

ANTITRUST MODERNIZATION COMMISSION

PUBLIC MEETING

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

Thursday, July 15, 2004

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

MEMBERS PRESENT:

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

ANDREW J. HEIMERT, ESQ.
Executive Director and General Counsel

ALSO PRESENT:

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

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

2 CHAIRPERSON GARZA: The meeting of the
3 Antitrust Modernization Commission will come to
4 order. We have a quorum.

5 In addition to the commissioners that
6 are present, we are expecting Debbie Majoras to
7 come in at some point. She has a foot in a cast.
8 So she is probably making her way slowly here.
9 And we may be joined on the telephone by three
10 other of our commissioners, Jon Jacobson, Makan
11 Delrahim, and Sandy Litvack.

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

22 With that, I will recognize the chairman

1 and allow him to make some remarks.

2 CONGRESSMAN SENSENBRENNER: Well, thank
3 you, Madam Chairman, and welcome to the House
4 Judiciary Committee where the idea of modernizing
5 our antitrust laws and having a commission of
6 experts was hatched and nurtured and sent over to
7 the Senate, and then it was nurtured some more and
8 some more and some more. It finally ended up being
9 signed into law by the president as part of the
10 Department of Justice authorization bill in
11 November of 2002. We thought we had it made then.
12 Then we had to have an argument in getting you
13 folks funded. We were finally successful in doing
14 that.

15 I am glad to welcome you here and see
16 that the Commission is now off and away doing its
17 business.

18 The Committee on the Judiciary has
19 exclusive jurisdiction of America's Federal
20 antitrust laws and competition in our free market
21 economy. As chairman of the committee, I have
22 rigorously examined their implementation across a

1 broad range of industries. As you know, America's
2 Federal antitrust laws are periodically amended by
3 Congress. The recent passage of the Standards
4 Development Organization Act of 2004 provides an
5 example; however, I believe it is now time for a
6 more searching examination of whether the antitrust
7 laws continue to advance their fundamental goals in
8 a modern economy that bears little resemblance to
9 the economy of a century ago when those most of
10 these laws with initially passed.

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

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

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

15 Second, the intersection of the
16 antitrust and intellectual property laws has been
17 the focus of Congressional considerations on both
18 sides of the Capitol, at Federal antitrust
19 enforcement agencies, and in academia. To ensure
20 that antitrust laws and those protecting
21 intellectual property rights operate in a
22 complementary rather than a conflicting manner, the

1 Commission should carefully examine whether the
2 antitrust laws should be amended to forcefully
3 defend IP rights while promoting effective
4 competition in this field.

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

18 I am increasingly concerned that foreign
19 antitrust authorities have applied their antitrust
20 laws in a discriminatory manner that unfairly
21 advances foreign commercial interests at the
22 expense of American businesses and American jobs,

1 and I want to cite two examples of that. First,
2 the proposed GE-Honeywell merger was approved by
3 the Justice Department. It was not consummated
4 because the European Union determined that despite
5 that the fact that both GE and Honeywell are both
6 American-based corporations secured the approval of
7 U.S. antitrust enforcement authorities, it did not
8 meet the European standards.

9 Second involves the Microsoft case. As
10 we all know, the Justice Department and Microsoft
11 reached a settlement, and that settlement was
12 approved by the court where the antitrust
13 enforcement action was pending; however, it appears
14 that the European authorities do not accept the
15 settlement, and as a result of that failure to
16 accept the settlement, there is a different
17 antitrust case that presently winding its way
18 through the European Union enforcement mechanism.
19 And there has to be some type of comity involved,
20 and I would hope that the Commission would look
21 into this very serious issue because if this type
22 of discriminatory treatment is allowed to continue,

1 American-based industry is put at substantial risk
2 and American jobs are placed in jeopardy.

3 While America is not the source of all
4 knowledge, international antitrust convergence must
5 not require the U.S. to abandon its antitrust laws
6 in favor of poorly-defined non-economic models that
7 unfairly penalize market success.

8 Fourth, the relationship between Federal
9 and State antitrust enforcement efforts is another
10 area of interest. While I believe that the States
11 have a vital antitrust enforcement role, interstate
12 commerce may be adversely affected by the divergent
13 and sometimes inconsistent antitrust standards.

14 Fifth, the continued application of the
15 antitrust laws in regulated industries is a fertile
16 area for the Commission's inquiry. Over the last
17 several years, the courts have sometimes ignored
18 explicit antitrust savings clauses and legislation
19 enacted by Congress, principally the Telecom Act of
20 1996. The antitrust laws provide a pro-competitive
21 bulwark across a range of regulated and non-
22 regulated industries and their dilution or

1 circumvention by judicial fiat is a troubling
2 development. In a similar vein, competition
3 advocacy by the Antitrust Division of Justice and
4 the FTC Bureau of Competition during regulatory
5 proceedings undertaken by other Federal agencies,
6 such as the FCC, is a productive area of inquiry.

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

19 As you commence the Commission's work,
20 you can be assured that the Commission's
21 conclusions will be carefully reviewed by Congress.
22 While this is not the first Federal commission to

1 study the antitrust laws, the caliber of those
2 chosen for this Commission has created heightened
3 expectations that I have every confidence will be
4 either met or exceeded. I appreciate your
5 willingness to serve and look forward to working
6 with you in the coming months.

7 Thank you for opportunity to come here
8 today.

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

11 CHAIRPERSON GARZA: Well, thank you very
12 much.

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

18 As people know, I'm sure, the Commission
19 was established to examine whether the need exists
20 to modernize the antitrust laws and to identify and
21 study issues. We are, among other things, to
22 examine whether the need exists to modernize the

1 antitrust laws, to solicit views of all parties
2 concerned with the operation of those laws, to
3 evaluate the advisability of proposals and current
4 arrangements with respect to any issues that we so
5 identify, and to prepare and submit to Congress and
6 the President three years from today a report that
7 contains a detailed statement of our findings and
8 conclusions together with any recommendations that
9 we have.

