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UNITED STATES ATOMIC ENERGY COMMISSION

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IN THE MATTER OF:

CONSOLIDATED EDISON COMPANY OF  
NEW YORK, INC.

(Indian Point Station, Unit No. 2)



50-247

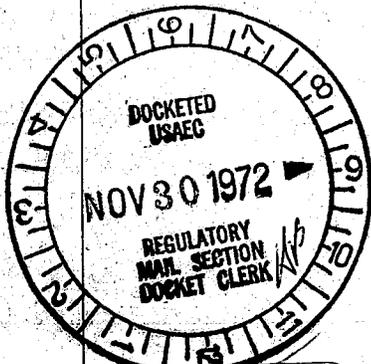
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Place - Washington, D. C.

Date - Wednesday, 22 November 1972

Pages. 6063 - 6207

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UNITED STATES OF AMERICA  
ATOMIC ENERGY COMMISSION

In the matter of:

CONSOLIDATED EDISON COMPANY OF  
NEW YORK, INC.

(Indian Point Station, Unit No. 2)

Docket No. 50-247

Room 115  
811 Vermont Avenue, N.W.  
Washington, D. C.

Wednesday, 22 November 1972

The above-entitled matter came on for further  
hearing, pursuant to notice, at 9:30 a.m.

BEFORE:

SAMUEL W. JENSCH, Esq., Chairman, Atomic Safety  
and Licensing Board.

DR. JOHN C. GEYER, Member.

MR. R. B. BRIGGS, Member.

APPEARANCES:

LEONARD M. TROSTEN and EDWARD L. COHEN, 1821  
Jefferson Place, N.W., Washington, D. C.  
20036; on behalf of the Applicant.

MYRON KARMAN, FRANK DAVIS, and EDWARD LYLE, Office  
of General Counsel, United States Atomic  
Energy Commission, Bethesda, Maryland; on  
behalf of the AEC Regulatory Staff.

BRUCE L. MARTIN, 112 State Street, Albany, New York;  
on behalf of the Atomic Energy Council of the  
State of New York.

## 1 APPEARANCES (Continued):

2 ANTHONY ROISMAN, 1910 N Street, N. W., Wash-  
3 ington, D. C.; on behalf of Intervenor,  
4 Citizens Committee for the Protection of the  
Environment, and on behalf of the Environmental  
Defense Fund.

5 ANGUS MACBETH, Finney Farm, Croton-on-Hudson,  
6 New York; on behalf of Intervenor, Hudson  
7 River Fishermen's Association.  
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P R O C E E D I N G S

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2 CHAIRMAN JENSCH: Please come to order.

3 This proceeding is a conference in the matter of  
4 Consolidated Edison Company of New York, Inc., Station Indian  
5 Point No. 2, Docket 50-247.

6 This conference is convened in accordance with an  
7 order for this conference issued on October 31, 1972, setting  
8 this time and place for the conference.

9 This order was given general public distribution,  
10 which included transmittal to the many persons who had requested  
11 that they be sent copies of orders in reference to hearings,  
12 and this list is shown in the certificate showing such trans-  
13 mittal filed by the public proceedings branch of the Atomic  
14 Energy Commission.

15 I see represented here on behalf of the Applicant,  
16 Messrs. Trosten and Cohen; on behalf of the Regulatory Staff,  
17 Karman.

18 MR. KARMAN: I would like to introduce Mr. Edward  
19 Lyle and Mr. Frank Davis, of the county -- General Counsel  
20 Office, Atomic Energy Commission.

21 CHAIRMAN JENSCH: Very well. Thank you.

22 On behalf of the Environmental Defense Fund, Mr.  
23 Roisman, and on behalf of the Hudson River Fishermen's  
24 Association, Mr. Macbeth.

25 I see no other appearances here.

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1 I might state that Dr. Geyer will be here. He  
2 evidently has been delayed by the traffic conditions prevailing  
3 this morning, with some falling snow.

4 We have received, here on the table, a proposed  
5 agenda for the prehearing conference. The Board would note the  
6 Board has been in receipt of quite a few communications from  
7 the parties in this proceeding reflecting their several meet-  
8 ings and endeavors to precisely define the areas of contention  
9 and controversy, as well as proposed suggested procedures.

10 The Board appreciates the effort of the parties to  
11 seek to narrow the areas of controversy into a system for the  
12 presentation of evidence.

13 With that introduction, I believe the Applicant  
14 will go first, or the Fishermen's Association, who suggested  
15 that we do have this conference. Either one or both may speak  
16 to what they propose for this proceeding.

17 I gather there is a finite line between the two.  
18 I think Mr. Trosten had it.

19 MR. TROSTEN: Mr. Chairman, I simply want to say  
20 we have prepared a partial proposed agenda today for the Board,  
21 which we have placed on your desk. We have covered on this  
22 agenda today those matters that we felt we were in a position  
23 to state at the present time.

24 I think the remainder of this needs to be filled  
25 out as the result of the discussions this morning.

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1 I would propose that we address ourselves first  
2 to the matter of the schedule for the hearing sessions on  
3 December 4th, as I have indicated on this agenda.

4 CHAIRMAN JENSCH: Very well.

5 Have the parties had an opportunity to review this  
6 proposal?

7 MR. MACBETH: Yes, Mr. Chairman.

8 I think the first item of business should be the  
9 question of whether or not the Intervenors are entitled to a  
10 more specified series of contentions from the Applicant.

11 I agree after that we have to turn to the schedul-  
12 ing. I think that whether or not such a further specification  
13 will be ordered by the Board is curable to the question of  
14 exactly how the schedule of cross-examination and direct  
15 examination should be worked out, so that I would urge the  
16 Board to take up that matter first.

17 There is a motion, letter and a motion, that I  
18 filed on behalf of the Hudson River Fishermen last week, and  
19 there is a reply, an answer from the Applicant, which was filed  
20 yesterday.

21 I think the issue is before the Board. I think  
22 that is the first issue that should be taken up.

23 MR. TROSTEN: I have no objection to taking up the  
24 motion and our answer.

25 I would like to point out, however, that in our

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1 judgment, the motion of the Intervenors is addressed to the  
2 question of their ability to cross-examine the Applicant -- or  
3 at least, that is the way it should be properly considered.

4 I do not consider that the Intervenor's motion is  
5 really properly addressed to the question of whether we are  
6 able to go forward with cross-examination of the Staff on  
7 December 4th. The Applicant is not contending, nor is the  
8 Staff contending, that the Staff is not in a position to be  
9 cross-examined or that the Applicant is not in a position to  
10 cross-examine the Staff. Quite the contrary.

11 It is our position that we are prepared to go  
12 forward with cross-examination of the Staff; and we -- I am,  
13 of course, prepared to argue the motion before the Board today,  
14 that Mr. Macbeth has put before the Board.

15 MR. MACBETH: I think the cross-examination of the  
16 Staff should follow a specification of the issues from the  
17 Applicant. It is clear that, obviously, the Intervenors will  
18 be listening to the cross-examination, and their cross-examin-  
19 ation of the Staff, their reaction to that cross-examination  
20 will rest, to a large extent, on what it is the Applicant is trying  
21 to prove in its direct case, and maybe trying to prove or con-  
22 trovert through its cross-examination of the Staff.

23 I really think that the place that we have to  
24 start is by having some kind of simple, direct outline from the  
25 Applicant of what its factual position is, what it is going to

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1 prove on its direct case, and the matters of controversy.  
2 I don't look at this simply as a technical require-  
3 ment. I don't want a long statement from the Applicant on  
4 transmission lines, for instance, something of that sort,  
5 which isn't in controversy, but on the other areas in contro-  
6 versy. I think a statement of that sort is necessary; that  
7 the Applicant file a list of -- I think it was on Monday that  
8 they filed a list of the testimony on which it relies, the  
9 documents on which it relies in this proceeding, and it is a  
10 very long list -- as I have pointed out in my earlier letter --  
11 which contains a number of contradictory statements.

12 There are issues in there that I am not really  
13 sure the Applicant is pressing in these matters of controversy.  
14 There really -- it is very difficult for me to make out what  
15 the outline of the Applicant's position is at this time.

16 Another obvious example is this matter of the  
17 conditions which are discussed in the outline of the  
18 Applicant's position on environmental matters, but no actual  
19 conditions seem to be proposed, as far as I could make out, and,  
20 yet, there is a great deal of evidence presented on the  
21 question of a research program of the next five years.

22 Now, if the Applicant is not proposing any condition  
23 to the license which has to do with research, I cannot see the  
24 relevancy of this research program. If the Applicant is asking  
25 for a 40-year license, full power, with no conditions for the

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1 protection of the environment, then it seems to me the presen-  
2 tation of evidence by the Applicant on a research program for  
3 the next five years, or twenty years, is simply irrelevant  
4 to the case the Applicant is making.

5 I would move to strike it if I was sure that that  
6 really was the Applicant's position. I think that I am  
7 entitled to some kind of outline of what it is that the  
8 Applicant is pressing here.

9 The Intervenors have provided that. I don't feel  
10 strongly that it is necessary in detail from the Staff, because  
11 we are much more in agreement with the Staff.

12 I am not aiming at some technical requirement so  
13 that I -- you know, this hearing should put unnecessary labor  
14 on the Applicant, but I think to have focused cross-examination,  
15 it is necessary to have that kind of outline in order to  
16 represent my client in the course of this proceeding. Without  
17 that kind of outline, I think we are going to be driven to  
18 lengthy and unnecessary cross-examination, which will waste  
19 the time of all the parties and the Board.

20 For those reasons, I would urge the Board to order  
21 that Edison produce such a factual outline, some kind of clear,  
22 concise statement of their position and the hearing not go for-  
23 ward until they do that.

24 I hope that Consolidated Edison could do it  
25 quickly. I don't see why they couldn't do it by next Monday.

1 This case has been going forward for two years. I would hope  
2 by this time it would be possible for the Applicant to produce  
3 a short, factual statement of outline of what their position  
4 is.

5 CHAIRMAN JENSCH: I take it they are seeking a  
6 license.

7 MR. MACBETH: Yes. I take it now they are seeking  
8 a license without any conditions for the protection of the  
9 environment, but in order to seek that license on environmental  
10 issues, they must discharge a burden of proof, and must be  
11 trying to prove some set of facts which they contend will  
12 entitle them to a license without any conditions for the pro-  
13 tection of the environment; and I would like to see an outline  
14 of what those -- what that basic factual case is.

15 The testimony that has been put in is voluminous  
16 from the Applicant, and a great deal of it is contradictory.  
17 I don't want to waste the Board's time and the Applicant's  
18 time in trying to discover just where it is the Applicant  
19 stands on some of these crucial issues.

20 CHAIRMAN JENSCH: I hope I don't misstate it, but  
21 I have had the impression from some of these items of corres-  
22 pondence that -- for instance, about the Staff's suggestion  
23 about cooling towers, that they -- the Applicant feels that  
24 maybe that should be examined a little bit; and I wonder if  
25 in the course of the hearing you persuaded them of your view

1 about cooling towers, maybe then they would be able to formu-  
2 late a position more specifically, but I inferred that they  
3 were looking for a greater development of evidentiary matter  
4 than the present proposed record reflects.

5           Isn't that your understanding?

6           MR. MACBETH: Well, I don't really want to venture  
7 an understanding, Mr. Chairman. I find it very difficult to  
8 pin it down. I think just the way you put it, they may or may  
9 not be aiming at this in further evidentiary development.

10           Well, maybe they are; maybe they aren't.

11           I would like a statement from them as to what it is  
12 they are proposing to prove in the hearing.

13           Again, I don't want to hold them to some, you know,  
14 technical requirement they can't vary from what they put down  
15 on some outline of their factual presentation, but if all they  
16 want to get out of the hearing, at this point, is that there  
17 should be further research, I really think that is irrelevant,  
18 when what they are asking for is a 40-year license without any  
19 conditions in it.

20           That I take it is their present position. I would  
21 move to strike any testimony about a research program or any-  
22 thing of that sort.

23           The Applicant, in his reply, says that they don't  
24 feel there is any necessity to have conditions in the license  
25 to require the Applicant to do what the Applicant says it is

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1 going to do.

2 Well, if we all had absolute confidence in the  
3 Applicant, the Hudson River Fishermen would not have been here  
4 for the last two years and neither would the Environmental  
5 Defense Fund.

6 I don't think evidence should be put in that just  
7 generally makes a statement of what the Applicant says it is  
8 going to do, and the Applicant is resisting any condition in  
9 the license that we require it to do what it says it is going  
10 to do.

11 I would move to strike that. I think there is a  
12 great deal of the evidence about cooling towers that may fall  
13 into the same category.

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arl 1 CHAIRMAN JENSCH: Well, one of these papers that  
2 came in from the Applicant. indicated that it felt that the  
3 only party to a proceeding who had a specified contention  
4 was the Intervenor.

5 MR. MACBETH: Mr. Chairman, I find that outrageous  
6 on grounds of fundamental justice, I find that outrageous  
7 that every specification, every requirement to be precise  
8 applies to Intervenor and does not apply to Applicants.  
9 The rules of the Commission in discussing prehearing con-  
10 ferences talk about specifics of issues and they do not talk  
11 about it in terms of one rule applying to the Applicant and  
12 another applying to the Intervenor. I think any reasonable  
13 notion of due process would make it clear that if one party  
14 has to be specific, the other party has to at least get into  
15 the ball park of generality.

16 CHAIRMAN JENSCH: Well, they haven't changed, as  
17 I understand it, from their position that they are still seeking  
18 a license as they have proposed it in their application. You  
19 may disagree.

20 MR. MACBETH: No -- well, I think that's right.  
21 They did talk about these conditions in that, in the document  
22 filed October 16th, that the document filed yesterday makes  
23 it clear they are not seeking any conditions.

24 But I think what's needed is some specification  
25 of the outline of the factual case on which they will rely

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1 to demonstrate that they have discharged their burden of  
2 proof and are entitled to a license on those terms. I don't  
3 think it is enough for them simply to say we want a license  
4 and here are six or seven hundred pages of evidence, some  
5 says X, some says Y. It is for the Board and the parties to  
6 work through it on their own, to cross-examine anything they  
7 like, to put in other testimony, and at the end of it, we  
8 think we are entitled to a license.

9 I think something a little more specific than that,  
10 some factual outline of their case, is essential. It is  
11 essential -- it really is essential to cross-examination. We  
12 are going to be driven to lengthy discussion in cross-examina-  
13 tion if we don't have some clear notion of what it is the  
14 Applicant is trying to prove in a factual sense to support  
15 its license application.

16 CHAIRMAN JENSCH: Any other Intervenor or Staff  
17 desire to speak before we ask the Applicant to reply?

18 Environmental Defense Fund?

19 MR. ROISMAN: Yes, Mr. Chairman. I think that  
20 the essence of the problem is that to begin with, on the  
21 issue of Intervenor's application versus the Applicant, the  
22 only place in the new rules -- and those are the ones that  
23 govern here -- where there is a distinction drawn between  
24 Intervenor and Applicant is in Section 2.714, which deals  
25 only with petitions to intervene and puts into it a requirement

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1 of particularity. In section 2.705, where the Applicant  
2 files its answer to the original license, the same language  
3 about particularity, although not exactly the same words,  
4 appears, and it is contemplated that all the parties that  
5 come into the proceeding, Staff, Applicant, Intervenor,  
6 as the case may be, will begin the proceeding with some  
7 statement of particularity.

8           Actually at this point, of course, we are well  
9 beyond that, almost three years since the original petitions  
10 to intervene and answers were filed to the notice of hearing.  
11 Now we are now at the point where the prehearing conference  
12 procedures come into effect, and those procedures always talk  
13 in terms of the parties and indicate quite clearly that the  
14 purpose of the prehearing conference, simplification, clarifica-  
15 tion, specification of the issues, necessity or desirability  
16 of amending the pleadings. In Appendix A to the new regula-  
17 tions, reference is made, "The Board" -- this is in sub-  
18 paragraph five -- "The Board should use its powers under  
19 2.718 and 2.757 to make sure the hearing is focused in  
20 matters of controversy among the parties. The hearing is  
21 conducted as expeditiously as possible consistent with the  
22 development of an adequate decisional record."

23           Really, our problem is that we don't know what it  
24 is the Applicant wants to prove other than the ultimate thing.  
25 In other words, they want to get the license without any

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1 conditions whatsoever as quickly as possible.

2           The counterside of that would be if we were to come  
3 in and simply say we don't want them to get the license,  
4 without any conditions. Well, we wouldn't have advanced our-  
5 selves much beyond where we were three years ago when we met  
6 for the first time up in the Springvale Inn. Now we have a  
7 substantial amount of evidence. The Applicant has a large  
8 environmental report, supplemented by various pieces of  
9 evidence, and according to the document they filed on Monday,  
10 they are really relying upon all of that. That is they  
11 intend to use all of that evidence, all of that environmental  
12 report.

13           But they haven't been able to tell us what it is  
14 they think they are going to prove with all of that. Maybe  
15 some of the things they want to prove are totally irrelevant  
16 to this hearing.

17           For instance, it is a legal question as to whether  
18 or not there is any significance to the fact that the Applicant  
19 is going to conduct a research program. If it is the  
20 Applicant's position that whether it conducts the research  
21 program or not should not be a condition of the license,  
22 they might as well tell us they are going to give charitable  
23 funds away each year, and we should take that into account,  
24 that they are pro bono public company. The issue is what  
25 evidence do they have that they want to prove certain points

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1 with.

2           Then if those points are relevant, we can measure  
3 the evidence against it. Maybe we'd like to move to strike  
4 the evidence on the ground that it doesn't prove the  
5 point the Applicant wants to prove or that the point the  
6 Applicant wants to prove is irrelevant. Not knowing what  
7 point they want to prove leaves us in the difficult position  
8 of really having to cross-examine and question everything  
9 that they say.

10           Dr. Raney, for instance, has a lot of material in  
11 his statement that is going to be offered in evidence, which  
12 has questionable relevance to this proceeding. Until the  
13 Applicant tells us why he wants Dr. Raney's evidence in,  
14 relates it to an issue, a point he wants to prove, we don't  
15 know whether to cross-examine Dr. Raney or move to strike.

16           Now the cross-examination might take three or four  
17 days, at the end of which time the Board might say to itself,  
18 quite properly, that was a foolish four days. We have been  
19 talking about a point that doesn't have any bearing in the hear-  
20 ing.

21           We want to know as the -- since the Applicant has  
22 the burden of proof, we want to know what it is they think  
23 they have to prove to win. They have to state their position.  
24 They seem to feel that what they would like to do is to lie  
25 back, prove as much as they possibly can, regardless of its

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1 relevance, and hope that when it is all over, they can piece  
2 together a winning case, which is the kind of position which  
3 Intervenors, of course, have traditionally been accused of  
4 following: shotgun approach, fill the record with cross-  
5 examination as much as you can, and hope at the end the Board  
6 might find a few things in there by which you can win the case

7 Applicants don't have to use the cross-examination  
8 route to fill the record. They have an unlimited number of  
9 experts. Every two or three weeks the Applicant comes in  
10 with a new expert or supplemental testimony from an old expert  
11 to prove a whole bunch of different points that have something  
12 to do with fish, and Indian Point No. 2. But we are still  
13 at this point not clear where they disagree with us, and what  
14 it is that they want to prove.

15 Now once we know what it is they want to prove,  
16 we can then direct the hearing towards, one, trying to  
17 establish if we think this is correct that they didn't prove  
18 it; and if we feel they don't prove it, we can move under the  
19 new rules -- I don't have the number -- I think it is 2.47 --  
20 for a summary judgment, in effect, a motion for a directed  
21 verdict on the ground that the Applicant has failed to prove  
22 what it is that it set out to prove.

23 One could -- it is 2.749. One could hardly make a  
24 motion under 2.749 to dispose of the pleadings when the  
25 Applicant hasn't pled. We cannot argue that the Applicant has

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1 failed to prove a particular point because the Applicant has  
2 not identified any other point other than it wants a license  
3 without any conditions.

4 That point doesn't advance us at all.

5 Number one, the logic of the particularization  
6 standard, which is really in 2.75 -- excuse me, really in  
7 2.752, applies to all the parties, and the purpose is quite  
8 clear: We want to narrow the issues down to what we dis-  
9 agree about, get rid of all the irrelevant issues, if there  
10 are such issues, move for cross-examination on those where  
11 it is warranted, dismiss cross-examination on those where it  
12 is not warranted.

