 through 7.

In the II block I would vote for 9, and in particular for (e) and (f).

In that connection, I would recommend the poorly named but otherwise brilliant "Jacobson proposal" for consideration among this group. And observe that the FTC has come up with a 35-custodian limitation as a hard rule. As we'll talk about later, that is a boon to large deals. It is regressive and, in fact, a tax on smaller transactions and needs to be viewed critically from that perspective.

It is also associated with an additional 30-day cost to get the benefit of the 35-custodian limitation. I think we need to talk that through. And, as Commissioner Valentine has pointed out, we have not heard from the Department of Justice on these issues.

With regard to 10, I would say yes, but that has to be carefully calibrated, because it will affect the waiting period times. It basically has to be a stay of the waiting period if you're going to take an appeal to a magistrate judge.

And finally, a strong no on 11. If the securities laws don't require disclosure, there's a benefit to the parties in being able to notify a transaction. And if there's a competitive problem the public will find out about it. But if there isn't, and the securities laws don't require the disclosure, what interest does antitrust have in disclosure, as such.

But I support the spirit of all of 9, as captured in the poorly named Jacobson proposal.

CHAIRPERSON GARZA: I think it's really well named.

MR. HEIMERT: And for the audience, Commissioner Jacobson's proposal is on the table at the front of the audience. If you don't have a copy, you're welcome to take one.

Commissioner Litvack.

COMMISSIONER LITVACK: 1, yes. 4, yes. 9, yes. And under 9:(a), yes; (b), yes; (d), yes; (e), yes; (f), yes; (g), yes; and (i), yes.

And 10, yes, although I'm mindful of Jon Jacobson's point. You would have to do something, but yes.

11, no.

MR. HEIMERT: Commissioner Cannon.

COMMISSIONER CANNON: On 1, yes.

Under 2 –

And under 9 – to echo this, we really should wait and see what DOJ comes up with. My guess it may not be fundamentally different. It may be different, but it would be good to know that.

With that said, (a), (b), and (c), but then I would also not – I don't think we want Congress to do that, at this point.

Also (d), and then (e) and (f). (i), also.

And then I think yes on 10.

No on 11.

MR. HEIMERT: Commissioner Shenefield.

COMMISSIONER SHENEFIELD: I support 1, 7, 9, 9(a), 9(c), 9(d), 9(f), 9(g), 9(h), 9(i), 9(j), and 9(k).

And I'm interested in hearing more about 11.

And I don't support the Jacobson proposal because of paragraph four.

MR. HEIMERT: Commissioner Garza.

CHAIRPERSON GARZA: On I, I support other, I

guess, which is that I like to – I think it may be worth considering, given the statistics that were reported by the FTC and talked about in the staff memo. It does seem as though a lot of filings are being made that aren't getting a look.

I mean, if you look at the ET – is it 76 percent of transactions get ET, or just 76 percent of those who – in any event, if you look at the statistics on how many transactions get early termination and how many are investigated and how many go to second request, it's a very small percentage. So that might indicate that there are a lot of filings being made and a lot of money being paid that isn't necessary.

So, while no one had proposed it, and therefore, maybe it's a bad idea, I was thinking that there might be some focus on whether or not there was an SIT Code – or, I guess they don't use SIT Codes anymore.

NEIS?

COMMISSIONER VALENTINE: NAICS.

CHAIRPERSON GARZA: NAICS. Whether there's a code overlapping. If there isn't, or if there isn't below a certain dollar threshold, or maybe it could be by

industry, but maybe we could eliminate a lot of unnecessary filings.

The other thing is that perhaps, at some appropriate point, the agencies could go back periodically and review the statistics and make a determination, recommendation, to Congress whether the threshold should be raised or stay the same or even be lowered. So, maybe if they had to do that every two or three years, we could keep current and raise them or lower them as appropriate. So, that's other.

On II, I was going to say 9(a), although I'd like to think about the Jacobson proposal.

(d), (f), (h), (i), (j), and (k).

And that's it.

MR. HEIMERT: Commissioner Warden.

COMMISSIONER WARDEN: A strong yes on 2. I found it interesting that, in the memo, the legislative history is quoted in 1976 as saying this was to provide advanced notification of "very large mergers", and again, later, legislative history supposedly directed towards the very largest or giant corporations. And Rodino said it will reach only about the largest 150 mergers a year.

And the footnote discloses that even in the early years, the number on the report was about six times that.

I would raise thresholds, which are stated on page nine of the memo. Transactions valued at greater than \$200 million, reportable without regard to the size of person test, I would make it at least \$500 million. Transactions between \$50 million and \$200 million, generally reportable if they meet the size of person test, I would make that between \$150 million and \$500 million.

And the size of person test, I would make one person at least \$250 million in sales, and the other at least \$100 million, instead of \$10 million. I think this just encompasses many too many transactions.

I also point out that there are caught today block trades in securities that raise no antitrust issue whatsoever. And I think some persons engaging in such trading in what I would call an excess of conservatism, nonetheless file reports. Now, why there would ever be a waiting period for something like that is wholly beyond me.

I have to go on?

MR. HEIMERT: On II, yes.

COMMISSIONER WARDEN: I would favor 4.

9(a), I'm happy to wait and see what the DOJ says.

(b), (e), and (f), except I would go further and say nothing has to be produced from disaster-recovery type retentions.

I'm not sure quite what (g) means, in the sense that, how can you produce data you don't keep in the ordinary course of business. They make you compile it, I guess. If that's happening, I would strongly favor (g).

(h), (i), (j), and (k).

I don't favor 10 or 11.

But oddly enough, for the reason John Shenefield didn't like it, I favor the Jacobson proposal. I favor making the agency go to court, not the applicant.

COMMISSIONER VALENTINE: To clarify on your filing thresholds, \$150 to \$500 million is the first? So, nothing under a \$150 million, and in the \$150 to \$500 million range, the size of person test would be \$250 million in sales and \$100 million in sales?

COMMISSIONER WARDEN: Correct.

COMMISSIONER VALENTINE: And for the \$500 million and above, what was the size of person test?

COMMISSIONER WARDEN: No size of person.

COMMISSIONER VALENTINE: No size. Okay. Thank you.

COMMISSIONER KEMPF: Would you index those, John?

COMMISSIONER WARDEN: Well, I think indexing is kind of silly, because it produces trivial increases year to year. And it seems to me it's far better to just increase them by a big measure once every five years.

MR. HEIMERT: Commissioner Yarowsky.

COMMISSIONER YAROWSKY: Okay. I, yes on 1.

II, yes on 9, and then I would also say yes on (a). (d), minus the last sentence. (e), but I'd like to hear our discussion about, generally, the contours of what some of us imagine substantial compliance might mean.

(f), yes. (h), yes. (i), yes. (k), yes - pick up the line about protecting confidentiality.

On number 10, I'm leaning no, just for a lot of procedural reasons. I mean, not just the time delay of

staying the agency review, but just for a federal court to take an appeal – I'd like to hear whether people imagine we would be prioritizing the civil docket of the federal courts in such a way as to give preference to those appeals, which is a real serious policy issue, I think, in the wake of the criminal docket they're faced with.

And second, if in fact it goes on a long time, I think that prejudices the parties, even though the party may say it's in their interest. But once they get a final disposition, it could prejudice parties.

So, I'm open to hearing the discussion, but I just see some procedural issues. And that's all.

MR. HEIMERT: Commissioner Delrahim.

COMMISSIONER DELRAHIM: On 1, yes with a couple of additions. A couple of things we did not get in the 2000 threshold changes is that, I think, the adjustments should be done rounded up to the nearest million dollars every other year. Doing it every year to .1 and all that is silly. We had an amendment, time ran out, we couldn't get that in. It was agreed to unanimously. That would just be a good clean up to do.

I do agree that the indexing is important for a number of reasons. One is John is right, that it maybe makes sense to do this periodically with a large amount. The problem is Congress is just – because of the budgetary impact that it raises when you exempt the transactions, it's impossible. And the ransom we had to pay for changing the thresholds was increasing those fees to the three-tier system that was there. And that's just not good policy, because merger review and enforcement decisions are made based on budgetary implications.

That gets me to the next point. I think we should strongly recommend that the two agencies should not be funded by Hart-Scott-Rodino fees because of the policy implications it has.

COMMISSIONER VALENTINE: Did we put that in here? Was that something suggested to us?

COMMISSIONER YAROWSKY: I thought we had that discussed, but –

CHAIRPERSON GARZA: No. I thought that it was recommended for us to study, but we didn't adopt it for study.

MR. HEIMERT: I don't recall if it was

recommended yes or no, but it was one of the issues.

COMMISSIONER DELRAHIM: The one that was recommended to us by the ABA and we voted not to study it specifically.

CHAIRPERSON GARZA: But if you would like to move to have it put back –

COMMISSIONER DELRAHIM: I would move strongly –

COMMISSIONER VALENTINE: I second –

[Simultaneous conversation.]

CHAIRPERSON GARZA: And I third it.

COMMISSIONER DELRAHIM: And many chairmen, many heads of the agencies would agree, but, however, would never go before Congress – to go to the folks who write their checks and tell them no, you should not do this and write our checks out of that account, but I think –

COMMISSIONER VALENTINE: Good point. Good point.

COMMISSIONER DELRAHIM: – It would probably the best point we can do.

In addition to that, I think that perhaps something along the lines of what Commissioner Warden said. Every 10 years, starting whenever – 2010 –

Congress should look back and see whether the threshold amount has the same impact on the economy as whatever the Ouija board is for which we base the current thresholds on. Unfortunately, the current threshold is based on some good policy for moving it from 15 to 50, but also, the budgetary implications it had - this is probably more appropriate for Dennis' discipline. Somebody needs to figure out - all we knew is that \$15 million in 1976 did not have the same impact as it did in 2000 and then let's move from there.

We exempted 58 percent of transactions from being reported from going from 15 to 50 alone. But every 10 years, they should automatically look at this, at least. It would be nice if there was a repeal of the fee for small businesses, at the very least. That would be a side addition.

Then I will go to just the ones that I will say yes.

9(a), (b), (d), (e), (f), (h), (i), (j), and (k).

I think, more importantly than anything else, the transparencies that it would allow - and for

businesses to know what substantial compliance means. Many of you have much more experience than I do, but I found that trying to advise clients, especially during the second request process, what substantial compliance is, is not always easy.

And then with 10, I would support that. I would like to know what standard we would put in there. I think the same standard used for quashing the motion to subpoena. I also think it's important to put a timeline for exactly the reasons Commissioner Yarowsky mentioned that the magistrate would have. The judicial conference will violently oppose that, because they don't like any timeline on their activities. But if we're going to a magistrate, there should be 30 days, no more review. You just have somebody to get a quick review. Otherwise, it defeats the purpose of the efficiency it would cause.

11, I would support. And I would also make public the non-confidential portions of applications. I think, again, the public, the markets, would be better advised to look at this instead of certain arbitrage that occurs. I know that the public companies do make those reportings, however they're done when their SCC

requirements are done. Might as well let the public know when the application is made.

The Jacobson proposal I really like. I would just love to know on number four what the that standard would be for the agency to go. I don't want that standard to be too high for the agency to go to court to get additional information. If it's reasonably low, then I think it makes sense to do that. As much as I don't like to hamper the agencies, I think this would just provide some discipline.

MR. HEIMERT: Commissioner Carlton.

COMMISSIONER CARLTON: On most of these I don't have strong views, because this is a bit out of my area of expertise. So, I'm interested in listening to the discussion. My preliminary views are as follows.

On 1, I would vote yes on 1.

On 6, I would vote yes. If I understand it correctly, a lot of the mergers are passed without a second request, and that suggests a sequential analysis in which you get rid of a lot of them quickly. That would make sense, at least as I understand things.

On number 9, I would vote yes.

On (a), I would vote yes, however with a clarification. When they refer to the time period, I would distinguish between document request and data requests. Sometimes you need data going back – and it's available – for longer periods of time.

I'm not sure I quite understand (b), what "number of specifications" means.

COMMISSIONER JACOBSON: Request.

COMMISSIONER CARLTON: For information? Okay.

COMMISSIONER VALENTINE: So in AOL-Time Warner, there are, for example, 200 specs.

COMMISSIONER CARLTON: I see. I would vote yes on (d), on (e), on (f), on (g), on (i), and on (k).

On 10 and 11, I'd like to hear some discussions.

I don't fully understand, on 11, the issues about confidentiality. If two people who aren't public want to engage in a transaction, and it's a secret transaction, I don't know if 11 is saying that it has to be revealed or not, or whether that creates any complications. So, I'd like to hear that.

On the Jacobson proposal, in general, it

strikes me as a reasonable subject to the clarification that Makan just asked for item number 4, which I'd like to hear a clarification that addresses sort of the same procedural issues that Jonathan raised on timing.

COMMISSIONER KEMPF: Madame Chairman, before we begin the discussion, let me raise a procedural question. I had thought that, in response to much of the testimony that we heard, both of these panels, and some of it gratuitously on other panels, we would address the international aspect of it.

Now, many of the people talked to us about the need for our agencies to coordinate with the EU and elsewhere to try and simplify their filings in multinational transactions where they file 50 or 60 forms. They're all different, and they all have slightly different ground rules, and trying to get that into sort of one world-form that people could use throughout - Is that going to come up in another -

CHAIRPERSON GARZA: Well, you know, Don, the one where you tried to call in? That meeting -

COMMISSIONER KEMPF: Yes.

CHAIRPERSON GARZA: We discussed it then.

COMMISSIONER KEMPF: You did. Okay.