10 The AMC has called this meeting pursuant
11 to our authorizing statute and to formally launch
12 that process today. The agenda for this meeting,
13 first will be to have a brief briefing on
14 administrative matters from our Executive Director
15 and General Counsel, Andrew Heimert; secondly, to
16 discuss procedures for identifying issues to study
17 sort of the first phases of our Commission's work;
18 and then after that, we will have a brief period to
19 take questions from anybody in the audience that
20 wishes to ask a question.

21 So the first order of business would be
22 to ask Andrew to report on the work that he's been

1 doing to establish the Commission's infrastructure
2 so that we are in a position to move full speed
3 ahead.

4 Andrew.

5 MR. HEIMERT: Thank you. We have
6 accomplished a significant amount in the six weeks
7 since I was appointed as Executive Director and
8 General Counsel. It is neither easy nor fast to
9 establish a new Federal agency, which is what in
10 essence we are doing. Unlike many Federal Advisory
11 Committees, this commission does not have a
12 sponsoring agency. So we don't have structured
13 support from an already established Federal entity.
14 We have to create a lot of things from the ground
15 up that others do not have the burden of doing.

16 I have been working hard with the
17 assistance of the Chair and the General Services
18 Administration to assemble many of the basic
19 components for a Federal agency. Much of that work
20 is still in the process of being completed. I am
21 hopeful that most of the projects will be finalized
22 in the coming weeks.

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

15 I also have been working on more mundane
16 tasks, things like obtaining Commission letterhead
17 and business cards, establishing credit card
18 accounts for Commission travel, entering into
19 agreements with GSA to handle payroll, accounting,
20 and human resources support, and setting up E-mail
21 accounts. None of these tasks are exciting. They
22 DO take time to complete and they often require

1 substantial paperwork to get completed as well.

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

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

15 Second, we created a commission web
16 site, www.AMC.gov. It is now up and running and
17 available to the public. I encourage everyone to
18 take a look for additional information. It
19 currently does not have a tremendous amount of
20 information because the Commission has only begun
21 its work. It does have information about the
22 Commissioners, also some of the background

1 materials on the Commission, such as the statute,
2 its charter, as well as press releases and the
3 Federal Register notices for this meeting.

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

7 MR. HEIMERT: That is correct. My
8 expectation is that the web site will be the
9 principal means by which the public will be
10 informed or be able to get information about the
11 Commission and Commission activities. Obviously
12 there will be Federal Register notices and press
13 releases.

14 CHAIRPERSON GARZA: Can you repeat the
15 address again?

16 MR. HEIMERT: It's www.AMC.gov.

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

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

13 And with that, I turn it back to you.

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

16 What I would like to do now that I
17 should have probably done before, but we wanted to
18 let Chairman Sensenbrenner make sure that he had
19 ample time to make his remarks before he had to go
20 off and do something, I do want to recognize that
21 in the audience today, we have several staff of the
22 House Judiciary Committee. Specifically, we have

1 Phil Kekoe, Joseph Gibson, and Rob Tracci.

2 And, Rob, I want to thank you in
3 particular because I know that you provided us with
4 extensive assistance in coordinating this meeting
5 and getting the hearing room and a variety of other
6 things.

7 Also, from the staff of the Senate
8 Judiciary Committee, I think we have--let me see if
9 I've got this right. I am going to ask you.

10 MR. YAROWSKY: Okay. I'm glad to jump
11 in.

12 We have got from the Senate Antitrust
13 Subcommittee, representing Chairman Dewine, we have
14 the chief counsel and David Boley, counsel. From
15 Ranking Member Cole's office, we have the Honorable
16 Jeff Miller, chief counsel, and Jeff Bloom,
17 counsel; and from Ranking Member Conyer's office
18 from the House Judiciary Committee, I see Ted Calo
19 and Stacy Danski. I don't know if Perry Applebaum
20 is in the room somewhere, but I don't see him.

21 These are the--Chairman Sensenbrenner
22 talked about working together on this Commission

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

11 CHAIRPERSON GARZA: The next order of
12 business is to discuss, as I mentioned, the process
13 by which we will begin our work and in particular
14 against the framework of a memorandum that Jon and
15 Andrew and I sent to the Commissioners dated July
16 14 proposing for discussion a sort of straw man
17 process for soliciting public input and proposing a
18 time line for the preliminary identification of
19 issues for the Commission to study. And I believe
20 that a copy of that memorandum is on the table for
21 the public, on the table next to the door as you
22 came in.

1 I want to take a minute to give a little
2 give a little bit of background to this memo, which
3 is short, to explain briefly the thinking behind
4 the proposal before I turn to Jon to allow him to
5 give his thoughts and then open it up to a more
6 general discussion by the Commissioners. First,
7 this memo largely reflects the recommendations of
8 the working group established at the time of the
9 Commission's first non-FACA organizational meeting,
10 April 2. The working group members, John
11 Shenefield, Jon Jacobson, Debbie Majoras, and Debra
12 Valentine, undertook to consider the best way for
13 the Commission to decide at least a preliminary
14 agenda of issues to study with the understanding
15 that that process importantly would include the
16 consideration and solicitation of input from the
17 public.

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

21 Secondly, it will be clear from the memo
22 it assumes that the Commission will approach its

1 work in phases, that is rather than launching
2 immediately in hearings covering potentially the
3 entire landscape of antitrust and distilling issues
4 at the back end of the process, the procedure
5 proposed in the memo assumes that the Commission
6 will proceed first to identify a set of issues for
7 further study. The procedures set forth in the
8 memo for those members of the public who haven't
9 been able to read it breaks down into four parts.
10 The first part is that as soon as practicable after
11 the meeting, assuming we have a consensus of the
12 Commission members, the Commission will publish a
13 public notice requesting comment from the public.