13 At this point the Staff and the Intervenors  
14 have gone sufficiently far that I think the Board could rule  
15 if anyone wanted to make motions with regard to our issues on  
16 the question of relevance, on the question of whether or not  
17 we have proven the points that we are purporting to prove.  
18 That can't be done with the Applicant. There is no way that  
19 we can single out because every time we do it, there is always  
20 the possibility that the Applicant is going to come back and  
21 say, "Well, you kind of misinterpreted what we wanted to say,"  
22 and I can't -- I can't quarrel with them for wanting to put  
23 themselves in that posture, but I certainly can quarrel with  
24 them for saying that that's permitted under the regulations,  
25 or that it is going to make for an orderly hearing.

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1           They must be more specific so that we can spend  
2 our time fruitfully. Our funds and time are very limited,  
3 just as the Board's are. We cannot allow the hearing to drag  
4 through a morass of stuff. It is too important. The issues  
5 have too much evidence already in on them, and we can neatly  
6 focus on the issues, I think, if we can just find out what  
7 the Applicant considers the issues to be and what its position  
8 is on those issues.

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1 CHAIRMAN JENSCH: Staff?

2 MR. KARMAN: Mr. Chairman, members of the Board,  
3 the -- I get the impression from listening to both the  
4 Applicant and the Intervenor that we are starting a new case.  
5 It seems to me we have been through so much during the past  
6 two years, the Applicant has put into the record tons of  
7 evidence with respect to the environmental issues involved  
8 only. I am excluding the radiological issues which were  
9 tried in a separate proceeding. The present testimony which  
10 was furnished on October 30th, and I believe on November 3rd  
11 is, while it is labelled direct evidence of the Applicant,  
12 is basically, as far as I can see, a rebuttal type evidence  
13 to the Staff's final environmental statement.

14 The Staff feels at this time, Mr. Chairman, that to  
15 comply with the Intervenor's motion to bar certain testimony  
16 or to delay the proceeding would be to delay this proceeding  
17 long, long beyond the new year and possibly two or three  
18 months thereafter if we are going to delineate to the fine  
19 honing that the Intervenor would want any of the issues, that  
20 they claim.

21 We feel, from the Regulatory Staff's point of view,  
22 that we have what we consider sufficient information so that  
23 we could prepare the cross-examination which we feel is  
24 required to carry out the examination on the testimony which  
25 the Applicant has put in to rebut the Staff's Final Environmental

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1 Statement. We agree with the Intervenors that as far as  
2 specificity is concerned, in this type of a proceeding, that  
3 all the parties should be bound by the same type of specific  
4 pleading.

5 We can't buy the Applicant's position that the  
6 rules will require the specificity with respect to Intervenors  
7 only. This may very well be on petitions for leave to inter-  
8 vene, but we have gone well, well beyond that. We were under  
9 the impression, Mr. Chairman, that at this prehearing  
10 conference we could, in effect, have the Applicant, the  
11 Intervenor, and the Staff, very, very quickly outline and  
12 define the various issues which will be in contention; and  
13 from this delineation, which we have had back and forth  
14 between the parties, I believe that we can go ahead on the 4th  
15 of December with the evidentiary hearing itself, so that this  
16 thing can finally come to a meaningful end; and I don't believe  
17 that our going ahead with the hearing on the 4th will be  
18 prejudiced by an overall lack of knowledge as to what the  
19 Applicant has in mind.

20 With respect to the Intervenors' contention that  
21 the Applicant must specifically indicate what conditions it  
22 wants in the license as the Chairman indicated, the Applicant  
23 wants an operating license. The Applicant is not, from what  
24 I can gather, proposing a license with any conditions. We  
25 are going to hold an evidentiary session which may well

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1 determine what conditions, if any license is to be issued,  
2 should go into that hearing. I really don't think the burden  
3 is upon the Applicant to indicate to the Board or to the  
4 parties what conditions it desires in the license. They have  
5 indicated, at least from our understanding of the pleadings,  
6 that they are not considering for any conditions. They are  
7 indicating what tests, what biological sampling and meteorolog-  
8 cal sampling they are going to make. It is for the Board to  
9 determine, as a result of the evidence which is adduced at  
10 the hearing, whether any conditions are to be inserted in a  
11 license, if such license is to be authorized.

12 CHAIRMAN JENSCH: Applicant?

13 MR. TROSTEN: We certainly agree that the  
14 Intervenors are entitled to know what the Applicant is trying  
15 to prove. Our basic position is very simple. They do know  
16 what the Applicant is trying to prove. We have furnished  
17 to the Board and to the Intervenors a statement of the  
18 Applicant's basic position, which on page 4, I think,  
19 very clearly outlines what the basic elements of our case are.

20 We have indicated to the Intervenors what the  
21 issues in controversy are, which indicate quite clearly what  
22 matters the Applicant intends to prove or what matters the  
23 Applicant intends that other parties be put to prove on.  
24 We have indicated on what matters we controvert the assertions  
25 of the Intervenors and so it is perfectly clear that the

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1 Intervenor know what points the Applicant is trying to make  
2 in this case. I really think it is a little bit unrealistic,  
3 frankly, in a case of this sort, with the issues as diffuse  
4 as they are, dealing with the statute, that is generally as  
5 vague as NEPA to talk about motions for summary judgment or  
6 moving to strike lots of things on the grounds that they are  
7 not relevant. It is going to be pretty hard, Mr. Chairman,  
8 to say that something is irrelevant to this, although  
9 admittedly there are some things that are irrelevant.

10 I really don't think it is very productive to think  
11 in those terms with regard to this particular hearing. As I  
12 say, we have produced a factual outline for the Intervenor.  
13 I think that they know or they ought to know what it is that  
14 we are trying to prove. I think the Staff knows what it is  
15 we are trying to prove. We know what the Staff is trying to  
16 prove, even though they haven't given us a piece of paper  
17 that lists factual contentions of the Staff, because we have  
18 read their evidence, and we know what they are saying.

19 Now, as far as the matter of what the regulations  
20 provide with regard to the statement of contentions, we  
21 haven't spent a great deal of time in our answer debating  
22 with the Intervenor about this point because we don't think  
23 it makes a great deal of difference. We don't think that the  
24 Intervenor properly interpret the regulations when they talk  
25 about the Applicant having to state contentions. We think they

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1 are misinterpreting what the regulations provide for. We  
2 think that the Intervenors missed the boat in their argu-  
3 ments about burden of proof and that they are not being --  
4 they are not interpreting the requirements properly as far  
5 as that goes.

6 But that really is kind of beside the point.  
7 The basic point is whether or not the Intervenors have a  
8 reasonable understanding of what the Applicant is trying to  
9 prove, whether the Board has a reasonable understanding of what  
10 the Applicant is trying to prove, so that the hearing can be  
11 orderly and focused and we won't go off on a lot of tangents  
12 and waste a lot of everybody's time.

13 Now, as far as the matter of what license condi-  
14 tions we are asking for, it is perfectly obvious that the  
15 Applicant doesn't see a basis at this point for asking that  
16 its license be conditioned. Now other parties may think that  
17 the license should be conditioned, and perhaps the Board will  
18 feel at the conclusion of the hearing that the license should  
19 be conditioned. But nobody has shown us at this point in time  
20 why we have to ask why our license is being conditioned. We  
21 haven't done that. We have stated what it is we are going to  
22 do.

23 I would just say, Mr. Chairman, that I feel that the  
24 issues are ripe for determination in this hearing. I think  
25 we have given the Intervenors what they reasonably need.

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1 I think they are reasonably entitled to an understanding of  
2 what we are doing. I think the degree to which issues are  
3 specified in a hearing of this sort, or contentions are made,  
4 have to be considered in the light of the nature of the issues  
5 and the nature of the hearing. I submit in this particular  
6 hearing, the Applicant has done everything that the Intervenors  
7 reasonably require.

8 CHAIRMAN JENSCH: Excuse me before we proceed.

9 Mr. Martin, I should -- State of New York is now  
10 represented. Mr. Martin, would you care to come up to  
11 the table. I am sure the Applicant will not feel crowded if  
12 you all share the table, the same table, as the other  
13 Intervenors are sharing with everybody.

14 I might say that Dr. Geyer arrived at about --  
15 I would say the second page of the transcript. So he has been  
16 here all this time.

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1 MR. MACBETH: I want to say a few words in  
2 reply.

3 We have had two different versions from the Staff  
4 and the Applicant of how much is known about the Applicant's  
5 position. The Applicant says it is all very straightforward  
6 and everyone knows what their position is.

7 If that's so, I don't think there would be any  
8 burden on the Applicant to produce a statement by Monday that  
9 would give us a factual outline and this hearing could go for-  
10 ward.

11 The Staff thinks that this might take many months.  
12 Well, if it would take many months, then this hearing is really  
13 in a lot of trouble. If it is going to take a number of  
14 months for the Applicant to produce some kind of outline of  
15 what it is trying to prove, then the hearing shouldn't go for-  
16 ward. I think the Applicant does know what it is trying to  
17 prove, and I would like to see that put out somewhere so we  
18 can focus on it. I don't want to spend three weeks or three  
19 months at the Springvale Inn cross-examining the Applicant's  
20 witnesses because I am not sure of what kind of case the  
21 Applicant is trying to make.

22 What the Applicant points to, I presume, on page  
23 4 of the document it filed on the -- I think the 16th of  
24 October -- as a long discussion again about research and  
25 further investigation after a license is issued. That was

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1 the document that ended by saying the Board should conclude  
2 that Indian Point 2 should be licensed to operate with its  
3 present once-through cooling system, subject to the condition  
4 that Con Edison make the studies and be prepared to take  
5 remedial actions if necessary, as discussed above.

6 Now we are told they do not want those conditions.  
7 They do not want any condition. I think all of this discus-  
8 sion of research, anything past the point of licensing, is  
9 simply irrelevant to an application for a license for full  
10 power operation for 43 years without conditions; and I  
11 certainly will move to strike that. I think that the  
12 irrelevance of that material is patent, and I have every  
13 intention of moving to strike it.

14 Frankly, until I received the Applicant's document  
15 yesterday, making it clear they were not seeking conditions,  
16 I read that statement at the end of their October 16 submis-  
17 sion to mean they were seeking some kind of condition. I  
18 mean it talks about conditions. I think already we have managed  
19 to make things a little clearer by getting it clear on the  
20 record that they are not seeking any conditions. I think we  
21 are a good step forward from where we were. Now we are faced  
22 with a lot of irrelevant evidence that is going to have to be  
23 struck from the record or not admitted as testimony.

24 I would urge the Board to require the Applicant  
25 to produce by Monday a simple statement of its -- of factual

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1 outline of its case so we can focus this cross-examination  
2 on the hearing going forward quickly in an orderly manner.

3 CHAIRMAN JENSCH: Well, the Board hasn't had an  
4 opportunity to consider several statements, of course, here  
5 this morning. The Board has been in receipt of these several  
6 documents to which you refer.

7 I think, first of all, any approach to what should  
8 be a conclusion in a case depends to a great degree on legal  
9 analysis of what the evidence reflects. You may have a posi-  
10 tion that's different from the Applicant. Each can assert his  
11 position. You may think the evidence compels a certain result.  
12 The Applicant may think otherwise.

13 I think under the National Environmental Policy  
14 Act we are in a sense in this stage of great development,  
15 and what are crucial points for licensing proceedings are  
16 still being developed. I think that first of all, as to what  
17 evidence is relevant or not, may, of course, be first  
18 considered when an offer is made of the evidence.

19 The Applicant indicated he was going to propose  
20 the offer of these things, and you may make your statement in  
21 reference to it. I don't know what the Board will decide.  
22 But the ultimate objective, I take it, has never been changed  
23 by the Applicant, that he wants a license without any condi-  
24 tions.

25 As I understand the submittals recently filed, the

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1 Applicant does not feel that there is an adequate basis for  
2 the recommendation that the Staff is making, and some state-  
3 ment from the Applicant indicated that it would oppose certain  
4 specific statements that the Hudson River Fishermen's Associa-  
5 tion has proposed. That's quite a long list. I don't know  
6 whether this is within the realm of that which is reasonably  
7 credible and not improbable and likely to happen, and not to  
8 be overlooked, or whether the possibilities are; but that they  
9 should be convinced from your presentation and the Staff's  
10 presentation that cooling towers, for instance, were the  
11 thing they wanted, they might urge that position, too. But  
12 I take it they would like to hear a little more evidence,  
13 not only in this proceeding. Their position is they want more  
14 evidence even if it isn't yet available. I don't know whether  
15 that's likely or probable.

16 I think the ultimate position of a party, in one  
17 sense, waits until the case is over and until each party  
18 has analyzed it legally as to what each party believes the  
19 evidence compels.

20 Now you do like to have a little further specificity.  
21 They say they would like to have a research program under-  
22 taken. I don't know that they feel that's within the realm  
23 of a condition. In one sense, if a research program seemed  
24 to be advisable to the Board, the Board might impose it  
25 whether the Applicant is urging it or not.

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1           There are things that the Applicant might state that  
2 it would like to see as a result of this proceeding, but their  
3 statement is no better than the Intervenor's statement about  
4 what the Intervenor would like to see; and the decision will  
5 necessarily have to wait for the presentation of all the  
6 evidence.

7           I think your request in reference to the Raney  
8 testimony and to -- in regard to the research program can  
9 be handled by matters that would develop in the course of  
10 the evidentiary proceeding to a large extent.

11           I think that you might get a better focus on  
12 the relevancy when there is a further presentation in reference  
13 to the various matters. Now Applicant -- I mean Staff counsel  
14 has indicated that while the Applicant has filed evidence on  
15 environmental matters, and while it has -- is not relieved  
16 at any time of the burden of proof, there may be in a sense  
17 the obligations of going forward now upon other persons and  
18 perhaps primarily for the moment, at least, the Staff, because  
19 it has proposed something different in this proceeding than  
20 has heretofore been suggested.

21           The Staff will make its position known and its  
22 evidence available when we get to the evidentiary hearing.  
23 You may not agree with what the Staff is recommending, or  
24 ultimately may recommend, as I understand the Applicant --  
25 the Applicant is willing to put in cooling towers if the

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1 evidence, at the end of some research or study program,  
2 advises it or -- I think the statement of the Staff is that  
3 the Applicant should go forward with plans for a cooling tower,  
4 but in the meantime, if they can -- excuse me -- if they can  
5 prove that there will not be any harm to the environment,  
6 and particularly to the Hudson River, then a further considera-  
7 tion would be expressed perhaps by the Staff in that regard.

8 But at the moment, as they see the situation,  
9 they are recommending cooling towers.

10 I think in reference to some of this, we might  
11 get into this recent bit of legislation. I think it is  
12 entitled the Water Pollution Control Act Amendment.

13 MR. ROISMAN: Can I ask one question before we do  
14 that?

15 Did I understand that the thrust of your comment  
16 to be that it would certainly be permissible for us at each  
17 point that the Applicant either offers testimony in the pro-  
18 ceeding, or proposed to begin cross-examination, to challenge  
19 the Applicant at that point to give a justification for the line  
20 of cross-examination it chose to take, or the evidence that it  
21 chose to put in the record on the basis of relevancy, and  
22 that we could deal with those issues at that time, so that  
23 if they began to conduct cross-examination in an area where  
24 it was not apparent what it was they were attempting to  
25 prove, that the Board would be willing to consider a

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1 ruling that they could not pursue that area of cross-  
2 examination because it didn't appear to have any relevance  
3 to the proceeding?

4 Are you suggesting that we should consider follow-  
5 ing that procedure, regardless of what you may rule on the  
6 motion after the Board has had a chance to consult?

7 CHAIRMAN JENSCH: Yes. I think that that opportunity  
8 is always available to any party; that whenever -- they offer  
9 any evidence, it is subject to any objection on any ground  
10 asserted and a ruling will have to be made on any objection  
11 that is made.

12 I think that -- I don't think any proposed evidence  
13 is automatically receivable because of its advanced submittal  
14 for review. I think at the time of the hearing a party has  
15 yet to justify the relevance and materiality of any proposed  
16 evidence; and I think that to some extent you will get state-  
17 ments of relevancy based upon what the record appears to be  
18 at that time. It may be the record at that time will reflect  
19 a materiality that is not now readily apparent.

20 Excuse me.

21 I feel that in one sense -- and I don't know how  
22 far we have gone in the radiological and safety matters, but  
23 on the environmental matters -- and I hope I don't misstate  
24 the position, but I have the impression that the Applicant  
25 feels that whatever be the effect upon the environment, that

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1 in a cost-benefit analysis consideration that the demands  
2 by their customers for electricity overcomes the effect on  
3 the environment. I think that issue will be very seriously  
4 contested, as I understand the views of the parties here.

5 MR. MACBETH: I really don't think that's  
6 even at issue. None of the parties have argued that the  
7 plant should not operate at a time when the production of  
8 electricity is essential to the Con Edison consumers. I  
9 think at best it is now become an argument about weighing  
10 the environmental costs against some incremental increase in  
11 what Con Edison's consumers pay for electricity. It is not,  
12 I think, a contest on any side of argument that the plant  
13 should not operate. That is not at stake.

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1 CHAIRMAN JENSCH: No Intervenor in this proceeding  
2 takes any opposition to the operation of Indian Point No. 2,  
3 is that correct?

4 MR. MACBETH: We think --

5 CHAIRMAN JENSCH: If you want to try that yes or  
6 no, we will get the specificity we are seeking.

7 MR. MACBETH: I think I have spelled this out in  
8 earlier submissions. The Hudson River Fishermen's  
9 Association and the Environmental Defense Fund believe  
10 there should be conditions to the operating license that  
11 require a speedy construction of cooling towers and that  
12 the operation of the plant at certain times of the year,  
13 before those cooling towers are in operation, should be  
14 restricted to what is essential to the -- to consumers in  
15 the Con Edison area so that we are not in favor of 40 years  
16 of unconditioned operation at full power, as the Applicant is.  
17 We are not proposing here that no license at all be issued  
18 and that the plant simply never operate or be torn down.  
19 We have tried to balance the cost/benefits and we think  
20 the cooling towers can be built in a short period and there  
21 can be restricted operation until then which would allow the  
22 power needs of the City of New York and Westchester County to  
23 be met, while at the same time minimizing the environmental  
24 effects on the Hudson and its fish.

25 I think that perhaps the only other points I

2mil 1 would like to add is that it only seemed to me that if there  
2 was some kind of factual outline from the Applicant, we would  
3 have a clear sense of what he was attempting to prove to  
4 support their case, their license application. I think they  
5 have been reasonably fair about what they don't like in what  
6 the Intervenors have put forward with a great deal of  
7 specificity and what the Staff has put forward. It is rather  
8 unclear what it is on the other side that the Applicant  
9 is putting forward; and I would have thought that it would be  
10 much better to have that from the Applicant himself rather  
11 than the Board and the parties guessing at what it is that  
12 the Applicant intends as a factual outline of the factual  
13 presentation to support their license application and the  
14 facts that they have to prove to merit that operating  
15 license.

16 CHAIRMAN JENSCH: Well, if you accept the premise  
17 that the Staff, in a sense -- and perhaps for the Intervenor,  
18 Environmental Defense Fund, and Hudson River Fishermen's  
19 Association, to some degree, have the obligation of going  
20 forward, if not the burden of proof, in reference to cooling  
21 towers, the Staff has made this suggestion that there be  
22 cooling towers within a certain period of time and so forth.

23 While they don't have the burden of proof, they  
24 have the obligation of going ahead to assert and support  
25 their position.

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1 Now that being so, the Applicant in a sense can --  
2 I don't say sit back, but can await the full presentation  
3 of that evidence, really, in order to determine the kind of  
4 evidence it feels necessary to meet that going-forward  
5 presentation by the Staff and -- to the extent that the  
6 Intervenor --

7 MR. ROISMAN: That is precisely where we are. We  
8 have all presented our direct case. The Final Environmental  
9 Statement is in. The direct testimony is in.

10 CHAIRMAN JENSCH: They haven't cross-examined your  
11 case.

12 MR. ROISMAN: The first thing is to tell us what  
13 they want to cross-examine us about in sufficient detail so  
14 we can understand whether they are wasting our time and  
15 resources, or whether they have something to say.