CHAIRPERSON GARZA: But seriously, this was the issue – I think the way it was worded, the recommendation was actually for a clearinghouse, or something.

Is that what it was? And I don't remember, to be honest, if we –

MR. HEIMERT: Working towards a common form and/or –

[Simultaneous conversation.]

CHAIRPERSON GARZA: Is that where we went?

MR. HEIMERT: Study or pursue is also a –

COMMISSIONER VALENTINE: Yes –

COMMISSIONER KEMPF: Okay. The staff has been good enough to send me a rough of the transcript, so I'll take a look at that.

CHAIRPERSON GARZA: Well, I think, you know, the staff needs to catch you up, anyway. We need to get your straw vote.

MR. HEIMERT: Commissioner Jacobson, also. Since Commissioner Delrahim noted the de-linking of fees, it might be useful for Commissioners to opine on that one way or the other, briefly.

Do you want to do it by show of hands?

COMMISSIONER DELRAHIM: And on threshold changes, if there was any comment on that.

MR. HEIMERT: Well, that's maybe something we can take up on the general discussion. This is just sort of an added proposal.

Should we do a show of hands?

Commissioner Delrahim, could you restate it, and just clarify?

COMMISSIONER DELRAHIM: It would be that the two agencies' budgets would not be derived from fees paid by merging parties. And it causes certain policy and enforcement decisions that are really based on budgetary factors rather than, really, the true policy implications of the enforcement policy.

CHAIRPERSON GARZA: But you would keep the filing fee?

COMMISSIONER KEMPF: It would go to the Treasury, I take it.

COMMISSIONER DELRAHIM: I would put them to the Treasury, or completely do away with the filing fees.

CHAIRPERSON GARZA: Well, that's my question —

COMMISSIONER DELRAHIM: The rate for a couple of hundred million bucks, it's, you know, they could be paid out of the general funds. I think all of the FTC, the great work that they do in the consumer protection area, which I think is fantastic - However, privacy, consumer protection, fraud, all of that is paid by a tax on merging parties. I don't think merging parties should fund that. Not just the antitrust operations, but all these other operations are paid through HSR. And I think it's just an unnecessary tax that should come out of the general fund.

CHAIRPERSON GARZA: So, there are two different questions, though.

COMMISSIONER VALENTINE: Yes. Why don't you phrase it as two different issues. One issue, should it be de-linked? And then two, should there be filing?

CHAIRPERSON GARZA: Okay, so the first question is whether or not the agencies should be funded out of the Hart-Scott-Rodino filing fees, assuming that there continue to be Hart-Scott-Rodino filing fees.

Raising your hand would be saying that you don't think the agencies should be continued to be

funded.

COMMISSIONER VALENTINE: As the status quo.

COMMISSIONER JACOBSON: Can I explain why I like that in theory, but oppose it in practice?

MR. HEIMERT: Should we get a straw poll first, and then do a discussion?

COMMISSIONER VALENTINE: Okay.

MR. HEIMERT: Okay. So on the de-linking question –

COMMISSIONER VALENTINE: How many would like to de-link the agency funding from the filing fees?

MR. HEIMERT: Everybody except Commissioner Jacobson and Carlton.

COMMISSIONER CARLTON: I'm going to abstain.

[Simultaneous conversation.]

MR. HEIMERT: We'll try it differently. Commissioners Valentine, Litvack, Warden, Shenefield, Kempf, Cannon, Delrahim, and Yarowsky and Garza are all at least in favor of the straw poll phrase of that. And we'll have discussion to the extent people want to.

CHAIRPERSON GARZA: And then the second question, raise your hand if you agreed with recommending

the abolition of filing fees.

COMMISSIONER YAROWSKY: Madame Chairman.

CHAIRPERSON GARZA: Yes.

COMMISSIONER YAROWSKY: Could we have a subpart of that, about waiving fees for small businesses, as Makan suggested at the end of his remarks? If we could take a vote on waiving them entirely, or just waiving –

CHAIRPERSON GARZA: The first one – yes – we can have discussion about it. But the first one is just eliminating the filing fee.

MR. HEIMERT: Commissioner Delrahim,
Commissioner Garza.

CHAIRPERSON GARZA: And then the third one is adjusting the filing fees so that small businesses would not have to pay.

COMMISSIONER CANNON: And how are we defining small businesses?

CHAIRPERSON GARZA: Well, we'd have to discuss that.

[Simultaneous conversation.]

CHAIRPERSON GARZA: Small companies –

COMMISSIONER DELRAHIM: There's a statutory

definition for small businesses, those who qualify for SBA loans and all that.

COMMISSIONER WARDEN: Do they have to make HSR filings? We would not --

COMMISSIONER DELRAHIM: Sure, if they --

COMMISSIONER JACOBSON: Certainly not under your --

[Simultaneous conversation.]

CHAIRPERSON GARZA: But let me ask for a show of hands.

MR. HEIMERT: For the small business, however defined, exception to the fees. Could you raise your hands if you're in favor of looking into that and further defining it?

Commissioner Delrahim, Yarowsky, and Shenefield.

And we can discuss it as we go forth.

CHAIRPERSON GARZA: But that means that we won't be discussing it.

COMMISSIONER KEMPF: One other thing that was a middle ground on two things that were discussed, is repealing the fees altogether, which three of the

Commissioners, by my count, favored, and I didn't vote for that. That's because I would favor a dramatic reduction in the fees, but have them cover the activity that they're designed to cover.

Now, right now – Commissioner Delrahim made the point that they cover that and a lot of other things. But if they were reduced to cover the merger review activities to more roughly coincide with that, that would strike me as being fair.

In other words, I might not abolish them altogether and have it come out of the general Treasury.

COMMISSIONER DELRAHIM: Directed user fee.

CHAIRPERSON GARZA: Right. Right now, we didn't have a sufficient number of Commissioners favoring the complete abolition to continue to have that on the table.

COMMISSIONER KEMPF: That's why I'm explaining my vote.

CHAIRPERSON GARZA: So, the next question is whether, for a show of hands, Commissioners would favor discussing further keeping filing fees, but reducing the size of them and perhaps getting rid of the graduation

per size of the transaction.

Is that right?

COMMISSIONER KEMPF: That certainly encompasses it.

CHAIRPERSON GARZA: Okay.

COMMISSIONER KEMPF: I wasn't being that precise. I was just saying, while I don't favor going to zero, I also don't favor keeping them at the high level that supports the full budget at the current level. I would favor some reduction.

CHAIRPERSON GARZA: All right.

Can I have a show of hands of Commissioners who would like to discuss that concept further.

MR. HEIMERT: Commissioners Kempf, Warden, Delrahim, Garza, and Shenefield.

That's five.

CHAIRPERSON GARZA: So we won't be discussing it, then.

MR. HEIMERT: All right. Who wants to begin?

Commissioner Jacobson.

COMMISSIONER JACOBSON: I'm the lone dissenter on the source of funding for the agencies. I think in

theory it would be great if they could be de-linked. My concern, and it's a very serious concern, is that antitrust enforcement – which is always political, no matter we say or do – would be the subject of enormous Congressional pressure to file a case, to not file case. The whole enforcement regime would be altered, in effect, through threats of cutting off funds.

I think we have a source of funds that allows the agencies to flourish as, I believe, they truly have over the years, subject to much less political influence than we have seen in prior pre-HSR eras. Recall the hearings that Commissioner Dixon got involved in that got written up in the *Pillsbury* case. I know some of us are old enough to remember that one.

And that having a source of funding that is stable and less vulnerable to political ups and downs, I think, is an enormous plus, notwithstanding the fact that just by saying this, I have engendered at least four flags to arise.

But the reason I had raised – five, now – my flag to begin with was simply to ask Commissioner Shenefield on the HSR reform proposal that I made – would

there be an alternative to paragraph four, a different enforcement mechanism such that, at the Department of Justice, more than these custodians could be searched if approved by a signed document from the Assistant Attorney General or by moving - Commissioner, is it just the judicial aspect of it? Because I was trying to get some enforcement mechanism, and having them go to court is certainly one, but it's not the exclusive one.

COMMISSIONER SHENEFIELD: The answer to your question is yes.

If it were a required finding by the AAG, that would be fine with me. The idea of the Division or the Federal Trade Commission having to go to federal court just strikes me as unworkable and ponderous.

MR. HEIMERT: Commissioner Litvack.

COMMISSIONER LITVACK: I was going to address my questions, and they are questions, to Commissioner Jacobson on his proposal. There are a number of things that bother me, while I like the concept.

For instance, I think the whole thing is modified by the terms, depending on the size. So, if you say this is done depending on the size, the agency will

be limited to documents from 15 to 30. Now, I don't know whether you mean within that range depending upon the size or it goes outside, or what have you. One question.

Second question, you say if the agency wants more – more what? More people's files? More documents from the files of the people who were searched? Would the agency be stymied, in the sense that they would get the files of Mr. X, and they inexorably lead to Mr. Y, who is not one of the 15 they chose in the first instance – Do they have to go to court for that? It sounds like a bit much.

I also worry a little about providing a responsible officer to interview about the company structure. Any time you write words like that, Jon, as I think you would agree, you're leaving a big opening for “what is company structure?”. And I can imagine an interrogation that ends up in all kinds of fights about whether or not the inquiry is going beyond what was contemplated.

So those are questions. I like the notion. This puts some teeth in it. I don't think, candidly, unlike my colleague and mentor, Mr. Shenefield, that I

would be particularly comfortable with just the AAG certifying it, because the AAG is just going to rely on the staff. I mean, what does he or she know, ultimately, about this kind of thing?

I'm speaking for myself, yes.

And I think I asked as many questions as anybody, but at the end, I'm not sure I knew any more than anybody else. And so, you know, I think a court – and I assume we're talking about a magistrate here, is appropriate.

So, I tend to favor it, but I have all these questions.

MR. HEIMERT: Commissioner Yarowsky.

COMMISSIONER YAROWSKY: A couple of topics.

One, I want to applaud Makan for bringing up the de-linkage proposal.

And, Jonathan, I really do respect your guardianship of trying to keep enforcement going and trying to reduce the political winds that surround it.

Ironically – and this, again, is just a subjective observation – once the user fees came into effect – at least, in my observation of being up there

kind of during that period – I think it perversely created less interest in oversight on a lot of the things we're discussing today just because some numbers – and I, respectfully – are on automatic pilot, figuring that the fees were just going to fund this process. Not that they didn't review how the process was working, but it was a different correlation in saying, look, we've giving you this much money; how is this system working? And then they'd have to really check this out.

Once the user fees came into play, I think that oversight lessened a lot. And it bothered me because I think a lot of the things we're talking about should be done under active oversight, and they just haven't been done –

COMMISSIONER JACOBSON: That's why I'm disagreeing.

COMMISSIONER YAROWSKY: Okay. We'll just simply disagree on kind of the practical effect of all of that.

COMMISSIONER JACOBSON: Yes.

COMMISSIONER YAROWSKY: On your proposal – shifting gears to your proposal – and I think we all

don't want burdens in this for the parties going through this process.

I'm cautious about this, because I think that the one thing that we witnessed with the Hart-Scott-Rodino Act moving forward was an attempt to shift merger enforcement away from the courts and back to the agencies, as much as they could. The way merger enforcement was done was almost – it was solely – through the courts, post-consummation. And a new system was created for preventive review, before the fact review, and I think that's been very useful.

We've talked about going to court on a number of these proposals, getting orders. I would be very cautious about injecting the court system in to this process before the decision is made. I'd just be very cautious about it, whether it's your proposal or some of the subparts we've discussed.

But, having had all those hesitations, Jon, if you will simply withdraw your foreign compulsion proposal to the state action doctrine, I would –

[Laughter.]

CHAIRPERSON GARZA: This is how it works.

COMMISSIONER JACOBSON: Hence my suggestion that the agencies continue to be funded by HSR.

MR. HEIMERT: Commissioner Delrahim.

COMMISSIONER DELRAHIM: Let me just respond to Commissioner Jacobson's very valid concern that you don't want to politicize any kind of enforcement decisions. I can't agree with him more on that. And I don't think it has anything to do – if the agencies were collecting and had the authority to spend those fees, I think you're absolutely right.

However, they're raising the money, and then it goes to a fund that still needs to be appropriated. They have no authority to use that unless the politicians give them that money. So all that happens is policy decisions and budgetary decisions are based on the fees.

It still is political. In fact, I would argue it's much more political than it was when fees were not charged when they were first instituted in, I believe, 1989. It was supposed to be a temporary fee to balance the budget, and then it became, just like crack cocaine, something Congress gets addicted to. And we can never let it go. And I think this Commission –

CHAIRPERSON GARZA: And that's the sound bite.

[Laughter.]

CHAIRPERSON GARZA: It's like crack cocaine.

COMMISSIONER JACOBSON: That will get picked up.

COMMISSIONER DELRAHIM: That'll be good for my career in this town.

MR. HEIMERT: Commissioner Shenefield.

COMMISSIONER SHENEFIELD: I'd just like to say a word about Jonathan's concern about politicizing antitrust enforcement.

I think the Senator or Congressman, or indeed staff, that has any specific involvement with a particular case and tries to use the appropriation power, the budgetary authority, to deal with it is asking for a very short career. I just don't think it happens much in the real world. I can't ever remember it happening, except in the resale price maintenance area, and that was a policy, and not a specific case. And as to policy, it seems to me altogether appropriate that Congress be part of that conversation.

COMMISSIONER JACOBSON: *Pillsbury.*

COMMISSIONER SHENEFIELD: I don't know about *Pillsbury*.