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

21 The second step is that the Commission
22 will continue and intensify its outreach to members

1 of the public, for example, academics, business,
2 consumer, other groups. We assume that this
3 process--oh, I should say that the first part of
4 the memo suggests that the public comment period
5 formally would end September 30. That doesn't mean
6 that that is the last input from the public, of
7 course. That is the date that we set to try to get
8 initial public comments in.

9 Beyond that point, the Commission I
10 think will continue to intensify its outreach
11 efforts going beyond the September 30 date,
12 certainly, which might include follow-up discussion
13 with some commentators and will also include
14 outreach to people that have been identified by the
15 working group for outreach. We can talk about
16 this, but it is a flexible process which people, I
17 assume, will be inside and outside of Washington
18 where groups of Commissioners will talk with groups
19 of people, for example, several members of academia
20 and economist communities and may talk to them
21 about specific issues that the Commissioners have
22 identified that warrant going out and conducting

1 outreach. Part of what we would propose is that we
2 have some discussion today amongst the
3 Commissioners as to how we want that to proceed, to
4 potentially put it back to the working group to ask
5 them to basically incorporate those discussions and
6 efforts and try to solidify our outreach targets
7 and propose a plan for going forward with outreach.

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

19 The third step would be that the
20 Commission staff would summarize and analyze issues
21 proposed by commentators and raised by
22 Commissioners in a report. The memo says that will

1 be due no later than November 30, 2004, although
2 the staff may report on specific issues before that
3 time. And then, finally, the memo proposes that
4 there be a meeting of the Full Commission, the memo
5 proposes in early January, to discuss and decide
6 issues for study, although it notes that the
7 Commission might choose to meet before that.

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

13 Jon.

14 MR. YAROWSKY: I will say a few brief
15 remarks. I think just as committees in Congress
16 operate, probably our most important function here
17 is agenda setting. It's a difficult job, both
18 short-term, midterm, long-term. Results and
19 analysis flows from the agenda we set. So, to me,
20 it is very important at this very preliminary stage
21 to make sufficient outreach to all different
22 communities and interests, which are great and

1 diverse, and I know that there is a sufficient
2 amount of time allocated in this first period until
3 September 30th. I think that will be well spent by
4 all of us on the Commission if we can make that.
5 So I'm in favor of the general time intervals that
6 you've set.

7 CHAIRPERSON GARZA: Okay.

8 MR. SHENEFIELD: Madam Chairman, may I
9 say a word?

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

18 Second, I also am generally in favor of
19 the basic skeletal proposal. I would like to
20 suggest a modification or perhaps an addition more
21 or less along the following lines: We do need
22 ideas from all of the interested parties, and the

1 outreach effort is essential. Notwithstanding
2 that, the Commissioners were appointed, I think and
3 appropriately so, because each of them have
4 substantial experience in this general area and,
5 indeed, has formed conclusions on many of the
6 larger issues that we will be asked to address.
7 And I think there are a few topics we already know
8 we want to address, at least I would suggest there
9 might be, so that there could be a parallel track,
10 it seems to me. We move ahead with the general
11 outreach. We get the ideas. Perhaps the staff
12 summarizes them. Perhaps that isn't necessary. We
13 don't know yet.

14 But there may be some few subjects that
15 we could actually get started on and sink our teeth
16 into right now. As an example, and I would suggest
17 I assume we know we want to look at the issue, one
18 of the issues that Chairman Sensenbrenner
19 mentioned, exemptions and immunities. Without
20 specifying any particular exemption, we could get
21 started in the business of asking, let's say, a
22 committee of qualified economists and names like

1 Fred Kahn and Paul Joskow and Jim Miller all come
2 to mind as experts in that area, to give us their
3 thoughts on exemptions that today in 2004 are net
4 consumer welfare disadvantages, so that at least
5 you could have some of that started. That is an
6 example.

7 Another example is the issue of
8 remedies. I think we all know that we are going to
9 get to that issue in due course. Is the treble
10 damage remedy sensible? Outmoded? Is State
11 enforcement sensible? Outmoded? Is indirect
12 purchaser enforcement sensible? Outmoded? Perhaps
13 there are some things in that area. We may decide
14 they are just fine, but those are questions we are
15 going to be asked why we didn't examine them if we
16 don't. There may well be others along those lines.

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

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

9 MR. SHENEFIELD: The latter. Very much
10 the latter.

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

13 MR. WARDEN: I'll make one brief
14 comment. I assume in talking about whether treble
15 damage actions still serve the purpose they were
16 intended to serve and do so properly, subtopics
17 such as burdens of proof, contribution, joint and
18 severable liability, and so forth would be
19 subsumed.

20 MR. SHENEFIELD: I would assume.

21 MR. WARDEN: Well, I think that--I
22 happen to agree with John Shenefield that that has

1 got to be front and center in our consideration.

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

18 Is that a fair summary or suggestion?

19 MR. SHENEFIELD: The public may never--

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

1 MR. JACOBSON: Hello.

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

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

7 MR. KEMPF: John, can you hear us?

8 MR. JACOBSON: I can.

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

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

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

17 MR. JACOBSON: Sure. As discussed with
18 Deb earlier, it was my hope that we could get the
19 staff report a little bit earlier than suggested in
20 the memorandum. In any event, irrespective of when
21 we get the staff report, that we should be able to
22 have at least one meeting in the first couple of

1 weeks in December, maybe the first week of
2 December. My own speculation is that the items on
3 the agenda is going to require several meetings and
4 that there's no reason that we can't start at that
5 point and hopefully have one in December and one or
6 two in January and, you know, be in a position
7 reach a conclusion as to the status of the agenda,
8 you know, at some point early in 2005.

