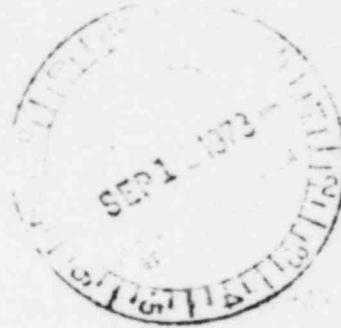


UNITED STATES ATOMIC ENERGY COMMISSION

IN THE MATTER OF:



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Pages 10

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1 UNITED STATES OF AMERICA

2 ATOMIC ENERGY COMMISSION

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 4 In the Matter of: :
 5 DUKE POWER COMPANY : Docket Nos. 50-269A, 50-270A
 : 50-287A
 6 Oconee Units 1, 2 & 3 : 50-369A, 50-370A
 7 McQuire Units 1 & 2 :
 8 - - - - -X

9 Room 2132
 10 1111 Constitution Avenue, N. W.
 Washington, D. C.

11 Thursday, 2 August 1973

12 The prehearing conference on the above entitled
 13 matter was convened, pursuant to notice, at 9:30 a.m.

14 BEFORE:

15 WALTER K. BENNETT, Chairman

16 JOSEPH F. TUBRIDY, Member.

17 JOHN B. FARMAKIDES, Member.

18 APPEARANCES:

19 GEORGE A. AVERY, TONI K. GOLDEN, and MR BRUNNER, Wald
 20 Harkrader and Ross, 1320 19th Street, N. W., Washington,
 D. C., on behalf of the appl cant Duke Power Company.

21 WALLACE E. BRAND, DAVID A. LECKIE, United States Depart-
 22 ment of Justice, Antitrust Division, Washington, D. C.
 20530, on behalf of the Department of Justice.

23 J. O. TALLY, JR., DAVID F. STOVER, and J. A. BOUKNIGHT,
 24 JR., Tally, Tally & Bouknight, Home Federal Building,
 P. O. Box 1660, Fayetteville, North Carolina 28302,
 on behalf of the petitioning intervenors.

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BENJAMIN H. VOGLER, Office of the General Counsel,
United States Atomic Energy Commission, Washington,
D. C. 20545, on behalf of the AEC Staff.

P R O C E E D I N G S

CHAIRMAN BENNETT: Ladies and gentlemen, this is a prehearing conference in the matter of Duke Power Company, Coonee Units 1 and 2 and 3, and McGuire Units 1 and 2. It bears Docket Numbers 50-269A, 50-270A, 50-287A, 50-369A, 50-370A.

The prehearing conference was called by Order dated June 15 and amended to postpone for a month by Order dated July 11. The Chairman sent a memorandum to all of the parties which has been complied with to the extent that copies of the various pleadings were received yesterday.

Ladies and gentlemen we would like to suggest the following agenda. First, we would like to determine what the results of the proposed talks concerning possible consummation with Canada.

Second, we would like to ascertain all of the outstanding differences that there are presently in connection with discovery. And we would like to be advised concerning what date it is contemplated there will be comprehension.

Next, we would like to reexamine the date specified in pretrial Order Number 6, dated 22 March, 1973, to make sure that those dates are still valid ones. Then we would like to hear argument on the motion for a protective order and then argument on the motion to exclude certain discovery requests.

Now, another matter which Mr. Tubridy brings to my attention: There have been several withdrawals of intervenors

1 and it was my understanding that my order was adequate without
2 a further order to constitute their withdrawal by their filing
3 of papers. However, if any of the parties would like to have us
4 issue an order on each one of those, we will be glad to do so.

5 I see no reason for it. But if somebody thinks it
6 might be a decoration to the record, we will be glad to do it.
7 May we hear from you, Mr. Brand, as to the suggestions which
8 Mr. Avery took as a motion to consolidate. What is the status
9 and where are we going?

10 MR. BRAND: Sir, I must report that the discussions
11 are still going on with respect to Catawba. We have a meeting
12 scheduled for 11:30 tomorrow morning with the general counsel
13 of Duke Power Company and Mr. Avery, and I am afraid that as far
14 as I can report, that is the present status of the matter.

15 I would say, however, that we are surprised that the
16 company did not want to consolidate Catawba with the other two
17 units, and we would not insist on such consolidation in any
18 event.

19 However, we believe that treatment of a joint hearing
20 could be a very desirable method and we have an alternative
21 proposal that we have not as yet had an opportunity to discuss
22 with the company that we propose to take up with them tomorrow
23 which might provide for an expedited procedure with respect
24 to Catawba.

25 CHAIRMAN BENNETT: I thought counsel made the suggestion

1 that they would abide by the decision in this case.

2 MR. BRAND: Yes, sir.

3 CHAIRMAN BENNETT: What is the matter with that one?

4 MR. BRAND: I don't believe it is in accordance with
5 the status, your Honor.

6 CHAIRMAN BENNETT: You mean the Department of Justice
7 and the parties, including the intervenors, couldn't agree to
8 that?

9 MR. BRAND: Your Honor, I believe --

10 CHAIRMAN BENNETT: You think there has to be another
11 notice published to permit other intervenors to come in, is
12 that the point?

13 MR. BRAND: No, your Honor. I believe the spirit
14 of the statute is to prevent monopoly from creeping into this
15 nuclear generating industry. And this was not an inadvertent
16 matter, it was carefully considered at the time Section 105 C
17 was put into the Act.

