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A Suggested Rule for Electronic Discovery in Illinois Administrative Proceedings

Thomas R. Mulroy¹
Kristopher Stark

I. INTRODUCTION

In recent years, the importance of discovering electronic data has grown in commercial litigation and in administrative proceedings.² This is true because the volume of electronic data vastly exceeds that of paper and electronic data seems to be rarely destroyed once it is created.³ Thanks to computers and the advent of the “paperless age,” 93% of all corporate documents are created electronically, and in the year 2000, employees exchanged 2.8 billion emails *every day*.⁴ While America’s reliance on computers and their almost unlimited storage capacity (“rent free”) has continually increased, so has the amount of potentially discoverable information in litigation.⁵ As the scope, volume and cost of discovery dramatically increases, businesses can spend millions of dollars producing millions of pages in a commercial disputes in court rooms and before administrative agencies.

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2. John H. Jessen, *Special Issues Involving Electronic Discovery*, 9 KAN. J.L. & PUB. POL’Y 425, 440 (2000). See also Mark D. Robins, *Evidence at the Electronic Frontier: Introducing Email at Trial in Commercial Litigation*, 29 RUTGERS COMPUTER & TECH. L.J. 219 (2003) (noting that “‘e-mail’ has become the very fabric of commercial litigation.”); Thomas R. Mulroy, *Discoverability of Computerized Trial Preparations – and Ways for Attorneys to Protect Themselves*, Trial Diplomacy Journal, Vol. 19/Number 3 May/June 1996.

3. MICHELE C.S. LANGE & KRISTIN M. NIMSINGER, ELECTRONIC EVIDENCE AND DISCOVERY: WHAT EVERY LAWYER SHOULD KNOW 6 (2004). Electronic data usually remains on a hard-drive even after it has been deleted. Such data can easily be recovered and accessed by computer forensics experts. *Id.*

4. Mark Ballard, *Digital Headache: E-Discovery Costs Soar into the Millions, and Litigants Seek Guidance*, National Law Journal, Feb. 10, 2003. “While the advent of the digital age has made businesses more efficient and saved billions of dollars in manpower hours, for many companies involved in litigation it has become a huge and incredibly costly-legal headache.” *Id.*

5. See Stephen D. Williger & Robin M. Wilson, *Negotiating the Minefields of Electronic Discovery*, 10 RICH. J.L. & TECH. 52 (2004). “As the use of computers and data processing systems has increased, the scope of information potentially subject to discovery has skyrocketed. . . Given this vast amount of information, it can be fairly assumed that nearly every legal entity subject to the jurisdiction of the state and federal courts generates and maintains at least some of its information in an electronic form”. *Id.*

Administrative agencies are important forums for commercial litigation. Among other things, they regulate avenues of commerce, are involved in business and community development, enforce environmental protections, oversee workers' benefits, and regulate utilities. In Illinois, these agencies include the Illinois Department of Commerce and Economic Opportunity, the Illinois Environmental Protection Agency, the Illinois Workers Compensation Commission, and the Illinois Commerce Commission.⁶

Litigation before these agencies increasingly involves electronic document discovery and production. This article suggests a rule for administrative agencies which would govern electronic discovery in order to reduce costs to the litigants, guide the hearing officers, avoid delay in the proceedings, and ensure consistency. The Illinois Commerce Commission ("Commission"), like other administrative agencies, deals in large volumes of discovery, both electronic and document. Because of that and because of the complex issues presented to the Commission, this article uses the Commission as an example of how a rule regulating electronic discovery will further the administration of justice in administrative litigation.

Without clear standards, the electronic discovery process can be done imprecisely and broadly and can cost litigants thousands of hours and dollars but can produce immaterial and irrelevant documents which do not advance the case. Without guidelines, litigants are encouraged to argue over what is "searchable," what is discoverable, the scope of discovery, and who must pay for the search and production. This uncertainty affects the litigants' discovery strategy and can delay the proceedings. For instance, "*any and all documents relating to . . .*," a standard discovery request, will produce thousands of repetitive emails, drafts, duplicates, and totally irrelevant material (some of it personal) because the "search words" identify documents with the same words but with irrelevant and immaterial meanings. Administrative agencies can clarify the scope and breadth of electronic discovery through their rulemaking procedures and give guidance to the hearing officer who can institute standards early in the case.

The rule suggested herein governing or regulating electronic discovery, encourages administrative agencies to consider the burden to the producing party, financial fairness, proper scope of discovery and judicial economy.

6. See generally, www.commerce.state.il.us; www.epa.state.il.us; www.iwcc.il.gov; www.icc.state.il.us

In most administrative agencies, the discovery process is less formal and the data requests are less precise than they are required to be in the courtroom. Unfortunately in the area of electronic discovery, the rules need to be stricter. The points raised and the rule suggested here are intended to apply to all Illinois administrative agencies. A Suggested Rule Governing the Production of Electronic Data in Administrative Proceedings (“Rule”) follows:

Electronic Discovery

- (A) *Electronic discovery is permissible where:*
 - (1) *the requesting party reasonably tailors the scope of the request to the issues in the case; and*
 - (2) *specifies the form in which the requested information is to be produced.*
- (B) *The produced material is to be disclosed in the electronic form in which it is stored in the ordinary course of business unless good cause is shown that it should be produced in another form.*
- (C) *If the scope or form of an electronic discovery request places an undue burden on respondent, cost shifting is permissible at the discretion of the hearing officer.*
- (D) *In determining whether there is an undue burden on respondent, the hearing officer shall consider:*
 - (1) *the importance of the information requested to the issue or issues in the matter before the agency; and*
 - (2) *the cost and efforts necessary to respond to the request.*
- (E) *An undue burden exists where the cost and efforts necessary to respond to the request outweigh the importance of the information sought.*