9 MS. MAJORES: Deb, may I?

10 CHAIRPERSON GARZA: Yes, please.

11 MS. MAJORES: First, I want to apologize
12 to my fellow Commissioners for being late. My new
13 mode of transportation is one that I am not very
14 accustomed to yet and I have to get my timing down.
15 So apologize to you.

16 MR. JACOBSON: I'm sorry. I'm not
17 hearing.

18 MS. VALENTINE: She is apologizing for
19 her late entry.

20 MR. KEMPF: Because of a broken leg.

21 CHAIRPERSON GARZA: Her new mode of
22 transportation is crutches.

1 MS. MAJORES: I'll talk louder. I think
2 that September 30th is a good date. I most
3 certainly wouldn't want to move it up any sooner,
4 because I think the public input is absolutely
5 critical, and to tell you the truth, I don't think
6 most people will really seriously focus on this
7 until after Labor Day, and that really only gives
8 about three and a half weeks in any case. So I
9 think that is right.

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

15 CHAIRPERSON GARZA: Well, we have Andrew.

16 MS. MAJORES: Okay. And we don't know
17 how many public comments that we'll receive. I
18 know and others know just from, for example, the
19 number of comments that have started to come into
20 the Justice Department on just, you know, one
21 particular settlement that there is more and more
22 interest in the issues, and when you are opening up

1 the entire field, we can get an awful lot of
2 comments. And we since we don't know how many
3 there are going to be and or how much we're going
4 to need to digest, I hate to short-circuit that
5 process.

6 I'm certainly in favor of having another
7 meeting before January if we can do something
8 useful, for example, talk about some of the
9 outreach that we have been receiving, and perhaps
10 if we are on two tracks, we most certainly should
11 have another meeting; but if we crunch our timing
12 too much on when we are raising expectations on
13 particular reports, I think we might find ourselves
14 coming up short and we may find ourselves with
15 reports that are less than what we would want them
16 to be.

17 CHAIRPERSON GARZA: I agree with that,
18 and just to clarify some of my thinking, and, gosh,
19 I have done lots and lots of thinking about this
20 and looked at others', the experiences of other
21 other commissions that have been created to do
22 things similar to what we have done, the bankruptcy

1 commissions and other commissions, and I have had
2 conversations with folks on the Hill and other
3 places. One of the things that I have come away
4 with is that the issues of selection process is
5 probably the most important thing that we will do,
6 at least as important as what the contents of our
7 report are. The agenda for Commission is very
8 important.

9 I am a little nervous about--and one of
10 the reasons that I had actually wanted and agreed
11 with the process of having public input and public
12 outreach and staff analysis before we settled on
13 our agenda was so that we could be very considered
14 about it, and I am a little hesitant or a little
15 wary about picking up issues on the fly. One of
16 the things that I noticed, just John raising
17 the--John Shenefield raising the issue of remedies
18 and then John Warden brings up there are all kinds
19 of sort of subparts of that, the burdens of proof,
20 the contribution, all these other various issues.

21 And my only concern is that this is not
22 a particularly good forum unassisted by staff work

1 and everything to really frame the issue well. It
2 is a good way to identify things that I think would
3 organize the initial phase one outreach. For
4 example, we could say, Well, we know we want to
5 look at remedies; let's work on framing that issue
6 for study and figure out why we want to put it in
7 our agenda, what is it that this commission,
8 thinking about it in the abstract, his commission
9 can fruitfully do in that area given what our
10 charge is, how are we going go about getting input
11 for it, that kind thing.

12 And that is only one of just a whole lot
13 of other issues that are potentially for study. My
14 only concern is that it would be nice to have some
15 thoughtful analysis of them all as a group to
16 narrow it down to what we want. So I think the
17 double-tracking is a good idea to get things
18 started, though I will say we have three years from
19 today to do our work and that is quite a long time.
20 Another possibility to me would be to have those
21 things out there, to do the outreach, to have
22 whether you call them hearings or whether you call

1 them, you know, outreach with smaller groups of
2 commissioners to flesh out a little bit more when
3 we say this is an issue that we want to study, what
4 are we really saying about that and then how are we
5 going to prioritize it and weigh it against other
6 issues that are likely to come in, and that is sort
7 of my concern about the process of how we do it.

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

14 MR. SHENEFIELD: Well, I'm loathe to
15 rush too quickly into anything, I will tell you
16 that. It seems to me that nothing is lost and
17 something is to be gained, i.e., if we can do some
18 of our work sooner. If, for instance, on the
19 issues of exemptions and immunities, we were to do
20 some of thee study work, whether as a full
21 commission or as a subgroup or however you would
22 like to suggest, so that when we get together for

1 our next meeting, we would at least have winnowed
2 out some of the materials from the vast mass of
3 stuff that is out there that would help us to the
4 decision; otherwise, I fear we'll come to January
5 or November, we'll have comments, yes, we should be
6 looking at exemptions and immunities, and then
7 we'll have to ask the question we could ask now,
8 which is is there a consensus in the economic
9 community that Web Marine is no longer at all
10 useful or is there a consensus that whatever
11 remains of regulation in the shipping industry is
12 no longer sensible.

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

17 MS. MAJORAS: And I think that I would
18 envision that that would be part of what the
19 outreach would be. So I think we are on the
20 same--exactly. You could basically say we want to
21 talk to you, we want to talk to you specifically
22 about these issues. My only thing is that it may

1 be that at the end of the day, you know, where is
2 it on our issues list. But I think you're right.
3 You may decide there is not enough there; for a
4 variety of reasons, this is not going to be an
5 issue that we are going to focus on.

6 So I don't disagree with that. I think
7 that would be helpful to sort of in the process to
8 have a process to make sure that that happens and
9 happens in the way we want it to and it gets to a
10 decisional point.