COMMISSIONER JACOBSON: It was a long time ago.

COMMISSIONER SHENEFIELD: If it happens only once every hundred years, I wouldn't worry about it.

COMMISSIONER KEMPF: But I took Commissioner Jacobson's – maybe you can clarify this for me – I took your concern to be not individual cases but, sort of, enforcement generally.

COMMISSIONER JACOBSON: No. It's individual cases.

COMMISSIONER KEMPF: It was. Okay. I misunderstood.

COMMISSIONER SHENEFIELD: If it's policy, there should be some back and forth, give and take.

COMMISSIONER KEMPF: I agree.

MR. HEIMERT: Commissioner Garza.

CHAIRPERSON GARZA: Commissioner Jacobson, on your proposed reform, in thinking about it, I think I have some concerns about it. And actually what I think I like is recommending just a plain old 15-30 kind of requirement, as you have in paragraph 3. Just simply

that the government presumptively would ask for documents from 15-30 custodians depending on the size of the transaction.

Now, in reality, what will happen, then, of course, is either the parties will voluntarily provide additional information, if the government feels that it's needed to make a decision that would avoid litigation. In which case, though, the parties will have a little bit more leverage than they do now. Or it will end up in court. But rather than paragraph four, I wouldn't say that they have to get an order, but what's going to happen then, if the agencies on the basis of 15-30 custodial searches decide, well, maybe if I had more information, I'd think differently, but right now, because of the HSR deadlines I've got to go to court.

So, then they will be before a judge. At that point that's where the parties say to the court, well, you know, I only had documents from 15 custodians. I think, Your Honor, I need to get this and this information. Therefore, I need 60 days, 90 days discovery or whatever it is. So it will be before the court but not in a special way, just the normal way that

would happen when you would challenge a transaction.

I think that's maybe what the FTC proposal is intended, in part, to do, where it says the parties can opt for this, but they have to agree in advance that they'll go to the court jointly and agree to a 90 day discovery schedule. So, I don't know whether, you know - it may be not necessary. And we may not want to recommend exactly the FTC proposal, but I think that's where that comes from.

So, I wouldn't go with paragraph four, and I'm not sure I would go with one, either. The way you've got it now is that one says, well, the party has to opt. And that's similar to what the FTC has. But unless the party is giving something up for that one, unless they check the box, but unless they're giving something up, like the 90 days, I would just make it a 15-30 across the board, whether you check the box or not.

And then, the other thing I wanted to raise on the HSR thresholds, it occurred to me that, at the last ICN conference in Cape Town, I was in a small group session where a lot of jurisdictions were talking about their obligations, their commitments to each other, to

adjust their own filing thresholds. And a lot of countries other than the United States had gone back after having filing systems in place and looked at whether they really needed to get all those filings. And they decided that they didn't. And, as a result, they substantially raised their thresholds.

I think it would be worthwhile for Congress to direct the FTC and the DOJ to do that, maybe now, maybe periodically, but go back and figure out whether they can raise the thresholds. I'm a little bit concerned about us recommending numbers, because we don't know. We didn't talk to the agencies. I have no idea whether or not they feel, based on their experience, that if the thresholds were raised they would miss transactions. Because I've seen transactions for clients that actually raise bigger issues on smaller transactions than I've seen with bigger transactions. And it can be just as hard to unscramble the eggs on those transactions. So I'd be a little bit reluctant about that.

And then, I guess, so, no one thought it was a good idea that if you don't have an overlap, you don't have to file. I just was curious as to why there wasn't

any traction for that. Is it because we're concerned that parties can't be trusted to determine whether they've got an overlap and file if they do, or what? It just occurs to me that there are an awful – it doesn't matter what size – lot of transactions that are filed on, including these transactions you were talking about too, John, where there just isn't any competitive overlap, so what's the point?

MR. HEIMERT: Commissioner Cannon.

COMMISSIONER CANNON: A couple of things. Just an initial matter, Jon.

I'm reading this and I'm wondering who would not check the box?

COMMISSIONER JACOBSON: People who don't have a competitive issue at all. And I want to respond to the other comments, but I was going to wait at the end.

People who don't have a competitive issue at all. If there's no overlap that you have to file, why would you check the box?

COMMISSIONER CANNON: Do that early termination and you're done.

COMMISSIONER JACOBSON: Right.

Second, people who think the agencies will miss the deal, and there are a lot of those - So, if you want to take your chances, roll the dice; if you think the agencies will miss it, you won't check the box.

Part of the reasoning behind number 1 is to force the parties to make a decision. Am I going to alert the agencies that this is a deal that they may want to look at? And I think that's a good thing. So, that was the intent behind number 1.

COMMISSIONER CANNON: Okay.

A couple more things, if I may, Andrew.

You know, looking at all of these other kind of reforms that we've talked about under 9 here, I do wonder how often any of these will really come into play in the real world. You know, you're going to the agency. You're going to the Division, or the Commission, and, as a lawyer, you have one go as to get that transaction through. And a lot of that has to do with the relationship you develop with the staff that's in charge of this.

I actually voted against number 11 and, actually, I voted for number 10, and I'm rethinking that

because I wonder how often you would actually do that. And I voted to have maybe some discussion or debate on that. To me, that's a big question.

And finally, I can't resist talking about the question of Congressional influence, *et cetera*. I thought the governing rule was kind of embodied in what we called the *Pillsbury* Doctrine - I think it's still good - which was, in the end, if there was some political influence that's brought to bear, and it's shown that's why a transaction was either approved or disapproved, then you can't do that.

But I remember, John, when I was up there - do you remember the famous taxicab debate with Senator Hollings, by chance? I bet you don't.

Well, this happened - John, you remember this, I bet - about 1982 or 1983. Senator Hollings put a rider on an FTC appropriations bill; Remember that?

CHAIRPERSON GARZA: Yes.

COMMISSIONER CANNON: Prohibiting the Commission from investigating the taxicab commissions in New Orleans, Louisiana. I mean, it was a huge ruckus. So, people, I think - Hill folks - will send letters all

the time. And they will say, I'm interested in this, or keep me apprised of the progress. I think it would be very unlikely that anyone would ever say, you may not approve this merger, or you must bring this case. But that ebb and flow goes back and forth all the time. And I think how the money is appropriated and spent really doesn't make that much difference on that.

COMMISSIONER VALENTINE: In fact, that was in a timeframe before filing fees, the example you're citing.

COMMISSIONER CANNON: It was, indeed.

MR. HEIMERT: Commissioner Valentine.

COMMISSIONER VALENTINE: Okay, I have a few questions, because I'm not sure I understand what it is we're voting for in certain cases.

On 9(e), recommend that the agencies promulgate a policy or regulation establishing a standard for substantial compliance. My answer to what is substantial to compliance, I'd say it depends. And I don't know what that standard would be. A lot of people voted for that, and I would like to know what on earth that proposed standard or concept would be.

Second is (g), which is, recommend that the

agencies implement procedural reforms to reduce the burdens of complying with requests for data that are not kept by parties in the ordinary course of business. Again, I don't understand what that means. I don't recall that proposal being made to us. And, quite frankly, whether we have procedural reforms or no reforms, there are going to be burdens if you're complying with a request for data that aren't kept in the ordinary course of business. So, I don't understand what that means, either. And I'd appreciate clarification on that, from whence that suggestion might have come.

And finally, on 10, with the magistrate. You know, this was an issue that was that was thought out very much in the 2000 reforms. I believe, at the time, the ABA may initially have even been proposing magistrates. And it really makes absolutely no sense, because there is not a single magistrate in the world who can sort of parachute down into a case and have any clue as to how many specs and how many requests are reasonable or not reasonable.

So, all you're betting on is a hope that either, if you're the government side, you're going to

bet that a magistrate judge thinks that any amount of discovery is reasonable. If you're private side, you're going to bet that any magistrate would think that, my god, I've never seen anything like this, it's not reasonable.

But the person won't have a clue, and it will take them so long to even remotely, vaguely figure out what might be reasonable or unreasonable, you're going to be stopping the clock for so many days - I don't understand how it's at all efficient or feasible.

So, again, we had a few votes for that. I just don't understand how that would work. If anybody wants to try to convince me that it makes any kind of sense, I'm open to listening, but I think we already had this debate in 2000, and nobody, at the end of the day, thought it was conceivable.

MR. HEIMERT: For clarification in the discussion memo, there were a couple comments that were received on the date of burdens point. It's on page 33 of the memo, but that's just a factual point. I'll leave it to everyone else to discuss.

Commissioner Jacobson.

COMMISSIONER JACOBSON: Let me first say that, given what I have heard from Commissioners Shenefield, Yarowsky, and Delrahim, I will withdraw my no vote on the source of funding, with some trepidation. But those are people who know a lot more about this process than me. And I am very, very happy to defer to them. So I'm going to maintain my no vote from this morning where I voted 11 to 1, but this one I'll make unanimous.

I want to talk a bit, and just bear with me for a few minutes, if you would, about my HSR reform proposal. It's written the way a statute would be. There are language changes that would undoubtedly be appropriate. But let me articulate what the intent was.

Paragraph one is that you would have to check a box. I think I explained the rationale for that. You have to come clean, parties, if you want the significant benefits of getting custodian reduction. If you try to sneak one past, you may win, but if not, your files are going to be opened as in the original process.

Part two is that the party checking the box must both provide an organization chart. You can't have a custodian limitation without an organization chart. It

just doesn't make any sense. And the second is to provide someone – my intent was not to talk – and the use of company structure was an inartful phrasing – someone to explain the organization chart. Who is this person in this title? What does this person do? What sort of files does this person keep? It's all part of the same process – provide the agencies upfront, early on, with the ability to make effective use of the custodian limitation that comes later. I'm sure that can be drafted better, but that was the intent behind it.

The third part of it is the limitation from 15 to 30. And that's simply the recognition that there are going to be \$75 million deals if we don't change the thresholds that are reportable, where 30 employees, or 35 that the Federal Trade Commission now has, maybe everyone in the company.

So, when I said it's regressive, for smaller companies a 35-custodian limitation is no limitation at all. For Mobile-Exxon, 35 is manna from heaven. So, you have got to make some distinction between the smaller deal and the larger deal. And maybe the number 15 is too low; maybe the number 30 is too low, but I think we can

talk that through.

The message here is, let's get some calibration that would be subject to some modification. I'll get to that next. Subject to some modification, as needed, but there would be some presumptive limitations, either on a sliding scale or on tiers; this size of a deal presumption limitation is 15, this size it's 20, and this size it's 30. But that was the concept underlying this.

The fourth one, which, if you'll recall, was written out in longhand while Bob Kramer was explaining why everything was just fine at the Department of Justice. Bob's a terrific government servant, and does a terrific job, but it just struck me that we ought to have something here on limiting Hart-Scott-Rodino. So, I was writing this out in longhand, and I just threw four in because there has to be some enforcement mechanism. And I think we can debate about what the appropriate enforcement mechanism is.

I suggested to going to court. My assumption would be that it would be a very simple standard. If, within the range of agency discretion, additional custodians were appropriate, the magistrate would write

yes. And presumably, in most cases the parties would consent, because if you have an appropriate standard for the agency to seek additional custodians, why wouldn't the party consent? The party wants to get their deal approved. If it's reasonable to ask for more custodians, you would think that most people who deal with the agencies who do these deals would consent to it. And therefore, the magistrate order would be a form of course.

This, to me, notwithstanding the debate, is the least important aspect of this. I believe we clearly need some sort of limitation on the breadth of these requests. And this was a basis to come up with one that would be fair to the agencies, to the parties, that would not be regressive, but that would have some teeth in it so that it worked. And that was the idea behind it. I'm not wed to any of the numbers or the wording of any of the proposition, apart from the basic concept that we ought to have some custodian limitation on second request.

MR. HEIMERT: Commissioner Warden.

COMMISSIONER WARDEN: I would, I think, prefer

John's number four if it said "for good cause shown."

In response to Commissioner Valentine's suggestion about how anyone would know what's reasonable, what I would hope would happen is this: After there had been two or three of these recourses to magistrates when the merging parties brought six moving vans down and said, this is what we've already produced, and the magistrate says, that's enough, maybe the agencies will ask better questions the next time.

MR. HEIMERT: Commissioner Delrahim.

COMMISSIONER DELRAHIM: In a much less artful way, I just want to echo Commissioner Warden's response. And I agree, Commissioner Valentine, that no judge or magistrate judge is going to come in and find these. But what he'll do, just like they do in all the other mergers cases, the parties will have to negotiate and work with the agency and work out a time agreement and all that.

What this will do is just shift the balance, I think, a little bit – I'm talking about number 10, but it could probably equally apply to the Jacobson proposal. And, at some point, the agency will just, you know, based on whether an assessment – as well as the parties – based

on an assessment of what a court would say, whether it's through a couple of precedents or just the fact that they don't want to go through that. And they could work it out.

The two parties will then be at, I think, a better balance. Right now, I don't think there's structural parity in the powers that the two sides have. It's worked okay, but, I think, by the unnecessary requests for second requests – documents, perhaps to buy more time, perhaps for other reasons – the balance can shift, and it will just get back to a standard where the parties will probably not use the court system but can come to terms and have a more reasonable method of operating.

MR. HEIMERT: Commissioner Shenefield.

COMMISSIONER SHENEFIELD: Jonathan, the explanation that you give is very helpful to me, and I can support your proposal, except for four in its present form. And I would urge you to consider – and Sandy, also – when you ask for a certification from a government official, it's not something lightly given. It isn't reflexive. And if you put in language that requires the

government official to make some reasonable investigation into the facts and circumstances and then ask him or to certify, I think that has a disciplining effect on the staff. So, if it were that kind of a check process, I could support this.