18 Many people contended Section 105 A was at the
19 insistence during the time of the great debates on the
20 Atomic Energy Commission Act of 1954, at the very time when
21 you had the fight over who would supply the growing needs of the
22 TVA area, that this 105 C, a prelisting review, was insisted
23 upon.

24 But for the prelisting review, there would be no
25 need for an Atomic Energy Commission hearing at all, you might

1 as well go into the district court, the district court procedures
2 are perfectly adequate. There would be far less paperwork in
3 the district court, I'm sure.

4 CHAIRMAN BENNETT: Don't count on that. I will
5 give you a citation if you would like it, United States against
6 Henry S. Morgan.

7 MR. BRAND: Yes, sir. However, all I wanted to bring
8 out is that this is not a mere procedural technicality, this
9 is a substantive part of this Act, and it was intentionally
10 put into the Act, so that the antitrust problems would be
11 cleared up before the fact.

12 And we have serious problems with --

13 CHAIRMAN BENNETT: In other words, you don't think
14 that this Board, or that you would have the right, that the
15 Department of Justice and the Atomic Energy Commission would
16 have the right to accept a proposal that would make this hearing
17 and the determination is made as a result of this hearing,
18 binding on the same company with respect to another plant?

19 MR. BRAND: I believe that -- that isn't my view,
20 your Honor. I believe that the remedies that we are going to
21 propose, and that are in accordance with the statute, would be
22 system-side in effect.

23 However, the question is, does the Atomic Energy
24 Commission have the authority to list a unit and permit the
25 commencement of construction on a unit when the antitrust problems

1 are unresolved with respect to that unit.

2 CHAIRMAN BENNETT: In other words, you say so far as
3 the grandfather clause is concerned, it is quite clear they can,
4 but absent statutory authority, you don't think they can.

5 MR. BRAND: That is exactly so, your Honor. That
6 is the intentional provision.

7 CHAIRMAN BENNETT: I now understand you. Now you
8 said there was another suggestion which was just coming up when
9 I interrupted you.

10 Now, can we go back to that? Am I reminding you now
11 of what you were going to say? I'm sorry I interrupted you.

12 MR. BRAND: I would like an opportunity to consult
13 further with our people in the Department and to consult with
14 the applicants before I discuss that procedure, if that is all
15 right.

16 CHAIRMAN BENNETT: Fine. Very good.

17 MR. BRAND: But that is the present status of the
18 Catawba proceeding.

19 CHAIRMAN BENNETT: In other words, you won't have
20 an answer until tomorrow morning at 11:00, or after 11:00?

21 MR. BRAND: That is correct, sir.

22 CHAIRMAN BENNETT: Did you want to add anything to
23 that, Mr. Avery.

24 MR. AVERY: I won't take the Board's time with a matter
25 that's --

1 CHAIRMAN BENNETT: We are very much interested,
2 because if there is going to be a consolidation, and an expedited
3 proceeding, I would think we would have to know about it.

4 MR. AVERY: Well, it is obviously a matter of
5 concern to the Board, but I think there are some decisional
6 steps that will have to be taken by the Department and by the
7 Commission itself, as I understand it, the consolidation decision
8 will have to be made by the Commission, rather than by this
9 Board.

10 CHAIRMAN BENNETT: That is correct. No question
11 about that.

12 MR. AVERY: The only thing I would say at this time
13 is we disagree with the position taken by Mr. Brand as to the
14 Commission's power to accept our proposed condition for Catawba,
15 and that is that the result in this proceeding would be binding
16 on the Catawba list and construction permit. And we think that
17 on the basis of that concession by us, and our willingness to
18 accept that condition, that a full antitrust review hearing of
19 the type that is going on here does not need to be held with
20 regard to the Catawba application for a construction permit.

21 We think that the Department is seeking to put the
22 Commission into a straightjacket that really is not intended
23 by the statute.

24 CHAIRMAN BENNETT: How about the possibility of
25 additional intervenors? That is the only thing I can see that

1 might be a problem. The only person that I can see that might
2 be hurt, because the Department presumably will take care of the
3 general public, but there might be some intervenors who would
4 like to intervene in the Catawba matter, who would have no
5 interest in the present matter.

6 MR. AVERY: That is a possibility. In fact, there
7 are some people, the co-ops, I believe, filed a petition in the
8 Catawba proceeding.

9 CHAIRMAN BENNETT: I suppose there would have to be
10 notice given to them.

11 MR. AVERY: I think you might be able to work that
12 out by agreement. The whole thing is rather ridiculous, because
13 the net effect of what you are doing, you are not achieving
14 anything with regard to Catawba by consolidating with this
15 case, you are not achieving anything for the intervenors.

16 Catawba will come on line years after Oconee-McGuire,
17 and years after the decision in this case is made. The only
18 effect of consolidating it is to, in effect, put the squeeze
19 on Duke Power Company, because it, in order to meet the demands
20 of its customers, has to proceed on schedule with Catawba.