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

22 MR. KEMPF: Can I talk?

1 CHAIRPERSON GARZA: Yes.

2 MR. KEMPF: Jon, can you hear me?

3 MR. JACOBSON: I can hear you better
4 than everyone else.

5 MR. KEMPF: That is because I have a
6 courtroom voice.

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

14 MR. JACOBSON: No, of course not.

15 MR. KEMPF: Okay. This was Jon's what I
16 thought was a pretty measured reaction to the memo
17 that Chairman Garza described. He made two points:
18 Number one, and I am reading his words:

19 "There is no reason why it should take
20 the staff two months, September 30 to November 30,
21 to summarize and analyze issues proposed by
22 comments and identified by Commissioners.

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

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

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

18 Two, consistent with the thoughts
19 expressed above, our first meeting to address the
20 agenda should in no circumstances be delayed until
21 January 10th."

22 Then he has it is a date that may well

1 conflict with the ABA midwinter meeting in any
2 event.

3 "The first meeting of what may be
4 several should take place no later than the first
5 week in November. Although Thanksgiving
6 intervenes, I would hope that we could have no less
7 than three or four meetings before Christmas so
8 that we are in a position to announce our
9 preliminary agenda and accept whatever public
10 praise or flack may come by early January of '05."

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

14 Let me just give you my own thoughts,
15 which I think I subscribe to much of what Jon says.
16 I think the November 30th--I'm sorry--September
17 30th deadline is fine. I view that as a little bit
18 like a fail-safe process. You want to ensure two
19 things: One, you want to ensure that we don't
20 overlook anything. As Jon points out, this is a
21 group of people who have spent much of their
22 professional lives thinking about these issues, and

1 we could pretty well set our agenda with no input.
2 There is no patent on wisdom, however, and we all
3 benefit from having everybody else provide us with
4 their thoughts as to what we should cover.

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

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

19 You have sort of signalled some of your
20 own thoughts by the way you frame the questions,
21 John.

22 And it strikes me that it is important

1 that we have fully appropriate processes, but those
2 are at the end of the day, in my judgment, to make
3 sure that two things occur that we want to occur,
4 one, that we don't overlook anything inadvertently,
5 and, two, that everybody has an opportunity for
6 input. But I see no reason to delay either taking
7 input on some of those subjects, as John suggests,
8 or, indeed, beginning some preliminary discussions
9 among ourselves.

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

21 But I am reminded when there was a
22 rather public fight when Ross Perot stepped down

1 from the General Motors board. They were asking
2 him what he didn't like about it, and it was the
3 time factor. He said two things I remember well.
4 One was he said that, you know, down in Texas, if
5 we have a snake in the tent, somebody steps on it
6 and kills it, but at General Motors, they form a
7 committee on snakes. Second, he asked them how
8 long when they were working on the Saturn they
9 thought it would take to develop the Saturn, and
10 they said six years. He said are you sure it's
11 going to take that long, and they side yes. He
12 said, Well, I would remind everybody that, you
13 know, we did win World War II in less time than
14 that.

15 I am really loathe to let so much grass
16 grow under our feet before we start conferring
17 about the issues that Chairman Sensenbrenner, for
18 example, teed up today and others that we could
19 productively think of on our own, and I just as
20 soon start a dialogue among us and taking input on
21 things that you identified and others that might
22 make sense to take a look at. I know in our very

1 first administrative gathering, someone said, you
2 know, maybe we should spend two or three days
3 chatting, and it wasn't my idea, but I said, Gee,
4 that makes sense to me. We all recognize that much
5 of our work will be done in the sunshine. I had no
6 problem with that, but I think we ought to think
7 about that. It struck me at the time as a good
8 idea and still does.

9 That is all I have.

10 MS. MAJORES: In reaction to that and
11 Jon Jacobson's memo, I don't think those things
12 have to be independent of one another. In other
13 words, I think we could front-load some of those
14 right now in the way that's consistent with what
15 Jon and Don are proposing, but at the same time, I
16 don't know why that precludes having staff do work
17 on public comments so have them to synthesize them.
18 We could get thousands, and for anybody who has
19 ever tried to this, everybody on this committee
20 still has a day job, and we are going to want to
21 sink our teeth into this. There's no question
22 about it, but on the other hand, we could have a

1 lot of material to review in a very short period of
2 time, and I just don't think we should lose sight
3 of that because that is--we all agree that is an
4 important aspect, of getting that input, but it
5 doesn't have to preclude us from getting going on
6 our own thoughts.

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

1 here, the people that were be considering our
2 recommendations and whatnot.

3 What I see the staff doing, just to
4 clarify, is--

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

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

14 CHAIRPERSON GARZA: Thank you, Jon.

15 MR. KEMPF: Jon, we'll see you when you
16 get back.

17 MR. JACOBSON: Thank you.

18 CHAIRPERSON GARZA: What I see the staff
19 as doing is not simply summarizing the comments that
20 we get in, but also at the request--being basically
21 resources for the Commissioners. Some of the
22 Commissioners, obviously, are going to have a very

1 good idea about some issues and others aren't about
2 others, and just thinking of myself, there are some
3 things I very feel very competent to address and
4 other issues that I personally would want to have a
5 little bit more knowledge about. I see the staff
6 as being there to basically respond in terms of
7 giving maybe a little information on more of the
8 legislative history, explication of case law,
9 helping us to work through thinking about the
10 interaction of certain issues, helping us to
11 identify nuances.

12 There are numbers of things that the
13 staff could do, the same kinds of things I have
14 associates do when I have something to look at for
15 a client. I think that's why we have been given
16 the staff. So I want to make sure that we use
17 them, and I think with the three years we have, we
18 have the ability to use them. So I don't disagree
19 with everybody's energy, and which I applaud and I
20 am going to be reminding you about as we move
21 forward, but I hope that we will use our staff
22 well. And, again, I am a little bit--I don't want

1 to not use them, because we have been given these
2 resources and it is rare to be given that. So I
3 want to use it, and I want to make clear that I did
4 have something more in mind for our staff than
5 simply summarizing.