Administrative agencies might consider implementing this rule to regulate electronic discovery and to give hearing officers guidance. In enforcement of the Rule, the hearing officer should consider: (1) the potential scope of the data request⁷, (2) the importance of the information sought to the issues of the case⁸, and (3) the cost burden of retrieving and producing the electronic data as compared to the possible materiality of the information sought to the issues.⁹ The necessity of a rule regarding electronic discovery is recognized by administrative hearing officers, who have suggested that a standard for the scope of electronic discovery be addressed through rulemaking procedures.¹⁰ For example, Administrative Law Judge Claudia Sainsot has “urge[d]” the Commission to add to the rules of practice regarding discovery. By providing more guidance, “discovery disputes could be

7. See, e.g., FED. R. CIV. P. 26(c) (2004).

8. Zubulake v. UBS Warburg LLC, 217 F.R.D. 309, 324 (S.D.N.Y. 2003).

9. FED. R. CIV. P. 26(b)(2).

10. Claudia E. Sainsot, Administrative Law Judge, Report Pursuant to 83 Ill. Adm. Code 200.520 of the Commission’s Rules of Practice, Docket No. 01-0707, 17 (Aug. 25, 2004).

minimized, the parties could know, with greater clarity, what they can and cannot do, and cases would move through discovery more quickly, without the 'bottleneck' that appears to be occurring. . ."¹¹

As discussed below, the suggested rule addresses uncertainties which lead to electronic discovery disputes by considering the following factors: A. undue burden to producing party; B. scope of discovery; C. financial fairness. If the hearing officer takes these factors into account when exercising his/her discretion in managing electronic discovery, delay and expense may be alleviated when electronic discovery issues arise.

II. UNDUE BURDEN TO PRODUCING PARTY

Electronic discovery can impose huge burdens on the parties.¹² For instance, a litigant, who has no electronic records of his own, may be able to require his adversary to produce hundreds of thousands of records, resulting in tremendous expense to the respondent and possibly altering his/her litigation strategy. The discovery expense which can surpass \$100,000 could prevent the responding party from being able to afford an expert for example.¹³ In the case of a Commission proceeding, typically no discovery is required from the intervenors, so the regulated entity suffers all the cost of electronic discovery production. "Computers. . .enable individuals and small businesses to store immense quantities of data – thus exposing them to the risk of litigation costs substantially out of proportion to their ability to bear those costs."¹⁴

Realizing that this undue burden and great expense can arise from electronic discovery requests, Federal Courts recognize that:¹⁵

"[E]conomic considerations have to be pertinent if the court is to remain faithful to its responsibility to prevent undue burden and expense. . . If the likelihood of finding something was the only criterion, there is a risk that someone will have to spend hundreds of thousands of dollars to produce a single email. That is an expensive needle to justify searching a haystack."¹⁶

11. *Id.*

12. Steven C. Bennet, *Two Views from the Data Mountain*, 36 CREIGHTON L. REV. 607, 618 (2003).

13. *Id.*

14. Hon. Shira A. Scheindlin and Jeffrey Rabkin, *Electronic Discovery in Federal Civil Litigation: Is Rule 34 up to the Task?*, 41 B.C. L. REV. 327, 349 (2000).

15. Fed R. Civ. P. 26(c) (noting that a responding party may seek the courts protection from "annoyance, embarrassment, oppression, or undue burden or expense. .").

16. *McPeck v. Ashcroft*, 202 F.R.D. 31, 34 (D.D.C. 2001). "No corporate president in her right mind would fail to settle a lawsuit for \$100,000 if the restoration of backup tapes would cost \$300,000." *Id.* See also *In re Brand Name Prescription Drugs Antitrust Litig.*, 1995 WL 360526

III. SCOPE OF DISCOVERY

Due to the volume of data that can be sought in administrative proceedings, requests for electronic data can often take litigants on extended fishing expeditions knowing they have little chance of catching any "fish."¹⁷ Under Illinois law, discovery that is merely a "'fishing expedition,' . . . conducted with the hope of finding something relevant," is recognized as a form of abuse of the discovery process.¹⁸ "It is no justification that a fishing expedition might result in worthwhile information; the possibility of success must be sufficient to justify the inconvenience or expense to the opponent."¹⁹ One must fish in waters where the fish swim.

Without a rule limiting the production of immaterial and overly burdensome discovery, the potential for abuse is exacerbated.

The rule suggested above takes into account the proportionality test set out in Rule 26(b)(2) of the Federal Rules of Civil Procedure,²⁰ which limits discovery where "the burden or expense of the proposed discovery outweighs the likely benefit. . . ."²¹ This keeps the burden of retrieving and producing electronic data in proportion to the importance of the claim and the specificity of the request.

For example, *Fennel v. First Step Designs, Ltd.* rejected the discoverability of defendant's entire hard drive in order to obtain a specific

(N.D. Ill. June 15, 1995). While the court asked plaintiff to narrow the scope of their request, it found that the expense was a direct result of defendant's method for document retention and therefore ordered defendant to produce the responsive documents at its own expense.

17. "The following illustrates a reason for the likelihood of such fishing expeditions resulting from electronic discovery requests. "Many informal messages that were previously relayed by telephone or at the water cooler are now sent via e-mail. Additionally, computers have the ability to capture several copies (or drafts) of the same e-mail, thus multiplying the volume of documents. All of these e-mails must be scanned for both relevance and privilege. Also, unlike most paper-based discovery, archived e-mails typically lack a coherent filing system. Moreover, dated archival systems commonly store information on magnetic tapes which have become obsolete." *Byers v. Illinois State Police*, 2002 U.S. Dist. LEXIS 9861 at *10 (N.D. Ill. June 3, 2002).

18. *Snoddy v. Teepak, Inc.*, 198 Ill. App. 3d 966, 969 (1st Dist.1990).