16 I think you described the situation precisely the  
17 way it is: They come forward with the direct case, in which  
18 they say no conditions for a license, and here it is. The  
19 burden then shifts to us to go forward. Our going forward  
20 can consist of presenting a counter-direct case, which we did;  
21 and, in addition, identifying areas in which we wish to cross-  
22 examine them to show that they didn't prove what it was they  
23 started out to prove. They then have the burden of showing  
24 what they are going to do with respect to our case. Are they  
25 going to deny it, say, "We deny flatly; it is irrelevant," and

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1 leave it at that? Do they want to present rebuttal testimony  
2 to it? Do they want to cross-examine it? The -- it appears  
3 they want to do all three.

4 Now the question is, did they tell us with enough  
5 specificity to entitle them to take the Board's time, our  
6 time, to look at the issue? What they did was file a document  
7 which on page 4 -- this is the document, Applicant's answer --  
8 which is attached to the Applicant's answer to our motion --  
9 but the document itself is a summary of Con Ed's position  
10 concerning environmental issues. This \$1 million paragraph  
11 on page 4, the Board has been directed to consider the matters  
12 in controversy. Con Ed is confident this Board will fairly  
13 and confidently -- so are we, incidentally -- evaluate the  
14 evidence presented to it and conclude there is an adequate  
15 justification at this time to implement the installation of a  
16 closed-cycle cooling system, the studies which Con Ed has  
17 described to this Board could be carried out over a period of  
18 not less than five years, and so forth.

19 I would say that is something comparable to an  
20 Intervenor saying after an Applicant presents its direct  
21 case, "We don't think the Applicant's quality assurance program  
22 is adequate for it to get a license; we believe what they  
23 need is another five-year study of the emergency core cooling  
24 system before they are authorized to operate the plant, because  
25 the emergency core cooling system doesn't work."

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1 Similar broad contentions -- we also have clear  
2 authority for the proposition that just those kind of broad  
3 contentions don't meet the specificity requirements of the  
4 Commission. The Appeals Board in the Point Beach case,  
5 Docket 50-301, handed down its decision on the -- on this  
6 very issue applied to an Intervenor, on the 8th -- on August  
7 18, 1971, and in Appendix B to that, it lists an example  
8 of the kinds of contentions that won't stand up to the  
9 specificity requirement. Contention 19, for example, "Components  
10 and engineering safeguards of Unit 2, will be exposed to radia-  
11 tion that will lead to deterioration. There is no assurance  
12 of integrity over the 40-year life of the plant, and there  
13 are inadequate procedures for inspection and replacement of  
14 components." The Licensing Board found that that was not  
15 reasonably specific and the Appeal Board upheld it.

16 CHAIRMAN JENSCH: That is for the Intervenors.  
17 They said the Intervenors hadn't shown specificity.

18 MR. ROISMAN: That's right.

19 CHAIRMAN JENSCH: I don't find any obligation in  
20 the rules here that shows the -- says the Applicant has to  
21 have such a statement.

22 MR. ROISMAN: In Section 2.507 of the original rules,  
23 which are still in effect -- they deal with answers --  
24 excuse me, here it is -- lay out the Applicant's obligations  
25 with regard to its position. I am sorry, 2.705. Now in this

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1 case the -- what we have really done is evolve the answer  
2 over many months; but -- so we can disregard the time limits.  
3 It says, "Within X days after the notice of hearing or such  
4 other time as may be specified in the notice of hearing,  
5 party may file an answer which shall concisely state the  
6 nature of its defense or other position, the items of the  
7 specification of issues he controverts, and those he does not  
8 controvert, and whether he proposes to appear and present  
9 evidence. If facts are alleged in the specification of issues,  
10 the answer shall admit or deny specifically each material  
11 allegation of fact," so forth, and so on.

12 That obligation applies to the Applicant. It  
13 takes us then to what was clearly contemplated by the  
14 regulations as a further specification of issues, namely the  
15 issues at this stage in the hearing. After we have all agreed  
16 that we are talking about cooling towers, and that we are not  
17 talking about what color you paint the plant, we are worried  
18 about fish and not birds; we are concerned here not with whether  
19 the Indian Point plant should be permitted to operate or not,  
20 for environmental purposes, but merely what conditions are to  
21 be imposed for purposes of its operation, to protect the  
22 environment and the time schedule for the installation of  
23 those, and so forth, we then try to focus on the factual  
24 disputes and the Board is given the authority under 2.752, to  
25 require simplification, clarification, and specification of

7mil 1 the issues.

2 But that authority is not meant to be exercised  
3 willy-nilly, as is made clear in Appendix A because it says in  
4 Appendix A, with reference to the hearing, the Board should  
5 use its powers under 2.718 and 2.757 to assure that the  
6 hearing is focused upon the matters in controversy.

7 Now just this morning, I think if we just sat down  
8 with this morning's transcript, we would have some difficulty  
9 figuring out what it is that Con Ed wants to prove. For  
10 instance, you asked the question, is there anybody here who  
11 is opposing the issuance of a license for this plant? It  
12 is possible that Con Ed is opposing the issuance of a license  
13 for the plant if the condition that this Board imposes is  
14 cooling towers, and Con Ed, in its heart, is not persuaded that  
15 it should build them. It is possible that is their position.  
16 We don't know.

17 It is also possible that Con Ed is arguing that  
18 all the fish that live in the Hudson River never leave the  
19 Hudson River. Dr. Raney has a lot of stuff in his testimony  
20 from which one might interpret that that is a possible position  
21 they are taking. That is demonstrably wrong. We can quickly  
22 deal with that. We have plenty of competent witnesses, and so  
23 does the Staff, to prove that statement wrong. If that is  
24 not what Dr. Raney is proving, then what is he talking about  
fish in the Chesapeake Bay for? Well, it isn't clear why he

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1 is talking about fish in the Chesapeake Bay. Our expert  
2 can mull over why he is talking about fish in the Chesapeake  
3 Bay, but why should we have to think about it? Presumably,  
4 Raney knows why he said that and we have been talking this  
5 morning as they were asking the Applicant to do something  
6 which will be time-consuming and difficult. Much to the  
7 contrary: We are asking the Applicant to do something which  
8 we must assume it knows, and I am puzzled as to why anyone is  
9 questioning why they shouldn't do it? Why hasn't the  
10 Applicant come in and said, "Oh, we are terribly sorry; of  
11 course, we will tell you what we are doing."

12 I am admittedly suspicious and I fear that maybe  
13 they aren't telling us what they are doing because they are  
14 fearful if we knew what they are doing, we would realize the  
15 king isn't wearing any clothes and that Con Ed doesn't have  
16 anything to say that will persuade this Board that the condi-  
17 tions which we and the Staff urge should be imposed on the  
18 license shouldn't be imposed; and that they are hoping for a  
19 bolt of lightning to come and save them at the last minute  
20 from this, what they consider a hideous alternative of  
21 having to put up cooling towers for the Indian Point plant.

22 Now if that were an Intervenor trying to do that,  
23 this Board quite properly would say, "You are not entitled  
24 to lie back and say, 'Well, maybe you will persuade us before  
25 the hearing is over so we are now going to conduct 15 hours of

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1 cross-examination this day and 15 hours of cross-examination  
2 that day to see if you can't persuade us."

3 We know that the Commission doesn't want that to  
4 happen in its hearings; and if this Board allows the Applicant  
5 to do what it is now saying it wants to do, nine days of  
6 cross-examination, and never tell us with any specificity where  
7 it is going or what it attempts to prove with that cross-  
8 examination, to fill the record up with thousands of pages of  
9 testimony, without ever telling us precisely what points that  
10 testimony is trying to prove, then the Board lays down the  
11 precedent for the Intervenor, who finds itself on the other  
12 side of the case sometimes, where it opposes the position of  
13 the Staff, and where it wants to simply delay the hearing,  
14 hoping for something to come along that will save it, to turn  
15 to this hearing and say, "Well, if it was sauce for the goose,  
16 then it is sauce for the gander." The whole logic of the  
17 reorganization that the Commission did in the hearing structure  
18 was to eliminate that. We are not asking the Applicant to do  
19 the impossible. If Mr. Trosten's position is that Con Ed  
20 doesn't know what it is trying to prove, that will save us a  
21 lot of time. We can get that statement into the record at  
22 this point.

23 If he has something to say to what it is they are  
24 trying to prove, I would like to know why he won't tell us  
25 what it is they want to prove.

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1 This statement that it -- is contained on page 4,  
2 "The possibilities of damage to aquatic biota from the once-  
3 through system should be scientifically investigated."

4 That statement tells us very little except the  
5 conclusion. We don't know, one, why the Applicant thinks  
6 that it should be scientifically investigated; why it contends  
7 that it has not been scientifically investigated; what it  
8 believes it would prove if it were scientifically investi-  
9 gated; and we now do know, however, that although it says  
10 that it should be scientifically investigated, it doesn't  
11 believe that should be written into any license. It is  
12 a should that doesn't apply to the hearing. It is simply  
13 a should that is out in the air.

14 They tell us if the studies which Con Ed has  
15 described to this Board should be carried out over a period  
16 not less than five years, consistent with the life cycle  
17 of the fishes in the Hudson River estuary. It does not tell  
18 us it is willing to have this Board impose that standard.  
19 Again, the should is some should, other than should be imposed  
20 by the Atomic Energy Commission.

21 In addition, it doesn't tell us why it should be  
22 five years; it doesn't tell us why it shouldn't be two years;  
23 why it shouldn't be ten years.

24 It says at the same time the economic and environ-  
25 mental aspects of alternative cooling systems should be

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1 investigated as promptly as practicable. It doesn't explain  
2 to us that it has not been investigated as promptly as  
3 practicable already. It doesn't explain to us what it intends  
4 to achieve by doing that.

5           These contentions offered by an Intervenor in  
6 opposition to a plant would clearly be rejected. Not under  
7 2.714, because this type of specificity never comes up at  
8 the 2.714 intervention stage, but after the FES was in and  
9 after the Applicant had its environmental report in, if an  
10 Intervenor stood before the Board and said, "We want to  
11 wait and finish our cross-examination before we tell you whether  
12 we oppose this plant or not," I know what the Applicant's  
13 counsel, and I know what the Staff counsel would say, and I  
14 know what the Appeals Board would say to that. I think I  
15 know even what this Board would say to that.

16           It would say, "No, sir, you have to tell us where  
17 you are going before you take our time, take our time in this  
18 hearing." Now the Applicant wants five days John Clark  
19 and Eric Ainsley. We think we have a right and the Board  
20 has a right to know what they want to do with John Clark  
21 and Eric Ainsley in those five days. Not that they want to  
22 disagree with them, but what they want to establish by dis-  
23 agreeing with them.

24           If the Board will say, "The only thing you oppose  
25 from John Clark is that on Mondays he takes a nap from 2:00

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1 to 3:00 in the afternoon," maybe we can get a stipulation  
2 from the Intervenor to that effect. We can't stipulate  
3 with the Applicant on many of these things.

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1 CHAIRMAN JENSCH: May I interrupt?

2 I wonder if some solution to your description of  
3 the situation would be provided by an arrangement as to the  
4 time of presentation of evidence. That is, if the Staff goes  
5 forward in support of its environmental statement and its  
6 suggestion for cooling towers, and then it is cross-examined,  
7 perhaps the Applicant would be in a position to put on its  
8 rebuttal evidence at that time, and the Intervenor's presenta-  
9 tion of evidence need not be presented until the conclusion of  
10 those two stages, so that your witnesses, Ainsley and Clark,  
11 whoever they are, would not be within the cross-examination  
12 until a little more specificity of issues has been developed  
13 through the presentation of evidence.

14 MR. ROISMAN: That certainly would get to part of  
15 the difficulty, but we are still stuck with the problem that  
16 either Mr. Macbeth or myself will have to sit through the  
17 cross-examination of the Staff's witnesses, and that cross-  
18 examination may be unduly extended if the Applicant has not  
19 focused.

20 I mean, part of the reason, obviously, for requir-  
21 ing a party to tell the other parties what it is doing is to  
22 make sure that the party itself knows what it is doing. We do  
23 not want Mr. Trosten to develop his areas of cross-examination,  
24 and his points, if you will, only as he happens to be on --  
25 happens to have his witness up on the witness stand.

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1 We can assume Mr. Trosten handles this case very  
2 efficiently. He knows what he wants to prove. He knows he  
3 wants to put a Staff witness on the witness stand, and he has  
4 not only major contentions that he wants to get that witness to  
5 support, but subcontentions as well.

6 We watched him cross-examine Mr. Brill. We know  
7 he is an adept cross-examiner. He prepares his questions in  
8 advance.

9 For some reason, Mr. Trosten doesn't want to share  
10 with us his road map. He wants up to follow along in his caravan  
11 and when we get to the points of interest, hope that we find  
12 them on our own.

13 Well, that is an interesting Perry Mason kind of  
14 approach to the hearing, but hardly a useful one, particularly  
15 if Mr. Trosten's caravan is going to go into a bunch of dead-  
16 end valleys instead of taking us to where we are trying to go  
17 in the proceeding.

18 If one of Mr. Trosten's motive, for instance, is  
19 to simply obfuscate the issues through repetitious, long,  
20 quasi relevant cross-examination, then he is going to be able to  
21 accomplish it by not having to tell us what his road map is.

22 All we are asking is for him to tell us his road  
23 map: What does he attempt to prove when he cross-examines the  
24 Staff witnesses and what does he intend to prove when he offers  
25 those thousands of pages of evidence in? Not his general

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1 conclusion, but the specific point at issue.

2 I don't think that any party in this proceeding,  
3 except perhaps Mr. Trosten -- and I don't think the Board --  
4 is capable of sitting down now and putting down on ten pages  
5 a brief outline of the individual factual issues in controversy  
6 and the positions of each of the parties to those issues.

7 We do not know where the Applicant stands, spe-  
8 cifically, on the questions that are -- that we have raised in  
9 our contentions.

10 He says in his --

11 CHAIRMAN JENSCH: Could you draw up a list of ten  
12 items as to which you are seeking specific answers at this  
13 time? What ten items --

14 MR. ROISMAN: We have ten pages of contentions that  
15 we filed pursuant to the agreement of the parties which set  
16 forth the issues that we think are in controversy in the  
17 proceeding, and our position with respect to them.

18 CHAIRMAN JENSCH: Let's just get those right now  
19 and see what they look like, again.

20 MR. ROISMAN: It is filed October 30 and entitled  
21 "Outline Summary of Intervenor's Factual Position." It is the  
22 counterpart of what the Applicant filed on the same day that --

23 MR. MACBETH: No. No.

24 MR. ROISMAN: Mr. Macbeth corrects me. The  
25 Applicant didn't make that filing date. He filed at some

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1 subsequent time --

2 MR. MACBETH: He never filed anything labeled  
3 actual position or contentions. There is just nothing.

4 MR. ROISMAN: All we have on -- I guess on the  
5 Applicant's side, if you will, as the counterpart of this, is  
6 the summary of Consolidated Edison's position concerning  
7 environmental issues, which is a summary of its conclusions  
8 as opposed to a summary of its position.

9 We have one extra of this, Mr. Chairman.

10 CHAIRMAN JENSCH: Could I have that?

11 MR. ROISMAN: Yes.

12 CHAIRMAN JENSCH: Thank you.

13 MR. ROISMAN: Mr. Chairman, perhaps the best way  
14 to look at it, the answer that the Applicant filed yesterday  
15 to our motion has attached at the back their November 13, 1972,  
16 submittal entitled "Applicant's Statement of Factual Matters  
17 in Controversy Concerning Position of Intervenors," and the  
18 numbers that they use are corresponded with the numbers that  
19 are in the document which we just gave you.

20 You will notice that, first of all, at the beginning  
21 they state what their position is with regard to these, and  
22 what I must say has to be the classic of vagueness: "Applicant  
23 controverts the following portions of the outlined summary of  
24 Intervenor's factual position submitted on October 30, 1972, on  
25 the grounds they are false, unsubstantiated, misleading, or

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1 some combination of the three," without necessarily agreeing  
2 or disagreeing with the remaining portions or the relevancy to  
3 this proceeding.

4 Now, I mean, that does not advance us a great deal.

5 They then list in these items the very things which  
6 we listed. In fact, it seems to me the Applicant has squandered  
7 squandered a fair amount of its money. The items that start  
8 with 2-C and 2-D are merely quotations from our Outline  
9 Summary of Intervenor's Factual Contentions.

10 CHAIRMAN JENSCH: Well --

11 MR. ROISMAN: We don't even know whether they  
12 think 2-C is false, unsubstantiated, misleading or some com-  
13 bination of the three, which, if I remember on permutations of  
14 combinations -- seven possible positions they could be taken  
15 on item 2-C.

16 It is to know why they think that stripped bass are  
17 not in the planktonic mode for the -- the planktonic mode for  
18 approximately the first six weeks, of life, and what they  
19 intend to offer in evidence to prove that point, to say that  
20 they disagree -- all the Applicant has done is ride on our  
21 specificity.

22 We have been sufficiently specific so that we get  
23 down to a good sub-issue, this issue indicated in item 2-C.

24 Now, they need to be more specific than to say no.  
25 They have to say no, and why.

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1 If they don't say no and why, they are just exactly  
2 where an intervenor would be in any case where after the  
3 Applicant gives a very specific statement, they say I disagree  
4 with line two on page 2,000 of the Applicant's safety report.

5 MR. TROSTEN: Mr. Chairman, would it be appropri-  
6 ate --

7 CHAIRMAN JENSCH: Have you concluded?

8 MR. ROISMAN: Let me just say one more thing on  
9 that.

10 Let's look at 2-C for a second and sort of dissect  
11 it, because it gives us a good idea.

12 We will assume that the Applicant's position on  
13 2-C is that it is false. All right. I just picked that at  
14 random.

15 They are saying, therefore, that stripped bass are  
16 not in the planktonic mode for approximately the first  
17 six weeks of life.

18 Are they saying it is not the first six weeks, but  
19 the last six weeks? Are they saying not the first six weeks,  
20 but the first four weeks? Are they saying not planktonic, but  
21 some other mode? Not stripped bass, but stripped cod? Not  
22 approximately, but clearly? End of life rather than the  
23 beginning of life?

24 To deny a statement of that complexity and say that  
25 it is false without telling us what is false about it advances

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1 us nowhere except to say that the Applicant has said since this  
2 hearing began: We don't want anybody to tell us what to do.  
3 That is all the Applicant's position is in this case, so far.

4 We need more specificity. We want to have our  
5 witness prepared to answer that. If our witness is going to  
6 be cross-examined on that point, if the Staff witness is going  
7 to be cross-examined on that, or if several thousand pages  
8 of testimony are going to be introduced on it, we want to  
9 know what it is that is being sought to be established.

10 We think this Board, even if we only think of it as  
11 a discretionary duty under Section 2.752, and Section 2.757, must  
12 exercise its discretion to have the Applicant answer that  
13 question: What is it about 2-C they disagree with, and 2-D,  
14 and 2-E and 3, 9 and 9-E, et cetera.

15 We don't know whether they think it is false or  
16 misleading, unsubstantiated or a combination.

17 It is that specificity that we are concerned with,  
18 Mr. Chairman.

19 CHAIRMAN JENSCH: It is my recollection that the  
20 rules of federal procedure are perhaps a little more expansive  
21 than the rules here at the Commission, but it is my recollection  
22 that a request for a stipulation can be presented and specific  
23 responses given.

24 I wondered if this outline by the Intervenor's can  
25 be construed in that light to impose a duty upon the Applicant

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1 to make a -- and the Staff -- to whomever this is directed --  
2 to give a specific response to each of these items.

3 Now, I think it would substantially advance the  
4 proceeding to give more consideration to these assertions that  
5 the Intervenor's have presented.

6 Do you not agree?

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1 MR. TROSTEN: Let me respond in this way: I am  
2 afraid what Mr. Roisman really wants to do is have the  
3 hearing over with and all the results of the hearing  
4 determined and presented to him for his consideration before  
5 the hearing starts.

6 I am afraid you just can't do that like that.

7 CHAIRMAN JENSCH: Let's take this one item for the  
8 moment and let's see if we can get into that predicament, if  
9 you envision it to be a predicament.

10 2C, striped bass are in the planktonic mode for  
11 approximately the first six weeks of life.