21 So, you don't achieve anything for the intervenors
22 or for the Department in terms of more prompt relief by consoli-
23 dating Catawba, but you put Duke into a terrible time bind.
24 We think that that is a result not required by the statute.
25 We think we have made a major concession in our willingness to

1 accept the result which will be reached here for Catawba and
2 we think that that is a very reasonable basis on which to either
3 the Department not recommend a hearing; we still hope to persuade
4 them to not recommend a hearing, or if they do recommend a
5 hearing, that the hearing be limited as to when that condition
6 will take care of the situation, when the Oconee-McGuire hearing
7 is going on.

8 But that is a matter you gentlemen won't have to
9 decide.

10 CHAIRMAN BENNETT: I think I have both of your
11 positions. What we are most interested in is what is the time
12 frame?

13 MR. AVERY: It is firmly in mid-air at the moment.

14 CHAIRMAN BENNETT: Let's see if we can't put a
15 whole through the hot air in the balloon and drop it.

16 MR. AVERY: We are, believe me, Mr. Chairman, as
17 interested or more interested than the Board in just finding
18 out what the story is. You know, we are seriously concerned
19 about keeping Catawba on schedule. We do have the meeting
20 scheduled tomorrow, we have been pressing hard on this.

21 CHAIRMAN BENNETT: Will you let us know promptly,
22 can you get a joint statement to us, or both of you send us
23 a statement so we will know where we are going to be. We can
24 hold up our prehearing order until such time as we get that
25 statement, provided we get it within two or three days.

1 MR. AVERY: Yes, I don't know really what to suggest
2 in that regard. If I could make a suggestion, I would think the
3 wisest course as far as this case is concerned, is to simply
4 proceed on schedule without Catawba. In other words, I think
5 it would be unfortunate to start holding back this case to see
6 what will happen to Catawba.

7 CHAIRMAN BENNETT: You don't have a desire to hold
8 it back.

9 MR. AVERY: No, sir.

10 CHAIRMAN BENNETT: How about you, do you have a
11 desire to hold this case back?

12 MR. BRAND: No, sir.

13 CHAIRMAN BENNETT: Let us know as soon as you can,
14 so we will be advised and we will have to determine whether
15 this will have an effect on what we are doing, but I would suppose
16 not, particularly with the concession that has been made.

17 The only one reservation I have is that somebody
18 might subsequently come in and say we want to intervene in this
19 particular proceeding.

20 MR. BRAND: They have already, your Honor, the
21 co-ops have petitioned to intervene in the Catawba proceeding.

22 CHAIRMAN BENNETT: I see. But they have not in
23 this proceeding.

24 MR. BRAND: No, sir.

25 CHAIRMAN BENNETT: So if they are going to be bound

1 by the results of the decision here, I would suppose they
2 would want to be permitted at least to make a statement here.

3 MR. BRAND: Yes, your Honor. I should say that
4 under the present schedule in Catawba, we have a pleading, a
5 response to their motion that is due on the 13th, in which our
6 position would be explained.

7 I might also say it is my understanding that counsel
8 for the applicants is participating in the drafting of a
9 statute change which would accomplish just the objective that
10 applicants seek here without the change in the statute. And it
11 would seem to me that of Congress wants to change the statute,
12 why of course the Justice Department will attempt to carry out
13 the law.

14 CHAIRMAN BENNETT: You wouldn't have any objection
15 to their changing the statute, I take it, would you?

16 MR. BRAND: I would recommend against it, but if --

17 CHAIRMAN BENNETT: In light of the amount of time
18 that it takes the Department of Justice to secure the necessary
19 discovery?

20 MR. BRAND: Your Honor, we have found --

21 CHAIRMAN BENNETT: And the delay that would necessarily
22 be caused.

23 MR. BRAND: We found in the bank merger case that
24 when there is time pressure on the applicants, these cases get
25 tried in a hurry. When there is no time pressure on the

1 applicants, cases drag out for many, many years. And that was the
2 very purpose for which Congress enacted the prelisting review
3 under 105 C.

4 CHAIRMAN BENNETT: In other words, you think it will
5 delay the matter seriously if we don't go ahead?

6 MR. BRAND: Yes, sir.

7 CHAIRMAN BENNETT: All right, gentlemen, I think
8 we have canvassed this thoroughly.

9 MR. AVEPY: Could I note one more thing on the
10 record, Mr. Chairman?

11 CHAIRMAN BENNETT: Yes.

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1 MR. AVERY: We have said in a pleading filed with
2 the Commission, not with this Board, and I think it is true,
3 that if consolidation does take place here, there is the
4 significant possibility of delay in the Oconee-McGuire proceed-
5 ing because of problems that might arise on our behalf of wishing
6 further discovery in light of the new issues that might be
7 introduced.

8 CHAIRMAN BENNETT: Well, I suppose the new Inter-
9 venors might want some discovery too.

10 MR. AVERY: That is possible, that I don't know.
11 But I know how we feel about it. There is the possibility
12 that if it is consolidated there would be delay. These
13 questions are not ripe for decision, but since Mr. Brand brought
14 a number of these matters up, I think I should note for the
15 record that that is our position as expressed in the pleading
16 we have filed with the Commission opposing consolidation and
17 we regard that has a very real possibility.

18 I might also say that we feel quite strongly that
19 we have not sought in this case any delay whatever, that it has
20 been a very lengthy process, it has not been because we have
21 been foot-dragging. Indeed we feel we have done just the
22 opposite, we have been making a prodigious effort.