If any of these proposals involves going to court, I just am unalterably opposed.

MR. HEIMERT: Commissioner Garza.

CHAIRPERSON GARZA: Right. I'd just, on 10, note that if we recommended 9(d), where the agencies adopt a procedure by which the parties and agencies could agree to terminate a second request investigation without certifying substantial compliance and proceed to litigation with a reasonable discover schedule.

I think probably, to me, it seems a preferable way of dealing with the issue of whether the parties think that there may be a reasonable burden in the second request, because they would always have the option saying, we think this is enough. It should be sufficient for your investigation. We think it's all really burdensome. Let's go to court.

And again, it's not a special trip to the

magistrate, but it's going to court. It's getting the litigation going, and if the agency needs more information, it can get it during the discovery process.

MR. HEIMERT: Commissioner Litvack.

COMMISSIONER LITVACK: I mean to diminish, for one second, the seriousness with which any Assistant Attorney General or any government official would apply whatever standards were developed to indicate the reasonableness and importance of whatever information is being sought. But it seems to me – I won't use the word threat – the prospect of the court is a disciplining factor within itself. And I – almost as much as John – feel that I can't support – without a court, I feel it is – whether it's any one of these things; whether it's what Chairman Garza – whether it's one of the other provisions. I guess Commissioner Delrahim mentioned 10. Or whether it's the Jacobson thing.

I think, and I think history has proven me correct, that the disciplining effect of the parties knowing that if either one is either overreaching or being unreasonable on either side, there is a third party. And when Commissioner Valentine says, how is a

magistrate going to deal with it, the answer is the same way they deal with every other discovery dispute in every civil case filed in the federal district courts. Are they going to know as much as the agencies and the parties? No, but they're not going to be as biased either, so they will try to get it done in a sensible way. I strongly favor the prospect and the disciplining effect of the court.

MR. HEIMERT: Commissioner Kempf.

COMMISSIONER KEMPF: When I voted, I voted on everything except 9(j) and 10. And by my count, the votes on those are evenly split, absent my question mark on them. So, I had thought, as I listened to my fellow Commissioners, I'd get a clear consensus one way or the other, and I think we have an even split on both of those.

On 10, Commissioner Valentine's questioning led me to reach some of the same conclusions Commissioner Litvack had just spelled out. So, I think I've moved into the yes camp there.

COMMISSIONER VALENTINE: I'm glad I was so efficient.

COMMISSIONER KEMPF: Well, you said, how does it - And the first thing that came into my mind is precisely what Sandy said. It is the prospect itself as a powerful disciplinary thing. And as one who has dealt a lot with magistrate judges, the problem you identified is one that they have with everything they deal with. They seem to go through it okay.

On (j), I still probably would benefit from more guidance. I think it's five yeses, five noes, and, me with a question mark. You know, what I sort of said to myself was, it probably would be a good idea if, in responding to the second request, I had some thing that said, what is the itch you're trying to scratch, here, rather than just a big send me this; send me that; send me the other thing. But at the same time, you don't want to box in the agency, as it were, where their stuff can be used against them or that will limit or narrow them.

So, I sort of like the idea, in concept, but I also don't want to hamstring the agencies. So, I would be looking for something. Perhaps those are the kinds of concerns where other peoples minds are led to the even five yes, five no split. And I would wonder whether we

could come up with something that attempts to reconcile the parties' desire for additional guidance in trying to both expedite the process and secure favorable outcome, while at the same time not penalizing or hamstringing the agencies.

MR. HEIMERT: Commissioner Yarowsky.

COMMISSIONER YAROWSKY: I still have grave concerns about easy access to the courts in the middle of a merger review, except once you get to the end of the merger review. I'm torn, simply because I couldn't admire any two gentlemen more in their tenure at the Division than Commissioner Litvack and Commissioner Shenefield.

I think Chairwoman Garza is being very shrewd in trying to craft, maybe, a compromise. Not on the specific provision that 10 is speaking to, but in the general process itself. What I certainly wouldn't want to see is a merry-go-round where a party feels that there is an unreasonable burden in the process, goes to a magistrate, gets a ruling at that part of the process, and then, three months later, because of some other communications, feels exactly the same way and goes back

to the magistrate.

I think to avoid the merry-go-round effect, what Chairwoman Garza is basically saying is, look, for a lot of reasons, it may accumulate. You may just want to terminate the process, agree to go to court, and go forward to discovery.

CHAIRPERSON GARZA: Although I'm shifting more to 10.

COMMISSIONER YAROWSKY: Well, I like your original position. And I think that way you wouldn't have a constant tension. I agree we need to discipline all sides. And, at this point, if there are excesses and an undue leveraging power that the agencies have over parties – and Makan, you spoke – not that they do that all the time, but it exists. There is no counterweight. So, I understand where this derives from, the concern about it.

But, on the other hand, I think if we create a procedural process that goes on and on and on, this will just be, at some point, a tactical asset, or a tool that will be used. And I just don't want to see that happen. I don't want individual abuses, but I don't want to

create a structural tool that could be used for tactical reasons.

So, I like your suggestion heretofore of using a 9(d) process.

MR. HEIMERT: Commissioner Jacobson.

COMMISSIONER JACOBSON: What I would propose to try to bridge the gap on this is the following. That the custodian limitations can be exceeded if, a, the parties consent. That seems easy. And what we're trying to do is build in a discipline so that the parties reach agreement on these issues. I mean, that would be the best of all worlds.

If the parties do not consent, the limitations can be exceeded upon the approval, after personal inquiry, of the Chairman of the Federal Trade Commission or the Assistant Attorney General in charge of antitrust for the Antitrust Division. If the parties feel aggrieved at that point, they can go to court, subject to the judicial process, automatically staying and extending the HSR waiting periods.

And second, subject to an abuse of discretion standard. One that would give presumptive weight to the

personal determination of the FTC Chair or AAG in antitrust. I think that kind of regime would lead to very little litigation in practice and would lead the parties to agreement in most instances.

MR. HEIMERT: Commissioner Valentine.

COMMISSIONER VALENTINE: I think we are all trying to get at the same thing, both in 10, in the Jacobson proposal, and in 9(d). And I think the question is, how do you sort of fairly balance the negotiating strengths of both sides but keep this an efficient process that keeps the merger moving forward. And, quite frankly, my greatest issues and concerns with going to the magistrate and going to court really is just the time.

Even if you get a stopping of the clock, you're still losing time on the deal getting reviewed and getting done and getting implemented. And, as we all know, the longer mergers drag on the less successful they are.

COMMISSIONER JACOBSON: Which is an incentive not to go to court. That's the point.

COMMISSIONER VALENTINE: Right.

So, I guess I ultimately don't have a problem with your latest proposal, and it may even discipline the AAG or the Chair of the FTC to a greater extent. But I have to say, I side with John Shenefield on the fact that I have often seen heads of agencies or bureau directors drastically reduce the number of specifications in a second request or a the number of custodians.

So, I don't know that you actually need the ultimate boomerang of court. And I'm wondering whether, likewise, in 10, if there's really a claim of unreasonable burden, you just don't go to 9(d) and end up going to court in any case and getting your merger done, because, again, you'll get through the whole process sooner.

MR. HEIMERT: Commissioner Garza.

CHAIRPERSON GARZA: On the 10, I'm sympathetic to the point that Sandy and others made about the effective threat of going to a magistrate, but I wonder whether there's something that could be done to insure that. Well, one, it would have to be something to make sure that the agencies weren't disadvantaged vis-à-vis waiting periods and when people chose to go. And I

assume that could be done without disadvantaging them.

And then the other would be whether you get to appeal from the magistrate's decision if you didn't like it.

COMMISSIONER JACOBSON: No.

CHAIRPERSON GARZA: And maybe it would be that you wouldn't get an appeal, right? And maybe just once to the magistrate, so that you didn't have constant – although I assume merging parties would generally want to get things done quickly, so they're not necessarily going to delay things by trips to the magistrate.

COMMISSIONER JACOBSON: Right.

CHAIRPERSON GARZA: So, I might be persuaded on 10, although I initially did not vote for it, if we thought it could be structured in a way that wouldn't, you know, run into problems with the court dockets and could be managed in a way that didn't end up allowing either end of the parties to, essentially, game the system.

MR. HEIMERT: Commissioner Kempf.

COMMISSIONER KEMPF: Two quick things. I think I like Commissioner Jacobson's fine tuning of his

proposal. I'd like to see it in writing. The only question I would have is – and it's something I would defer to Commissioners Litvack and Shenefield – whether the process drives a wedge between the certifier, either the Chairman or the Assistant AG for DOJ and the staff. Does it interfere with that smooth working if he is part of, sort of, an adversarial proceeding there? And I don't know whether it does or doesn't. I'd be interested in your thoughts on that.

Secondly, Commissioner Valentine raised a time point. I mentioned this at prior hearings. One of the things that I dislike about the present process is that there is no time limit on it. And that's something I thought we might constructively address. The staff will call you up and say, if we have to make a decision now, we can, but it's probably in your better interest to provide us additional time. And that changes a two-month process into a year-long, or longer, process.

And I think we should think about – and today is obviously not the day. We're already into our next time slot. What, if anything, do we want to say on that to try and make it something that parties aren't held

hostage to just interminable investigations.

And you can say, well, it's voluntary. It's not really voluntary.

MR. HEIMERT: Commissioner Yarowsky.

COMMISSIONER YAROWSKY: I'll yield to Commissioner Shenefield, who had his flag up before mine, and then I'll go after that.

MR. HEIMERT: Commissioner Shenefield.

COMMISSIONER SHENEFIELD: Thank you. I think, Jonathan, your redraft makes sense. I would prefer not to have the court involved at all, but in order to get a consensus, I think I could accede to that using the standards that you suggested.

As to (j), Don, I think a good staff does that anyway. And therefore, I wouldn't be at all averse to putting in a rule or a reform that made more a matter of general procedure. By far, the best staffs in both agencies will let you know as they go along, even before the second request, what's bothering them, so you can begin to respond to them, particularly where economics experts are going to be involved and you need to some work. They want to get that process started. So, I

would think (j) is something we could all readily accept, and I'm a little surprised that some have not accepted it.

MR. HEIMERT: Commissioner Yarowsky.

COMMISSIONER YAROWSKY: Yes. I was actually going to say exactly what Commissioner Shenefield said.

I think John has recalibrated his proposal, made the burdens tougher. I think that will maybe balance out any kind of tactical gamesmanship that I'm a bit worried about.

So, I don't like going to court until the agency is finished. I think that's a generally good principle. But I think if we're trying to find some middle ground, I think he's close to doing it.

MR. HEIMERT: Commissioner Litvack.

COMMISSIONER LITVACK: Yes. I agree with that. I was just going to respond to Commissioner Kempf's question, at least as I see it, and I suspect Commissioner Shenefield. And that is, it is not going to interfere with the working between the staff and the AAG. To some extent there is, and should be, some tension between the two to make sure, from the standpoint of the

highest, most responsible official, that the things that the staff are doing, who are generally less experienced and not necessarily able to see quite the way the Chair or the Assistant Attorney General does.

This is a review process. And the Assistant Attorney General does have that responsibility. I don't think he or she shirks it. And I don't think it would interfere one iota with the relationship.

COMMISSIONER SHENEFIELD: I agree with that.

COMMISSIONER KEMPF: I was going to raise a procedural issue. And that is my question I raised about the overall time issues on the Hart-Scott-Rodino thing. I don't think, as I said, we should do that today, but I would be interested to see if my fellow Commissioners think that's something we ought to discuss at some point.

CHAIRPERSON GARZA: So that's 9(c).

COMMISSIONER VALENTINE: I believe there were only three votes for that.

COMMISSIONER KEMPF: I'm not sure there was anything in there.

CHAIRPERSON GARZA: I think 9(c) is recommend the agencies adopt a fixed time or that Congress amend

the HSR Act.

COMMISSIONER DELRAHIM: Or are you talking about the 30 plus 30?

COMMISSIONER KEMPF: I think it's the latter.

COMMISSIONER LITVACK: Aren't you talking about that the process really works distinctly from the timeframes?

COMMISSIONER KEMPF: Yes. What I'm saying, as you read it now is, it looks like its fine. And then what you say is, yes, but that's not really what happens.

COMMISSIONER LITVACK: But I think what we're trying to address via these various other proposals that we have been talking about - I think if we are right, and if we reach the right point of view, that would address the point you're making.

COMMISSIONER KEMPF: Well, I don't want to push it right now, but I do have a concern - let me see how these other things fit together. If they do adequately address it, then I would not want to address it further, but I fear I may still have a residual concern that there's a fundamental flaw in the process that really does not have an end date as it works out in reality.

CHAIRPERSON GARZA: Well, Commissioner Kempf, I think what will happen is that the staff will, again, prepare something for our next meeting on the – we'll wrap up on the 25th and 26th. And then I think we'll have another chance to discuss it. So, at that point, you can raise it again. And that document that the staff will prepare will also reflect a recalibrated Jacobson proposal, unless he chooses to rename it.

MR. HEIMERT: And perhaps, Commissioner Jacobson, you would care to take the first crack at revising your proposal for the discussion.

COMMISSIONER JACOBSON: All I need is more homework, but I'm happy to do that and I'll rename it, I think, the Heimert proposal.