12 Is that true or false?

13 MR. TROSTEN: I don't know, Mr. Chairman?

14 CHAIRMAN JENSCH: Can your witnesses tell you?

15 MR. TROSTEN: I don't think our witnesses have  
16 enough information to answer that question. I don't think  
17 Mr. Clark knows, or the AEC knows.

18 CHAIRMAN JENSCH: May I digress for a moment?

19 MR. TROSTEN: Yes.

20 CHAIRMAN JENSCH: We have in the past given some  
21 consideration to the concern we of the Board have to the  
22 ongoing studies that have been made of the Hudson River. It  
23 is my recollection that starting in 1959 or '60, when Indian  
24 Point Number 1 was proposed, that there was the indication  
25 that we really were going for a study on the Hudson River.

1           Every time a case comes up, we really are going for  
2 a study on the Hudson River.

3           MR. TROSTEN: Yes.

4           CHAIRMAN JENSCH: We have looked for the data from  
5 the studies and just give us five more years -- I don't  
6 know where we start with the five years, 1959 or '60, or 1973  
7 but I suppose that there will always be enough changing  
8 molecules of water in the Hudson River to -- that you will  
9 never know every bit of minutia, but somewhere there ought  
10 to be something from studies that we really have been working  
11 on that ought to just about come to an end of the line.  
12 I would wonder.

13           So, as I say, I think the subject is open for  
14 persuasion, but every time you hear about what is happening  
15 to the Hudson River, one more study will do it.

16           MR. TROSTEN: Mr. Chairman --

17           CHAIRMAN JENSCH: I am kind of losing faith in the  
18 representation.

19           MR. TROSTEN: Having been through a number of  
20 these hearings on Indian Point with you, Mr. Chairman, I can  
21 understand your frustration about this and I am sure we are  
22 never going to know everything that we probably ought to  
23 know about the Hudson River.

24           That doesn't necessarily mean that we don't have  
25 enough information to make certain types of judgments.

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1           That doesn't mean that it is impossible to ever  
2 get this information with a well-conceived and properly  
3 directed program; and that doesn't mean that it is just  
4 impossible to know the answers to these things.

5           In response to your question about Item 2C, I  
6 answered fairly that we don't know. I don't think anybody  
7 knows for sure.

8           I think the evidence that is available suggests  
9 that Mr. Clark is wrong; on the other hand, Mr. Clark  
10 doesn't know whether he is right and the AEC doesn't know  
11 whether he is right.

12           We think he is probably wrong.

13           That is the answer to the particular question  
14 that you raised.

15           Mr. Chairman, can I just address myself generally  
16 to some of the points Mr. Roisman has made?

17           CHAIRMAN JENSCH: Surely.

18           MR. TROSTEN: In the first place, I just want to  
19 call the Board's attention to the fact that I filed on  
20 Saturday four pages of proposed cross examination, indicating  
21 the areas that I intend to cross examine the Staff and  
22 Mr. Clark in.

23           It should be quite clear to Mr. Roisman the areas  
24 in which I want to ask Mr. Clark some questions.

25           Now, if I ask Mr. Clark a question about whether

1 he naps from two to three o'clock in the afternoon, I  
2 expect Mr. Roisman is going to object to that.

3 CHAIRMAN JENSCH: He won't have to wait for that  
4 one.

5 (Laughter.)

6 MR. TROSTEN: I certainly should have that  
7 question ruled out.

8 Now, I am not absolutely sure, Mr. Chairman,  
9 exactly what questions I am going to ask Mr. Clark, because  
10 I don't know the answers that Mr. Clark is going to give me.

11 Frankly, I have a lot of difficulty understanding  
12 what Mr. Clark says.

13 Maybe he can explain these things to me and then  
14 I won't have to ask him any more questions.

15 Maybe the questioning won't take five days, if he  
16 gives certain types of answers to the questions.

17 I am not in a position to tell Mr. Roisman  
18 exactly the questions I am going to ask Mr. Clark, unless  
19 he can tell me exactly what Mr. Clark is going to say in  
20 response to my questions.

21 Now, in terms of being specific about what it is  
22 that we are trying to prove, I appreciate Mr. Roisman  
23 having read through that page 4, because I think it does  
24 actually state in general terms what it is that we are  
25 trying to prove, but there is a big difference between the

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1 situation where an intervenor comes in and makes simply a  
2 general statement and then says that is it, I want to have  
3 you prove everything --

4 CHAIRMAN JENSCH: May I interrupt?

5 MR. TROSTEN: Yes, sir.

6 CHAIRMAN JENSCH: Are you suggesting that it  
7 would be helpful in your view if you were to propose a list  
8 of interrogatories or a list of questions in advance of the  
9 hearing to Witness Clark or Ainsley, and they can perhaps  
10 indicate in advance their answers, which would help you  
11 present -- know the scope of your further cross examination  
12 or your further inquiry?

13 Would that be helpful, do you think?

14 MR. TROSTEN: I really don't think so, Mr.  
15 Chairman.

16 In trying to get ready to cross examine Mr.  
17 Clark, and by the way, it is very difficult to do that,  
18 because Mr. Clark's statements are veiled in a way that makes  
19 it quite difficult to get at them -- the questions that I  
20 would ask, I would have to prepare a series of ten different  
21 subquestions, Mr. Chairman, and present them to Mr. Roisman,  
22 that would depend on the nuances of the answers Mr.  
23 Clark would give. That is the answer, Mr. Chairman, why you  
24 really can't do that.

25 I have tried to indicate the questions, the areas

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1 that I want to question Mr. Clark on, but it would simply  
2 take me months to sit down and ask every possible question  
3 and then every possible subsequent question that I would  
4 then go to, depending exactly on what Mr. Clark said at that  
5 point.

6 Now, let me just make a general observation about  
7 the specificity of our position.

8 In addition to the laying out of what our general  
9 position is, what it is we are trying to prove, we filed,  
10 really reams of testimony that lay out the specific under-  
11 pinnings. We haven't just said something like; "We think the  
12 ECCS is going to fail or there is not enough proof about  
13 that." We filed all kinds of testimony that indicate why  
14 we think we need to study the river more, why we think  
15 there is not enough evidence to indicate that the  
16 aquatic biotas are going to be harmed.

17 CHAIRMAN JENSCH: Are you saying that since 1960,  
18 or reasonably -- assume thereto that date, that Con-Edison  
19 does not have studies that will tell you whether striped  
20 bass are in the planktonic mode for approximately the first  
21 six weeks of life?

22 MR. TROSTEN: Yes, sir. We don't have studies that  
23 indicate clearly whether striped bass are in the planktonic  
24 mode for approximately six to eight weeks.

25 CHAIRMAN JENSCH: What do they tell you at all,

1 if it is not clear? Is it veiled enough to give you an  
2 indication?

3 MR. TROSTEN: Well, let me suggest this, Mr.  
4 Chairman. I don't think that there is information available  
5 anywhere, to the best of my knowledge, that indicates  
6 whether striped bass are in the planktonic mode for the  
7 first six to eight weeks of life, and this notwithstanding  
8 the fact that the striped bass is the most studied fish in  
9 the Hudson River. It is notwithstanding the fact that you  
10 have the Hudson River Fisheries Investigations.

11 I don't think that the studies that were prepared  
12 for this purpose were directed to that particular question in  
13 the sort of detail that you really have to know in order to  
14 really know the answer to that question.

15 We believe, Mr. Chairman, on the basis of our  
16 information -- and I am speaking now merely as a lawyer --  
17 we believe on the basis of our information that the striped  
18 bass are not in the planktonic mode for the first six to  
19 eight weeks of life on the basis of general literature  
20 studies, on the basis of laboratory studies, and so forth.

21 We think there is general evidence to suggest  
22 they are not in the planktonic mode for the first six to  
23 eight weeks of life.

24 CHAIRMAN JENSCH: If you took each of these items,  
25 you at least could say that, couldn't you? You could say

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1 that your information is that they are not, at least, that  
2 would give an answer which, as I understand it, the  
3 intervenors are seeking to assist them in the preparation  
4 of evidence.

5 MR. TROSTEN: Well --

6 CHAIRMAN JENSCH: You could take each of those  
7 items, say whatever you want to say to it, the qualifications  
8 of it, but that is you wanted it more clearly shown or  
9 further studies -- your present knowledge is that they are not  
10 in the planktonic mode.

11 Would that be correct?

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arl 1 MR. TROSTEN: Mr. Chairman, if prior to the start  
2 of the hearing Mr. Macbeth or Mr. Roisman chooses to serve us  
3 with a set of interrogatories they want us to answer in lieu  
4 of cross-examination --

5 CHAIRMAN JENSCH: Take this list as a start  
6 (indicating).

7 MR. TROSTEN: That's not a list of interrogatories.

8 CHAIRMAN JENSCH: Assume they have said before each  
9 of these points, do you agree to C, striped bass are in  
10 the planktonic --

11 MR. TROSTEN: And simply answer do you agree?

12 MR. ROISMAN: And why.

13 MR. MACBETH: What we are seeking, Mr. Chairman,  
14 is some notion of what it is the Applicant thinks is true, not  
15 simply this definitive position which they have taken constantly  
16 with the Staff's submission and our submission of simply saying  
17 no after things. We need some notion of what it is they think  
18 is so. If all they can say at the end of this is we think  
19 nothing is known about striped bass in the Hudson River, if  
20 that's really their position, all right.

21 But I would just like something like that, that  
22 clearly. If their problem with this is they think the  
23 planktonic mode lasts five weeks instead of six weeks, that's  
24 different from saying we don't know what's going on with the  
25 striped bass at all. We just have to have some notion in

1 terms of our own statement and also what they are putting  
2 forward of what it is they think is happening. I am afraid  
3 they are going to say time after time, nothing is known.  
4 If that's all they are going to say, if their testimony is going  
5 to add up saying we don't know anything about this river, it  
6 is a very complicated river, and we have only been here 10  
7 or 15 years, we need some more time, then there probably  
8 isn't too much point in cross-examining them. If they don't  
9 know anything about it, I don't want to spend a lot of the  
10 Board's time or my own time cross-examining them. If I knew  
11 that's what they were going to say, we could simplify this  
12 a great deal.

13           Something equivalent to this outlined summary  
14 shouldn't take them very long, especially if they don't  
15 know anything.

16           MR. TROSTEN: Mr. Chairman, I don't want the Board  
17 to be misled by the discussion here. I call the Board's atten-  
18 tion to page 2 of the testimony of Dr. Lauer. Dr. Lauer has had  
19 a team of people studying the Hudson River from New York  
20 University for years. He has done a tremendous amount of work  
21 on the river, but unfortunately because of the scope of the  
22 problem, even putting a tremendous amount of -- a large number  
23 of people to work doesn't answer all these questions.

24           What Dr. Lauer has said is that as the result of  
25 his laboratory and field studies, it is my opinion -- and this

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1 is merely a summary of the data that appear in here -- it is  
2 my opinion that the plants will have a negligible impact,  
3 that phytoplankton metabolism will be stimulated during most  
4 of the year and will be inhibited under certain circumstances  
5 during summer months. No significant changes in abundance  
6 or composition of phytoplankton populations in the Hudson  
7 River will occur as a result of planned operations of the  
8 two units. No effect on zooplankton will result from planned  
9 operations of both units.

10 Fourth, in view of the foregoing, there should  
11 not be a significant adverse effect on the aquatic food web  
12 as a result of the effects of the plankton bacteria, phyto-  
13 plankton and zooplankton.

14 Lastly, laboratory tolerance studies show striped  
15 bass, eggs and larva, will be able to tolerate the temperatures  
16 experienced passing through Indian Point, Units 1 and 2.  
17 The exceptions are those that experience temperature eleva-  
18 tions while passing through the plant of 1 to 4 degrees  
19 Fahrenheit. A first approximation of the passage of white  
20 perch and striped bass larvae is that approximately 54 percent  
21 survive in apparently healthy condition.

22 This is merely an example, Mr. Chairman.

23 CHAIRMAN JENSCH: What does he say about striped  
24 bass are in the planktonic mode for approximately the first  
25 six weeks of life?

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1 MR. TROSTEN: He does not say that, but I can easily  
2 find -- I think I can easily find a section in Dr. Lauer's  
3 statement that indicates they are not in the planktonic mode  
4 because they begin to assume a pelagic life earlier than the  
5 first six to eight weeks. I could find similar statements,  
6 and Mr. Macbeth can find them, and Mr. Roisman can find them,  
7 and I am sure Mr. Clark has found them. The same statement  
8 made repeatedly in the testimony of our other witnesses. I  
9 really think --

10 CHAIRMAN JENSCH: You already have the answers,  
11 and you could fill them in after reach of these lines, then,  
12 I take it?

13 MR. TROSTEN: Depending on, as I say, what question  
14 we are asked. If Mr. Roisman were to ask me, or Mr. Macbeth  
15 were to ask me a question about these things, in some cases  
16 I am sure I could say either I don't know, or I disagree and  
17 so forth.

18 CHAIRMAN JENSCH: Or you could key them in to what  
19 you say, either false, unsubstantiated or misleading, you could  
20 put one, two, three after it?

21 MR. TROSTEN: Yes, sir. I could do that.

22 Before Mr. Macbeth goes on, let me make a couple  
23 of other points which relate to the earlier discussion.

24 Some time ago the Board made an observation that  
25 perhaps requires a little clarification. Con Edison is not

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1 taking the position, Mr. Chairman, that come what may, we  
2 don't want cooling towers, that Con Edison doesn't want cooling  
3 towers, and that we regard them as hideous. Con Edison  
4 is neither for or against the cooling towers. The position we  
5 are taking here is that there hasn't been enough evidence.  
6 We don't know whether we need cooling towers; Mr. Macbeth  
7 doesn't know; Mr. Roisman doesn't know; and Mr. Karman doesn't  
8 know. We need more information.

9 Now they are more sure than we are. You see, they  
10 feel that you -- these things are very cut and dried. We  
11 have the information. Let's build those cooling towers.  
12 We don't think that we know quite enough about this yet, and we  
13 would like to explore some of the bases for their certainty  
14 in this hearing. I would like to hear more about why Mr.  
15 Clark feels he understands this quite so clearly. Maybe he  
16 does. Maybe Mr. Clark will be able to convince us that  
17 really they are in the plankton mode for the first six to  
18 eight weeks, and then maybe we wouldn't have an objection to  
19 what he was saying.

20 We would like to have Mr. Clark explain this, and  
21 tell us why he feels this way about it.

22 In terms of the matter of the burden of persuasion,  
23 Mr. Chairman, and the burden of proof, I would certainly agree  
24 that the Intervenors have the burden of coming forward with  
25 the evidence with regard to their condition; but I also

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1 agree -- I would also say, Mr. Chairman, that when -- that an  
2 Intervenor by -- in proposing that we have enough evidence  
3 now to determine that the benefit-cost balance which is  
4 required by NEPA and required by Judge Wright's decision,  
5 justifies building cooling towers, they can't just come  
6 forward and present a little evidence and say now, "Now it is  
7 time for you to show that we don't need those cooling towers."  
8 They have got to show they need those cooling towers. They  
9 have to justify that the balance has been properly drawn,  
10 that the balance Calvert Cliffs calls for is properly drawn  
11 in this case.

12 I think it is more than coming forward with a little  
13 evidence and presenting a piece of paper that says, "We think  
14 the striped bass are going to be disseminated here." You have  
15 to do more than that.

16 CHAIRMAN JENSCH: Do you take the position that  
17 the Water Pollution Control Act Amendments prevent any  
18 condition for cooling towers in this proceeding?

19 MR. TROSTEN: Our position with the Federal Water  
20 Pollution Control Act Amendments is as follows:

21 We certainly believe that there is a very serious  
22 question that has been presented and is currently under adjudi-  
23 cation, in other cases, as the Chairman, I am sure, is aware  
24 as to whether the Atomic Energy Commission has the authority  
25 since enactment of that statute to impose the condition for the  
requirement of cooling towers.

1 CHAIRMAN JENSCH: What is your view?

2 MR. TROSTEN: Our view on this, Mr. Chairman, is  
3 that probably the Commission -- the Commission probably does  
4 not have the authority to impose this condition. On the  
5 other hand, and we certainly are reserving that position  
6 and I want to make that point clear in the hearing conference  
7 that the applicant is reserving that position and we believe  
8 that this is a matter that may take some time to resolve.  
9 It may be the subject of ruling --

10 CHAIRMAN JENSCH: Five-year study to go along  
11 the same line.

12 (Laughter.)

13 MR. TROSTEN: It probably is going to take that  
14 long for the Commission to promulgate rules or for the  
15 Court of Appeals to tell the Commission.

16 CHAIRMAN JENSCH: You tell us what your view is.  
17 I think that will be helpful in this proceeding rather than  
18 waiting for somebody over the hill to decide it.

19 MR. TROSTEN: Mr. Chairman, as I say, I believe  
20 the answer to this question probably is that the Commission  
21 does not possess the authority under Section 511(c) to  
22 impose this condition. We are certainly reserving that.

23 On the other hand, Mr. Chairman, I feel that this  
24 is a question that is going to have to be resolved. It is  
going to have to be resolved whether --

1 CHAIRMAN JENSCH: Maybe right in this proceeding?

2 MR. TROSTEN: Perhaps right in this proceeding  
3 or more probably, Mr. Chairman, in the context of rules that  
4 the Commission will have to --

5 CHAIRMAN JENSCH: If it is a question of legality  
6 or no legality, we don't have to have a rule.

7 MR. TROSTEN: I agree it has to be resolved in  
8 this proceeding ultimately. What I am really saying is it  
9 doesn't have to be resolved right now. Clearly at the time  
10 that a decision is made, yes, sir, it has to be resolved. It  
11 is a jurisdictional question.

12 On the other hand, there is no point, sir, in  
13 our view, and I gather in the view of the intervenors and  
14 the staff, of delaying the hearing and not going forward  
15 with it.

16 We think the hearing should proceed. We think  
17 this is a difficult question to answer.

18 CHAIRMAN JENSCH: Should we certify this one up,  
19 would you suggest?

20 MR. TROSTEN: I believe it has been certified.

21 CHAIRMAN JENSCH: I think there is almost a race  
22 between two proceedings to see whether you can get a decision  
23 out of another board.

24 MR. TROSTEN: Briefs have been filed, as you know,  
25 Mr. Chairman, on the Fort Calhoun proceeding on this.

1 CHAIRMAN JENSCH: I think I recall that.

2 MR. TROSTEN: Yes. It could be the subject of  
3 certification.

4 CHAIRMAN JENSCH: The Board would be interested  
5 in having a brief from you if we can by December 4 in  
6 reference to this Water Pollution Control Act.

7 Some of the things I would like to ask that you  
8 cover in your brief --

9 MR. KARMAN: Is that directed to all of us,  
10 Mr. Chairman? I am not quite certain the staff will be in  
11 the position to submit a brief.

12 CHAIRMAN JENSCH: I am interested particularly  
13 in the applicant at the moment because in a sense it is  
14 the applicant's answer to your suggestion. I think we would  
15 like to have it from the applicant and then after that all  
16 the parties can comment on it.

17 But, as I recall, the Water Pollution Control Act  
18 amendments were the subject of two bills, one in the House  
19 and one in the Senate, and they went to conference and out of  
20 the conference came several new sections.

21 MR. TROSTEN: Yes, sir.

22 CHAIRMAN JENSCH: As I understand the rules of the  
23 House of Representatives, a conference cannot develop a new  
24 condition unless there is a waiver by the House of that  
25 prohibition that precludes a new section being written into

1 a bill and so this was in the mind of the sponsors of the  
2 legislation when it came before the House and a resolution  
3 was proposed that this prohibition be waived.

4 Now, the resolution is very broad. It says that  
5 upon adoption of this resolution it shall be in order to  
6 consider the conference report on the bill as to 77002 to  
7 amend the Federal Water Pollution Control Act and all points  
8 of order against said conference report for failure to comply  
9 with Clause 3, XXVIII are hereby waived.

10 Then up spoke Mr. O'Neal who said "I yield to  
11 Mr. Anderson" who said, "I hold in my hand a list of twelve  
12 specific instances in which it is believed that in violation  
13 of Clause 3 of XXVIII the Committee of Conference did go  
14 beyond the scope of the House bill and the Senate bill and  
15 therefore violated the rule and made it necessary for us  
16 to adopt the resolution waiving points of order for that  
17 reason."