19. *Yuretech v. Sole*, 259 Ill. App. 3d 311, 316 (4th Dist. 1994) (citation omitted).

20. "The frequency or extent of use of the discovery methods otherwise permitted under these rules and by and local rule shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs the likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues." *FED. R. CIV. P. 26(b)(2)*.

21. *Id.*

memorandum in a sexual harassment suit.²² Characterizing the request as a fishing expedition, the court denied the request due to the disproportionality of the burdens imposed compared to the likely benefit that would result from such a search and production.²³ The court stated that the requesting party must show a "particularized likelihood of discovering appropriate material."²⁴ Similarly, *Wright v. AmSouth Bancorp* denied discovery of backup tapes of all documents modified, accessed, or created by five employees over a period of two and one-half years as unduly burdensome.²⁵

The rule suggested here permits the hearing officers to establish guidelines for limits of electronic discovery and puts litigants on notice that the burden imposed by electronic discovery requests may be required to be shared by the parties. The requesting party will have to agree to some "filter" on search terms so that thousands of electronic pages of irrelevant and immaterial documents are not required to be reviewed and produced. The hearing officers must consider the issues in the case and the relevant time period when ruling on the parameters of electronic discovery. In addition, there should be a presumption that the documents be produced in electronic form. At the very least, this rule will send the message that electronic discovery is not more discoverable than hardcopy.²⁶ Ultimately, this rule will make the discovery process more efficient and will expedite the process.

IV. FINANCIAL FAIRNESS

The sheer volume of electronic data that may be responsive to a given document request can burden the responding party with tremendous costs.²⁷ For example, in *Linnen v. A.H. Robbins*, it was esti-

22. *Fennel v. First Step Designs, Ltd.*, 83 F.3d 526, 532 - 534 (1st Cir. 1996). See also *Murlas Living Trust v. Mobil Oil Corp.*, 1995 U.S. Dist. LEXIS 3489 at *2 (N.D.Ill. March 16, 1995) (applying Federal Rule of Civil Procedure 26(b)(2)).

23. *Fennel*, 83 F.3d at 532-534.

24. *Id.*

25. *Id.*

26. *LANGE & NIMSINGER*, *supra* note 3, at 21.

27. Martin H. Redish, *Electronic Discovery and the Litigation Matrix*, 51 Duke L.J. 561, 590 (2001). Where one defendant "had a policy of retaining all of its electronically store data reportedly incurred costs in excess of three million dollars responding to a discovery request." See also *Wiginton, et al. v. CB Richard Ellis*, 2004 LEXIS 15722 at *11 (N.D. Ill. Aug. 9, 2004). "As contrasted with traditional paper discovery, e-discovery has the potential to be vastly more expensive due to the sheer volume of electronic information that can easily and inexpensively stored on backup media." *Id.*

mated that the producing party spent \$1.75 million to restore backup tapes to retrieve email.²⁸

Normally, the party to a discovery request must bear the expenses resulting from the request.²⁹ Cost considerations, however, have long influenced courts' decisions regarding discovery. In 1977, the Second Circuit ruled that where a requesting party seeks electronic discovery that would impose a great financial burden to the producing party, the costs of that production may be shifted to the requesting party.³⁰

The primary factors to consider for financial fairness in electronic discovery are: (1) the form in which electronic discovery must be produced and (2) shifting or splitting the cost of a burdensome production request. Any kind of cost shifting which places the burden on both sides will almost guarantee more tailored, narrow requests.

a. *Form of Production*

The Illinois Supreme Court Rules require that electronic discovery be produced in paper form.³¹ This can result in the imposition of great financial expense on the producing party. The rule provides no alternative to the producing party even though disclosing documents in electronic form can be far more efficient and less expensive than printing the electronic documents and then producing them.³²

The rule applied in administrative proceedings should be that documents should be produced in the way they are kept in the respondent's normal course of business unless respondent can show good

28. *Linnen v. A.H. Robbins Co.*, 1999 WL 462015 at *12 (Mass. Super. 1999) (wherein the court granted plaintiffs' motion to compel the production of electronic mail messages retained by defendant).

29. *Oppenheimer Funds, Inc. v. Sanders*, 437 U.S. 340, 358 (1978).

30. *Sanders v. Levy*, 558 F.2d 636, 649 – 650 (2nd Cir. 1977) *rev'd on other grounds sub nom* *Oppenheimer Funds, Inc. v. Sanders*, 437 U.S. 340 (1978) (wherein both courts stated that cost shifting was legitimate pursuant to Rule 26(c) of the Federal Rules of Civil Procedure). *See also* *Bills v. Kennecott Corp.*, 108 F.R.D. 459 (D.C. Utah 1985) (wherein the court denied an employer's request to shift the costs imposed by a document request that required the printing out of electronic data. The court's denial was based on the fact that (1) the amount of money involved was not excessive or inordinate, (2) the relative expense and burden in obtaining the data would have been substantially greater to the employees as compared with the employer, (3) the amount of money required to obtain the data as set forth by the employer would have been a substantial burden on the employees, and (4) the employer was benefited in its case to some degree by producing the data in question).

31. ILL. SUP. CT. R. 214 (2004).

32. *See Zubulake*, 217 F.R.D. at 318 (S.D.N.Y. 2003). "Many courts have automatically assumed that an undue burden or expense may arise simply because electronic evidence may be involved. This makes no sense. Electronic evidence is frequently cheaper and easier to produce than paper evidence because it can be searched automatically, key words can be run for privilege checks, and the production can be made in electronic form obviating the need for mass photocopying." *Id.*

cause that they should be produced in another format.³³ This would result in paper files being produced in hard copy form and electronic data being provided in disk or CD-Rom or in some other comparable electronic storage medium. Such production would reduce the responding party's costs, would speed production, and would reduce storage concerns often associated with hard copy production. The rule is a way to share costs of discovery between the parties because it will burden the requesting party with the obligation of printing out the documents he/she decides to use in the litigation. It will cause the litigant to think carefully about what is relevant and admissible, before he/she issues a data request for electronic discovery.