6 The other concern I have, frankly, which
7 is what Debbie mentioned and which I have
8 encountered already is that you all have very
9 high-powered practices and businesses and this is a
10 part-time job, and we're all keenly aware of the
11 limitations on the amount of time that you can put
12 into this. It is 60 days a year. Every time we
13 spend any amount of time in a day, that is a day.
14 So I don't want us to kid ourselves about how much
15 you're going to be able to accomplish and how much
16 assistance you are going to find that you need to
17 balance your work and then also slog through
18 comments, think about issues, go get someone who
19 has research for it.

20 I hope to use the staff to help you,
21 frankly, so that we can use better, make more
22 valuable use of your very scarce time. So I hope

1 not to mention the staff and using the staff just
2 to give them work or to delay us, but that I hope
3 that we'll keep in mind that they're there. I
4 think we are considering several people to help us
5 as senior advisors and whatnot that can be pretty
6 valuable to us. So I want to just say that I hope
7 that we will be able to use them, and I'm all for
8 moving ahead, and as long as people have time and
9 energy to devote to it, I say by all means, and if
10 that is going to peter out at the end, let's do
11 more now and take advantage of our energy and
12 enthusiasm at this point to move ahead and grab the
13 initiative. That is fine with me as long as we
14 don't--obviously, I'm going to be the tern in the
15 punch bowl, to use a phrase of a friend of mine,
16 but I am going to do it because I am afraid that I
17 don't want to at the end when I'm, frankly, going
18 to be pulling together the report, I don't want to
19 want to be left with a lot of Helter-skelter stuff
20 that is going to be impossible to fold together.

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

1 process.

2 MR. SHENEFIELD: I take it, Madam
3 Chairman, that we also welcome the assistance of
4 outside groups. I see representatives of the
5 American Bar Association in the audience. I see
6 representatives of the American Antitrust Institute
7 in the audience. I see folks from the Department
8 of Justice in the audience. There's no doubt
9 there's people from the Federal Trade Commission
10 here.

11 MS. VALENTINE: There are several.

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

16 CHAIRPERSON GARZA: I agree.

17 MR. KEMPF: I do have some concern that
18 we not be limited to what I would call the inside
19 baseball crowd and we get some regular people
20 giving us their views as well.

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

1 MR. WARDEN: Do you really think regular
2 people sit around and think about these questions?

3 CHAIRPERSON GARZA: There is no one
4 regular up here.

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

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

15 MS. VALENTINE: Okay.

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

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

6 But, for example, you know, I think
7 there can be a lot of activity between now and
8 then, meeting with groups with academics and groups
9 of economists or groups of the Bar on certain
10 issues in Washington, in Chicago, in San Francisco,
11 wherever. So there is--actually, I don't think we
12 were thinking about dead time. It was more of,
13 basically, okay, we have got until July of 2007 to
14 come up with a report; let's build in a process for
15 basically building our agenda, getting the
16 information we need, getting the analysis we need.
17 And in some sense, I frankly thought
18 January--although I put January because I was
19 concerned about the December holidays and the
20 ability to get really focused in December, but I
21 really did that so that we would have the time to
22 go out and do that kind of stuff and get the staff

1 work as we need it.

2 So I would propose, maybe, that we with
3 all this input--I don't mean to cut off discussion
4 now, but that it go back to the working group,
5 Deborah that you are on and Debra and John and Jon
6 Jacobson, to take this sort of feedback and then
7 propose more flesh. And I know you guys can work
8 quickly because you worked quickly the first time,
9 to basically kind of flesh out the middle part, the
10 outreach part. And if people are available for a
11 meeting in December, I am fine with that.

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

20 CHAIRPERSON GARZA: Sure.

21 MR. YAROWSKY: We could speak among us
22 about what we think are the top-rung issues, not to

1 be decided, but to at least get that conversation
2 going so that certainly by the January meeting,
3 that has already started moving along and then
4 we'll catch up with other issues that may not be at
5 the top rung.

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

9 MR. SHENEFIELD: Sure.

10 CHAIRPERSON GARZA: I think Andrew will
11 reach out to folks and start getting dates, and so
12 everybody try to--I mean, if this is what you want
13 to do, that's great, and so let's make sure that
14 can happen but right now getting--not right now,
15 after this getting your calendars out and let's try
16 to get as full a participation as we can and pick
17 dates that no one is going to be unhappy about.
18 For public meetings, we need a quorum. I think
19 Andrew can give guidance to us on our possibilities
20 to have subcommittees, if you will, smaller groups
21 of Commissioners going out maybe on particular
22 issues, affinity issues, issues of particular

1 concern to you where you have expertise, John, for
2 example in remedies or something, and that will
3 allow us, I think, to move forward more quickly if
4 you don't have to have all 12 Commissioners. But I
5 think Andrew and whatever staff we have should be
6 of use to you to make sure we get that captured and
7 distributed.

8 Steve, you can talk

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

13 CHAIRPERSON GARZA: No. It's his better
14 get it done by then date.

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

19 CHAIRPERSON GARZA: Yes.

20 MR. CANNON: So can I move that?

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

1 MR. KEMPF: Second.

2 MR. SHENEFIELD: Second.

3 CHAIRPERSON GARZA: Well, those are the
4 magic words.

5 MR. CANNON: Take a vote.

6 CHAIRPERSON GARZA: We did take a vote.
7 We had a second. So I guess the motion is adopted
8 and Andrew will--if anybody--is the form of the
9 Federal Register notice sufficient for people then?
10 We're all in agreement on the September 30 date
11 and everything else is fine?