18 And then he listed twelve items, but at no  
19 time did he refer to Section 511.

20 So he didn't ask for a waiver of the prohibition.  
21 The prohibition may perhaps still apply.

22 The Section 511 was not properly within the  
23 conference report and is invalid because of the failure to  
24 comply with the rules of the House.

25 Now, this is something as to which you perhaps would

1 like to direct your attention.

2 MR. TROSTEN: All right, sir.

3 CHAIRMAN JENSCH: Then if you would give us the  
4 benefit, if you would, of your view of the language of it,  
5 it says in 511(a), I believe, first that there shouldn't  
6 be any review of it, of an effluent that may have been  
7 established by -- that would be national environmental  
8 policy administrator.

9 Then it says it shall not impose any limitation  
10 as I recall it. First it says under Section 511(2)(a) there  
11 is no authority to review.

12 Now, what does that mean? You can't look at it?  
13 Don't determine the validity of it? You don't consider it?  
14 Or you ignore it?

15 And then 511(2)(b) says there is no authority  
16 for any agency to impose as a condition precedent to the  
17 issuance of any license or permit any effluent limitation  
18 other than any such limitation established pursuant to this  
19 Act.

20 Now, does that mean -- and we request of you --  
21 that -- specifically here the Atomic Energy Commission could  
22 not say if the environmental policy administrator fixed the  
23 effluent release to be 85 degrees, or whatever, the Atomic  
24 Energy Commission could not say that it should be 82 degrees;  
25 but does that section preclude the Atomic Energy Commission

1 in acting in a way wholly separate from the temperature limit,  
2 for instance, of an effluent? To say the only way to stop  
3 fish kill is to put in cooling towers.

4 In one sense it isn't affecting, is it, or is it?  
5 Your views are requested.

6 MR. TROSTEN: All right, sir.

7 CHAIRMAN JENSCH: The effluent limitation, you  
8 don't care what the effluent limitation is. You want to  
9 stop the fish kill. And if cooling towers are the only way  
10 to do it, does that section stop cooling towers for a  
11 different purpose than effluent limitation?

12 MR. TROSTEN: Yes.

13 CHAIRMAN JENSCH: So I think this Board would feel  
14 that unless the matter was certified that it would proceed to  
15 arrive at its best judgment in the matter regardless of the --  
16 I don't say convoluted way of approaching it in the Fort  
17 Calhoun proceeding, but regardless of -- we might get a  
18 conflict among the courts of appeal among the circuit or  
19 something, but I think the Board would like to make its  
20 feelings known.

21 MR. TROSTEN: We will brief it.

22 CHAIRMAN JENSCH: Perhaps this is a good time to  
23 help the reporter a bit and take a few minutes recess if  
24 we may.

25 At this time let's recess, to reconvene in this

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room at 11:15.

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CHAIRMAN JENSCH: Please come to order.

There is just one further item on the briefing. If you would also cover the relevancy of consideration on the floor of the Senate. I had the impression in reading some submittals about the amendments to the Federal Water Pollution Control Act, particularly Section 511, that the conversation on the floor of the Senate was more persuasive in the meaning of the words used in the statute.

I have had the impression that the Court has said that you should read the statute first. In fact, pay no attention to -- maybe there are only two Senators on the floor. I don't know whether the entire Senate accepted -- or -- whatever two Senators talked between themselves about the meaning of some of the language of the bill.

I have always had the impression the Court has said if you can't figure out what the statute says, then you can do something somewhere; but you better stay with the English language in the bill all the way. I think that really is a primary.

We interrupted you. You were going to say something further. The Board is inclined -- did you have anything further to say?

MR. MACBETH: Not really. I was a little surprised about Mr. Trosten's statement about the bags and so on.

Dr. Lauer says that an analysis of clarification testimony

1 says: an agreement with -- that's -- it is for just that  
2 sort of reason that I really would like to have some statement  
3 of what kind of factual outline the applicant is relying on.

4 CHAIRMAN JENSCH: The Board has given consideration  
5 to this outline summary of intervenors' factual position  
6 and it is the Board's conclusion and ruling that the  
7 applicant can't file a specific answer to each of the  
8 paragraphs and subparagraphs on those ten pages. We

9 We think that will expedite the hearing and bring  
10 the factual matters more in focus. We ask that the answers  
11 need not be long, but be specific.

12 For instance, to get back to our one example that  
13 we have of the striped bass in the planktonic mode for  
14 approximately the first six weeks - if it is five weeks, say  
15 so - if it is not planktonic, what is it?

16 If you don't know, say you don't know. Something  
17 a little more positive and definite that will assist not only  
18 the presentation of evidence but certainly the understanding  
19 by the Board of the direction that the parties feel is  
20 important.

21 The Board will deny the motion of the intervenors  
22 to stay the proceedings.

23 MR. MACBETH: Could I --

24 CHAIRMAN JENSCH: Excuse me.

25 MR. MACBETH: Could I simply inquire, Mr. Chairman,

1 when the answer should be filed? I really do not want to  
2 delay this proceeding. As long as they come quickly --

3 CHAIRMAN JENSCH: We were going to come to that.  
4 We will further deny the motion of the Hudson River  
5 Fishermen's Association and the Environmental Defense Funds  
6 to require the applicant to offer testimony deducing evidence  
7 examining or cross-examining witnesses on the ground that a  
8 basis has not been offered for the motion.

9 What time would the applicant suggest as convenient  
10 for the specific answers as directed by the Board?

11 MR. TROSTEN: May we have a brief recess, please?

12 CHAIRMAN JENSCH: Sure.

13 (Recess.)

14 MR. TROSTEN: Mr. Chairman, could we possibly  
15 postpone giving a specific response to this while we look  
16 at it and move on to other matters? We will certainly  
17 do it promptly.

18 CHAIRMAN JENSCH: Yes. I don't know whether we  
19 are going to have enough at this conference to merit taking  
20 a noon recess for lunch, but if we do, perhaps you could  
21 answer after lunch. If not, we will go straight through  
22 and perhaps you can give us an answer when we do come back.

23 MR. TROSTEN: We are going to do it as promptly  
24 as we can and will get it to them obviously before their  
25 cross-examination -- all right. We will answer very shortly.

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1 MR. MACBETH: I would like it before the hearing  
2 begins, Mr. Chairman.

3 MR. TROSTEN: Well, all right. Let us respond as  
4 soon as we can.

5 CHAIRMAN JENSCH: All right. We have got about  
6 ten days. We will probably have a full day tomorrow.

7 MR. TROSTEN: That's right. After the turkey is  
8 finished.

9 (Laughter.)

10 CHAIRMAN JENSCH: Does that move our agenda along?  
11 It has been suggested that -- are there any other legal  
12 arguments you would like to present?

13 MR. MACBETH: Mr. Chairman, there is also pending  
14 before the Board the motion for a consideration of Bowling  
15 and Roseton. That has been briefed extensively by the  
16 intervenors and by the applicant and the staff.

17 I could say just a few words about it but I think  
18 essentially that most points are covered in the paper.

19 CHAIRMAN JENSCH: Let me ask the staff, I don't  
20 know as I quite understand the position of the staff about  
21 these two plants. As I understand the view of the staff, it  
22 is that we don't have jurisdiction over the plants?

23 MR. KARMAN: Pardon?

24 CHAIRMAN JENSCH: As I understand the view of the  
25 staff is, the staff is -- the position is the staff says we do

1 not have jurisdiction over the fossil fuel plants?

2 MR. KARMAN: That's right.

3 CHAIRMAN JENSCH: What difference does it make as  
4 to considering the environmental effect of the operation of  
5 this plant?

6 MR. KARMAN: The position of the staff, Mr. Chairman,  
7 as indicated in the response which we filed to the  
8 motion of the intervenor, Hudson River Fishermen's  
9 Association, was based upon, primarily upon the Appeal Board  
10 decision in the Vermont Yankee case which indicated that the  
11 impact should be concentrated on the proposed action,  
12 proposed action here is the licensing of the Indian Point Two  
13 nuclear unit and not the Roseton-Bowling fossil fuel plant,  
14 and that -- if I may quote, "But the proposed action in the  
15 licensing of the Vermont Yankee reactor and not of other  
16 present and future facilities at other places to be operated  
17 by other firms, and having at best a contingent presently  
18 undefinable relationship to the facility."

19 This was basically the underlying motivation of  
20 the staff in not being able to analyze the environmental  
21 impact of the proposed plants, those that are just about to  
22 start operation.

23 CHAIRMAN JENSCH: It seems to me in the Niagara-  
24 Mohawk case there was some question raised as to the effect  
25 of the operation of the Salem plant.

The Salem plant was excluded as I recall the

1 situation, by the Niagara-Mohawk final environmental statement.

2 When this was called to the attention of the staff,  
3 the Salem plant and its effects were included.

4 MR. KARMAN: You have me at a disadvantage, Mr.  
5 Chairman.

6 CHAIRMAN JENSCH: If I am in error, I would like to  
7 be corrected. While I realize that was the Salem, New Jersey  
8 plant and this is the Salem, New York plant.--

9 MR. TROSTEN: I am not familiar with it. Which  
10 plant was this?

11 CHAIRMAN JENSCH: Nine Mile Point Number Two.

12 MR. MARTIN: Salem, New York is 150 miles from  
13 Nine Mile Two.

14 CHAIRMAN JENSCH: Maybe the plant with the name  
15 of Salem closer to the Nine Mile Point -- what is that,  
16 Salem, New York or not? I don't know. I have a recollection  
17 the Salem plant was thereafter included in the staff final  
18 environmental impact statement after it was called to their  
19 attention.

20 MR. TROSTEN: For Nine Mile Two?

21 CHAIRMAN JENSCH: Yes.

22 MR. TROSTEN: To the best of my knowledge there  
23 hasn't been an environmental impact statement prepared for  
24 Nine Mile Two. I will check that.

25 MR. ROISMAN: This isn't the Cincinnati case that

1 the Appeal Board decided?

2 MR. KARMAN: No, no. It might possibly be, Mr.  
3 Chairman, that one of my technical staff advisers -- it  
4 might possibly be the Fitzpatrick plant, Upstate New York.  
5 I am not familiar with the position so I am not in a position  
6 to respond.

7 CHAIRMAN JENSCH: My recollection is it is ~~with~~  
8 Niagara-Mohawk.

9 MR. MACBETH: I would like to say a little bit. I  
10 think Mr. Karman misconceives what the intervenors are saying  
11 here.

12 We are not saying Bowling-Roseton are part of the  
13 proposed action. That was the contention the intervenors  
14 made at the Vermont Yankee.

15 The life cycle of the nuclear fuel was part of  
16 the action the Commission was going to license. We are  
17 saying Bowling-Roseton on the Hudson River for the next  
18 number of years are part of the environment on which  
19 Indian Point Two will be operating.

20 To know the impact of the Indian Point Two Plant  
21 on the environment, we must know what's going on in that  
22 environment and part of what's going on are Bowling-Roseton.

23 It doesn't matter that they happen to be electrical  
24 plants. In fact they are and we have identified them as  
25 that throughout. They are part of the environment on which

1 the plant operates as if they were, you know, tidal run-off  
2 or tidal movement or fresh water run-off.

3 They are part of the impact you look at.-- this  
4 plant being situated on this estuary, as opposed to a plant on  
5 the shores of Lake Ontario, Lake Superior, or on a fresh  
6 water stream like the V. T. Yankee plant itself.

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2 To understand that environment, one has to under-  
3 stand what these plants are doing and what is in fact going  
4 on, on the Hudson now is an enormous exploitation of that water  
5 on the river for use by power plants for cooling purposes,  
6 the level the fish kills that have been predicted by both  
7 the Staff and by the Intervenors will be even greater as the  
8 affidavit from John Clark suggests, when you factor in these  
9 additional operations on the environment of Bowling and Roseton.

10 In order to understand the full weight and importance  
11 of Indian Point 2, one has to see it in this context, which  
12 is the actual factual context in which the plant will be  
13 operating for the foreseeable future. We are not asking the  
14 Board to take into account, you know, speculative things in  
15 the future, Storm King Plant, if the Storm King Plant should  
16 be built. I mentioned the plant in the motion papers since  
17 the Applicant has dropped its motion for a nuclear plant  
18 which has been accepted, happily, by the Intervenors here.

19 (Laughter.)

20 We certainly don't have to think about that. But  
21 those plants that are going to be operating, I think, have to  
22 be looked at as part of the environment. It might well be  
23 that the Board would come to a decision based on the Indian  
24 Point evidence alone, that Indian Point is likely to kill,  
25 oh, say -- just to pick a number -- 25 percent of the striped  
bass production of the river, and in those terms it would be

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1 better to condition the license and allow Con Edison to do  
2 research for two years or five years or whatever.

3           If the evidence is before the Board that at the  
4 same time the rest of the striped bass production in the  
5 river was going to be decreased by other activity in the  
6 environment, then this additional impact of Indian Point  
7 might persuade the Board that in fact there wasn't time to do  
8 research, the cooling towers were needed at this plant now.  
9 Obviously the Board can only exercise jurisdiction over this  
10 plant, but it should exercise that jurisdiction and make its  
11 decision on the basis of the knowledge of the entire environ-  
12 ment. It is not only the importance of that knowledge to this  
13 Board and to the Commission.

14           I think there is no question after the decisions  
15 from the Circuit Court of Appeals in the District of Columbia,  
16 and particularly in NRDC versus Morton and the Seaboard  
17 case thing, that part of what NEPA is aiming at is to inform  
18 other agencies and the Congress and the President himself as  
19 to what the situation, the environmental situation is in the  
20 areas surrounding these various proposals; and the agencies  
21 must look beyond, you know, a narrow view of just their little  
22 plant. They have to look at the environment in a broader  
23 sense.

24           That was true with the Morton case and with the  
25 offshore oil leasing proposal in which they were required to

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1 look at the oil importa quota system. Other alternatives  
2 for procuring the oil. Here I think there is no question  
3 that that broader view of the Hudson River is absolutely  
4 essential to inform other agencies and the Congress, two  
5 Congressmen pointed it out in letters which they wrote in,  
6 in response to the draft statement, that a broader view of  
7 the Hudson River was essential. I think Congress and the  
8 executive generally are relying on agencies like the AEC to  
9 take that broader view so the information is before them  
10 and they can take others, if they think it would be necessary,  
11 at Bowling and Roseton.

12           Bowling and Roseton are part of the environment.  
13 One cannot understand the impact of Indian Point 2 on the  
14 environment unless one looks at the whole environment there.  
15 Those plants are part of it. They are starting up. Bowling  
16 has started up, I believe. Roseton, the first unit must be  
17 just starting or just about to start. The second unit is  
18 coming in the spring. The second unit of Bowling, in time for  
19 the summer of '74, it is there. This is not speculative.  
20 Next time you are at the Springvale Inn, you can drive up and  
21 down the banks of the Hudson and there they are. It is not a  
22 matter of, well, maybe some time five or 10 years from now  
23 plants will be constructed, something will happen.

24           I think that environmental situation has to be  
25 analyzed and I think that the Staff statement is inadequate

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1 for failing to do so and that further evidence from the Staff  
2 should be required on those points and evidence from the  
3 other parties on those issues should be ruled admissible  
4 to the hearing.

5 MR. BRIGGS: Mr. Karman, in the Staff's environ-  
6 mental statement, in thinking about they -- there must have  
7 been some thinking about Bowling and Roseton, if there was  
8 a reason to believe that operation of those two plants would  
9 in effect destroy the Hudson River fishery, would there be  
10 reason to recommend putting cooling towers on Indian Point 2?

11 MR. KARMAN: It would seem not, Mr. Briggs.

12 MR. BRIGGS: Do you know whether some consideration  
13 was given to that point in preparation of the environmental  
14 statement?

15 MR. KARMAN: Well, I am not in a position at this  
16 particular moment to respond to that.

17 CHAIRMAN JENSCH: The Board is a little concerned  
18 as to whether the reliance by the Staff is really not a state-  
19 ment out of context. I think the fuel cycle was the subject  
20 of the decision which Staff counsel referred to, and I don't  
21 know that it is particularly helpful here.

22 Applicant?

23 MR. TROSTEN: May I address the general questions?

24 CHAIRMAN JENSCH: Sure.

25 MR. TROSTEN: Mr. Chairman, we believe that the

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1 fundamental legal question that's involved here is whether  
2 the action to be considered in this particular proceeding is  
3 the impact of the licensing of this particular plant or  
4 the impact of the licensing of a series of plants or some  
5 complex involving these plants.

6 CHAIRMAN JENSCH: I think that is true. But it  
7 is the impact on what.

8 MR. TROSTEN: Well, if you -- accepting the basic  
9 principle that the licensing action is the licensing of this  
10 particular plant, then you come to the question that Mr.  
11 Macbeth posed as to what is the environment upon which this  
12 plant will operate.

13 Well, it is clear to us, Mr. Chairman, that you  
14 cannot take the operation of these two -- these plants, the  
15 Bowling and Roseton plants, the projected future impact of  
16 these plants, and consider because these plants are going to  
17 be operating in the future, that they somehow will constitute  
18 the environment of this Indian Point plant which is being  
19 considered in this proceeding.

20 Mr. Macbeth gave a very beautiful example, as a  
21 matter of fact, of how plans change and schedules change, and  
22 so forth. The Applicant has withdrawn its application for  
23 the Rappahannock Plant. There could be many changes in the  
24 schedule for operation of the Bowling and Roseton plants, in  
25 the design of those plants. Maybe cooling towers will be

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1 required for those plants. Schedules can change. The whole  
2 situation can change. To say that in determining what the  
3 environment is --

4 CHAIRMAN JENSCH: By the ice age.

5 (Laughter.)

6 That's a possibility, too.

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1 MR. TROSTEN: In any event, what is called for, it  
2 seems to us, by NEPA, is a rule of reason as to what the  
3 environment is that should be viewed by the Board and by the  
4 Staff and by the parties in a particular proceeding.

5 Now it is certainly true that we have looked at the  
6 total environment as it has been affected by plants that  
7 are on the river, the Lovett plant, the Danskammer  
8 plant, and so forth. To look beyond into the plants that  
9 are expected to operate in some mode on the river, and say,  
10 "Well, will these become part of the environment upon which  
11 this plant will operate?" we say that is a speculative  
12 and unrealistic sort of analysis that is not called for under  
13 NEPA.

14 CHAIRMAN JENSCH: Is there some use of one of these  
15 plants now, Bowling and Roseton?

16 MR. TROSTEN: The Bowling plant has gone into --  
17 Bowling 1 unit has gone into partial commercial operation.  
18 I don't believe it's reached full commercial operation.

19 CHAIRMAN JENSCH: It is releasing some effluent  
20 now?

21 MR. TROSTEN: Yes, sir.

22 CHAIRMAN JENSCH: How do you feel that can be  
23 obviated or removed from consideration? That is an existing  
24 fact, is it not?

25 MR. TROSTEN: Well, I would say this, Mr. Chairman:

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1 I suppose it would be conceivable if you -- to determine the  
2 very limited amount of information that is developed during  
3 the last month or two of operation of this particular facility,  
4 but that isn't what the Intervenors are asking for here.  
5 They are asking that an analysis be made on the basis of  
6 models or projections or what-have-you as to what the future  
7 impact of these plants will be when these plants have not  
8 operated at the present time in any substantial degree. Some  
9 of them are not expected to operate until, in one case, May of  
10 1973, if it goes into operation in May of 1973, and the other  
11 the summer of 1974, if it goes into operation in the summer  
12 of 1974.

13 CHAIRMAN JENSCH: You see, that isn't the position  
14 the Staff takes at all. Staff just says, "We don't have any  
15 jurisdiction; draw the blind down. We won't even look at it."

16 You are making an argument that, as I understand  
17 it, from these different cases, there's some process, I hear  
18 a lot about, called extrapolation. I thought if you knew  
19 what a fossil fuel plant will do, because you know certain  
20 power levels and certain release rates of effluent, that you  
21 can know when -- no one is going to believe that it is  
22 speculative that you are going to shut down Bowling or Roseton  
23 or dismantle it and move it away. It is there and they  
24 are planning to use it. All reasonable probability, with a  
25 reasonable assurance that we need beyond being incredible and

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1 unlikely and remote and impossible -- we sti-1 think it is  
2 something that you -- looks pretty realistic.