CHAIRPERSON GARZA: Then we'll take a short break. We're right on schedule, and that's good. And we'll move on to begin at 2:30 on patent reform issues.

[Whereupon, at 2:15 p.m., the discussion on the Hart-Scott-Rodino Act was concluded.]

Discussion Of Patent Reform Issues

MR. HEIMERT: Commissioner Delrahim.

COMMISSIONER DELRAHIM: This will be quick,

partly because some of these are not necessarily within our mandate, and I'm not fully convinced, as far as some of these, with respect to comments on the NAS or the FTC reports.

I will just go through the ones that I would vote yes on, and I really have no comment on the others.

The first one is number 5. I think that Congress should seriously consider - and, in fact, they are doing that. By the time this report comes out - Congress has probably already held a couple of dozen hearings on exactly those proposals with respect to patent reform.

With respect to the subparts in five, I agree with (a), increasing the quality of patents. The question is reducing the number of patents issued that are likely invalid. I wish we could just delete that parenthetical, because if they knew it was going to be likely invalid or obvious, they wouldn't be issuing them. So, I think it's just extraneous.

But increasing the quality, whatever that means, is a great thing. Insuring that they are adequately equipped, wonderful, yes. Reducing the length

and cost of patent litigation, always a worthy goal.

With respect to 6, I think that (b) is the one, expanding the consideration of economic learning, competition policy, and patent law decision-making is helpful. How we do that - there's some guidance in the two reports and the FTC recommendation. But again, I have concerns about the specificity of those.

Filing a publication of patents go into a file rule, yes. (That's (d). I'm sorry.)

And (e), as well - publishing after 18 months. It helps reduce the issue that we discussed at the hearing of submarine activity that occurs by certain patentees that keep concealed their application and then issue it after a certain time when other folks have made investments. And that really causes concerns with competition more clearly than other of the patent reform issues. And it brings us in harmony with the rest of the world.

The instituting of post-grant review procedure as an alternative to patent litigation, again, that is good. That's (f). It's easier said than done.

Increasing PTO funding - I'm not convinced that

there's not enough funding there. It could certainly use it. Congress has been siphoning off a lot of the PTO fees for other purposes, but that doesn't mean that they don't have enough funds already.

The courts should tighten the non-obviousness requirement. Again, it's great. My guess is that the Supreme Court will already decide this in the *KSR* case before we even issue our report, but it could be very helpful.

Recommend that the PTO adopt procedural rules to limit continuations. Yes, and they're already doing that. There's just been a lot of movement since we started these hearings, and many of these are already being implemented.

With respect to (1), enact legislation to adopt preponderance of the evidence standard for invalidity, I would only do that for information that the patentee has not provided to the Patent and Trademark Office for their consideration.

I think there should be a presumption of validity of patents. When you go to court and the standards that are there now are just fine. However, if

an applicant has not provided prior art to the PTO and the PTO has not reviewed it in granting a patent, that should not get a higher standard, and just a lower standard of preponderance of evidence is much more appropriate in those instances.

And the last one I agree with, but again, it's not needed anymore, is enacting legislation creating stricter limits on the circumstances in which patentees may obtain injunctive relief. The Supreme Court just addressed that in the *EBay* case. And so, I don't think there's any necessity for any statutory fix. The statute was always fine; they just corrected the Federal Circuit in that.

MR. HEIMERT: Commissioner Carlton.

COMMISSIONER CARLTON: Well, before I give you my preliminary views on this, let me just make a general statement that I'm a bit uncomfortable about this entire topic, in the sense that we are being asked to basically endorse what other Commissions or other government agencies have done. And I've looked through the material. It seems very well done to me, but I'm just worried that – we've had some hearings on it, but not

nearly as detailed as they have. And I'm a little worried it dilutes our recommendations to simply say, those are smart people; listen to them and, in particular, items 1, 4, and 7 stand out.

This is not a criticism at all of the staff. I want to make it clear that the memo was very clear and very well done. If anything, it's a criticism of ourselves, maybe, of defining this as a question.

But what I think would be useful would be for us to focus on the intersection of patents, intellectual property, and antitrust that came up during some of the testimony. And if we could do that, I think that then we will be saying something that someone might listen to us about. Do we have something new to say, in particular regarding antitrust and intellectual property?

And I went through the testimony of people on intellectual property, and maybe other people have different ideas, but what I wrote down is, the topics that seemed to come up in the testimony were the following: patent settlements could raise an antitrust issue; pay attention in patent settlements to whether they're complements of substitute patents, if it's cross

licensing; in a standard setting, there were concerns raised as to whether the antitrust laws applied or not. I know this specifically came up as a question we decided whether or not to study, and we chose not to study it because, as I understand it, we thought it could be handled by contract. Well, just saying that, I think, would be very helpful. And I don't think we have to necessarily vote on it. I'm happy to vote on anything, but at least in the report I think that point should come out.

The other issue that came up had to do with damages, injunctive relief, and submarine patents. And I think the notion - I think it was Professor Lemley. I'll have to go back and check. Someone made the suggestion that if someone gets sued for patent infringement and loses, that, rather than the draconian relief of injunctive relief, that person, under appropriate circumstances, who's deemed to be infringing, gets some time to invent around, if it was, for example, that it was not foreseeable that he was infringing a patent.

Those struck me. And one other area that has actually not come up yet - maybe it should have come up

in mergers - is, in industries that are high tech, the process by which innovation occurs and then market structure changes - so, for example, an inventor comes up with an idea, and then someone buys him out, because that's the way to get funding to pursue the idea. That market structural change, even if it involves some horizontal overlap, may be more important in high tech industries than in our mature industries. And I don't think people have really studied that enough. And I think that's something people should be sensitive to.

So those struck me as the areas in which our hearings have said something specifically about the intersection of intellectual property and antitrust. And I think our report would have much more power if we focused on those areas.

Having said that, therefore I would vote yes for 1. I think they raised good concerns, those reports.

And I also think yes for 5, that Congress should consider.

I prefer not, therefore, in light of what I said, to give any specific endorsements to other recommendations.

I will point out that 6(e) does go to the submarine issue, so I would be in favor of that.

And also, 6(n) goes to the injunctive relief issue. So, I'd vote for only those two, because those seem to deal with the IP-antitrust issues that I raised.

But I also hope that our report, at least in the write-up, will discuss the issues that I articulated. And there might well be others that other people would like to see discussed.

MR. HEIMERT: Commissioner Yarowsky.

COMMISSIONER YAROWSKY: Well, I second the sentiments of Professor Carlton about what I believe to be are the appropriate reach and scrutiny of this Commission in this area.

I am not comfortable, other than pure hortatory encouragement where competition issues are considered, whether it's by Congress or anyone, because they should be. Obviously the interface creates the tension we've always had. The Constitution started out immediately recognizing intellectual property. That is a fact of life in America, and a good one.

The antitrust laws came along. So, the

interface is really what's an exciting but also necessary area. But the specificity level of these recommendations, except for this hortatory language, is beyond anything that I, at least at this initial phase, would want to support.

Between recent Supreme Court decisions and expected Supreme Court decisions, I think that takes off the table a number of large issues.

So, I can certainly say 5, because there's an invocation about trying to take competition issues into consideration.

Obviously, 5(a), (b), and (c). They talk about strengthening the process that the PTO has in reviewing patents. We all want that because if the patent process is sound, then competition issues can flow from that. If it's not sound then it creates just a complete mess. But again, taking a strong position on that, for me, is not just really an order.

It's very hard to disagree with 6(b). I mean, it's a laudatory purpose, but beyond that I have nothing to add.

And I think beyond that the level of

specificity is such that it doesn't help for me to comment or take a position at this time.

MR. HEIMERT: Commissioner Delrahim.

COMMISSIONER DELRAHIM: Chair, can I just put one other item on the table for this? Just like the Federal Trade Commission and the NAS studied the impact of patents on competition in the industry, I think that it would be very helpful to competition in other industries for them to study the effect and the current process of copyright law for artistic products, whether it be music, motion pictures, or, to some extent, software. And how reforms could be done in the copyright area with respect to all the different licensing processes and how they're impacting the new economy. And we're seeing a lot of legislation and debate, especially abroad - whether or not Apple's iPod - there should be some compulsory licensing in position, and how that's affecting new technologies like mp3 players.

And if we could do that, if it's what people think might be within our reach - but we should just recommend or suggest to them to study this at the Federal Trade Commission just like the great report they did in

the patent field.

MR. HEIMERT: Commissioner Warden.

COMMISSIONER WARDEN: Let me just say initially that I think my spur of the moment reaction is that copyright is completely different than patents. I mean, MGM or whoever could have a monopoly forever on *Gone With The Wind* and I don't care. They created that.

COMMISSIONER KEMPF: I think the thing he's raising, in particular, is the copyright area. Where the copyright for software is like a patent.

COMMISSIONER WARDEN: I know. I don't think it is like a patent, actually. But be that as it may, I'll go on to the ballot.

I happen to think there's a huge problem here. And while I agree with Jonathan that intellectual property protection is founded in the Constitution - there's no doubt about that - and I believe it's a worthy public objective, and I don't want any of my remarks to be construed that I don't think that it's a worthy public objective. I think that, internationally, it's important for our economy to try to secure greater protection than we've been able to secure in the past.

On the other hand, I think the patent system is totally broken. And Makan suggested that the Supreme Court was going to fix the obviousness problem in a decision. I had circulated the *John Deere* decision in which the Supreme Court attempted, in what I consider to be very strong terms for a court, to fix this problem 40 years ago. And the Patent Office has paid absolutely no attention to those admonitions. And with the advent of the federal circuit judicial oversight designed to enforce the Constitutional requirement of invention went away.

Now, I bring to this views based on two things. One, I don't believe that there are 180,000 inventions every year. I regard that as absurd. I don't know what the right number is, 5,000-10,000, but more to that order of magnitude at the most. I mean, we're not talking about the incandescent bulb every time one of these patents is issued. And they're not written in plain English. The whole system is nuts.

The second is, the limited extent to which I've been involved in litigation in this field - one was *Kodak-Polaroid*, and addition to patenting this very

complicated method of compressing the film inside the camera and therefore causing development to occur, which one might actually consider an invention if it wasn't anticipated in the prior art. Polaroid had patents that were sustained on the levers that moved the film out of the camera after the process was over, because no one had ever in the prior art described moving film out of a camera on levers. Now, I don't know whether it was in the Bronze Age or when levers were first invented.

[Laughter.]

COMMISSIONER WARDEN: And some years later I was involved in a series of lawsuits in Silicon Valley in which three companies were all claiming they were the inventor of certain kinds – I can't even remember the names of them anymore – but electronic switches, if you will. And there were three inventors, and all three of them had come up with these ideas within 18 months of one another, which, upon reflection, led me to believe long after I finished working on the cases that what happens today in this high tech economy is that technology evolves, and what was unforeseeable 10 years ago becomes almost the inevitable next step at a certain point.

And for someone to claim I was the first person to actually take the next step, like I was the first person to cross the avenue when the light turned green and therefore I'm an inventor is kind of absurd. None of these people were inventors. The fact that they all independently came up with it was, to my mind, the strongest evidence you could have that someone skilled in the art and highly intelligent could do this. Because now there was perceived both the product and the need for the product based on where our technology stood at the time.

So, I think the system is completely broken. And the submarine patent – and I'll get to this on one of the ballots in a minute – problem is another indication of this. If somebody has actually invented something, why are 15 or 20 other people out developing technologies that will infringe that now secret invention when it becomes disclosed.

If that happens, it seems to me to be almost conclusive evidence that it wasn't an invention. It was obvious.

[Laughter.]

COMMISSIONER WARDEN: And yet, since that is not, quote, "prior art," they did it after the guy filed his patent or, in the current system, after he invented secretly, it's not prior art and therefore can't be used against him, even in litigation, much less in the Patent Office.

So, recognizing the value to social welfare as well as the, if you will, justice with a small j of conferring upon true inventors the benefits of the fruits of their labors, or their genius, whichever way you want to go on that, the fact nonetheless remains, as pointed out in the *John Deere* case, that monopolies were anathema to the founders. And these are monopolies. And they shouldn't be granted without just cause or they become not contributing to the general welfare or just in any sense, but impediments to competition and useless social overhead that retards the general welfare.

With that preliminary statement, I vote yes on 1.

[Laughter.]

COMMISSIONER WARDEN: Yes on 5, (a), (b), and (c).

Yes on 6(c).

By the way, I don't vote for (a) and (b) because I think it's either patentable or it isn't patentable. You don't decide that it's not patentable because of some economic learning and competition policy says, it might be better in this instance not to patent it.

I'm in favor of 6(d).

I'm in favor of 6(e). And I would say that all practices within this 18 months before publication constitute "prior art" for the purpose of determining validity.

I'm in favor of (f).

(g), I think there should be a much bigger burden of proof on the person seeking the patent.

(h), I really don't think there is adequate funding. The statistical man-hours in the staff's memo are low enough. I think the actual reality is that the hours per granted patent are lower than that. And, as I said at one of our previous meetings, reading one of these things could easily take 8 or 10 hours, in my mind.

I think 6(i) is the heart of all this, and I

don't know who can deliver this admonition to make the PTO listen. The Supreme Court – I mean, if the Justice Department reacted to Supreme Court decisions the way the PTO has reacted for 40 years to *John Deere*, you'd have hearings almost weekly with the Attorney General being required to explain over and over again why he is not acquiescing to the Supreme Court's decision to use tax lingo. I guess Congress is the only place left that can tell them it has to be an invention to give a patent.

I'm in favor of (j).