23 It does take a long time to try these cases,
24 particularly when you get the kind of discovery request that
25 was served on us. But the suggestion implicit in Mr. Brand's

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1 comments that we foot-drag, where we wouldn't if we were under
2 the gun of non-grandfathered application is --

3 CHAIRMAN BENNETT: I don't think he said that. I
4 think you might get such an implication, but I don't think it
5 was directed toward you, Mr. Avery. I think this was just an
6 observation of what had occurred in another industry. So
7 let's not create any further cause for disturbance among us.

8 Mr. Vogler? I see you are standing up, and I
9 wondered if you had anything to say.

10 MR. VOGLER: We are in receipt of a letter from the
11 attorney general recommending a hearing in Catawba and it
12 looks like we will have one unless they reverse it. He also
13 suggests that under the circumstances we consolidate it.

14 Mr. Avery has said we should not. The staff has
15 an answer prepared in this matter and is holding it until we
16 can see if there is an agreement reached between the Department
17 and the Applicant. We don't want to go before the Commission
18 divided, because it will take longer to get an answer. So
19 we are reserving our right to file a recommendation to the
20 Commission in this matter, and the Commission will decide.
21 And it will have to be noticed and you will have to give a
22 chance for intervention for Catawba.

23 So I urge under the circumstances that we proceed
24 with Oconee-McGuire, rather than hold it back.

25 CHAIRMAN BENNETT: All right.

1 MR. BOUKNIGHT: I have nothing of substance to
2 add, but I did want to correct what may be a mistaken impression.

3 The Intervenors in this case have moved for consoli-
4 dation in this matter. We are participating in the discussions
5 with Applicant that are proceeding now, but I didn't want to
6 leave the impression that discussions among the Department of
7 Justice and the Staff and the Applicant alone could resolve
8 this matter.

9 CHAIRMAN BENNETT: But you do not represent the
10 Intervenors who would come into Catawba, do you?

11 MR. BOUKNIGHT: The seven cities who are before the
12 Board in this case have petitioned to intervene in Catawba.
13 We represent no other potential intervenors.

14 CHAIRMAN BENNETT: Are there other potential
15 intervenors?

16 MR. BOUKNIGHT: Yes, your Honor, I have seen a
17 petition for intervention by certain cooperatives in North
18 Carolina.

19 CHAIRMAN BENNETT: I see. Thank you.

20 Now I think that subject we have exhausted and we
21 would appreciate it if we receive a report from all of you at
22 the earliest time you can give us a report, and we will proceed
23 as if Catawba did not exist.

24 Now what presently are outstanding differences,
25 if any, with respect to discovery?

1 MR. AVERY: Maybe I should start on that subject,
2 if the Chairman wishes, by giving you a report on where we
3 stand.

4 CHAIRMAN BENNETT: That would be fine.

5 MR. AVERY: On production.

6 I just want to tell you where we are. By a letter
7 dated today, a letter we will be sending today, we will be
8 making available to the other parties approximately an
9 additional 2,500 documents, which will take us, you might be
10 interested to know, through No. 96,187.

11 With that production, we will have furnished all
12 documents responsive to the request with the exception of
13 just a few documents, about five or six documents, which we
14 sent back to Charlotte, they had problems such as they were
15 illegible, the Xeroxed copy we received was illegible and
16 were sufficiently nonlegible that if we Xeroxed it again,
17 it would be illegible, or it had a missing page, a page 2,
18 but not page 1, problems of that kind which we sent back to
19 Charlotte and asked them to take care of.

20 We sent a number of those down and most of them
21 have come back, but there are still about five or ten documents
22 of that kind.

23 CHAIRMAN BENNETT: I take it unless they are key
24 documents, Mr. Brand won't have any objection. Of course if
25 they say, of course, we have been intending to violate the

1 antitrust laws for many years, you will please burn this
2 document after it has been received, why I think he would be
3 interested.

4 MR. AVERY: I will concede he would be interested
5 in a document like that.

6 CHAIRMAN BENNETT: All right.

7 MR. AVERY: That then is going to complete our
8 production.

9 I think in fairness though I ought to say with
10 the possible exception of human error. You know we have handled
11 hundreds of thousands of pieces of paper and it can happen,
12 it might be from time to time there is a possibility that a
13 document will turn up which we thought had been handed over,
14 but it hasn't. We know that has happened in some other cases,
15 and I can't exclude that possibility, because when you are
16 dealing with human beings, and great masses of paper, something
17 like that can happen.

18 CHAIRMAN BENNETT: Let's not leave it for nine
19 months before you turn it up, when you find it.

20 MR. AVERY: We are trying for a zero defect system
21 as somebody said recently.

22 CHAIRMAN BENNETT: Then you think substantially
23 all of your discovery is complete?

24 MR. AVERY: Yes.

25 CHAIRMAN BENNETT: How about the discovery for you?

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1 MR. AVERY: Can I finish on the other, so you will
2 have a full report? I reported on the documents.

3 By a letter dated yesterday, I don't know whether
4 the parties have received it, it was mailed yesterday, we
5 completed the furnishing of the list of legally privileged
6 documents to the parties. We had been furnishing partial lists
7 and we finished it up by a letter yesterday.

8 There is one item we will be furnishing, I might
9 just mention it. In the course of the file search down there,
10 it appears a file, one file is missing, having to do with an
11 acquisition of Donaldson Air Force Base. They acquired some
12 facilities regarding that in the mid-'60s, '64, or '65, and they
13 couldn't find the file, but they think there must have been one
14 at the time.