3 MR. TROSTEN: First of all, you won't have to shut  
4 down or move Bowling or Roseton away in order to change the  
5 potential impact on the environment which is -- that is pre --

6 CHAIRMAN JENSCH: You are saying you are going to  
7 put in cooling towers at those two fossil plants, then I think  
8 it is a certainty that ought to be taken into consideration.  
9 Until you propose a different operation than now projected  
10 or known, we'd have to take it to tell it like it is.

11 MR. TROSTEN: All I am saying, Mr. Chairman, is  
12 this: It is just because of the degree of uncertainty --  
13 and this isn't the only reason, but one of the principal  
14 reasons -- because of the degree of uncertainty as to what  
15 these plants -- what impact these plants may have on the  
16 environment, how they may be operative, how their design may  
17 be changed, that it isn't reasonable or rational or follow the  
18 rule of reason that NEPA requires for you to look into the  
19 future and say somehow the fact those plants will be  
20 operating makes them part of the environment, which this Board  
21 must consider in this case. I don't think that is what the  
22 Court in Amchitka did. I don't think that is what the Vermont  
23 Yankee case suggested.

24 CHAIRMAN JENSCH: Let me ask you: Suppose there  
25 were a fossil fuel plant right next door to Indian Point 2 and

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1 they were releasing some effluent, two units, one releasing  
2 now. Would you consider that as a part of the existing  
3 environment?

4 MR. KARMAN: Mr. Chairman --

5 CHAIRMAN JENSCH: If you move it up 10 miles or  
6 10 --

7 MR. TROSTEN: We don't consider a plant as a fossil  
8 plant is significant.

9 MR. KARMAN: Neither do we. We indicate -- in our  
10 environmental impact statement we indicate that the Staff  
11 has evaluated environmental impacts. This is XII-42 of  
12 the final statement.

13 CHAIRMAN JENSCH: Thank you.

14 MR. KARMAÑ: The last full paragraph on the page  
15 under M. It says the Staff has evaluated the environmental  
16 impacts of the once-through cooling system of Indian Point 2  
17 superimposed upon the cumulative effects of the existing  
18 plants upon the river, namely Danskammer, Lovett, and Indian  
19 Point 1.

20 On page XII-43, we indicate although this final  
21 statement includes the incremental effects of Indian Point  
22 Units 1 and 2, other impact statements will be prepared for  
23 Units 1 and 3.

24 CHAIRMAN JENSCH: Where is it dealing with Roseton  
25 and Bowling?

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1 MR. KARMAN: They were not operating when this was  
2 prepared.

3 CHAIRMAN JENSCH: I understand. As I understand  
4 the position, it is so close to reality nobody thinks you are  
5 going to change a fossil fuel plant from its normal operation.

6 MR. TROSTEN: Mr. Chairman, Mr. Chairman, these  
7 plants must go through the --

8 CHAIRMAN JENSCH: Bugging, de-bugging.

9 MR. TROSTEN: Not just that. I am not referring  
10 to the uncertainty associated with their method of operation.  
11 I am referring to the fact they are required to get permits  
12 for discharges under the Federal Water Pollution Control Act  
13 amendments. They must go through the environmental review  
14 that that statute calls for. They must go through the  
15 environmental review called for by the Department of  
16 Environmental Conservation of the State of New York.

17 In other words, these plants are subject to  
18 environmental review.

19 CHAIRMAN JENSCH: You mean to say their planning  
20 operation -- Bowling is now operating as part of Unit No. 1  
21 and you don't have any of those permits yet. Do you have  
22 permits for either one?

23 MR. TROSTEN: I am not absolutely certain, Mr.  
24 Chairman.

25 CHAIRMAN JENSCH: Would you guess they did if they

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1 are operating?

2 MR. TROSTEN: I would assume they do, excepting,  
3 Mr. Chairman, as you know, if you have filed an application  
4 for a permit under the Refuse Act of 1899 and you have  
5 complied with all applicable requirements, discharges are  
6 permitted for a period of time pending the consideration  
7 and action by the Environmental Protection Agency on that.  
8 As you know, there is that provision built right into the  
9 statute. To the best of my knowledge, they have a -- well,  
10 in any event they certainly have applied for a Refuse Act  
11 permit. Whether the --

12 CHAIRMAN JENSCH: You came almost up to the point  
13 of saying something definite.

14 (Laughter.)

15 I thought I wouldn't interrupt you.

12 16 What do they have for the Bowling plant now?  
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1 MR. TROSTEN: They have a Section 10 permit. To  
2 the best of my knowledge they do not have a final discharge  
3 permit from the Corps of Engineers and, of course, they don't  
4 have one from the Environmental Protection Agency.

5 CHAIRMAN JENSCH: That is grandfathered into  
6 the amendments?

7 MR. TROSTEN: That's correct.

8 Just to continue the argument, briefly,  
9 Mr. Chairman, I really think that to say that you should  
10 somehow consider this to be part of the environment because  
11 of the information function of the National Environmental  
12 Policy Act and to site Morton and these other cases is  
13 really beside the point.

14 First of all, it is quite clear from the Morton  
15 case that that was a very different sort of action than is  
16 being considered by the Atomic Energy Commission here.

17 The court in Morton very specifically indicated  
18 that the action be something more specific like the  
19 issuance of a license for a dam, that you would not be  
20 subject to the same sort of generalized information  
21 developing functions that came out of that court decision.  
22 So I really think that there is no basis in the National  
23 Environmental Policy Act to consider that simply for  
24 informational purposes it is necessary to disclose all of  
25 this information.

1           As I say, Mr. Chairman, I really believe that  
2 it is no more necessary for us to consider the impact of  
3 the Bowling and Roseton plant than it is for us to consider  
4 the impact on the river of the fish that the Hudson River  
5 fishermen are going to catch. They are going to have an  
6 impact, too. They are not suggesting that we consider that  
7 impact but, who knows, maybe that would have a much greater  
8 impact on the fish in the Hudson River than these two plants.

9           CHAIRMAN JENSCH: That may be, but the law doesn't  
10 require that as I understand it, that the men going out  
11 tossing a line.

12           MR. TROSTEN: He is not making that argument.  
13 He is saying yes, but you have to find out what the environ-  
14 ment is. He is just simply saying look at Bowling and Roseton  
15 because that is the only way you can know what the environment  
16 is.

17           The environment is impacted -- is affected by many  
18 more things besides Bowling and Roseton.

19           CHAIRMAN JENSCH: You are saying a man tossing  
20 a line is assured of getting a fish and it will affect the  
21 environment.

22           MR. TROSTEN: I am sure if Mr. Macbeth were  
23 doing it it would be very successful.

24           MR. MACBETH: In fact, the staff has considered  
25 that. The whole point of the staff's analysis about sixteen

1 inch fork lengths and those requirements and the state men  
2 pose that fish be caught only when they are sixteen inches  
3 long and there are analyses of how that influences the growth  
4 of the fishery is precisely aimed at the affect that fishermen  
5 had on the size of the fishery before that state requirement  
6 was put in. The staff has covered that.

7 It is -- again back to Chapter XII -- there is  
8 discussion in Chapter V about it. I don't have the reference  
9 offhand.

10 I think that if the applicant is arguing that if  
11 another agency has put its imprimatur of approval on these  
12 other plants that cuts off all consideration by the Atomic  
13 Energy Commission, that simply isn't so.

14 I think it is perfectly reasonable for the staff  
15 to look at the studies done by other agencies, and if they  
16 feel an excellent study has been done, they can simply  
17 incorporate it here as part of their general analysis.

18 I am not suggesting the staff has to go back  
19 and rip up everything another excellent agency has done, that  
20 the staff feels is competent, and start afresh. I feel they  
21 can perfectly well look at that material and if they find it  
22 persuasive, incorporate that as part of the statement.

23 But simply the fact that some other agency has looked  
24 at it, I don't think it really has bearing here. It is --  
25 those plants are part of the environment.

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1 In fact, other agencies are out there looking as  
2 well. That is probably a good thing. It will make the  
3 Commission's work less.

4 But it doesn't instruct the Commission, therefore,  
5 to drop the issue at that point.

6 CHAIRMAN JENSCH: What does this Chapter 10 permit  
7 provide as to temperature levels of liquid releases, do you  
8 know?

9 MR. TROSTEN: Well, the more recent Section 10  
10 permits contain environmental conditions that may have dealt  
11 with that subject, Mr. Chairman. I am not absolutely sure.

12 MR. MACBETH: I know a little bit about the Bowling  
13 Section 10 permit. It is perhaps one of the most confused  
14 pieces of history the Army Corps of Engineers has ever  
15 produced. As far as I can make out it is a permit for  
16 construction in the river. It requires before a discharge  
17 permit be issued an impact statement of -- I believe a final  
18 impact statement be filed with the Council on Environmental  
19 Quality.

20 To the best of my knowledge a draft statement on  
21 that plant has now been filed, but no final environmental  
22 impact statement has been filed by the Corps and in the mean-  
23 time the discharges go forward.

24 The construction has been completed. On top of  
25 which the original draft statement that was circulated by

1 the Corps was drawn up by the applicant, Orange Rockland.  
2 Our Wilson Con Edison, of course, is in a joint venture  
3 with Orange Rockland on this plant. That is in fact bad on  
4 its face under the Green County case.

5 I would be willing to go into what the Army Corps  
6 of Engineers has produced in the way of a Rube Goldberg  
7 machine in their environmental review of that plant. It is  
8 one of the worst pieces of review I have ever seen.

9 CHAIRMAN JENSCH: What is the temperature level,  
10 do you know, Mr. Macbeth?

11 MR. MACBETH: It is approximately fifteen degrees.

12 MR. TROSTEN: That is the Delta T you are talking  
13 about. Are you talking about the Delta T on cross-condensers?

14 CHAIRMAN JENSCH: No. The release to the river  
15 after the condensers.

16 MR. MACBETH: I don't think there is such a  
17 precise requirement.

18 MR. TROSTEN: Mr. Macbeth, I believe you are  
19 referring to the Section 13 permit rather than the Section 10  
20 permit the Chairman was asking about. Isn't that correct?

21 MR. MACBETH: This is where it gets so confusing.  
22 Part of the Section 10 permit, as far as I can see, was a  
23 requirement that before discharges begin a final environmental  
24 impact statement be filed. Now, what has been -- that -- what  
25 has now been filed is a draft statement for the discharge

1 permit which was filed by the Army Corps of Engineers about  
2 two days before the Water Pollution Control Act of 1972 was  
3 issued which would appear to run the Army Corps out of the  
4 business of filing impact statements for discharges.

5 So it -- the legal situation really could not  
6 be much more confusing. One could set this all out, but I  
7 think the fundamental point is that regardless of how the  
8 Army Corps of Engineers has tied a Gordian knot around that  
9 plant, the staff of the Commission still has the duty to  
10 look at that plant as part of the environment.

11 If they can -- if they find the Corps has done a  
12 excellent study of that, they can simply rely on the  
13 information the Corps has produced and append that as part  
14 of their general analysis to this statement. That would be  
15 satisfactory.

16 They have to come up with something which they feel  
17 has a sound basis in fact. If they feel some other agency  
18 has done that, that is their judgment and that is fine. I may  
19 disagree with it, but the point is the staff has then  
20 discharged their duty as they see it. They have looked at  
21 the whole environment. If we have other evidence, we could  
22 bring it in.

23 The point is that the issue should be in the  
24 hearing and that the staff should produce as part of their  
25 impact statement some analysis of the impact of that plant in

1 environment.

2 MR. TROSTEN: One point I think Mr. Macbeth is  
3 overlooking is the fact that regardless of what the Corps  
4 of Engineers may have done in the way of preparing a final  
5 environmental statement under the National Environmental  
6 Policy Act for a discharge from Bowling, this plant must  
7 obtain a permit under Section 402 of the Federal Water  
8 Pollution Control Act amendments. There has to be an  
9 appropriate environmental review by EPA in connection with  
10 the issuance of that and there is the opportunity for a  
11 hearing.

12 There is -- Congress has enacted a complete  
13 framework here for the environmental review of this  
14 plant and of the Roseton plant. I think it is simply wrong  
15 and it is bad policy and it is bad law to suggest that somehow  
16 the Atomic Energy Commission should take over the environ-  
17 mental review of these other plants.

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1           CHAIRMAN JENSCH: I think that's entirely a  
2 misstatement of their position. I think what they are saying  
3 is that if Bowling-Roseton are authorized to release water to  
4 the Hudson River at a temperature of 96 degrees, that you  
5 shouldn't close your eyes to it. Whether it is permitted or  
6 changed or modified, whatever be the temperature limit, it  
7 is something that you see going down the river. You look  
8 out the river and steam is coming from the Hudson River, you  
9 don't say, "Well, that must be an illusion.. We are not  
10 going to look at it." I think you have to take a look at  
11 what you see and what's there.

12           MR. TROSTON: I don't think I have misstated their  
13 position for this reason. What they are adopting is they  
14 are saying we have to look at these two power plants. They  
15 are interested in the Bowling and Roseton plants. They are  
16 suggesting somehow you could determine what the environment  
17 is in the Hudson River by looking at these two plants.

18           They are not suggesting that you look at all the  
19 other commonest factors, Mr. Chairman, that could involve  
20 the environment of the Hudson River.

21           I mentioned a moment ago the impact on the river  
22 of the Hudson River Fishermen. There are other industrial  
23 facilities. There are pollution control abatement programs  
24 that are in function.

25           CHAIRMAN JENSCH: You are not going to wait for

1 those programs to be in effect before you look at what is  
2 existing there now, are you?

3 MR. TROSTEN: But it isn't existing there now.

4 CHAIRMAN JENSCH: Assuming you had releases from  
5 chemical plants with not only chemicals but high temperature  
6 and you know that, say, the State of New York is going to  
7 have some control programs on those releases; until those  
8 programs have been adopted and in operation, you are not  
9 going to say that doesn't exist?

10 MR. TROSTEN: But the point is, Mr. Chairman, that  
11 these plants don't exist now. You pointed out that it is true  
12 that the Bowling plant may have started generating a little --  
13 some electricity. But the other plants are -- one of them  
14 is practically two years away; the other one is in mid-year --  
15 mid-next-year, and we are talking about plants that are  
16 going to be starting up, and they don't exist now.

17 There are plants that are going to be starting  
18 up sometime in the future, if things go as we expect, if they  
19 are not changed and so forth.

20 CHAIRMAN JENSCH: Would they be within the range of  
21 your five-year study that you have been mentioning?

22 MR. TROSTEN: Yes, sir. I mean they would start  
23 up during the period of five-year study.

24 MR. KARMAN: And will be analyzed by the staff in  
25 its environmental analysis of Indian Points One and Three, Mr.

1 Chairman.

2 CHAIRMAN JENSCH: But not Two?

3 MR. KARMAN: Not for Two.

4 CHAIRMAN JENSCH: How --

5 MR. KARMAN: We indicated in our final environ-  
6 mental statement that the incremental effects of operation  
7 of Unit Two are of sufficient magnitude to justify the use  
8 of alternate cooling systems for protection of the  
9 environment. We have indicated Two to be superimposed on One,  
10 Dance Camera, Lovett, those plants in operation. We felt  
11 there was sufficient impact.

12 Now, the question that was asked of me before as  
13 to whether or not we had analyzed whether Roseton and Bowling  
14 would cause the -- such irreparable damage that regardless  
15 of the cooling towers, I cannot answer that.

16 CHAIRMAN JENSCH: As I understand the applicant's  
17 counsel --

18 MR. KARMAN: I shouldn't say cooling towers. We  
19 have never in our final environmental statement indicated  
20 we will recommend cooling towers. We have recommended an  
21 alternate closed cycle cooling system.

22 CHAIRMAN JENSCH: Which can be accomplished by  
23 perhaps many means, one of which would be cooling towers?

24 MR. KARMAN: Yes, sir.

25 CHAIRMAN JENSCH: As I understand this speculative

1 uncertainty about Bowling and Roseton, as to whether they  
2 are going to start up, I suppose you'd apply that to Indian  
3 Point, too? There seems to be some speculation  
4 possibilities.

5 The thing that is kind of disturbing is there  
6 seems to be so much uncertainty as to the environment, but  
7 on the radiological safety you didn't have quite the same  
8 uncertainty and I wondered if -- how you would distinguish  
9 between the lack of knowledge in some instances and --

10 MR. TROSTEN: I think that can be done, Mr.  
11 Chairman. First let me repeat that these plants will be  
12 operating, that the five-year study period will encompass  
13 the period during which these plants are starting up.

14 I would say as far as the matter of uncertainty  
15 in the environmental area versus the radiological safety  
16 area, it is simply a fact, Mr. Chairman, that the amount of  
17 information about environmental matters and indeed the level  
18 of concern over environmental matters has not yet permitted  
19 the amassing of a sufficient amount of information or an  
20 amount of information anywhere approximating the type of  
21 information that has been developed over the past 25 years  
22 in the radiological safety area.

23 It was for this reason that Congress went and  
24 enacted NEPA, providing for a balancing of information. It  
25 is for that reason that Judge Wright talked about a

1 systematic, finely tuned balancing that has to be done in  
2 each case because you don't have enough information in a  
3 lot of areas and you have to balance such things as the lack  
4 of information and the lack of certainty against other things  
5 like the cost of putting in cooling towers or the cost of  
6 taking certain measures to do things.

7 It is for exactly that reason that you have to  
8 have this kind of a balancing analysis. NEPA assumes you  
9 may not have this kind of information and it simply requires  
10 in each case the Board look at what is available and make a  
11 judgment on the basis of that, the best judgment that can be  
12 made.

13 CHAIRMAN JENSCH: Can I change to a different  
14 subject.

15 Let me ask you in your consideration how far does  
16 the scopr of alternatives go? Does it include the  
17 possibilities of power from Canada?

18 MR. TROSTON: I certainly think that the  
19 possibility of purchased power, including the possibility  
20 of purchased power from Canada, is one of the alternatives  
21 that was considered in the staff's statement and has been  
22 considered in the applicant's testimony, and I think that  
23 as an alternative, yes, this is an alternative within the  
24 scope of the proceeding.

25 CHAIRMAN JENSCH: And you will be prepared to

1 submit data on -- in a little more detail on this alternative  
2 of power and I take it that gets to the technical phases,  
3 too, the feasibility of direct current transmission, and  
4 diversion back to alternating current?

5 MR. TROSTEN: If this were to be required during  
6 the course of the hearing, we would be prepared to do that,  
7 Mr. Chairman.

8 CHAIRMAN JENSCH: I had some impression that this --  
9 there is quite a potential of hydroelectric power in  
10 Northern Labrador and I guess Quebec, too. It is going to  
11 waste up there now and the conservationists could save a lot  
12 of power if they put some cement in the canons up there;  
13 the possibilities of power seem tremendous.

14 I wonder whether that isn't the speculative  
15 alternative to Indian Point Number Two. How do you feel  
16 about that?

17 MR. TROSTEN: I think the analysis that has been  
18 done including the staff's analysis in the final environmental  
19 statement indicates that this is not an adequate alternative  
20 in the short term nor is it really a proven adequate  
21 alternative in the long term.

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1 CHAIRMAN JENSCH: You have a contract for some  
2 Quebec or Labrador Power, Churchill Falls project, do you not?

3 MR. TROSTEN: I believe so.

4 CHAIRMAN JENSCH: You are not suggesting the  
5 company shouldn't have signed that contract?

6 MR. TROSTEN: No, sir, but I am also saying I would  
7 have to look into this further myself.

8 CHAIRMAN JENSCH: Will you do that?

9 MR. TROSTEN: Yes, sir. Yes, sir.

10 CHAIRMAN JENSCH: All right.

11 Well, prior to the Board's consideration of this  
12 Bowling-Roseton situation, is there some other matter we can  
13 consider at this time?

14 MR. TROSTEN: Well, would it be satisfactory to the  
15 Board, Mr. Chairman, if we proceed to the matter of the  
16 schedule for the December 4 hearing?

17 CHAIRMAN JENSCH: All right.

18 What do you propose?

19 MR. TROSTEN: What I propose, Mr. Chairman, is that  
20 at the outset of the hearing, all parties commencing with the  
21 Applicant put in their direct case.

22 Applicant would propose to offer in evidence the  
23 documents listed on attachment A to the suggested agenda that  
24 was passed out this morning.