I actually am also in favor of (k). I think anything that can be done to simplify litigation in this area is highly desirable in my opinion, whether it's favorable to the accused or the patent holder, as long as it's not on the core issue.

I heard Makan's point on a patent ought to mean something. But, given that you don't have to prove anything in a contested proceeding to get one, I don't know why more than a preponderance of the evidence should be required to get rid of it.

I agree with (m). I think that's intended to be very limited and apply only to research, not having an

immediate commercial objective by whomever it's done. Although that isn't an antitrust issue, I'll readily concede.

And I don't think the recent decision has solved the injunction problem. The right is conferred, I think both in the Constitution and the statute, for the benefit of not just the inventor but of society as a whole. And somebody who patents something and puts it on the shelf and doesn't exploit it either himself or by licensing it to people who do exploit it, or a company that buys up a patent and doesn't exploit and doesn't want it's competitors to exploit it –

COMMISSIONER JACOBSON: How do you get an injunction?

COMMISSIONER WARDEN: Yes. I think there's a real serious question in my mind as to whether injunctive relief should be available to all in the case of non-exploited so-called inventions.

Presumably if it's something that society considers worth protecting because it confers social value, it would be exploited, not put on the wall and admired. So, I think some kind of limits based on lack

of exploitation in addition to the opportunity to invent around if we don't otherwise solve the submarine problem is called for.

MR. HEIMERT: Commissioner Valentine.

COMMISSIONER VALENTINE: I am highly sympathetic with essentially everything that Commissioners Carlton and Warden said. And I do believe it's a broken system. I do think that, with the increasing number of patent applications, and the ever slowing rate of actual patent issuances, we are both incapable of protecting that which we should be protected and, unfortunately, protecting many things that we should not be protecting.

So, I would also vote in I for 1 and for 5.

I am wondering though, whether there is some way that we could couch whatever additional recommendations we make to a greater degree of specificity in a way that is as consistent as possible with Dennis's concept of us really focusing on where we have our strengths and our strong points, which is the intersection of antitrust and intellectual property, competition policy and patent policy.

And so, at some level, (a), (b), and (c), are all very desirable. And I suppose they would help to reach an improved environment, and I would normally vote yes for them. I guess I will vote yes for them.

Both (a) and (b) actually go to quality of patent and therefore to the propriety of the patent and the appropriateness of protecting it.

(c) is just good, but it's not anything particular for antitrust lawyers to opine about.

6(a), 6(b), and 6(c) I actually do think all have something to say with respect to the intersection of competition and patent policy.

John, I understand where you're coming from on (a), and I somewhat agree with that, but I think the focus here was intended to be, if we're really taking it to new areas where we haven't previously had patenting, maybe we really ought to be asking, well, if it's been sort of obvious and not patented thus far, why does it suddenly deserve a patent. So, I think it may be worth, at least asking the question there.

On (d) and (e), they're both very good rules. They would bring us into, essentially, compliance or

convergence with the rest of the world. So, I have no problem about that. And I agree with both Dennis and John that (e) really is critical to enhancing the pro-competition aspects of patent policy.

You know, quite frankly, again, I would vote for (f), (g), (h), (i), and (j). But again, with John and Dennis, I think the non-obviousness requirement – and actually, Dennis, I may be putting something in your mouth, here – also again goes to what is at the core of what it is that we're trying to protect with patents. Why do we give these things a monopoly?

So, I do think (i) needs to be addressed seriously.

Finally, let's see, in (k) through (n).

You know, again, (k) is a good thing, but I don't see the particular competition nexus there.

(l), I very much agree with John. If they grant it based on a preponderance of the evidence and you barely need to show anything, you should be able to take it away based on that standard.

Now, I actually read (m), on the protection for patents from infringement claims to go to a competition

issue somewhat, to the extent that I think I understand the FTC recommendation, which is – and I would even extend it into a little bit of what you were saying, John. I think that they're saying, if you get a patent, and then you're filing more and more continuations – but while you're developing these continuations that are outside your original claim, and people have already invented that stuff, they ought to get a prior use kind of protection for that, which would be no different, I think, from your general concept of uses that are being developed before the thing is published and the patents granted known. So, I think that actually has something of a competition nexus.

And I'm not sure how I'm going to come out on (n), because here, too, I think I agree with John that *EBay* may not have totally resolved all our questions. I think here I want to listen a little bit more to how we could do something useful there. And do it in a sufficiently targeted way that there would be an audience for picking up the suggestion.

MR. HEIMERT: Commissioner Jacobson.

COMMISSIONER JACOBSON: Thank you. I first

want to associate myself, in general, with the comments made by Commissioners Carlton and Yarowsky that puts to question, at least, the competence of this body to deal with many of the technical issues that are involved.

I do think, however, the staff has done a good job, both in putting together the hearings and the memoranda. And I think our own experience gives us enough to comment usefully on the questions that have been presented to us. And, in that regard, I want to associate myself completely with the comments expressed by Commissioner Warden, which I think are important.

I think our report, if it makes the points that Commissioner Warden has made, I think, extremely well, here today will be an important contributor to the law of competition in this country and elsewhere. For that reason, I am comfortable with some exceptions that I'll mention towards the end, of voting on the various items that the staff has laid out, here. And I think it's important that we do so.

So, with that having been said, I wholeheartedly agree with 1.

With 5(a), (b), and (c).

In 6, I agree with all, other than (j), as to which I wonder if I have the confidence to talk about the effect of continuation proceedings. I think I agree with it, but I'm concerned about that.

I agree with 6(a) for the reasons stated by Commissioner Valentine. I don't think we're talking about particular patents, but whether, as policy matter, to extend patentability to new creatures that have not previously been thought of before, like software, for example. I'm not disputing that some software applications would be patentable. My point is that we should think about the competitive implications before extensions of that sort.

I completely endorse what Commissioner Warden said about 6(i). I think non-obviousness is the heart of that. I'll elaborate on that in a second.

With regard to (k) through (n), however, I am not comfortable in voting for (k), as articulated, because I don't think an antitrust violation rising to the level of inequitable conduct ought to continue to be a defense appropriately limited in antitrust cases. And one can call that a subjective element, but I would not

eliminate anti-competitive conduct as a defense if the nature of inequitable conduct.

I feel strongly about (l), for reasons that I'll elaborate on momentarily.

I don't know enough about (m) to comment. I do think the EBay case is a step in the right direction. I do think that if the standard judicial test for preliminary and permanent injunctions are applied, that nonuse and shelving of a patent will be a factor. But the Supreme Court didn't say that, and I do think we can provide some value in our report articulating the concerns that Commissioner Warden articulated.

With regard to the preponderance of the evidence, I do just want to highlight this with an anecdote. In a very recent case my clients were presented with what purported to be a patent for having a thick blob of plastic in the middle of a plastic beverage bottle. Now, these are one-piece bottles. Occasionally, you have some with the base cup that you used to see in the patent and apply to that. But this was a patent for a thick blob of plastic at the middle of the base of the bottle.

Now, you don't need advanced degrees in science to know that you can't possibly make a plastic beverage bottle without a thick blob at the bottom. It will blow out. Of course it will. And that experience may have affected many of the people in this room. And, in fact, plastic beverage bottles of the one-piece variety have been in the market since 1976.

So, when I was talking to the panel, I said, well, of course we're going to defend on the grounds of patent invalidity. They said, well, we'll put it in the answer, but no, we're really not going to defend the standard; it's too hard. You would have to get actual bottles that existed in the mid-1980s to meet the clear and convincing standard. And P.S., because they're plastic, none of those bottles exist anymore, at least in the same shape as they originally were. And we're not confident that the molds that were created to build the bottles have been sufficiently tagged and identified to allow us to make out that defense. So, no, we're not going to defend on invalidity.

Now, the case was won on a narrow claim construction at the end of the day. But how could you

not defend that case on the basis of invalidity based on obviousness or prior art. So, I think there's something wrong with that standard.

COMMISSIONER DELRAHIM: Now if you could make a bottle without that blob plastic, should you be able to patent that?

COMMISSIONER JACOBSON: Yes. Very much so.

[Laughter.]

COMMISSIONER JACOBSON: Or you would have a wet lap.

COMMISSIONER KEMPF: John, you said you felt very strongly about (1), but I wasn't sure which way you felt very strongly.

COMMISSIONER JACOBSON: I would support a preponderance of the evidence.

I might even put the burden of proof on the patent holder.

MR. HEIMERT: Commissioner Shenefield.

COMMISSIONER SHENEFIELD: The entertainment value of all of this is quite high. It tends, however, to make me nervous about the quality of the discussion.

It seems to me that a Commission like this is appointed because it permits people with lively intelligence and governed by their experience to exercise judgment on difficult issues. Speaking only for myself, I have no experience in this area at all.

Yes, I've had a case here or there. I've read an article. I heard an anecdote, once. I've read the staff memo, which I applaud. I thought it was quite good.

But if I were to hear myself express views on most of this, I would give them no weight. So, I suggest we all at least consider the possibility of uttering words that are almost never heard in this town, I don't know what I'm talking about.

I, for one, feel personally that they are appropriate in my case. And therefore, I propose to take no position on any of these questions.

I would like to follow through, at the appropriate time, on Commissioner Carlton's suggestions.

MR. HEIMERT: Commissioner Garza.

CHAIRPERSON GARZA: Well, I'm not too far off from where Commissioner Shenefield is, although I do

think I can agree a statement by us acknowledging that, in respect to I, that the concerns and problems, with respect to the patent system, identified in the NAS Step and FTC reports may be well founded. And include some language along the lines of – maybe not as colorful as what John Warden gave us – but essentially laying out what the concerns are that have been raised, identifying them, and making the point that the patent monopoly is a monopoly. And, in general, we don't like to encourage monopolies unless we have some sort of reason to do so.

And there's some strong belief by many that the patent system has broken down and that we need to be wary of abuse of the system. So, I would be comfortable making that statement. So, I guess I would go for a slightly modified 1 under I.

And then under II and III, I can endorse, 5(a), (b), and (c).

Although for (a), I might say insuring the quality of patents and taking out the parenthetical. And again, I view this as basically saying that it's important to keep in mind what the purpose of the patent system is and to make sure that it's not abused and that

we don't improvidently grant patents. I think it's useful to try to focus on improving the patent system to that end.

I would personally stop there, for the reasons that John Shenefield has expressed and that others have expressed. But, if we were going to go further, in terms of the other things, I have some concern about 6(b). It's not clear to me how you consider competition principles and economic principles when you're looking at whether to grant a patent in an individual case. I'm uncomfortable endorsing that aspect of the FTC report. So, I would not go with 6(b).

6(c) seemed fine to me.

6(e) seemed fine, too, although, again, I don't really know that much about it. It seems reasonable and it did seem to go to the submarine patent issue.

6(h), increase the PTO funding seemed appropriate, given what the staff said in the memos. It does seem like it would be useful.

6(i), tightening and reinvigorating the non-obvious requirement seemed like a reasonable recommendation, given that it appears that some people

feel that the non-obviousness requirement has not been applied as it should.

And that's all that I would do.

I'm a little bit concerned about (n), about the suggestions that have been made with (n).

And the final thing I would say, I guess, is that I would be nervous about doing anything that would sort of be taken as eroding people's legitimate property rights or possibly even eroding their right to exclude - and getting it to any kind of system that would be court-mandated licensing of a patent, although I do think that there's some validity to the issues that folks have raised about strategic use of patents, particularly when they're not being exploited. So, I might be persuaded to change my mind with respect to (n) and certain things.

COMMISSIONER VALENTINE: I'm sorry. After (i), (j), (k), (l), and (m) -

CHAIRPERSON GARZA: I can't really take a position on any of those.

COMMISSIONER VALENTINE: Okay.

MR. HEIMERT: Commissioner Kempf.

COMMISSIONER KEMPF: By my count of the eight

Commissioners who have voted so far, seven have begun by saying that they had serious reservations that we should be doing this at all. That, to me, is quite powerful.

I would add to it that I have greater reservations, I think, than anybody who has spoken before. So, I would associate myself with those comments without repeating them and say that mine are probably more intense, I think, than the others.

The Constitution, as someone noted, you know, when they were sitting around in Philadelphia, James Madison said, I've got an idea, how about the Bill of Rights - stuff like freedom of speech and right against self-incrimination - and they said, Jim, Jim, Jim, we've got important stuff to do; we've got to make sure that there are patent laws, and he said, oh, yeah, you're right. And so he parked it. And they made sure that the Constitution had patent laws.

So, I don't think we should be so cavalier in our treatment of patent laws and the role that they have played since the founding of this country and the betterment of society. I do have a lot of experience trying patent cases, including a number of them to

verdict.

The first one I want to talk about, and this is before I comment on them, specifically, but number 1, where we say, we find the concerns and problems with the patent system identified in the NAS Step and the fixed-cost reports well-founded. Boy, I want to completely disassociate myself with that. And I think the people would do well to read – because I think the FTC document is one of the most disingenuous documents I have ever read – I would contrast that with Carl Shapiro's piece on navigating the patent thicket. I think it's on page 28, where he says, you know, the DOJ has been pretty good on this, but those people at the FTC, they hate patents. They do everything they can to get it wrong and to screw things up.

And then I read the FTC report and, on the first three pages, it's all palliatives about how wonderful they think patents are. And I said, either they got it wrong or Shapiro has got it wrong. They can't both be correct. Then I take a look at the first two recommendations, and I have a hard time intellectually reconciling them.