15 Section B of the joint request on page 4 asks that
16 we inform them about any documents that were in our possession
17 on 12-17-70 and are no longer in our possession. We don't
18 know whether this falls into this category, because we have
19 made thorough inquiries and we don't know when the thing got
20 lost. But at some point between '65 --

21 CHAIRMAN BENNETT: This is an acquisition of a public
22 facility, so there must be a file on the other side, in the
23 government somewhere, must there not?

24 MR. AVERY: I don't know whether there would be or
25 not. But I am sure there would be internal documents documents

1 that wouldn't be in any public file.

2 I don't mean to make too much of it, I just want
3 to give the Board a full report, we don't want to hold anything
4 back.

5 We found out this file was apparently missing. I
6 don't think we are technically required to report anything about
7 it because Section B of the request only asked us to report
8 where it was in our possession on or after December 17, 1970,
9 and no longer is. We don't know whether it was or not.

10 In an attempt to be as complete as we can, we
11 are going to send them a letter, which we haven't gotten around
12 to sending, telling them essentially what I just laid out
13 before you, that it appears that at some point in time, we
14 don't know when or how or who had it, or what happened, just
15 when they were going through the acquisition files, they said,
16 gee, we acquired this from Donaldson, but we can't find the
17 papers having to do with it. So somehow they disappeared and
18 we haven't been able to find them despite a thorough search. /

19 So essentially what I am telling you is we have
20 completed discovery, the production after a very massive
21 effort requiring a tremendous amount of overtime, heavy expense,
22 large staff and as I say produced 96,000 documents and to our
23 great relief, the job essentially is done.

24 CHAIRMAN BENNETT: Now what about the discovery
25 that you are expecting?

1 MR. AVERY: Mrs. Golden is my expert on that.
2 Maybe I will ask her to talk to you about that.

3 MRS. GOLDEN: I am sure the Intervenorors would
4 want to talk to this too. But our initial review of their
5 responses indicate that in the case of each of the seven
6 Intervenorors, there are responses which have not been made,
7 or which appear to be incomplete.

8 The Board had previously indicated the desire on our
9 part to get together informally and try to work these out.
10 It is my understanding that the earlier motions we have made
11 to compel are in a holding pattern, as it were.

12 We have not compared the recent submissions by the
13 Intervenorors with those motions. We have only tried to go
14 through quickly, so that we could tell you, what our general
15 feeling is. And our feeling is that there is more to come.

16 CHAIRMAN BENNETT: It seems to me there is a void
17 in our deciding a motion that was made some months before if
18 it has been subsequent to that time.

19 MRS. GOLDEN: We agree. So I presume you want us
20 to follow an informal procedure if we can worm it out among
21 ourselves.

22 CHAIRMAN BENNETT: When completed, your informal
23 procedure, and you have reached a deadline, make your motion and
24 we will decide it. But it seems to me, as I have told you I
25 guess several times, and I would in private, except I am not

1 permitted to do so because I feel very strongly about it, if
2 you people can agree on what you really want, we can cut down
3 the extent of the discovery a tremendous amount. So I suggest
4 that that be done.

5 MRS. GOLDEN: We have no quarrel with that.

6 CHAIRMAN BENNETT: How soon are we going to be at the
7 point where either you are satisfied with what the responses
8 are, or you are going to make a motion, which we have to
9 decide?

10 MRS. GOLDEN: I would say we would be able by
11 August 20 to submit a list to the Intervenors completely
12 outlining the things we feel were not responsive or incomplete
13 and that thereafter they would need some time to go over the
14 list, we could then meet, and try to work it out. The time
15 frame after that, I don't know.

16 CHAIRMAN BENNETT: It would seem to me if you
17 could sit down and talk with them and work these things out,
18 have them make a suggestion to you that there is nothing in
19 this, or that we have gone over this before, and there is
20 just nothing we can get out of this particular lemon, the juice
21 is all-go, it might be desirable.

22 MR. STOVER: Judge Bennett --

23 CHAIRMAN BENNETT: Let's make sure that Mrs. Golden
24 has shot her ball. Have you finished?

25 MRS. GOLDEN: Yes. I don't think we have any

1 dispute in the matter of proceeding.

2 CHAIRMAN BENNETT: You don't want to say anything
3 further with respect to this?

4 MRS. GOLDEN: No, but I think perhaps the Inter-
5 venors may want to report their side and to describe what
6 they feel the situation is.

7 CHAIRMAN BENNETT: All right. I wanted to make
8 sure you had a chance to complete your statement. All right.

9 MR. STOVER: It wasn't my intention to interrupt,
10 Judge. I think the procedure that you have suggested is one
11 we should follow. The motions to compel additional discovery
12 filed against a few of the cities were filed late winter, I
13 think, late December or January, and of course there have been
14 fairly substantial productions since then. And I would only
15 suggest that if the Applicant proposes to prepare a formal
16 list of missing items or items that they feel are incomplete
17 or unresponsive by some date certain, that we have informal
18 meetings before that time, so that if there are things that
19 we know we do not have and the Applicant does not know we do
20 not have --

21 MR. TUBRIDY: You mean before August 20?

22 MR. STOVER: Yes.

23 Before this list is prepared and served on us, so
24 we feel we have to reply to every item, and the Board feels
25 perhaps it has to inquire into every item, we can perhaps

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1 eliminate items from that list if the Applicant is satisfied on
2 an informal basis that the piece of paper doesn't exist or
3 they have the information.