25 In addition, Applicant intends to offer a limited

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1 amount of oral testimony by four of its witnesses: Dr. Lauer,  
2 Dr. Lawler, Dr. McFadden and Dr. Raney. This would not be  
3 extensive testimony, Mr. Chairman, and that would be the only  
4 oral testimony that we plan to offer at this time.

5           Following the offering of evidence by the  
6 Applicant, I would presume that all other parties should offer  
7 their direct case.

8           As I understand it, the Staff's direct case will  
9 consist of the final environmental statement. I further  
10 understand that the Intervenors will offer the testimony of  
11 Mr. John Clark and Dr. Eric Ainsley of October 30th.

12           Following the offer of evidence and any objections  
13 or questions that may arise in connection with those offers,  
14 I would propose, Mr. Chairman, that we proceed with cross-  
15 examination of the Regulatory Staff by the Applicant followed  
16 by cross-examination of the Regulatory Staff by the Intervenors.

17           We estimate approximately three days of cross-  
18 examination of the Regulatory Staff. We will be receiving  
19 shortly, I understand from Mr. Karman, a list of the witnesses  
20 who will be available for cross-examination in the areas of  
21 my letter identified -- the letter of Saturday.

22           After the cross-examination of the Applicant by  
23 the -- of the Staff, rather, by the Applicant and the  
24 Intervenors, depending on how much time the Board had scheduled  
25 for the hearing, we would propose one of two things, Mr.

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1 Chairman: We could either proceed with cross-examination of  
2 the Intervenors' witnesses -- we are fully prepared to go  
3 forward with cross-examination of Mr. Clark and Dr. Ainsley,  
4 and, indeed, that is what we propose that we do.

5 If there is some question about that, and if the  
6 Intervenors feel in the time available they can complete their  
7 cross-examination of our witnesses during the hearing session,  
8 well, we are amenable to discussion of that with the Inter-  
9 venors, too.

10 We certainly will be prepared to proceed immediately  
11 following cross-examination of the Staff witnesses to cross-  
12 examination of Mr. Clark and Dr. Ainsley.

13 CHAIRMAN JENSCH: Any comment on that proposal?

14 MR. MACBETH: Yes. I have some differences. I  
15 don't think they are of a major nature.

16 I agree we should start out by putting in the  
17 direct case, written testimony on all parties. I would like an  
18 agreement that we don't actually have to physically have the  
19 witness there to swear to the written testimony at that point,  
20 but to have them for cross-examination.

21 If Dr. Ainsley is in Chicago, and Dr. Clark is in  
22 Washington, and since they would simply be swearing to the  
23 testimony at that point, I would hope we could agree that would  
24 not be necessary.

25 I have a little problem with the oral presentation

sw4 1 by the Applicant's witnesses. If that is simply an oral  
2 summary of what is in the written testimony, that doesn't  
3 disturb me at all; but there is a requirement that the testimony  
4 be submitted in writing and that certainly is what we have been  
5 trying to do here.

6 I would object if the Applicant proceeded into new  
7 areas that we haven't had in written form first.

8 Now, it is ambiguous as to what the Applicant  
9 intends to do there. As long as it was only an oral summary of  
10 the written material already submitted, that would be fine.

11 MR. TROSTEN: We do not intend to proceed into new  
12 areas, Mr. Chairman.

13 MR. MACBETH: On the order of cross-examination, I  
14 think that properly the Applicant should go first -- or the  
15 cross-examination of the Applicant's witnesses should take  
16 place first.

17 In an effort to get the documents from the  
18 Applicant in time and allow preparation and so on, I don't  
19 want to insist on that. I would like to see if the Staff is  
20 cross-examined first, that cross-examination by both the  
21 Applicant and the Intervenors of the Staff's witnesses takes  
22 place one behind the other so that we cover that body of mater-  
23 ial, and then move on to the next body.

24 If we have the Applicant's answers to the -- to our  
25 contentions at the beginning of next week, and the cross-

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1 examination of the Staff's witnesses between the Applicant and  
2 the Intervenors takes the week of December 4th, which it would  
3 appear to do now, I would be ready to cross-examine the  
4 Applicant's witnesses the following week.

5 I would hope that with those answers in advance  
6 that, in fact, from our cross-examination, that it could be  
7 brief. That would only take two, at the most three, days.  
8 I think really to be able to focus the hearing, we ought to be  
9 able to reduce the time needed for cross-examination.

10 MR. KARMAN: Could you estimate the length of time  
11 of cross-examination of the Staff witnesses?

12 MR. MACBETH: Roughly a day, day and a half.  
13 It is very hard to be precise.

14 MR. KARMAN: I just wanted an estimate.

15 MR. MACBETH: I don't see anything of great length  
16 at that point.

17 MR. TROSTEN: Mr. Chairman, if Mr. Macbeth is pre-  
18 pared to commence and complete his cross-examination of our  
19 witnesses and wants to do it ahead of our cross-examining Mr.  
20 Clark and Mr. Ainsley, we would be amenable to that.

21 As I say, I am -- I don't want to have the session  
22 held up by any unwillingness for feeling that more time is  
23 needed to cross-examine our witnesses. If that were to come  
24 about, I would want to cross-examine Mr. Clark and Mr. Ainsley  
and get that out of the way. We will be prepared to do that.

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1 We estimate it will take five days, and we think that during  
2 the second week of the hearings, we could complete our cross-  
3 examination of Mr. Clark and Dr. Ainsley.

4 MR. MACBETH: To my mind, the heart of this is  
5 getting the answers from the Applicant, I would hope by next  
6 Monday, so that I would have some time before the hearing  
7 began to look over them. I think in that situation, I would  
8 be prepared two weeks later to cross-examine their witnesses.

9 If I am handed the answers while the hearing is  
10 going on, it is very difficult to both follow the cross-examin-  
11 ation during the day and prepare for cross-examination of the  
12 Staff while at the same time preparing cross-examination of the  
13 Applicant's witnesses.

14 I would be prepared to proceed to cross-examination  
15 of the Applicant's witnesses two weeks from next Monday if on  
16 next Monday the Applicant will provide the answers to the  
17 factual contentions.

18 MR. KARMAN: The 11th?

19 MR. MACBETH: Yes.

20 MR. KARMAN: Mr. Chairman, we only have a problem  
21 with respect to some of the witnesses. I have discussed with  
22 Mr. Macbeth and Mr. Roisman, and Mr. Trosten, as well. It seems  
23 that of the -- there is a conflict between the Indian Point  
24 hearing and the Shoreham hearing. Both are commencing on  
25 December 4th. Several of our witnesses are also potential

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1 witnesses for the Shoreham hearing, but they will not be needed  
2 at Shoreham during the first week of the hearing, which would  
3 be commencing December 4th.

4           It would appear that there is general agreement,  
5 and the Staff would certainly request, that after the intro-  
6 duction of the direct testimony of all three parties, which  
7 will not be terribly time-consuming, that the Staff will be  
8 presented for cross-examination by both parties; and if on the  
9 basis of the estimate of Mr. Macbeth and Mr. Trosten, - it  
10 would seem entirely possible that could be completed in the  
11 first week of the hearing. We would certainly prefer that,  
12 Mr. Chairman.

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Take 16

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1 CHAIRMAN JENSCH: Well, as we have indicated  
2 before, arrangements on the accommodation of witnesses, the  
3 Board will leave largely to the attorneys for the parties.

4 I think the schedules of the witnesses must be  
5 considered and however the parties feel that they can  
6 accommodate the necessities of schedules, the Board is  
7 agreeable to accepting.

8 We will expect then that the staff will be  
9 available the first week and the parties, all parties will  
10 cross examine all the staff witnesses that week.

11 MR. ROISMAN: Mr. Chairman, I think Mr. Karman  
12 obviously does not want to be caught betwixt and between.  
13 May I make a suggestion that the oral presentation of the  
14 applicant's witnesses that is going to be made, why don't  
15 we plan to postpone that until the time that the witness  
16 is actually prepared to take the stand for purposes of  
17 cross examination so there is no danger that any of the  
18 valuable time that we have set aside for the staff during  
19 the week of the 4th would in any way be taken up by an oral  
20 presentation by the applicant's witnesses.

21 There doesn't seem to be much point in having  
22 them make a statement on the 4th if they are not going to  
23 be crossed until the 11th anyway. Then we know when we get  
24 there on the 4th, with the exception of the hour or so it  
takes to go through getting the documents in evidence, we

1 can start immediately with Mr. Goodyear or whoever it may be.

2 MR. TROSTEN: I would prefer to do it as I sug-  
3 gested, with the applicant's witnesses coming on first.  
4 It won't take very long. Our witnesses will be prepared to  
5 be there. They will be there for a period of time of the  
6 cross examinatin anyway, and I think it would be nice to get  
7 everything in and then we could start out rather than breaking  
8 the presentation up as Mr. Roisman suggested.

9 I would really prefer if we could have our  
10 witnesses come on first. It won't take very long.

11 MR. ROISMAN: Mr. Chairman, I don't think there is  
12 any reason for Mr. Trosten and myself to fence about it.  
13 Mr. Trosten wants to get an oral presentation to set a  
14 tone to the hearing and then he wants to insulate his  
15 witnesses by filling in the gap with a week of cross  
16 examination.

17 The normal rule would be that a witness who makes  
18 a statement on the witness stand is then available for  
19 cross examination at that time. Mr. Trosten wants the  
20 advantage of starting with applicant cross examining the  
21 staff. Then it seems to me Mr. Trosten is going to have to  
22 postpone his witnesses' making an oral presentation. In  
23 addition, I intend to pursue into Section 2.743-B of the  
24 new regulations taht the applicant be required to submit  
25 those oral statements in writing five days in advance of

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1 the hearing as required, unless the applicant files a  
2 request to have that waived. And I will oppose it on behalf  
3 of the Environmental Defense Fund. I think the oral

4 I think the oral presentation is not going to  
5 advance the hearing substantively. I think it will take  
6 time. I think it is likely to be highly controversial and  
7 cause a delay in the course of the hearing.

8 Mr. Trosten's statement that it will cover the  
9 same areas as the written testimony makes me wonder why we  
10 have to hear them say it again.

11 This isn't a jury. We are not trying to sway  
12 the minds of people by the oral testimony. We are going on  
13 the facts. I would like to see the hearing start on the  
14 4th and begin with cross examination of the staff. They  
15 will be there, ready to go, even if the Lauer-Lawler-Raney-  
16 McFadden oral presentations only take two hours, which I  
17 suspect is conservative, that is two hours we may wish we  
18 have on Friday when the staff witnesses are telling us they  
19 have to go to Shoreham the following Monday.

20 I think we would do better to take our two  
21 hours --

22 MR. TROSTEN: I think Mr. Roisman's objection is  
23 uncalled for. I think that it is perfectly proper for these  
24 witnesses to make an oral statement.

25 CHAIRMAN JENSCH: About what?

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1 MR. TROSTEN: The oral statement, Mr. Chairman,  
2 would genrally describe, as I now conceive it -- and this is  
3 something I want to be talking to the witnesses about  
4 further -- the testimony that they are giving, probably  
5 describing something of the nature of their studies. I  
6 just feel, Mr. Chairman, that it would be rather important  
7 for these witnesses to be able to make a brief oral  
8 statement to the Board and not to have to write down every  
9 single thing they might say in advance.

10 Mr. Roisman is going to have the transcript of  
11 the testimony to study for a week, if he is concerned that  
12 what these men are going to say is going to be so contro-  
13 versial and I feel it is unreasonable for Mr. Roisman to  
14 even suggest that somehow the applicant can't have his  
15 witnesses give any oral testimony. There is no reason for  
16 that.

17 CHAIRMAN JENSCH: Well, I didn't understand that  
18 latter statement, describe his position. I was a little  
19 puzzled about your request for really an unusual presentation.  
20 The only time that an oral statement by way of summary, as I  
21 understand it, the commission has provided that the chief  
22 executive officer or some one or two, may make a statement  
23 at the outset of a proceeding. That has been done; and then  
24 every witness is just like every other witness. He comes  
25 on the stand and --

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1 MR. TROSTEN: I agree with that, Mr. Chairman.

2 CHAIRMAN JENSCH: I don't know that we need to have  
3 a kind of a warmup session.

4 MR. TROSTEN: Mr. Chairman, if Mr. Roisman wants  
5 to have -- or Mr. Macbeth wants to have Mr. Clark or  
6 Dr. Ainsley --

7 CHAIRMAN JENSCH: We won't accept it from him,  
8 either.

9 MR. TROSTEN: What I am suggesting, Mr. Chairman  
10 -- let me put it this way: One reason why I think it is  
11 quite important that we have an oral summary is that I have  
12 found over the period of time that it is very helpful to  
13 have an oral summary. I have read an awful lot of papers,  
14 Mr. Chairman, and I have also had an opportunity to sit  
15 down and hear various people discuss these things and I  
16 find it a lot easier for me --

17 MR. KARMAN: Why couldn't that be reduced to  
18 writing?

19 CHAIRMAN JENSCH: I don't think there is any  
20 objection to a summary type of thing. One of the factors he  
21 has raised is the timing of the presentation. I have yet  
22 to see in this proceeding any adherence to a projected  
23 schedule of witnesses.

24 MR. TROSTEN: All right, Mr. Chairman. If you  
25 feel that we may get the schedule thrown off so much by

1 having a brief amount of oral presentation, we will have  
2 our oral presentation when our witnesses come on.

3 CHAIRMAN JENSCH: All right.

4 MR. KARMAN: My problem is not the question of  
5 scheduling. I can't see any purpose of having an oral  
6 presentaiton if it is going to be in effect a summary of the  
7 written testimony. I can see no reason why if the applicant  
8 wants to introduce it, why not introduce it in writing along  
9 with the rest of the testimony.

10 MR. ROISMAN: The testimony, by the way, most of  
11 it that the applicant has submitted, does have as a preamble  
12 a summary or at the end a set of conclusions.

13 First of all, I don't actually read here that the  
14 applicant has a right to exercise short of actually making  
15 a filing -- 2:743(b) says: "The parties shall submit  
16 direct testimony of witnesses in written form unless otherwise  
17 ordered by the presiding officer on the basis of objectiones  
18 presented."

19 So that it would appear that a requisite to getting  
20 the permission to do that would be the filing of these  
21 objections presented by the applicant to the objections;  
22 and as you read the rest of the regulation, it appears that  
23 the only thing the applicant can normally get excused from  
24 is filing the written testimony in advance, does not suggest  
25 even that filing it orally would every be permitted.

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In any event, they would have to begin with that filing.

In addition, words are what the dispute is about and the words that are used in the oral statement may very well raise problems -- first of all, they could raise problems of conflict with the remaining testimony.

Secondly, those words may not be nearly as carefully chosen as written words.

We have already seen in the applicant's testimony places where there are shades of meaning that can possibly be given to statements in there. We think it important -- this really goes back to our whole argument this morning about the applicant saying what it wants and making it clear. This oral statement seems to us to be an easy opportunity to further confuse the record for no good justification.

I don't know what -- I don't know what the objections of the applicant would be, if they think that a summary that is more general than the written testimony be written in advance.

end 16

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1 MR. TROSTEN: Mr. Chairman, I would like to ask  
2 the Chair to rule that the Applicant has the right, which I  
3 think is entirely reasonable and justifiable under the  
4 circumstances, to make a limited amount of oral testimony.  
5 I think that the Intervenors are taking a completely unreason-  
6 able position about this. We are not asking to spend a lot  
7 of time. We are not trying to waste anybody's time.

8 Mr. Roisman, under my suggestion, would have had  
9 a solid week to have read everything they said and picked it  
10 apart. After having been through this hearing with Mr.  
11 Roisman, I have utmost confidence in his ability to take apart  
12 anybody who makes a statement that is inconsistent with some  
13 other statement. I don't see why he is hassling about this.  
14 I will put the question to you.

15 CHAIRMAN JENSCH: The Board rejects the request  
16 and the Board feels that the schedule requirements are so  
17 compelling in this situation that we should accommodate the  
18 Staff. I don't know what the Staff's schedule or workshop  
19 problems are, but just reading the papers that come in these  
20 different cases they have got a burden; and furthermore, in  
21 this particular case, they have made a rather strong statement  
22 about closed cycle cooling and if it isn't cooling towers,  
23 what is it going to be? And it may take a good week.

24 The Board is planning, however, to convene, as we  
25 have indicated, at 2:00 o'clock in the afternoon and have a

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1 pretty long first day, probably until 7:30, which will then  
2 be about the same number of hearing hours as --

3 MR. KARMAN: My notes say 1:00 o'clock, Mr.  
4 Chairman.

5 CHAIRMAN JENSCH: I forgot. Is it 1:00 o'clock?

6 MR. KARMAN: I think the order called for 1:00  
7 o'clock.

8 CHAIRMAN JENSCH: Whatever the order shows. I  
9 stand corrected by the order.

10 MR. TROSTEN: Are you rejecting the request for  
11 presentation of any oral testimony or just at the beginning  
12 of the first week?

13 CHAIRMAN JENSCH: Well, we will take up the second  
14 request at a later time. That seems to be desirable. But  
15 the first week -- I do think the Staff has an obligation of  
16 going forward here and with your accolades to Mr. Roisman, we  
17 will return it to you. I am sure you will want to be --  
18 I don't know whether you call it picking apart, whether that  
19 is good -- the Staff will probably be vulnerable to your  
20 interpretation, I will say. We will be lucky to finish by  
21 Friday afternoon, as we plan to do, in order to avoid the  
22 weekend rush. Probably knock off at 3:00 o'clock or there-  
23 abouts, if that is convenient.

24 We will work evenings, Tuesday, Wednesday, and  
25 Thursday to accommodate the time and start early on Friday.

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1 MR. TROSTEN: Mr. Chairman, with regard to the  
2 Intervenors' request for -- the Board's ruling that we provide  
3 responses, we will be prepared to have in Mr. Macbeth's hands  
4 our -- the responses directed by the Board by next Monday.  
5 We would like to state that -- I want to be able to reach  
6 an understanding with Mr. Macbeth at the beginning of next  
7 week whether he is going to be prepared to proceed immediately  
8 to cross-examination of -- and indeed I would like to have  
9 that understanding now if at all possible, whether you are --  
10 whether you want to cross-examine our witnesses or just what  
11 your position is, Mr. Macbeth; because, as I say, I am  
12 prepared to cross-examine Mr. Clark now, the following week.  
13 It is quite important how we prepare for this that we know  
14 this, whether you want to go ahead and cross-examine our  
15 witnesses. As I say, if you want to begin and complete  
16 cross-examination of our witnesses the following week, we  
17 are prepared for that.

18 MR. ROISMAN: What if we don't complete it?  
19 We have indicated that we --

20 MR. TROSTEN: If you don't complete it, then I am  
21 going to insist that I start and complete -- that I proceed  
22 to my cross-examination of Mr. Clark and complete that, because  
23 I am prepared to complete that the following week.

24 MR. ROISMAN: Sounds like Bowling and Roseton, Mr.  
25 Chairman. We can't predict how this thing is going to come

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1 out.

2 MR. MACBETH: I think I will have no problem.

3 CHAIRMAN JENSCH: Let us hear further from you at  
4 the start of the hearing on December 4, in the evening of  
5 December 4.6 MR. TROSTEN: Let me just say that, having heard  
7 a considerable amount of discussion this morning about the  
8 Applicant's unwillingness to provide information, I have been  
9 trying for some time, Mr. Chairman, to reach an agreement with  
10 the Intervenors about the order for cross-examination. It is  
11 sort of frustrating.12 CHAIRMAN JENSCH: We have got the first week taken  
13 care of. Let's see if you can't work out something next week.  
14 Perhaps we can give further consideration to it in the  
15 evening of December 4.

16 MR. TROSTEN: Yes, sir.

17 CHAIRMAN JENSCH: Some matter that perhaps should  
18 be mentioned, my recollection that the Atomic Energy  
19 Commission issued an order on some certification situation of  
20 pressure vessel integrity. What is the view of the parties  
21 as to presentation of evidence, if any, in reference to that  
22 order by the Commission?23 MR. ROISMAN: Mr. Chairman, with regard to that,  
24 are we essentially through with the environmental part? There  
25 were a couple of radiological issues that all relate to the

5mil 1 same question.