Courts have noted "documents in digital format can be copied quickly, less expensively, and with better quality."³⁴ If there is a significant number of documents, and their content must be examined in order to conduct the case competently, the cost of doing whatever is going to be done with these documents will be cheaper in digital format.³⁵ "In some cases, paper, rather than electronic production may still be the preferable method of discovery."³⁶

The production of electronic discovery can substantially impact both the producer of the materials as well as the recipient of the production, therefore, the parties should agree on the form (i.e., disk, CD, specific software, etc.) in which electronic discovery will be produced. If they cannot agree, the issues should be addressed at a scheduling conference early in the case. In the "electronic age," initial scheduling conferences "should include a discussion on whether each side possesses information in electronic form, whether they intend to produce such material, whether each other's software is compatible, whether there exists any privilege issues requiring redaction, and how to allocate costs involved with each of the foregoing."³⁷

For instance, the institution of early scheduling conferences in Illinois Commerce Commission proceedings is in accordance with the Commission's position that discovery issues should be worked out between the parties.³⁸ The hearing examiner may "develop docket spe-

33. ILL. SUP. CT. R. 214.

34. *In re Bristol-Meyers Squibb Sec. Litig.*, 205 F.R.D. 437, 442 (D.N.J. 2002) (citing Effective Use of Courtroom Technology: A Judge's Guide to Pretrial and Trial 67 (Federal Jud. Ctr. & National Inst. for Trial Advocacy eds., 2001)). The parties, paying by the page, agreed on photocopying 3,0985,994 pages for a cost of \$439,21. *Id.*

35. *Id.*

36. *Id.* at 444.

37. *Id.*

38. "Every motion to compel formal discovery. . . shall incorporate a statement showing that consultation and reasonable attempts to resolve differences have failed." ILL. ADMIN. CODE TIT.

cific discovery schedules and procedures to facilitate the prompt and efficient resolution of the proceeding.”³⁹ A prompt and efficient resolution of an administrative proceeding involving electronic discovery will be enhanced where the parties are required to address the proper form of production at the initiation of the proceeding.

b. *Cost Shifting*

All jurisdictions have adopted some form of cost-shifting test to handle electronic discovery requests.⁴⁰ Cost shifting tests resolve the issue of whether the responding party should be relieved of all or some of the financial burden when faced with arduous discovery requests.⁴¹ While some courts have found that producing electronic data should merely be considered a cost of doing business,⁴² others more realistically note that companies have no choice but to make great use of computers in document storage and thus greatly increase the amount of material stored and so increasing the cost of production in litigation.⁴³ “Today it surely defies reality to suggest that any viable

83 § 200. 350 (2004). *See also* ILL. ADMIN. CODE TIT. 83 § 200. 335(b)(1) (2004) (noting that parties are encouraged to resolve issues via pre-hearing discovery).

39. ILL. ADMIN. CODE TIT. 83 § 200. 370(a) (2004). *See also* ILL. ADMIN. CODE TIT. 83 § 200. 335(b)(1) (2004). “The Chairman or hearing examiner may, at any time, on his own motion or at the request of a party, issue such rulings denying, limiting, conditioning or regulating discovery as justice so requires, and may supervise all or part of any discovery procedure. . .discovery order should be calculated to lessen the time and expense required to reach an informed resolution of the issues.” *Id.*

40. *See, e.g., Byers*, 2002 U.S. Dist. LEXIS 9861, at *11 (noting that where the burden outweighs the benefit of complying with a request, all or part of the cost can be shifted to the requesting party); *See, e.g., ILL. SUP. CT. R. 201(b)* (2004) (permitting shifting of costs of information retrieval); *See, also* CA. CIV. PROC. CODE § 2031(g)(1) (2003); MISS. S. CT. R. 26(b)(5) (2003); *See, e.g., TEX R. CIV. P. 196.4* (2003) (noting that if the responding party can retrieve such information through reasonable efforts, then the court can require the requesting party to pay reasonable expense of “extraordinary steps required to retrieve and produce the information.”)

41. “Given the minimal threshold requirements of Rule 26(b)(1) for the discoverability of information. . .and the potentially enormous task of searching for all relevant and unprivileged electronic records, courts have attempted to fashion reasonable limits that will serve the legitimate needs of the requesting party of the information, without unfair burden or expense to the producing party.” *Thompson v. United States Dept. of Housing and Urban Devel.*, 219 F.R.D. 93, 97 (Md. Dist. Ct. 2003).

42. *McPeck*, 202 F.R.D. at 33 (citing *In re Brand Name Prescription Drugs*, 1995 WL at *3). *See also Linnen*, 1999 WL 462015, at *6. “To permit a corporation. . .to reap the benefits of such technology and simultaneously use that technology as a shield in litigation would lead to incongruous and unfair results.” *Id.*

43. *McPeck*, 202 F.R.D. at 33. “It is impossible to walk ten feet into the office of a private business or government agency without seeing a network computer which is on a server, which, in turn, is being backed up on tape (or some other media) on a daily, weekly, or monthly basis. What alternative is there? Quill pens?” *Id.* *See also* Redish, *supra* note 26, at 581-582. Such cases “improperly treat a commercial defendant’s choice to employ a computer based record-keeping

commercial enterprise could operate successfully in the modern business world without relying heavily on electronically based methods of information storage and communication.”⁴⁴

In *McPeck v. Ashcroft*,⁴⁵ the *cost based* approach was discussed and the requesting party was responsible for the cost of production. This reasoning assumes that the requesting party would limit itself to requesting only what it needs.⁴⁶