4 MRS. GOLDEN: I am afraid you misunderstood me.
5 My intention was to give you that list as the initiation of
6 our informal discussion.

7 MR. TUBRIDY: I thought you mentioned August 20.

8 MRS. GOLDEN: Yes. I will give him a complete
9 list of what we feel is not responsive.

10 MR. TUBRIDY: Couldn't you be supplying an ongoing
11 list.

12 MRS. GOLDEN: We could attempt that, taking one
13 intervenor at a time.

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1 MR. STOVER: What I am doing is offering to help
2 you make up a list.

3 MRS. GOLDEN: I would like to hear from you what
4 your feeling is as far as the Intervenor's compliance. I
5 don't think you have reported to the Board.

6 MR. STOVER: Well, subject to the disagreements
7 that apparently do exist in some cases, whether about
8 responsiveness or completeness, and possible lack of
9 information about the existence of certain items, which is
10 always a problem, especially with some of the smaller
11 systems, we think we are substantially complete.

12 CHAIRMAN BENNETT: Now Mrs. Golden doesn't think
13 so.

14 MRS. GOLDEN: Well, I would like to know what
15 "substantially" means. Does he mean he is complete as far
16 as the Intervenor has informed him of the fact, or what?

17 CHAIRMAN BENNETT: Is that all Intervenor's?

18 MR. STOVER: This is the seven, yes.

19 CHAIRMAN BENNETT: I mean the others are out,
20 as I understand it.

21 MR. STOVER: Yes.

22 MR. FARMAKIDES: Excuse me. When was the last
23 production of documents by the Intervenor's?

24 MR. STOVER: I would have to sort through the
25 file here. I could tell you in a moment.

1 MR. FARMAKIDES: It has been a couple of months,
2 hasn't it?

3 MR. STOVER: It has been at least a month, I
4 think, Mr. Farmakides. I have a file here of all of the
5 materials that we have submitted.

6 MR. FARMAKIDES: What I am driving at is I thought
7 the procedure suggested now by Mrs. Golden and we all agreed
8 with, that that was the procedure we already agreed to in
9 the past and I thought this had been going on. All of a
10 sudden I understand a new list will be drafted by August 20,
11 and pursuant to that list there will be further informal
12 conversation between the parties, which to me, speaking as
13 one member only, I frankly am astounded. I thought this
14 had been going on now for some time.

15 MR. STOVER: It went on for some time late last
16 year, I think.

17 MRS. GOLDEN: Frankly, it went on until we got
18 the documents to go through in order to make our own produc-
19 tion. And there was really not enough hours and hands to do
20 everything at the same time. We have attempted to keep
21 pace with the production of Intervenorors, but have not been
22 able to do so.

23 CHAIRMAN BENNETT: Now you are in a position to
24 do it right now.

25 MRS. GOLDEN: That is right.

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1 CHAIRMAN BENNETT: And you say you have to look
2 at these things to see whether or not there is anything
3 we think is absent. Is that right?

4 MRS. GOLDEN: That is right. Mr. Bennett,
5 I believe we have specified to the Board in our own report
6 exactly what we feel we have not come through with yet, and
7 I would still like to ask Mr. Stover what he means by
8 "substantial completion."

9 CHAIRMAN BENNETT: Yes. What haven't you gotten
10 through or don't you know?

11 MR. STOVER: Well, I would say that the gaps,
12 if there are any gaps, are of the kind that Mrs. Golden
13 mentioned earlier, that is things that are apparently
14 incomplete, may be incomplete because the city doesn't have
15 the documents, or the files don't go back or something has
16 been lost years in the past, or things which are perhaps
17 either admittedly not clearly responsive or ambiguous,
18 something of that nature. That is to say I think that
19 responses have been furnished to every question on the 81-item
20 request by each of the seven cities. Now whether the
21 responses are in every case clear to the Applicants and
22 sufficiently comprehensive for the Applicant to make use of
23 them is something that I guess Mrs. Golden will have to
24 discuss.

25 CHAIRMAN BENNETT: Is there any way we can push up

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1 the period of time?

2 MRS. GOLDEN: I very reluctantly will have to say
3 no.

4 CHAIRMAN BENNETT: All right. Mrs. Golden says
5 she can't do it until the 20th. So that being what
6 she says, I don't see how we can do any better than that.
7 So by the 20th, we will have a complete statement, and
8 we will give you a week to respond.

9 MR. STOVER: By "respond," Judge Bennett, do
10 you mean to disagree or to produce --

11 CHAIRMAN BENNETT: Either produce more documents
12 or say there aren't any.

13 MR. STOVER: Yes, sir.

14 MRS. GOLDEN: Just for the record, Mr. Bennett,
15 I checked my tally sheet and I believe that there are some
16 items to which no response has been made at all.