12 Okay. Then Andrew will take care of
13 getting that into the Federal Register, and I think
14 it will probably be Monday or Tuesday that it will
15 appear.

16 MR. KEMPF: I think when someone moves
17 it and seconds it, you still have to take a vote.

18 CHAIRPERSON GARZA: I'm sorry.

19 MR. KEMPF: But I think I heard
20 everybody second it.

21 CHAIRPERSON GARZA: Yes.

22 And, Andrew, you will also take care of

1 the appropriate press and other things?

2 MR. HEIMERT: Yes, I will.

3 CHAIRPERSON GARZA: All right.

4 MS. MAJORES: Do we have an address yet?

5 MR. HEIMERT: We are working on that.

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

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

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

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

17 MR. KEMPF: In the interim, you do have
18 an E-mail address.

19 CHAIRPERSON GARZA: We do.

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

22 CHAIRPERSON GARZA: People did not want

1 to go out and have to look at our web site for the
2 address to mail hard copies to, and so we hoped if
3 we could--we would get the E-mail address and the
4 post office address or a permanent address, which
5 may be possible.

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

9 MR. CANNON: Second.

10 MR. KEMPF: So moved.

11 CHAIRPERSON GARZA: Okay. Can we vote?

12 So moved, and, John, that is what you'll
13 be doing.

14 Is there any further business for the
15 Commission to discuss?

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

21 CHAIRPERSON GARZA: Court reporter, do
22 you have that?

1 Fortunately, Andrew had that covered,
2 and so for the audience, there will be a transcript
3 of this hearing or meeting, as there will be every
4 meeting, that will be publicly available, and
5 depending on whether we can do it or not, we'll
6 publish that on the web site.

7 Is that right?

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

14 CHAIRPERSON GARZA: Okay. Any other
15 further business?

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

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

21 CHAIRPERSON GARZA: May I ask is there
22 anyone in the audience who would care to ask a

1 question or say something?

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

3 MR. HEIMERT: Sure.

4 MR. KEMPF: I will answer the question
5 without the question.

6 CHAIRPERSON GARZA: The answer is?

7 MR. HEIMERT: It looks like there are
8 three questions. The first is from Burt Fore.
9 Would you care to ask your question?

10 MR. FORE: Thank you. My question is
11 simply will the web side include an ongoing
12 copulation of law review and newspaper and other
13 articles that relate to the work of the Commission?

14 CHAIRPERSON GARZA: Do you mean, Burt,
15 like your article?

16 MR. FORE: Or Jared Seaburg's or ongoing
17 coverage, I think is what I'm looking after. I can
18 read my own article. I'm more interested in seeing
19 others.

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

1 MR. KEMPF: I would welcome that. I
2 have already read yours and Ty Ewings, and those
3 are the only two that have come to my attention so
4 far. The more of those I can read, the happier I
5 am.

6 MS. VALENTINE: But you don't want us to
7 publish every article ever written on Section 1?

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

10 MS. VALENTINE: Okay.

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

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

18 Okay.

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

21 CHAIRPERSON GARZA: Okay.

22 MR. HEIMERT: I think this is Charlie

1 Cray that has a question.

2 MR. CRAY: Yes.

3 CHAIRPERSON GARZA: You're with an
4 organization?

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

12 MR. KEMPF: On what?

13 MR. CRAY: Giantism.

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

22 MR. SHENEFIELD: Well, it would be

1 helpful so we're complete if you have groups you
2 think should be on the list, if you could give
3 Andrew a list of those groups so we can be sure to
4 have them.

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

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

14 Oh. Please go ahead.

15 MR. DELAMAJO: Steven Delamajo,
16 Association for Competitive Technology. I was just
17 anxious to learn the criteria that will be use or
18 the process for figuring out which of the suggested
19 issues will make the priority list. You're bound
20 to hear more issues than you can study even over
21 three years. How will you determine which ones
22 will be addressed?

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

4 MR. KEMPF: Arbitrarily by vote.

5 CHAIRPERSON GARZA: Yes. But I do think
6 that, you know, one of the things that I think that
7 the Commission will have to discuss in future
8 meetings is that question, what are we perceiving
9 as being the goals of our commission, what do we
10 want to see come out at the end, and what will be
11 the benchmarks; and, frankly, that is part of the
12 process that I had hope the staff would help us
13 with and deliberate on in the next months coming
14 forward, because we do need some bases by which to
15 decide what of potentially hundreds of issues is
16 useful for us to focus on. I know in talking
17 individually to a lot of the Commissioners, there
18 seems to be a consensus that if we try to tackle
19 200 issues, we would not be very effective in what
20 we are trying to do. And so we have to find a way,
21 I think, to narrow the issues and to get a
22 framework that is going to make our work useful.

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

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

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

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

13 MR. YAROWSKY: I agree with John. I
14 don't know if it's right or wrong. I think that is
15 just part of the normal discourse of any collective
16 group that has different individuals with different
17 backgrounds. One has to believe we all come here
18 in good faith with different backgrounds and
19 hopefully clear minds and they have to reach a
20 consensus about what that is going to be. That is
21 what happens in this room every day. We just
22 happened to be in this room, and I hope we can draw

1 from that, but that is probably the hardest
2 decision we have to make.

3 MR. KEMPF: And when cert is denied,
4 sometimes the dissenting justice will write
5 something that says, Hey, this is something I would
6 have thought about, but you never know.

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

19 CHAIRPERSON GARZA: That's a good point.
20 I mean, to some extent, recognizing that there is a
21 consensus around a policy has some merit to it,
22 because after all, with economic regulations, that

1 is what antitrust law is. It needs to be largely
2 self-enforcing and there needs to be a consensus
3 that the policy that we are pursuing is the right
4 one. So part of--I think part of it is if we
5 conclude on certain issues that this is the right
6 thing to do, I think that can be potentially a
7 good, and it can be a good in terms of
8 communicating with other enforcement jurisdictions,
9 outside this country, for example, why we think the
10 way we're approaching it is actually a good thing.