The second cost-shifting test is the *marginal utility* test. Under this test, “[t]he more likely it is that the search will result in finding relevant information; the fairer it is that the producing party search at its own expense. The less likely it is that relevant information will be uncovered, the less fair it would be to charge the producing party for the search.”⁴⁷

The *marginal utility* test balances the goal of full disclosure with the exponential burdens that can be placed on a responding party.⁴⁸ The cornerstone of this test is that the producing party conducts a test-run before turning over all responsive documents.⁴⁹ During the test run, the initial discovery request is substantially narrowed.⁵⁰ “[T]he actual results of a test run will be indicative of how likely it is that critical information will be discovered.”⁵¹ The producing party to document

system as a voluntary act. . . . Because the decisions largely premise the conclusion that a party must bear the costs of responding to its opponent’s discovery requests on the ground that this cost is a natural consequence of the party’s voluntary commercial choices, and because this assumption is without doubt, factually inaccurate, the conclusion logically should be deemed suspect.” *Id.*

44. Redish, *supra* note 27, at 581.

45. *McPeck*, 202 F.R.D at 33 – 34.

46. *Id.*

47. *Id.* at 35.

48. The marginal utility analysis determines “which party was required to pay the cost of expansive discovery of electronic records. Under this approach, the court must assess the likelihood that the source to be searched will produce information that is relevant to a claim or defense.” *Thompson*, 219 F.R.D. at 97-98.

49. *Wiginton*, 2004 U.S. Dist. LEXIS 15722, at *16. A test run was conducted in a sexual harassment suit where employees sought discovery of their employer’s backup tapes. An eight term search list was resulted in 8,660 hits. “Whether many of the resulting documents are actually responsive is subject to debate by the parties.” *Id.* These allegedly responsive documents ranged from “graphic pornographic images, sexual correspondence and jokes, and the [defendant’s] policies and procedures regarding the circulation of inappropriate email and the visitation of inappropriate websites.” *Id.* at *16 – 17. Based on this search, the parties then argued the relevancy of these documents, focusing on whether they were being spread throughout the work place and if this supported the theory of a hostile work environment. *Id.*

50. *McPeck*, 202 F.R.D at 35.

51. *Wiginton*, 2004 LEXIS 15722, at *16. Of the 8,660 results from the narrowed search, Plaintiff’s identified “567 as being responsive which is a 6.5% responsive rate.” *Id.* “Plaintiff’s expert estimated that the total costs of the production would range from \$183,500 to \$249,900. . . . considering the initial results of the 92 item search list.” *Id.* at *24.

the time and expense expended on retrieving results responsive to the narrowed search.⁵² Throughout the search, the producing party will document the time and expense expended.⁵³ Upon completion, the producing party files a sworn statement as to its expenses and the results.⁵⁴ Based on the results, the parties argue whether continuing the search is justified.⁵⁵

The third cost-shifting test deals with balancing multiple factors. The test can take two forms. The first, an *eight-factor balancing test* was originally developed in *Rowe Entertainment, Inc. v. The William Morris Agency*.⁵⁶ This test takes the following factors into account: (1) the likelihood of discovering critical information; (2) the availability of such information from other sources; (3) the purposes for which the responding party maintains the requested data; (4) the relative benefits to the parties of obtaining the information; (5) the relative benefit to both parties of the discovery; (6) the total costs associated with production; (6) the relative ability of each party to control costs and its incentive to do so; (7) the relative ability of each party to control costs and its incentive to do so; and (8) the resources available to each party.⁵⁷

The second of the balancing tests developed out of the fear that “cost shifting may effectively end discovery, especially when private parties are engaged in litigation.” In *Zubulake v. UBS Warburg*, the *Rowe* test was amended.⁵⁸ The *Zubulake* test examines: (1) the extent to which the request is specifically tailored to discover relevant information; (2) the availability of such information from other sources; (3) the total costs of production, compared to the amount in controversy; (4) the total costs of production, compared to the resources available to each party; (5) the relative ability of each party to control costs and its incentive to do so; (6) the importance of the issues at stake in the litigation; and (7) the relative benefits of the parties obtaining the in-

52. *McPeck*, 202 F.R.D at 35.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Rowe Entm't, Inc. v. William Morris Agency, Inc.* 205 F.R.D. 421, 429 (S.D.N.Y. 2002) (Here, responding parties successfully challenged the court to shift the costs of production where the expenses resulting from the production of responsive email would far outweigh the benefits of such discovery.)

57. *Id.* at 429.

58. *Zubulake v. UBS Warburg LLC*, 217 F.R.D. 309, 324 (S.D.N.Y. 2003) (In a gender discrimination, plaintiff sought a single email to be produced by defendant from defendant's archived media. Claiming undue burden and expense, defendant asked the court to shift the cost of such a discovery request to the plaintiff. The court ruled that cost shifting should only be used where data was inaccessible rather than accessible).

formation.⁵⁹ The *Zubulake* test gives different weight to each factor, allows cost shifting for only inaccessible material and places the burden of proof on the responding party.⁶⁰

The hearing officer in all administrative agencies should adopt a cost shifting rule in order to fairly rest the sometimes staggering costs of electronic discovery.⁶¹

V. ELECTRONIC DATA IS NOT MORE DISCOVERABLE THAN WRITTEN MATERIAL AND SHOULD BE PRODUCED IN ELECTRONIC FORM

The Illinois Supreme Court Rules do not distinguish written and electronic material, so theoretically computer stored information is discoverable under the same rules that pertain to written material.⁶² However, hearing officers at administrative agencies must emphasize that electronic discovery is no more “discoverable” or subject to broader scope than is document discovery and that electronic data may be produced in electronic form.