17 CHAIRMAN BENNETT: Well, there may be no informa-
18 tion.

19 MRS. GOLDEN: But that is an answer. But that
20 answer has not been provided either.

21 CHAIRMAN BENNETT: I see.

22 MR. TUBRIDY: Do you have to wait until August 20
23 to tell him that?

24 MRS. GOLDEN: Not that aspect of it, no.

25 MR. TUBRIDY: Tell him now.

1 MRS. GOLDEN: We will attempt to take one Inter-
2 venor at a time and send him the list as soon as it is ready
3 before August 20, if possible, and by August he would have a
4 full list of all seven.

5 MR. STOVER: If Mrs. Golden has a tally sheet
6 showing just "yes" or "no" for each question for each
7 Intervenor, I wonder if you could supply that?

8 MRS. GOLDEN: I will be glad to provide the
9 information that we picked up from your own reports.

10 CHAIRMAN BENNETT: All right. Then by the 20th
11 we will have a definitive list as to what, if any, appear
12 to be the deficiencies and by the 27th we will have a
13 response, and then some time early in September we will have
14 a motion --

15 (Board conferring.)

16 MR. BOUKNIGHT: Judge Bennett, you were speaking
17 of a seven-day period. I don't think that is possible.
18 We have seven different city administrations, and 91 ques-
19 tions --

20 CHAIRMAN BENNETT: But you are going to get this
21 stuff, as I understand, piecemeal today and the end of it
22 will be by the 20th.

23 Is that correct?

24 MRS. GOLDEN: We will attempt to get it to them
25 piecemeal.

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1 CHAIRMAN BENNETT: Mrs. Golden, you represent
2 the Applicant; the Applicant, I assume, wants to get through
3 this thing as rapidly as possible. The last time they
4 produced documents for you was several months ago, wasn't it?

5 MRS. GOLDEN: About a month ago.

6 CHAIRMAN BENNETT: And so --

7 MRS. GOLDEN: We can certainly get them the list
8 of items to which we feel absolutely no response has been
9 made.

10 CHAIRMAN BENNETT: You can get them that tomorrow,
11 I take it?

12 MRS. GOLDEN: Yes. That is no problem. We
13 do have a more serious problem with trying to do this
14 thoroughly and carefully and I don't think you would want a
15 job that is too quick that will miss something and
16 deprive either one of us of the opportunities to consider it.

17 (Board conferring.)

18 CHAIRMAN BENNETT: All right. Now can we have a
19 final date which everybody agrees they will make all of the
20 motions they are going to make with respect to this discovery?
21 Because we frankly think it has --

22 MRS. GOLDEN: If you prefer, we can come in on
23 the 20th with a motion to compel. But I don't think that
24 will help either one of us. I mean they will need some
25 time after they get the list to check with their clients.

1 I don't feel the extra few days would matter.

2 CHAIRMAN BENNETT: We would prefer to have you,
3 as I have mentioned to you many times, for a very practical
4 reason, agree to it because we could make the most erudite
5 decision in the world which will be completely impractical.
6 So I would much prefer to have a practical solution agreed
7 to by you and I think the members of the Board would, but
8 we are disturbed that we won't try this case until some time
9 in the next century and energy, in the meantime, is short
10 and we don't want to have a beef shortage in the electrical
11 industry.

12 MRS. GOLDEN: Fortunately Oconee is still working
13 all right, Mr. Nader hasn't stopped its production yet.

14 CHAIRMAN BENNETT: When can we finish it, Mr.
15 Stover? I know there are problems in going to see seven
16 different cities. I realize that. But they have had it for a
17 real long time, and undoubtedly there are some holes in it,
18 and if you can get an explanation and get it to Mrs. Golden,
19 say now we just can't tell you about this, nobody knows about
20 it. That is it. And she is going to have to present that
21 to the Board as all she can get, that is it, too. Or maybe
22 she will have to send out and make a separate survey and
23 determine this, get an engineer to go out there and work up
24 whatever story she feels is necessary to fill in the gap
25 which exists here. I don't know.

1 MR. STOVER: I just have one more suggestion to
2 make on this August 20-August 27 schedule, which I think in
3 the main is doable. There may be simply physical communica-
4 tion problems where we think we do have a document that we
5 should have supplied and didn't. I am not saying that this
6 is the case, but it might turn out to be the case. If
7 we receive the list on the 20th, we might be able to find out
8 by the 27th where the document is, that it exists and where it
9 is, but we might not physically be able to get it to Mrs.
10 Golden by the 27th.

11 MRS. GOLDEN: That is perfectly acceptable with us.

12 MR. STOVER: If we inform you we have it and we will
13 supply it by the 17th, that would be all right?

14 MRS. GOLDEN: Of course.

15 CHAIRMAN BENNETT: Does that satisfy you?

16 MR. BOUKNIGHT: Judge Bennett, I foresee a
17 problem. I couldn't agree more with your suggestion a while
18 ago that we talk more informally. That is what Mr. Stover
19 suggested a while ago before August 20. I foresee us getting
20 a list of 91 questions with a statement of deficiency for
21 each of those 91, so on down the line, and we would much
22 prefer to have the Applicant sit down with us and tell us
23 what it is they want from Shelby that they don't already have.
24 We can see a really difficult situation arising.

25 Now in response to the 91 questions --

1 CHAIRMAN BENNETT: How about having somebody from
2 Shelby come up and talk with Mrs. Golden, with you and Mrs.
3 Golden, and actually sit down and determine exactly what
4 it is? Then in the next two days come up with somebody
5 from another city and do it.