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

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

1 MR. KEMPF: The answer is yes.

2 MR. SHENEFIELD: Even though it is going
3 to have no effect.

4 MR. KEMPF: Well, the answer is yes.

5 MR. SHENEFIELD: Or should we go on to
6 something where we have a chance to make a
7 difference.

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

10 CHAIRPERSON GARZA: But that is a valid
11 point, John, and I think that one of the things
12 that we have done is looked at things like the
13 bankruptcy commission and other commissions, and I
14 think we can learn from that. There are some
15 things we can get really bogged down about, and the
16 question is whether it is worth it.

17 MR. SHENEFIELD: I think a subject that
18 has always amazed me is dual Federal enforcement of
19 the antitrust laws. I mean no disrespect.

20 CHAIRPERSON GARZA: That was to Debbie.

21 MR. SHENEFIELD: That was to the person
22 I hope--

1 MR. CANNON: And she's on crutches,
2 John.

3 MR. SHENEFIELD: But the question is
4 there any public policy justification for it that
5 makes sense, but I think everybody understands that
6 it is very unlikely ever to change, and so why
7 bother.

8 MR. KEMPF: Well, I think, you know, we
9 are now evolving into what I said earlier I hope we
10 would evolve into, which is a thoughtful discussion
11 of issues. On that one, I would be interested
12 to--there is some benefit, for example, for people
13 who will fight to the death to preserve duality to
14 have them testify and say why, and that may inform
15 us to say--suppose we were unanimous that there
16 should not be dual jurisdiction. That might be
17 helpful to know even though it might not lead to
18 legislative reform. When I say even though, I mean
19 it's a very small chance of that. But I don't
20 think that makes it a fruitless exercise to put a
21 little sunshine on whether it makes sense or not.

22 CHAIRPERSON GARZA: Any more comment?

1 Any other questions from the audience?

2 Yes. Do you mind saying who you are?

3 MR. BURKE: Yeah. Jared C Burke with
4 the Daily Deal. I was wondering if the meetings
5 that the Commission is going to hold with agency
6 officials and interest groups, whether those will
7 be done in public, and if not, will transcripts of
8 those interviews be made and disclosed?

9 CHAIRPERSON GARZA: We are going to
10 proceed in the way that we are legally required to,
11 and our general counsel has been hired for one
12 particular reason, among others, to guide us in that.
13 Certainly, all meetings, all full meetings, of the
14 Commission are open to the public and will be
15 transcribed. Hearings will be open to the public
16 and will be transcribed. I believe under the FOIA
17 rules, we'll get more guidance on that, that these
18 individuals--that we have the ability to have
19 smaller subcommittees meet with stakeholders in a
20 non-public way.

21 We are basically going to develop a
22 policy, and that is one of the reasons why we need

1 to slow down a bit, because we do need to have an
2 understanding of the policy and procedures that we
3 are going to follow in that regard so we know and
4 you know.

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

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

12 MR. KEMPF: Let me go to what may be
13 driving your question, and that is, you know, back
14 room deals-type things, undue influence or things
15 like that. The composition of this committee is
16 very diverse. We have six people who were
17 appointed by Democrats, six who were appointed by
18 Republicans. They came from three different
19 selectors on each side, and I think the composition
20 ensures that there is going to be a healthy and
21 robust discussion of virtually every issue that
22 come before us. So I am not worried that John

1 Shenefield is going to sneak stuff by me. I'm not.

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

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

14 MR. CRAY: Charlie Cray with the Center
15 for Corporate Policy again. Is there any--many
16 this is a question that you don't have the answer
17 right now, but is there an intent avoid conflicts
18 of interest for people who in their prior practice
19 or otherwise represent clients who may have pending
20 matters related to issues being discussed would
21 recuse themselves from those subgroups or from
22 discussing those kinds of matters, or can we expect

1 full disclosure any time that issue might arise?

2 CHAIRPERSON GARZA: I think it is
3 important to understand that this commission has the
4 power to do nothing, which some would say is exactly
5 what we have been doing, but we'll put that aside.
6 We don't make decisions, and so I think you need to
7 keep that in mind in terms of your question about
8 recusals and everything else. We don't determine
9 anyone's rights. We don't determine results of
10 cases. We basically evaluate and make a
11 Commission--Full Commission report. So I just want
12 to be clear about that as you think about your
13 question.

14 MR. KEMPF: I can't speak for others,
15 but I would hope, A, to participate in anything I
16 have an interest in, and, B, if I have a conflict,
17 to disclose it. Let me address one of my fellow
18 commissioners. To my left is John Warden. He has
19 spent much of the last few years acting as counsel
20 for Microsoft. I think we would be seriously
21 remiss if we didn't solicit his views on all the
22 important issues that that set of proceedings has

1 arisen. All of us know that he was counsel for
2 Microsoft, and we can bear that in mind in any of
3 his comments, but I want his comments.

4 MS. VALENTINE: I believe, also, that as
5 members of a Federal Advisory Commission, we will
6 be subject to Government conflict of interest laws.
7 Most of us are lawyers and have legal standards
8 that apply to us. And, finally, I think that what
9 you tend to find in commission bodies as opposed
10 individual decision-making cases is that we will be
11 thinking much more about general rules and policies
12 that do not benefit any particular client or in
13 most likelihood even any particular industry.
14 Antitrust is somewhat unique in that regard.

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

22 MS. MAJORES: May I just get a point of

1 clarification?

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

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

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

12 MS. MAJORES: Okay.

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

15 No?

16 Well, any other business by the
17 Commissioners?

18 MR. KEMPF: Has anybody heard anything
19 about the Omar trade to the Cubs?

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

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

2 adjourned.]

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