In Illinois, electronic data is discoverable in all judicial and quasi judicial forums.⁶³ Pursuant to Illinois Supreme Court Rule 201, “[t]he word documents as used in these rules, includes. . .all retrievable information in computer storage.”⁶⁴ The Illinois Supreme Court Rules provide definitions and examples to guide litigants conducting discovery.⁶⁵ Supreme Court Rule 214 stipulates that electronic data must be

59. *Id.*

60. “For data that is kept in an accessible format, the usual rules of discovery apply: the responding party should pay the costs of producing responsive data. A court should consider cost-shifting only when electronic data is relatively inaccessible, such as in backup tapes.” *Id.*

61. Scheindlin, *supra* note 14, at 349 (noting that the staggering costs of electronic discovery can become a decisive factor in developing one’s litigation strategy).

62. ILL. SUP. CT. R. 201 (2004).

63. *Id.* “Information is obtainable. . .through. . .discovery of documents.” *Id.* at (a). “The word ‘documents,’ as used in these rules includes. . .all retrievable information in computer storage.” *Id.* at (b)(1). See also Committee Comments, Paragraph (b), ILL. SUP. CT. R. 201 (2004). “The definition of ‘documents’ in subparagraph (b)(1) has been expanded to include ‘all retrievable information in computer storage.’ This amendment recognizes the increasing reliability in computer technology and thus obligates a party to produce on paper those relevant materials which have been stored electronically.” *Id.*

See, e.g., *Anti-Monopoly, Inc. v. Hasbro, Inc.*, 1995 WL 649934 (S.D.N.Y. Nov. 3, 1995) (stating that “[t]oday it is black letter law that computerized data is discoverable if relevant.”). See also *Bryant v. Aventis Pharm., Inc.*, 2002 WL 31427434 (S.D. Ind. Oct. 21, 2002); *MHC Inv. Comp. v. Racom Corp.*, 290 F.R.D. 431 (S.D. Iowa 2002); *Collette v. St. Luke’s Roosevelt Hosp.*, 2002 WL 31159103 (S.D.N.Y. Sept. 26, 2002) (wherein the aforementioned courts confirmed the general discoverability of email).

64. ILL. SUP. CT. R. 201(b)(1) (2004).

65. See, e.g., Committee Comments, Ill. Sup. Ct. R. 213 (2004).

produced in printed form.⁶⁶ Therefore, the Supreme Court Rules require the producing party to transform electronic data into paper.⁶⁷ The Committee Comments note that requiring electronic data to be produced in printed form is “intended to prevent parties producing information from computer storage on storage disks or in any other manner which tends to frustrate the party requesting discovery from being able to access the information produced.”⁶⁸

This can be unbelievably burdensome because it is not unusual to have stored electronic material which, if printed, would consist of one million partial or full pages. A rule governing electronic discovery in administrative proceedings should presume that the material is to be produced in electronic form. The form used for production should be the form used in the ordinary course of respondent’s business.

VI. AN EXAMPLE: THE ILLINOIS COMMERCE COMMISSION

An example of electronic discovery in administrative proceedings can be the discovery process used by the Illinois Commerce Commission. The Commission deals with complex matters involving thousands of documents and detailed discovery requests and does not have a specific rule on electronic discovery. Like many administrative agencies, it relies on the litigants to manage their own discovery issues. The Administrative Law Judge is available to settle disputes but the intent is that parties resolve discovery issues without resort to motion practice. Many times electronic discovery disputes cause the hearing officer to become deeply involved in discovery matters and the proceedings can be slowed by the resulting motion practice. It presents a good case study for the use of an electronic discovery rule.

The Commission is an important administrative agency which supervises all public utilities, including telecommunications, electric and natural gas providers.⁶⁹ The Public Utilities Act created and governs the Commission.⁷⁰

66. “A party served with the written request shall (1) produce the requested documents as they are kept in the usual course of business or organized and labeled to correspond with the categories in the request, and all retrievable information in computer storage in printed form.” ILL. SUP. CT. R. 214 (2004).

67. *Id.*

68. Committee Comments, Paragraph (b), ILL. SUP. CT. R. 214 (2004).

69. “The Commerce Commission shall have general supervision of all public utilities, except as otherwise provided in this Act.” 220 ILL. COMP. STAT. 5/4-101 (2004). *See also* 220 ILL. COMP. STAT. 5/3-105 (2004) (defining “public utility”).

70. *People ex rel. Hartigan v. The Illinois Commerce Comm’n*, 148 Ill. 2d 348, 366 (Ill. 1992) (also noting the Illinois Administrative Procedure Act (IAPA) governs the Commission and that the Commission’s powers are limited to those granted by the legislature in the Public Utilities Act). *See also* Local 777, Duoc, Seafarers Int’l Union of North America v. Illinois Commerce

The Commission has the authority to supervise the entirety of utilities' operations, from the general oversight of business management to the services provided and the specified setting of rates.⁷¹

The Commission "performs investigative, prosecutorial and advocacy, as well as decision making functions."⁷² In order to determine whether a utility has complied with the Public Utilities Act, the Commission may "gather evidence, subpoena witnesses, depose witnesses, or require the production of documents."⁷³ As in many administrative agencies, how the investigative process is carried out can vary widely because each agency adopts its own rules of practice for formal hearings.⁷⁴ This discretion supports the generally accepted principal that agencies are "given wide latitude to adopt regulations or policies reasonably necessary to perform the agency's statutory duties."⁷⁵ This latitude includes the breadth of discovery.