The first one is that we ought to – the Patent Office is the pro, and rather than go right to litigation, we ought to have a post-grant proceeding over the PTO, one, to reduce the cost, and second, to give the experts a chance, in light of a now adversarial proceeding and take a fresh look at what they just did.

And then you turn to the second one, and it says, and by the way, as soon as you go to court, we don't give any deference at all to the PTO. We're going change the burden of proof from clear and convincing evidence to preponderance of the evidence.

And let me address – I think it was Commissioner Valentine who raised this thing of, if you only needed preponderance to get one, why should there be a different standard once you get to court? And the answer to that is precisely the point the FTC makes in recommendation one. These are viewed as the pros. They are viewed as a group of experts who have spent their whole life and 200 plus years developing a body of expertise. And they are not like a jury of 12 citizens or a single fact finder, if it's a bench trial. And, given the fact that the experts have waded through this,

thought carefully about it, we should impose upon citizens who would challenge their work, something higher than the preponderance of the evidence.

And you would think that the FTC first recommendation would call for a strengthening of that, and yet they turn right around in the second one and say we should escape from that.

Now, also this question about reducing litigation costs - as I read it, it adds a new layer of litigation costs; it doesn't reduce them at all. It increases them, or at least has that potential. I think there's a lot of trickery and deception working in the FTC recommendations. I agree with much of what Professor Shapiro said with respect to that agency's perspective on the role patents play. I think there are a lot of wolves posing in sheep's clothing there.

But I'd urge you to go back and reread recommendations 1 and 2 and see if they intellectually fit nicely, or if they don't betray that there's less there than meets the eye. And I would also say that the issues that we've been discussing, by and large, do not address the significant concerns that Commissioner Warden

raises. Most of the concerns he's raised are not antitrust concerns. They're concerns about the patent law process. And the only way – and it is tangential that they impact the antitrust laws – is because of the tension that fundamentally exists between the two bodies of law.

The antitrust law says, we don't like monopolies, and the other one grants monopolies. There's an obvious tension there. And that is something that has existed from the get go. And there may be reforms that are desirable in the context of the patent law to make higher quality patents. Who can be against higher quality patents?

But to say we are in favor of higher quality patents, when what we're really doing is trying to destroy the patents so that there is more sway to antitrust, I don't think is something we should be about. I'm very uncomfortable, us wading into that thicket.

And on the non-obvious things, let's go back to the *Rayovac* case where, for a long, long, time, people like myself and Commissioners Litvack, Warden, and Shenefield will certainly remember this – when we were

kids, our flashlights were always screwed up because the batteries leaked. And Rayovac invented the leak-proof battery. It's obvious; if something leaks, you put it in a leak-proof container. And Rayovac's response was, well, if it was so obvious, how come nobody has done it for 50 years, and they all screwed up their flashlights.

So, what's obvious or not - I'm reluctant to tinker and tamper with that. I think there's a lot of wisdom in a system that says, we do have the Patent Office. And once they wade through this - and now if some of these reforms are enacted - twice, we ought to have a clear and convincing burden of proof that we've had for a long, long time.

And some of the issues that have been raised, to me, cut in the opposite direction that we seem to be going. Some of them, to me, don't argue that we should weigh in on the side of making our own set of recommendations of, this sounds swell to me, because a lot of it I think is window dressing to achieve other objectives. I counsel us to go the other way and steer clear of it.

I mean, in my judgment, we're being used as a

tool in something we do lack expertise on, and we're better off leaving it to the courts. That doesn't mean I sign on to that a lot of this stuff is being extremely well done. Several of the commentators on the EBay decisions have said, it says – by the way, there are three really short decisions, and the majority by Justice Thomas – he and Justice Alito are the only two people who speak solely through that opinion. The other Justices are on one side or the other of a four-person and three-person opinion.

And what the majority opinion says is, we don't agree with either the circuit court of appeals or the district court. We think they each went too far in the opposite directions. But of the two concurrences, one says, we give guidance to always turn left, and the other one says, we give guidance to always turn right. So, a lot of commentators say, what kind of guidance is this?

I'm not saying we stay out of some these things, because I think it is really emerging clearly and well in things like the EBay decision. But like Commissioner Shenefield says, it is a stretch for us to opine on it. And even some of us who have spent many

years in the field, speaking for myself, would, I think, prefer to leave it to people who have spent even more time and more thought on it and not to be suckered in to signing on to stuff by people who have an alternative agenda. People who are there in the guise of reforming the patent laws, but are really trying to scuttle them, for example.

Having said that, let me comment on my votes.

I would be a strong no on 1, just because I think we're buying into window dressing that has an ulterior motive.

I don't know, in light of that, what I would do about 2 or 3. I would probably try to steer clear of almost everything on this agenda.

4, I don't know; 5, no; 5(a), I don't know; 5(b), make sure the Patent Office is adequately equipped - who can be against that? That's like motherhood and apple pie.

Reducing the length and cost of patent litigation. As I said earlier, I think that the reforms nominally say they are intended to do that do exactly the opposite. So, you know, I don't want to sign on to

something where the implicit in it is that I'm signing on to reforms that are nominally designed to accomplish that when they are actually nominally designed – let me tell you what they really are. It's a proposal to give two opportunities to knock out the patent instead of one. That's all it is. It has nothing to do with reducing litigation costs at all. That's a Trojan horse.

6(a), no; (b), no; (c), no; (d), question mark. You know, much of Europe has that system, and there's a greater certainty that comes out of it, but I'm not sure it's all that good or not. I'm not prepared to sign on to it based on my expertise. 18 months, that sounds like a spiffy idea, but I'm not sure we're equipped to really say that's the right amount of time or not.

And 9(f) I think is misleading. I don't think it's an alternative. I think it's an added layer. And all it's designed to do is to try to make it easier to destroy patents. And poor quality patents, it's a good idea to make it easier to destroy. Good quality patents it's a bad idea to make it easier to destroy them.

Strengthen the review of the patent application. Again, that sounds like something – who can

be against that? But the devil is in the details. And as soon as you get into those, then I think a lot of the proposals that are designed to strengthen the patent system are designed to undermine the patent system. That's the real agenda.

Increase PTO funding to allow improvements. Again, who can be against that, but is that really what it's about?

I'm no on (i); no on (j); no on (k); no on (l); I'm a strong no on (l); no on (m); and no on (n).

COMMISSIONER VALENTINE: So are you for 3?

COMMISSIONER KEMPF: What's that?

COMMISSIONER VALENTINE: Are you for number I(3), then?

COMMISSIONER KEMPF: I — what is it?

MR. HEIMERT: Number 3 was sort of a no finding.

COMMISSIONER VALENTINE: Make no findings regarding the patent system, I(3).

COMMISSIONER KEMPF: I put a question mark there, because I think I could be influenced by what other Commissioners are doing. If we end up doing stuff,

I would have some views on this and I want to discuss that. Right now, there're quite a few Commissioners who've said yes.

What I don't like about it is, the problems identified in the FTC report are well founded. I think that document is not what it purports to be. I think it is something else, and I think that Professor Shapiro has a pretty good finger on the pulse when he comments on what that agency is really about, with respect to patents.

MR. HEIMERT: Commissioner Delrahim.

COMMISSIONER DELRAHIM: I have three points. The first one, the PTO, I think they've been beaten up quite a bit – and not because there are two of my colleagues there who are the leaders of that – but I just feel like, for those folks, they're bound not so much by *John Deere*, but from the federal circuit's opinions. And they have to modify their practice – and I'll be the first to criticize much of what the Federal Circuit has done in this field.

So, I don't want to beat them up. They're doing what they're Constitutionally supposed to do with

the court of appeals standards there. The Supreme Court has shown a great interest in six different patent cases, and more coming up, because I think they're recognizing the impact that the Federal Circuit has had, and hopefully they'll correct that. I'm not holding my breath.

But we've seen that in *EBay*. Again, that's an issue that's not statutory. The statute is relatively clear: "may" does not mean "shall." The federal circuit read it as "shall," and they addressed that.

The other thing is that Commissioner Warden said that if you don't exploit it, then you should not get injunctions. Again, I was one who strongly criticized the federal circuit's view that there should be automatic injunctions, but I do believe that you should not be required to exploit a patent in order to exclude. You're granted a patent as a social exchange made, and you have a right to exclude. And if you meet the certain standards for injunctive relief as the *EBay* case has laid out. And I think the *EBay* case, the beauty of it is its simplicity. You got a unanimous decision saying you've got to apply the traditional four-part

test.

The great news was that yesterday, in the case of *Microsoft v. z4*, the district court applied, for the first time, the *EBay* decision in finding against granting the injunction. And they cited that prominently. And that was the first that we've seen. Does that mean that other Districts will apply that uniformly? Hell, no.

I, for the same exact reservations I think a number of us have expressed - getting down to the original mission. I just repeat my initial reservations about this whole area in general, and also about just wholeheartedly endorsing the foundations for the FTC and NAS reports. I'm sure they're well done, but I just don't know if I have studied this enough, or that this Commission did, in a half-day hearing, to conclude that it is well founded, hence my no comments on the first, second, third, or fourth questions there.

I do believe that what Commissioner Carlton said. The real issues that we should be, hopefully, looking to, and don't know if we might revisit that - Our issues that are critical to antitrust law, where they intersect with intellectual property is patent

settlements. There's a very lively debate about the patent settlements in the *Schering Plow* case. You have the two governmental agencies, enforcers, going to the Supreme Court with two totally different theories of what should be done.

I think that is just the height of policy differences about the intersection of antitrust law and patent law. And I'm one who agrees with the Solicitor General's brief in that case, not the Federal Trade Commission's theories for scrutinizing patent settlements, regardless of the policy concerns.

The other thing is standard setting and cross licensing of patents. What are the competition issues? Again, there are very important policy implications, especially in the high tech sector. You know, particular in standard setting.

And so, if we do address those, those would be great for the report to address and I would not have any reservations if we wanted to take a motion to decertify the writ that was granted with respect to patent reform changes to be recommended by this Commission. Not so much because I've dealt with this area - I'm a registered

patent lawyer, so I understand and follow these things - but I don't know if this is really this Commission's mission to do that, except for the areas where it affects competition and antitrust policy.

MR. HEIMERT: Commissioner Jacobson.

COMMISSIONER JACOBSON: First, just a point to Chair and general counsel for clarification.

I thought that we were going to address things like standard setting and the overall context of new economy issues. Is that going to be the subject of item 2 on the July 13 agenda, or are we just talking about bundling in the refusals to deal during that?

CHAIRPERSON GARZA: Refusals to deal.

MR. HEIMERT: It was refusals to deal, bundling, and the new economy issues that we were specifically addressing in *Independent Ink* and then sort of the innovation effects and concerns. There were some general new economy concerns.

But my recollection is that we had, as Commissioner Carlton noted earlier, specifically considered whether to take up standard setting and licensing. And, at the time, the Commission decided not

to for whatever reason.

COMMISSIONER JACOBSON: Well, we did, but it's my pretty distinct recollection that we decided not to take them up as discrete issues but recognized that, within the scope of the issues that we did take up, there would be opportunity to comment, particularly on the FRAND *ex ante* licensing point, during the course of the report.

And I would hope that we're not disassociating ourselves from that thought.

CHAIRPERSON GARZA: Well, we didn't authorize the staff to put any questions out for public comment, and we did not take any testimony on it. I mean, it was a split vote of the Commission. There were definitely some Commissioners who wanted to look into the issue, but unfortunately, we did not have the majority of the Commissioners, and so we didn't proceed with that as part of our agenda.

COMMISSIONER JACOBSON: But we did vote on the issue, as I recall, of whether the economy moves too fast for antitrust as currently configured and that we were going to consider that in the scope of our new economy

analysis.

CHAIRPERSON GARZA: Well, the scope of our new economy study is pretty clear and black and white. You can find it in the memos, the work plans that were authorized and the questions that went out for comment. That's the touchstone for it. I don't have those in front of me right now, but I know that —

COMMISSIONER JACOBSON: Let me turn to these issues.

I would not be uncomfortable with, as Commissioner Delrahim said, de-certifying these issues. I wouldn't have been uncomfortable at all before Commissioner Kempf's remarks. But I want to personally disassociate myself as far as I possibly can from virtually every word that Commissioner Kempf said, and particularly those that question the bona fides of the Federal Trade Commission in the work that it has done in this area.

This has been a long-term, detailed, bipartisan, public benefit effort starting in the Clinton Administration with Commissioner Pitofsky, being pursued by Chairman Muris, who is no populist, and who

commissioned a report drafted in large part by one of our staff, Ms. DeSanti, and who testified rather eloquently on those subjects.

And although I think some of the specifics of the patent laws are a little bit over the heads of what we've been asked to do, I think in large part, other than Commissioner Kempf's comments, I haven't heard a single word of anything other than praise for the work that the Commission did. And I personally think it's a fantastic job. And the Commission report is not hostile to patents, as such. It's hostile to the way the Patent Administration in the United States is being administered, which is entirely consistent with the remarks given by Commissioner Warden. It is a bipartisan concept. I don't think anyone has been suckered by it, to take another word that I would like to disassociate myself from.

So, I'm happy either way. I'm happy to vote up and down on these issues or to vote to remove this chapter from our report. But not if doing so is going to be taken as a criticism of the work that the Federal Trade Commission has done. That I would not support

under any circumstances.

MR. HEIMERT: Commissioner Carlton.