2 CHAIRMAN JENSCH: Proceed.

3 MR. KARMAN: Might I interrupt just one moment,  
4 Mr. Roisman? We have, with respect to the Staff witnesses --  
5 Mr. Chairman, I have made arrangements with the General  
6 Counsel's office of the Federal Power Commission to have a  
7 witness available on the subject of need for power. Mr. Trosten,  
8 Mr. Roisman, and Mr. Macbeth have indicated to me as far as  
9 they are concerned, they do not feel it would be essential  
10 for us to have the witness -- our Staff witnesses can discuss  
11 the need for power. However, if it were going to get into  
12 extremely finite and technical detail, it might be we would  
13 be required to have somebody from the Federal Power Commission.

14 My arrangements with them are that, if needed,  
15 I could call them. I was wondering whether that would be  
16 satisfactory with the Board.

17 CHAIRMAN JENSCH: Yes, that would be agreeable.

18 MR. KARMAN: Thank you, Mr. Chairman.

19 CHAIRMAN JENSCH: Proceed.

20 MR. ROISMAN: Right.

21 There are two -- at least two radiological issues  
22 that, in a sense, are outstanding before Mr. Trosten tells  
23 me the record is closed. I am not trying to make that state-  
24 ment. I think that is an open issue: The fuel densification  
25 study done by the Staff relates to the Applicant's now-pending

6mil 1 request to change the fuel rods of Indian Point No. 2 from  
2 the unpressurized to the pressurized. We have not seen that  
3 study. Mr. Karman advises me it has been a hot item in the  
4 Commission and copies are being made and will be distributed  
5 to everybody here.

6 MR. KARMAN: I think for the record, Mr. Chairman,  
7 yesterday I sent the only three copies I had, other than my  
8 personal copy, to the Appeal Board, which had specifically  
9 requested that upon issuance of this report, that it be  
10 forwarded to them. In my forwarding letter to the Appeal  
11 Board, a copy of which was sent to this Board, and to all of  
12 the parties to this proceeding, I indicated that a second  
13 printing was expected toward the end of this week or the  
14 beginning of next week; and as soon as I received it, every  
15 party to this proceeding and the Board will receive a copy.

17 16 CHAIRMAN JENSCH: Very well.  
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1 MR. ROISMAN: We, as you know, had raised in the  
2 course of the appeal board's review of the initial decision  
3 on the 50 percent testing license the densification question.  
4 What the appeal board said was in effect we would like to hold  
5 the whole thing in abeyance until they see the report.

6 Actually that is CCPE's posture at this time as  
7 well.

8 After looking at the report we feel it warrants  
9 examination into the fuel densification question for this  
10 plant. We, at a minimum, would come back to this board and  
11 request that the record be reopened for the purpose of taking  
12 evidence on that question as it relates to the 100 percent  
13 fuel power operating license question that is still pending.

14 We also feel the applicant's pending request  
15 to change its fuel rods is in effect a request by it to open  
16 the record for the purpose of having this board review the  
17 narrow question that may be involved in switching from  
18 pressurized to unpressurized fuel rods, that is what if any  
19 safety analysis done in the plant has to be changed as a  
20 result of that exchange in fuel rods.

21 I don't imagine anything is going to be done in  
22 terms of a -- at least we would hope, us making our presentation  
23 on that, until after we have completed this environmental stage  
24 of the hearing.

25 We would file our motion, but I mean we won't be

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1 scheduling, if a hearing were determined to be appropriate,  
2 a hearing on the fuel densification question in the midst  
3 of the hearing time that we have now scheduled for the  
4 environmental.

5 With regard to the question of reactor pressure  
6 vessel, our position is as follows:

7 Number one, there is testimony which has emerged  
8 in the course of the emergency core cooling system hearing  
9 which is pertinent, we think, to the pressure vessel  
10 question. That is going to bring back, I think, to some  
11 extent, the issue in this proceeding of the significance of  
12 testimony taken in another proceeding to which the parties  
13 here were also parties and how the Board should have to deal  
14 with that.

15 Secondly, there are people who are under contract  
16 to the Atomic Energy Commission, most significantly Mr.  
17 Wexler, to have knowledge on the question of reactor pressure  
18 vessel integrity whose presence here we are going to want to  
19 have.

20 There has been a recent order issued by the  
21 appeal board in the Point Beach case dealing with the question  
22 of the Board's responsibilities and authority to order a  
23 subpoena on behalf of an intervenor of a staff employee and  
24 there is in the ECCS hearings some ruling as to how broad  
25 the term employee is to be extended.

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1                   We discussed this, I think, during the preliminary  
2 testimony as well.

3                   What we contemplate at this time is supplementing  
4 the record on the vessel question by incorporating by  
5 reference if possible, hopefully by agreement, portions of  
6 the ECCS testimony, not lengthy but there are limited  
7 portions we think are pertinent; and having brought to the  
8 hearing -- hopefully the staff will produce voluntarily  
9 Mr. Wexler to discuss his very extensive study on the  
10 question of reactor pressure vessel integrity and  
11 reliability of the vessel.

12                   That is a matter that again we would assume the  
13 substance of it, that is the presentation would not take  
14 place until after we had completed the environmental stage  
15 of the hearing and that on that issue as on the fuel densifica-  
16 tion question, I frankly cannot say at this point whether or  
17 not we are going to raise both of those issues in the 50 per-  
18 cent testing license question.

19                   If we do, we think, as I read the regulations,  
20 that our redress at this point is to seek the relief from  
21 the appeal board rather than coming back to this Board and  
22 asking you to reconsider your initial decision on the 50 per-  
23 cent.

24                   It seems to me that you have been divested of your  
25 jurisdiction on the 50 percent question until remanded by the

1 appeal board for the taking of further evidence.

2 As far as this Board is concerned, we would  
3 anticipate coming back to this Board on the vessel integrity  
4 question with regard to 100 percent. We may come back on  
5 densification pending a study of the staff's densification report

6 Those are the two radiological-safety issues  
7 we now know of that we think are likely to need or will  
8 definitely need further taking of evidence in this proceeding.

9 I don't know, by the way, that the taking of  
10 evidence necessarily means cross-examination. We may simply  
11 wish to open the record and introduce certain documents into  
12 the record and have it closed again at least for our own part  
13 of it.

14 MR. KARMAN: Mr. Chairman, with respect to the  
15 pressure vessel integrity matter, of course, barring a  
16 motion by Mr. Roisman on behalf of his client, the appeal  
17 board has indicated in its decision dated September 27 that  
18 in response to the certified question before the Board,  
19 Certified Question Number 1, we see no evidence to suggest  
20 that further evidence should be considered other than that  
21 which is already in the record on this proceeding but we see  
22 the need for detailed evidence on possible result in  
23 future programs. And, of course, they get into another  
24 question as to whether pressure vessel -- evidence concerning  
25 the integrity of the pressure vessel should not be adduced

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1 in the licensing proceedings.

2 Our particular hearing is probably one of the few  
3 that had extensive pressure vessel testimony.

4 CHAIRMAN JENSCH: You are reading from the appeal  
5 board?

6 MR. KARMAN: Yes, I was.

7 CHAIRMAN JENSCH: What did the Commission say?

8 MR. KARMAN: Well, this was the appeal board.  
9 The Commission has indicated that "Where there are matters  
10 raised in the case that are of special safety significance" --  
11 supplementary measures may be taken.

12 As the record stands now, we do not have that.  
13 That was the preface to my remark about Mr. Roisman indicating  
14 where these special problems might arise which would indicate  
15 that we would require additional testimony with respect to  
16 pressure vessel integrity.

17 CHAIRMAN JENSCH: I didn't understand that the  
18 certification to the appeal board included a review of the  
19 transcript on the evidence in that regard, and I thought the  
20 Commission, however, indicated that this was a valid  
21 subject for inquiry. Did it not?

22 MR. KARMAN: It is a valid subject for inquiry,  
23 but with respect to this particular proceeding is that so?  
24 Have we not sufficient evidence in here?

25 CHAIRMAN JENSCH: I think that is the question we

1 are discussing. The views of all parties are important in  
2 that regard.

3 Did you have something?

4 MR. TROSTEN: Yes, Mr. Chairman. I would simply  
5 say with regard to the matter of the pressure vessel that I  
6 will await seeing Mr. Roisman's motion to see if he in that  
7 motion complies with the direction of the Commission with  
8 regard to identifying particular matters.

9 I don't know -- I don't know what Mr. Roisman  
10 has in mind. I think the Commission's decision was quite  
11 clear that an intervenor has a very distinct and significant  
12 burden to bear before these matters are raised in the hearing.

13 CHAIRMAN JENSCH: May I see that order?

14 MR. KARMAN: Yes.

15 CHAIRMAN JENSCH: I didn't bring my order with me.

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1 CHAIRMAN JENSCH: It says where there are matters  
2 raised in a case that are of special safety significance,  
3 supplementary measures in respect to the facility under  
4 review are an appropriate subject of hearing exploration and  
5 the certified question as it deals with the admission of  
6 evidence is answered in the negative. That question was: Is  
7 the position of the Commission that measures taken to  
8 insure the integrity of the pressure vessels of light water  
9 reactors have been demonstrated and documented sufficiently  
10 that protection against the consequences of the reactor vessel  
11 need not be included in the design of the plant and evidence  
12 concerning the integrity should not be adduced in the proceed-  
13 ing. They say no. I infer it means that they -- the -- the  
14 measures have not demonstrated, nor has it been documented  
15 sufficiently that you shouldn't consider it in a hearing. I  
16 don't know what they mean by special safety significance. They  
17 didn't define it.

18 I take it it is a valid concern as to the pressure  
19 vessel integrity as determined by the Board in the proceedings.

20 MR. TROSTEN: Mr. Chairman, I am sorry I don't have  
21 my copy of this in front of me. There is a footnote in there.

22 CHAIRMAN JENSCH: Yes, to warrant inquiry, the  
23 evidence must be directed to the existence of special considera-  
24 tions involved in a particular facility in issue. Licensing  
25 boards in their discretion are empowered to exclude contentions

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1 or challenges which have no substantial or prima facie basis  
2 or which merely amount to a generalized attack upon the  
3 standards presently required by the regulations.

4 MR. TROSTEN: What I interpret the Commission's  
5 decision to be very simply is really being an affirmation what  
6 this Board has done in this proceeding in this sense. Perhaps  
7 in no other -- I am not aware of any other proceeding where  
8 the evidence -- the evidentiary record has been developed  
9 to anything like the degree that it has in this proceeding,  
10 largely at the behest of the Board.

11 CHAIRMAN JENSCH: I don't know whether the inquiries  
12 have been completed.

13 MR. TROSTEN: Yes, sir.

14 CHAIRMAN JENSCH: Because at the time that the  
15 matter was considered by the Board initially, the Board was  
16 seeking guidance as to the scope of the evidence, and for  
17 that reason the Board certified the matter for guidance and  
18 the Commission has indicated that it is a proper inquiry  
19 when there are special safety circumstances.

20 MR. KARMAN: But I don't think there is anything  
21 open on the record at the moment with respect to this.

22 CHAIRMAN JENSCH: I think that's right. I think  
23 there should be -- we will give consideration to whatever  
24 the Intervenors submit and the answers that are filed to it,  
25 and whatever else the Board has in mind in reference to these

ar3

1 matters, I don't know.

2 MR. TROSTEN: As to the fuel densification matter,  
3 I would say essentially the same thing. Mr. Roisman has, we  
4 know, copies of those appeal board decisions that he referred  
5 to today which indicate the sort of contentions that are  
6 necessary to justify a reopening of this question, and I will  
7 have to wait and see what he says.

8 CHAIRMAN JENSCH: As to the Bowling and Roseton  
9 situation, the Board is having difficulty understanding the  
10 position of the Staff in this regard, and also the position  
11 of the Applicant. We are not prepared to at this time fully  
12 scope our concern on this, but the Board requests the Applicant  
13 and the Staff, if there are data available, to produce data  
14 as to the expected operations of these two plants in reference  
15 to their effluents, gases, I take it, and temperature, too.

16 There may be changes, as Applicant's counsel has  
17 pointed out. Maybe there will be conditions added, maybe  
18 they will shut the plant down, maybe there will be a tower  
19 built. That seems more speculative than the likely probability  
20 that when they get the hardware installed for these two plants,  
21 they are going to operate them. That's why they built them.

22 Fossil fuel plants, as I understand it, aren't  
23 subject to quite the certainty as to the amount of release,  
24 for instance, that maybe a nuclear plant has. I don't know.  
25 But fossil fuel plants are kind of standard pieces of equipment

ar4

1 and you know what they are going to do with a certain amount  
2 of power generated.

3 MR. TROSTEN: Mr. Chairman, the point that the  
4 Intervenors are making here -- and this is clear from the  
5 statement of one of their matters in controversy, that the  
6 only issue that they are really raising about the Bowling  
7 and Roseton plants has to do with entrainment and impinge-  
8 ment, which is the same difficult uncertain area that is true  
9 whether you are dealing with a fossil plant -- essentially true  
10 whether you are dealing with a fossil plant or with a nuclear  
11 plant.

12 So the sort of data that I imply from your --  
13 infer from your remark that you are talking about, about the  
14 thermal releases and the chemical releases isn't really going  
15 to the heart of the problem that they are raising.

16 CHAIRMAN JENSCH: That may be, but it is still part  
17 of the environment that may be affected. I think you should  
18 show what it is, whether they are particularly raising it.  
19 As to the fish impingement situation, is there some similarity  
20 between Danskammer and these other plants and Roseton and  
21 Bowling, or are they different or what kind of -- have they  
22 run the pumps over at Bowling and Roseton at all? Do  
23 you know what fish impingement experiences have been so far  
24 there? Are they within the planktonic area for the first  
25 six weeks of the life of the striped bass, for instance?

ar5

1 I don't know whether there is anything you can  
2 tell us about fish damage, injury, or dislocation.

3 DR. GEYER: As a minimum we need to know something  
4 about the size of these plants. Are they little tiny things  
5 that aren't going to put out enough heat or water to make a  
6 difference? Or are they twice as big as Indian Point No. 2,  
7 which I am sure they aren't? I have no idea as to how much  
8 water they are going to circulate, what kind of systems  
9 they use, what temperature rises, these things.

10 MR. TROSTEN: Some of this information is contained  
11 in the environmental report of the Staff by way of general  
12 background, and indeed some of it is contained in the environ-  
13 mental -- in the statement of facts of Mr. Macbeth. I don't  
14 agree with all the statements that are made in there, but in  
15 terms of the temperature rises across the condenser, for  
16 example, the size of the plant, that sort of information, of  
17 course, we could readily provide the Board.

18 If that's what you have in mind, Mr. Chairman, I  
19 could certainly prepare a letter in which I would describe  
20 the general characteristics.

21 CHAIRMAN JENSCH: I think these matters to which Dr.  
22 Geyer has referred should also be included and also the  
23 matters to which I referred. You probably have run pumps at  
24 both of these plants if they are near productive capacity,  
25 capability, and you can tell us the fish kill, if any, that

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1 you had; or if not, if you have none. Maybe you are in an  
2 area where there are no fish killed. Tell us something going  
3 on.

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1 MR. KARMAN: Dr. Geyer, with respect to your  
2 question, Table 3-1 on page 3-9 of the Staff's Final Environ-  
3 mental Statement gives the operating characteristics of  
4 existing plants, steam generating stations on the Hudson  
5 River, and included there is Danskammer, Bowling, and Roseton.

6 MR. TROSTEN: We will prepare a letter for you, Mr.  
7 Chairman.

8 MR. BRIGGS: Is there any information about condi-  
9 tions at the intake of those plants that could be included,  
10 for instance water velocities at the intake of the plants,  
11 whether the intakes are similar or dissimilar from the  
12 intakes at Indian Point 2? And I don't mean great detail,  
13 I mean just general information.

14 MR. TROSTEN: Yes.

15 CHAIRMAN JENSCH: Any other matter we can take up  
16 at this conference?

17 I hear no suggestions from the parties.

18 State of New York have any comments or suggestions?

19 MR. MARTIN: No, sir.

20 CHAIRMAN JENSCH: Are you representing Mr.  
21 Lebowitz, too?

22 MR. MARTIN: No, I am not.

23 MR. KARMAN: Mr. Sherman is representing Mr.  
24 Lebowitz.

MR. TROSTEN: Mr. Chairman, just one remark about

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1 something Mr. Roisman said, so there will not be any confusion  
2 about it.

3 The Applicant does not agree that the submission  
4 of additional information to the Staff concerning the new  
5 design of the core constitutes a request to reopen the hearing  
6 on that matter. I am sure the Board will agree and understands  
7 that that does not constitute a request on our part to reopen  
8 the hearing.

9 CHAIRMAN JENSCH: On that matter, incidentally,  
10 is that really the subject of a separate licensing proceeding?

11 MR. TROSTEN: Mr. Chairman --

12 CHAIRMAN JENSCH: Procedure, if not proceeding.

13 MR. TROSTEN: Separate licensing procedure. Well,  
14 the Applicant has obtained a special nuclear material license,  
15 Mr. Chairman, for the simple purpose of storing the new fuel  
16 at the site. Is that what you meant?

17 CHAIRMAN JENSCH: Well, I understand there was some  
18 correspondence between you and Mr. Roisman about whether there  
19 was an opportunity of participating in the determination of  
20 whether you would get a different type of fuel for Indian  
21 Point No. 2. I understood, I believe from one of your  
22 responses, that that would be taken up at a separate kind of  
23 a procedure.

24 MR. TROSTEN: I don't believe so, Mr. Chairman.

25 All I said in that letter was that I rejected the idea we were

3mil

1 not complying with any order of the Chairman and that this  
2 was a special nuclear material licensing, taken in  
3 accordance with the requirements under 10 CFR Part 70, and  
4 that Mr. Roisman, of course, retains all his rights in  
5 connection with the Indian Point 2 licensing procedure.

6 MR. ROISMAN: The status of that, incidentally, Mr.  
7 Chairman, I am advised two weeks before Mr. Trosten served  
8 me with the papers, the license was granted by the Special  
9 License Branch of EPA. Now I have to decide whether to reopen.  
10 That is, of course, a license to store. Our point was  
11 insofar as that proceeding was concerned, the Commission  
12 shouldn't grant a license to store any nuclear material unless  
13 the Applicant has established that it is going to use it.  
14 The Applicant can't use that material until this Board and  
15 the Staff in this proceeding has approved the use of pressurized  
16 fuel for this plant. The whole analysis so far was done with  
17 the unpressurized fuel. We have not seen a configuration of  
18 studies of the two fuels to see whether or not all of the  
19 questions on, you know, how well the wall of the fuel rod  
20 will hold up under transients and so forth, is the same.  
21 I am hoping the fuel densification studies can answer some of  
22 those questions. To the extent that the use of pressurized fuel  
23 in this plant has been requested, I don't think there is much  
24 doubt that that certainly is a change in the FSAR. It is a  
25 modification of the technical specifications and it seems to

4mil 1 me it is an issue before this Board unless it is determined  
2 that there isn't anybody that cares about it, including, of  
3 course, the Board.

4 I don't think -- I don't really think it is impor-  
5 tant. I am not going to push to have the hearing reopened  
6 unless I have something to say about it, even though I think  
7 the Applicant has effectively reopened it on that issue.

8 CHAIRMAN JENSCH: I don't understand this language  
9 about reopening. We started this proceeding some time ago.  
10 I think Staff even used the term "three years." I almost  
11 felt that words require somebody having their mouth washed  
12 out.

13 MR. KARMAN: December 1, we commence our third year.

14 CHAIRMAN JENSCH: It is the same proceeding going on.

15 MR. ROISMAN: I am sorry. I have let Mr. Trosten  
16 mesmerize me into using that terminology. I will ask the  
17 reporter to make a notation here that the use of reopen in  
18 no way was intended to concede that the record has yet been  
19 closed with regard to these.

20 CHAIRMAN JENSCH: Several requests that it be  
21 closed. We have those requests under consideration. As he  
22 asked, what -- are you going to -- to enter an order closing  
23 the record and we indicated yes, we would.

24 In due time.

(Laughter.)

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1 Any other matter?

2 At this time, this hearing is concluded.

3 (Whereupon, at 12:55 p.m., the hearing was  
4 adjourned, to reconvene at 1:00 p.m., December 4, 1972.)  
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MR b3  
1 in this room at 9:30 a.m. on Tuesday, July 13, 1971, and  
2 a formal order will issue to that effect.

3 [Hearing adjourned.]  
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