Comm'n, 45 Ill. 2d 527, 535 (Ill. 1970). By granting such supervisory authority in the Commission, utilities were exempted from the Antitrust Act. The Illinois Supreme Court noted that granting the Commission the jurisdiction to supervise and regulate the activities of any public utility, "particularly with respect to rates charged and services provided, make an effective safeguard against the evils of monopoly at which antitrust laws are traditionally directed." Prior to the PUA's creation, "unrestrained competition. . . had often resulted in the financial failure of many utilities, the Act adopted a policy of regulated monopoly to assure that utilities would be able to earn a reasonable rate of return on their investment and this would be able to provide the required service." *Id.*

71. The Commission's supervision entails "inquir[y] into the management of the business thereof and shall keep itself informed as to the manner and method in which the business is conducted. It shall examine those public utilities and keep informed as to their general condition, their franchises, capitalization, rates and other charges, and the manner in which their plants, equipment and other property owned, leased, controlled or operated are managed, conducted and operated, not only with respect to the adequacy, security and accommodation afforded by their service but also with respect to their compliance with this Act and any other law, with the orders of the Commission and with the charter and franchise requirements." 220 ILL. COMP. STAT. 5/4-101 (2004). *See also Business and Professional People*, 136 Ill. 2d at 201 - 202. "In supervising the utilities, the Commission may examine the rates and other charges of the utilities and review the compliance of the utilities with the Act." *Id.*

72. *Business and Professional People*, 136 Ill. 2d at 202.

73. *Id.* "The staff, or those employees of the commission who engage in the investigatory, prosecutorial, or advocacy functions, remains separate from the commissioners, hearing examiners, and other members of the commission who render decisions." (citing Ill. Rev. Stat. 1987, ch. 111 2/3, par. 10-103).

74. 220 ILL. COMP. STAT. 5/10-101 (2004). "To the extent consistent with this section and the Illinois Administrative Procedure Act [5 ILCS 100/1-1 et seq.] the Commission may adopt reasonable and proper rules and regulations relative to the exercise of its powers and proper rules to govern its proceedings, and regulate the mode and manner of all investigations and hearings, and alter and amend the same." *Id.*

75. *Resource Tech. Corp. v. Commonwealth Edison Comp.* 343 Ill. App. 37, 44 (1st Dist. 2003) (citing *Chemed Corp. v. State of Illinois*, 186 Ill. App. 3d 402, 410 (4th Dist. 1989)). Here, the court deals with Commission's interpretation of its own rule. *Id.* *See also Chemed Corp.*, 186 Ill. App. 3d at 410 (citing *Acker v. Dept. of Revenue*, 116 Ill. App. 3d 1080, 1084 - 1085 (5th

a. *Discovery in Commission Proceedings*

The Commission adopted its Rules of Practice to perform its statutory duties.⁷⁶ The Rules permit but do not require litigants to adopt the “tools of discovery” found in the Illinois Rules of Civil Procedure and the Illinois Supreme Court Rules, and thus the adoption of Illinois rules in common proceedings is not absolute.⁷⁷ The Rules of Practice state that “any party *may* utilize written interrogatories, depositions, requests for discovery or inspection of documents or property and other discovery tools commonly utilized in civil actions in the circuit courts of the State of Illinois.”⁷⁸ The application of standard court discovery practices is left to the discretion of the parties and/or the Administrative Law Judge assigned to the case.

The Commission’s rules encourage litigants to resolve discovery issues themselves.⁷⁹ In document discovery, this expectation is often met. Electronic discovery can present more problems. Since electronic discovery is more technical and results in far more material being sought, problems arise with the voluntarily exchange of information. Disputes arise over questions of format, search terms and materiality. These issues can delay the proceedings and increase the cost of the litigation. The requesting party may, for example, refuse to agree to any kind of “filter” on his/her electronic data request so that a respondent must produce thousands of electronic documents with absolutely no relevance to the issues in the case. For instance, seeking the production of all electronic files relating to the relevant words “Project New York” can result in email and digital photographs relating to an employee’s New York vacation. The requesting party will not agree to a “filter” fearing that it will cause him/her to miss important documents. This places the burden on the respondent to review each electronically stored document for materiality and then to apply to the hearing officer to quash the production of those responses which are not material to the case. This review can involve millions of electronic documents and will necessarily delay the proceedings. It raises questions of how to delete (not produce) the non-

Dist. 1983). “The regulations which enable the agency to execute its duties enjoy a presumption of validity. *Id.*

76. See ILL. ADMIN. CODE TIT. 83 § 200. 10, et seq. (2004).

77. “Interrogatories, requests for inspection of documents and all other tools of discovery are governed by the Illinois Code of Civil Procedure and the Rules of the Supreme Court of Illinois.” ILL. ADMIN. CODE 83 § 200. 35.

78. *Id.* (emphasis added).

79. “Parties to proceedings before the Commission are encouraged to clarify and resolve issues where possible through the use of pre-hearing discovery.” ILL. ADMIN. CODE TIT. 83 § 200. 335(b)(1) (2004).

material information without destroying the integrity of the relevant electronic material “attached to” or “imbedded” in the non-material information.

It is the Commission’s Policy on Discovery that “[f]ormal discovery by means such as depositions and subpoenas is discouraged unless less formal procedures have proved to be unsuccessful.”⁸⁰ This leads to less formal discovery requests, phrased less particularly than a court may require and calling for the broadest search possible.

b. *The Hearing Officer’s Discretion in Discovery*

In adjudicating a matter before the Commission, the Administrative Law Judges (“ALJ”) are given broad discretion to manage discovery issues.⁸¹ The Chairman or hearing examiner may, *at any time*, on his own motion or at the request of a party, issue such rulings denying, limiting, conditioning, or regulating discovery.”⁸² This mirrors the Illinois Supreme Court Rules which confer such discretionary authority on trial court judges.⁸³ Also similar to trial court judges, an ALJ will not be reversed absent an abuse of discretion.⁸⁴

The broad discretion given to ALJs derives from the fact that administrative agencies are established by legislatures as experts in their respective industry to handle industry specific problems.⁸⁵ Nevertheless, electronic discovery issues are new and technical and do not have nearly the “history” as do issues relating to document discovery.