COMMISSIONER CARLTON: I won't repeat my argument for why I think we should focus on antitrust, but in order for our report to have more power and effect – but, just following up on what Commissioner Jacobson said, I really think it would be a mistake if we cannot discuss the testimony we heard on topics that are related to intellectual property. And certainly, discussion about standard setting, settlements, and the like – I think it would be a disservice for us to have heard that testimony and have absorbed it, and then not be able to reflect, at least in the report.

Regarding the standard setting, if I recall, although we didn't vote to put that as a topic, one of the reasons was that many of us felt that it could dealt by contract, and therefore didn't raise an antitrust concern. And therefore, that seems to me to be a very important message, that this Commission, supposedly of experts on antitrust, didn't think it was an antitrust issue that people had to be worry about. That strikes me as extremely significant.

Now, it's true, we didn't put it out as a question. On the other hand, I'm happy to put it out as a comment that that was our view, because I think that could have an effect on how people think.

Then, in terms of the discussion, there were two points I wanted to follow up on. One, when I listed the intersection of IP and antitrust, I did mention cross licensing, and maybe I was a bit too brief. I just want to add that the amount of cross-licensing, at least to this economist, but I think to economists in general, has been surprising to them. And there are many more patents that are used for cross licensing compared to straight royalties than one would have expected if you had done a survey of economists, say, in 1980, before the specialized court was created.

That, by itself, has created an issue regarding the ability to enter an industry, and that isn't an antitrust issue. So, when I said cross licensing, the larger topic is one that I think we might want to comment on, that it does raise an antitrust issue.

And then finally, let me just go to a general point. Several people raised the tension, in their

comments, between patents and antitrust. That the antitrust - we're trying to create competition, patents grant the monopoly. And it's certainly true in the short run that there appears to be a tension, obviously, but not necessarily in the long run, if you think about it in the following way: the patent law is designed to stimulate invention - true invention, as John Warden was describing - that then ultimately benefits consumers. And you give the patent in order to create the incentive to invent.

The alternative is not to have property rights in intellectual property, but to allow competition. It's not obvious, *ex ante*, before people develop ideas, which system is going to work better in benefiting consumers. It depends as to whether how much you have to invest to innovate. And when people are deciding, some policy maker is deciding, whether to extend property rights and patents - to decide whether an area should be patentable - it does seem to me correct that you should be trying to figure out in your mind, is it better to give a property right and patent, to create a competition to get the intellectual property and then have a monopoly versus not

having that property right? What will that do to the investment? If it does very little, then I want to have competition.

That's precisely the tradeoff that you have to make when you're deciding whether to extend to new areas. So, I would say that someone – I don't know if it's our Commission; I think it's maybe one of these commissions dealing with intellectual property rights – when you're deciding what areas you want to give property rights protection to for intellectual property, it's precisely those two scenarios you want to contrast. And that really does involve having a sense of what competition policy creates.

The final point that I want to make is that we should, at least in the write-up, make the point that if you grant property rights to too many non-obvious situations, what you are doing is depriving true inventors of valuable property rights. Because if I come up with a true invention – and I use John Warden's suggestion – I may not be able to exploit it, because everyone else has these crummy, useless patents that deprive me of my ability to exploit it. And therefore,

consumers are deprived of the benefit. And that seems to me the real problem with the patent system.

So, my last set of comments is really just a comment on the general discussion. My own view is that this is an area that, if we do say something about it, I'd like it to be really short so that we can focus on the antitrust issues.

MR. HEIMERT: Commissioner Garza.

CHAIRPERSON GARZA: You know, I'll be short, because I said this already.

I do think that keeping it short would be the correct way to go, and I think that setting out the principles, much as Dennis has said, would be useful in the chapter, as an introduction to all of the things that we ultimately end up considering. So, I think I would envision a chapter that would basically set out the principles. Why do people think there is a tension? How do they work together? What are the things you have to watch out for? When might it go awry?

And the patent reform and the patenting process - serious people have raised questions about how flaws in that system could pervert the balance. Obviousness,

granting patents where things are obvious is an example. And what you just said, Dennis, is a way of explaining it.

I think I would endorse saying all that. I would also endorse saying something that I guess we'll get to in section 2, the monopolization discussion, something that says, thought valid intellectual property rights are valid intellectual property rights and compulsory licensing is to be avoided.

On the other question that you raised, Dennis, I'll tell you what the problem that I have with just addressing in the report, standard setting, and all these other things, which I agree with you are legitimate antitrust issues that have an intersection with IP and are worth looking at. The problem I have is, albeit some people who testified before us may have addressed it when we chose not to look at it - we didn't invite everybody to comment. And so, although we may have heard some people address it, we don't know what we would have heard in addition had we put it out. And so I'm a little bit nervous about just simply addressing questions that we said we weren't going to address and that we didn't

invite public comment on.

If there are some things that now Commissioners would like to address, I think you should move for a consideration of that, and I think we ought to solicit comment on it. And I think we have, if these are narrow issues, to address it, particularly if we cut back drastically on what we do in this area of patent reform.

COMMISSIONER DELRAHIM: Let me second Commissioner Carlton's earlier suggestions about patent settlements, cross licensing, and standard setting, if that was a motion.

MR. HEIMERT: Commissioner Warden.

CHAIRPERSON GARZA: Well, can I just -- he's made a motion. We don't have all the Commissioners here.

COMMISSIONER SHENEFIELD: Do you want me to make a motion, because I'm ready to.

CHAIRPERSON GARZA: Okay. Go ahead.

COMMISSIONER SHENEFIELD: I would move that we decertify all the intellectual property issues that are on these pages, and instead put ourselves in a position to discuss and comment on and write a report on the intersection issues that Professor Carlton has mentioned.

COMMISSIONER KEMPF: I'll second that motion.

CHAIRPERSON GARZA: All right.

COMMISSIONER JACOBSON: I'll vote for it, but on the patent settlement issue? I mean, we'll have to have a hearing on that.

COMMISSIONER SHENEFIELD: That's fine.

COMMISSIONER WARDEN: You could have weeks of hearings.

COMMISSIONER JACOBSON: In that context, there's a situation never seen before where the Justice Department filed a brief and the FTC filed in opposition to the Justice Department brief, which was, in turn, an opposition to the FTC petition.

CHAIRPERSON GARZA: And we have a Supreme Court opinion that will be coming up. So there's a question —

COMMISSIONER KEMPF: If the court takes it.

CHAIRPERSON GARZA: Well, that's true.

COMMISSIONER JACOBSON: Which the Justice Department has recommended against.

I think this is a complicated area. The more I think about it, I'm going to vote no, because we have so many issues on our plate. To add these others that are

already subject to intense scrutiny in the judicial process, today. I would be comfortable adding some issues, but the patent settlement issues, I think, are too broad and are quicksand for our reviews. So, I will vote no.

COMMISSIONER KEMPF: Let me make a suggestion. Perhaps we should, since this came up today, and we are missing a number of Commissioners, perhaps we should table this and get in better context – because he's also withdrawing. But maybe get a little more precise articulation of what it is we're de-certifying and what it is we're proposing to certify and do that when next we are together.

I'm happy to vote on it now, but if others would be comfortable, maybe that makes more sense.

COMMISSIONER JACOBSON: What if we vote on decertifying these issues and table the others until they can be more precisely articulated.

CHAIRPERSON GARZA: What does de-certifying these issues mean? Does that mean we can't even say it's conceivable that reform should be pursued in the patent area.

COMMISSIONER DELRAHIM: I think a short statement.

COMMISSIONER SHENEFIELD: Say it's conceivable that they should be considered.

CHAIRPERSON GARZA: Right. We could still stay that.

Commissioner Warden.

COMMISSIONER WARDEN: Well, I'm going to vote against this motion, but let me say I have no concern about limiting the number of specifics that we address. I do think that we should take the position that there's a problem, and it's a problem that affects competition and that's why we're talking about it. I don't think we have to say we endorse this recommendation or that recommendation, or even what the standards for an injunction ought to be. But I must say that I am not inclined to take the view expressed earlier by someone that these issues are best left to the, quote, experts in patent law.

Those people have an investment of their own intellectual property, if you will, in the system that's gone awry and provides all them with a lot of gainful

employment. So, I don't think things ought to be left to them.

I want to endorse one point Dennis made, which I think is relevant to this motion, if we're debating only the motion. And that is if we decided – and it is my recollection we decided not to take up the standards issue because we thought there wasn't a real problem that couldn't be dealt with by agreements that were not antitrust violations crafted by competent counsel. Then, I think it's enough to say that in our report.

COMMISSIONER JACOBSON: I thought that's what we agreed to do.

COMMISSIONER VALENTINE: That's what we agreed to do.

COMMISSIONER WARDEN: Now, on cross licensing, I absolutely oppose putting that on the agenda at this late date in our lifetime.

COMMISSIONER JACOBSON: You mean the patent settlement issue?

COMMISSIONER WARDEN: No, the existence –

COMMISSIONER VALENTINE: The barrier to entry issue.

COMMISSIONER WARDEN: This widespread practice of cross licensing. I have instinctive views about that. People go out and get these crappy patents so they'll have something to bargain with, and they can't be excluded. Everybody has got crappy patents, so they engage in this cross licensing. That's my view. If you want to have a hearing on this, with all of the people that will come out of the woodwork wanting to be heard, you might as well set aside the month of August for your hearings.

COMMISSIONER SHENEFIELD: Can I withdraw part of the motion, just to simplify things?

Acquiescing in Don's suggestion, if Professor Carlton would agree, I would limit the motion, then, just for the first part for today.

CHAIRPERSON GARZA: Just so we're clear then, what would be the motion?

COMMISSIONER SHENEFIELD: The motion would be that we decertify the patent law issues that are contained on these pages. If you want to make -

CHAIRPERSON GARZA: A general open statement.

COMMISSIONER SHENEFIELD: Open statements about

procompetition statements and concern and whatnot that would be fine.

COMMISSIONER YAROWSKY: Just to crystallize. We decertify the specific issues that are on these pages, and we agree we will have some general statement about the interface of antitrust and intellectual rights.

COMMISSIONER WARDEN: Well, I can support that as long as the issue of obviousness or invention is preserved for comment.

COMMISSIONER DELRAHIM: If I could just suggest on that –

MR. HEIMERT: Commissioner Delrahim.

COMMISSIONER DELRAHIM: The question number 5 seems to be the only one that is in somewhat general agreement. It says Congress should take a look at this and seriously consider them. And perhaps decertifying, whatever it's called, consideration of all these issues – and maybe we could just vote on – okay, the report will not address all of these other areas which, again, are more in the patent field, but will make a statement just along these lines of question number 5. And then we consider the issues that Commissioner Carlton had

mentioned, whether now, or in a future time – and put it out for public comment in a couple weeks to consider.

MR. HEIMERT: Commissioner Valentine.

COMMISSIONER VALENTINE: I recommend that we not do anything today, that the staff take into consideration what has been said, and that we wait until all the Commissioners are here, and we find some targeted and focused way to address what I believe are legitimate issues at the intersection of competition and patent issues.

Makan may be getting onto a kernel of something in trying to focus on the general 5, but I don't think it's healthy to have sprung on us this late in the day the whole issue of cross licensing. And I actually thought when Dennis was talking about patent settlements he did not mean the discrete area of Hatch-Waxman that is totally unique and probably will be resolved by the courts in the near future.

But the more general issues of patent settlements that Baxter and Bork and other's have identified – if I've got that wrong, Dennis, obviously, you can speak. But I, quite frankly, at this point,

don't know what's in front, and I don't have any interest on voting on anything that would both get rid of all the work we've done thus far and leave us with something totally vague.

MR. HEIMERT: Commissioner Carlton.

COMMISSIONER CARLTON: I wasn't intending, when I said that we should focus on these items, that people had talked about or that I viewed was the intersection that we necessarily hold more hearings. I think it's fine, from my point of view, to say that these other reports raise important questions about the patent law. We have concerns about the patent law and we think it's misdirected. And in particular, the relevance of our concerns about intellectual property and how it bears on competition is at least in the following areas -

We should say something about standards. I think that's helpful to express our reasoning. We can say we didn't hold hearings but we can say we didn't vote for it. I think that's important.

The fact that settlements are relevant and, as John was saying, that cross licensing is used as chips where you get non-obvious patents. I think that's quite

clear from the literature, the memo the staff put together, and the hearings we had.

So, I was not envisioning that, on any of these topics that I raised, we hold new hearings. I think we know enough to say something, and I am not proposing that we study cross licensing or propose a solution to cross licensing. More specifically, what I'm pointing out is that the problem in the patent system gives rise to competitive problems because of cross licensing, in which we have non-obvious patents used as chips, and this creates a competitive problem.

And I'm worried, also, about starting new hearings on a variety of topics. I know I feel comfortable - I know enough to write a few paragraphs about why these are important concerns that arise because our patent system has gone awry. So, I'm not sure I'd be in favor of holding more hearings. Like I said, I think we have sufficient information based on what's been said to include in our report.

COMMISSIONER SHENEFIELD: Our quorum is disappearing.

CHAIRPERSON GARZA: Yes. If you don't mind,

for our next meeting, just so we're all clear, and for the benefit of the Commissioners who weren't here, if you could just write out what it is that you're proposing specifically in those areas, so we're all clear on it.

And, at the next meeting, we will also decide what we're going to do in the patent reform area, with one proposal being that we essentially not get in detail in the items that are listed under 6.

We have to adjourn. We no longer have a quorum.

COMMISSIONER KEMPF: We have a quorum.

CHAIRPERSON GARZA: It's 4:00. We said we'd end at 4:00.

MR. HEIMERT: The Commission meeting is adjourned.

[Whereupon, at 4:03 p.m., the meeting was adjourned.]