Due to the ALJ’s discretion to control discovery, the procedures and scope relating to the electronic discovery between parties will depend on which particular ALJ is presiding over the proceeding. A

80. ILL. ADMIN. CODE TIT. 83 § 200. 340 (2004).

81. *Commonwealth Edison Co. v. Illinois Commerce Comm’n*, 332 Ill. App. 3d 846, 849 – 850 (“When an interpretation of the Commission’s own rules is at issue, the Commission’s interpretation is held *prima facie* reasonable.” *Id.*

82. ILL. ADMIN. CODE TIT. 83 § 200. 335 (2004). (emphasis added).

83. ILL. SUP. CT. R. 201(c)(1) (2004).

84. “An administrative agency’s decision regarding the conduct of its hearing and the introduction of evidence is properly governed by an abuse of discretion standard and subject to reversal only if there is demonstrable prejudice to the party.” *Wilson v. Dept. of Prof’l Regulation*, 344 Ill. App. 3d 897, 907 (5th Dist. 2003).

85. “Administrative agencies have power themselves to initiate inquiry, or when their authority is invoked, to control the range of investigation in ascertaining what is to satisfy the requirements of the public interest in relation to the needs of vast regions. . . Thus. . . [administrative agencies] should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.” *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 143 (1940). *See also* *FCC v. Schreiber*, 381 U.S. 279, 290 (1965). “[A]dministrative agencies and administrators will be familiar with the industries they regulate and will be in a better position than the federal courts or Congress itself to design procedural rules adapted to the peculiarities of the industry and the tasks of the agency involved.” *Id.*

rule regulating electronic discovery would ensure consistency. There needs to be restraint on this kind of discovery due to its cost and volume.

c. Absence of Res Judicata

It may be helpful, but it is not determinative for the parties to rely on earlier ALJs' orders as a guideline for electronic discovery.⁸⁶ The Commission is a regulatory body, not a judicial body and "its orders are not *res judicata* in later proceedings before it."⁸⁷ In order to effectively carry out its regulatory function, the Commission "shall have the power to deal freely with each situation, regardless of how it may have dealt with a similar or even the same situation in a previous proceeding."⁸⁸ This is true in discovery issues as well as substantive ones and, therefore, a prior Commission order is not binding precedent.

VII. IMPACT: A RULE GOVERNING ELECTRONIC DISCOVERY
WOULD FACILITATE THE GOALS OF ADMINISTRATIVE
AGENCIES' RULES OF PRACTICE.

The Commission and other Illinois administrative agencies seek the sound goal to "obtain full disclosure of all relevant and material facts to a proceeding."⁸⁹ "It is the policy of the Commission not to permit requests for information. . . whose primary effect. . . will delay the proceeding in a manner which prejudices any party or Commission, or which will disrupt the proceeding."⁹⁰

In the absence of a rule governing electronic discovery, a request for the production of electronic data causes some uncertainties: what is the scope of discovery; who pays for the discovery; what is the proper form of such discovery (i.e., software), and more difficult, the production of millions of pages of documents which cannot be segregated because the parties cannot agree on a "filter" due to the fear that some "good" material will be kept from them. When a party is uncertain how to proceed, delay is the result.

86. *Illinois-American Water Co.*, 331 Ill. App. at 1036. "The Illinois Commerce Commission's orders have no *res judicata* effect in subsequent proceedings." *Id.*

87. *Mississippi River Fuel Corp., v. Illinois Commerce Comm'n*, 1 Ill. 2d 509, 515 (Ill. 1953).

88. *Id.* at 515. See also *Illinois-American Water*, 331 Ill. App. 3d at 1036 stating that "[t]he commission is not a judicial body, but a regulatory body, and as such it must have the authority to address each matter before it freely, even if the matter involves issues identical to those in a previous case."

89. ILL. ADMIN. CODE TIT. 83 § 200.340 (2004).

90. *Id.*

VIII. CONCLUSION

In light of the massive volume of electronic data that can be requested for production in administrative proceedings, Section A of our proposed rule seeks to place an affirmative duty on intervenors. Requiring intervenors to narrow the scope of such requests, where possible, can preclude agencies involvement in electronic discovery disputes in part or in whole while shielding respondent's from the fishing expeditions that can likely be undertaken. Where a requesting party has propounded a narrowly tailored discovery request, the preceding sections are implicated. Section B seeks to make a clear standard for the intended format for production. This avoids uncertainty amongst the parties while also precluding the duplicative production of data in paper and electronic format. Sections C, D, and E address the issue of compelling the production of data and/or shifting the costs of such production. The more important the data being sought, the more permissible that relevant information will be discovered; the more likely it is that respondent's should assume this burden. Sections D and E look to the costs involved in the production of the requested data. This requires the requesting party to consider the accessibility of the material and lengths respondents must go to for retrieval. Circumstances implicating expense in this third factor could consist of the disruption imposed on the respondent's business, the time for privilege review, the need for a computer forensics expert or software to retrieve the data.

In this day and age, it is essential that administrative agencies adopt a rule governing electronic discovery. Litigants before administrative agencies are afforded no direction regarding electronic discovery. They can neither look to precedent, the Illinois Supreme Court Rules nor the Illinois Rules of Civil Procedure for guidance. Discovery can be controlled completely by the discretion of the ALJ handling the proceeding. Such ad hoc discretion lessens the predictability of the nature of the proceeding, greatly affecting the manner in which a litigant will handle their case.⁹¹ The absence of a rule for electronic discovery defeats the procedural goal of just and expedient discovery process and inevitably leads to delay. By addressing these issues, administrative agencies will make electronic discovery a more predictable procedure in administrative proceedings.

91. Redish, *supra* note 27, at 566-567.