6 MR. BOUKNIGHT: Judge Bennett, if we can do that
7 in North Carolina, we are all for it. It would be a little
8 difficult on us to bring the cities up one at a time.

9 CHAIRMAN BENNETT: I think you will find North
10 Carolina at this time of year is much more satisfactory
11 than Washington.

12 MRS. GOLDEN: If we can work out such a procedure,
13 I think that might be satisfactory. I see frankly little
14 point in proceeding, though, without having submitted a list
15 to them. I don't think that is going to get us anywhere.
16 We have had similar meetings before and what happens is even
17 if the person from the city is there, they don't know,
18 they have to say, "Well, now what is your list?" And we
19 go down item by item, they write it down and say, "Well,
20 we have to go back and look, we don't really know for sure,"
21 and they don't know for sure.

22 CHAIRMAN BENNETT: But you are going to have to
23 take it city by city, anyhow. When you get there, a city,
24 can't you talk with them?

25 MRS. GOLDEN: Of course.

1 CHAIRMAN BENNETT: Wouldn't that be a surprisingly
2 simple thing?

3 MR. BOUKNIGHT: That would be fine, if you want
4 to submit the list first and then talk with us.

5 Frankly, Judge Bennett, these cities have
6 emptied their files and sent them up here on these things,
7 and at this point no city has withheld anything, it is a
8 matter of finding it. And it is really a practical matter
9 rather than a problem of noncompliance at this point.

10 MR. FARMAKIDES: Did you say, sir, all of the
11 files are up here?

12 MR. BOUKNIGHT: Not all. I don't mean that
13 literally, but the financial records and the studies of
14 cost and the revenue figures and so on have all simply
15 been emptied out for these years, brought up to Washington,
16 indexed by Mr. Stover, and then presented to the Applicant.
17 And these cities, of course, don't have the large administra-
18 tion and don't have the organization of files in different
19 places and by different areas as Duke does, and each of them
20 has done their best to comply.

21 So at this point, it is a practical problem. It
22 is not that Shelby won't respond to No. 71, or it is
23 providing only part of what it has, it is more of a problem
24 of Mrs. Golden and myself and a gentleman from Shelby sitting
25 down in a room and her saying, "I can't do a study on such

1 such unless I have some figures on this." And then that man
2 scratching his head and saying, "Well, maybe we can find
3 those figures from such and such a source." That is the
4 problem we have now.

5 CHAIRMAN BENNETT: I would think that would be a
6 more practical way.

7 Do you agree?

8 MRS. GOLDEN: Yes I still think the list should
9 be submitted and we will need until August 20.

10 CHAIRMAN BENNETT: You are going to have to submit
11 the list piecemeal, right?

12 MRS. GOLDEN: Right.

13 CHAIRMAN BENNETT: You can't do it all at once.

14 MRS. GOLDEN: For each Intervenor, we will do
15 it all at once.

16 CHAIRMAN BENNETT: As soon as you finish with one
17 Intervenor, can't you send him the list and say a couple of
18 days from now I will be glad to talk with you on this? Give
19 him a chance to read it, and then go down and talk with him
20 and see if you then can't reach a practical solution, and
21 let's see if we can't get that done prior to August 20, so
22 that you have completed it by August 20.

23 MRS. GOLDEN: By completion, do you mean having
24 interviewed at the seven cities?

25 CHAIRMAN BENNETT: Yes.

1 MRS. GOLDEN: I am sorry, we just can't. There
2 is not enough time to do that.
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1 CHAIRMAN BENNETT: How soon can you do it?

2 MRS. GOLDEN: I can jump ahead a little bit to
3 your next item, you might want to defer focusing on this
4 August 20 date until the whole contents of the schedule is
5 considered because I think some of the fears you are expressing
6 will either be exacerbated or assuaged by the whole discussion
7 of schedule.

8 CHAIRMAN BENNETT: But my difficulty is you have
9 to add one, two, three and four and we have to find out what
10 has yet to be done before we can go into the next step, it seems
11 to me.

12 So while we have got this step swinging in the
13 breeze, we are not going to be able to fasten on a date which
14 is going to be hopefully a final one because we have suggested
15 dates and so forth, and we just don't know where we are at yet
16 and as long as we have anything up in the air, we are not going
17 to be able to fix a date when everybody can say we are going
18 to mark this on our calendar and this is going to be it, because
19 that is what we are trying to do today, make this solid, so
20 that nobody is going to try to change it.

21 MR. AVERY: Could I pick up on Mrs. Golden's ideas
22 in that regard? I think the kinds of problem you are talking
23 about now really requires us to get into the whole scheduling
24 matter. I think you ought to hear what the critics have been
25 talking about in that regard before you start worrying about

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1 this particular step.

2 CHAIRMAN BENNETT: I am worried about this
3 particular step because this is the one that has been giving
4 us considerable trouble. I mean this is one where we actually
5 had to say to some of the intervenors that you either put up
6 or shut up.

7 MR. AVERY: My point is I think, Mr. Chairman, the
8 procedure that has been suggested seems to be the most sensible
9 one; that is, to get the list together, sit down and talk, try
10 to work it out and then come to the Board.

11 To worry about whether it will be August 20 or
12 another date, in the overall context of the scheduling of the
13 case. I think when we get into the scheduling you will have
14 a better framework to decide whether it should be done by
15 August 20 or some other date

16 CHAIRMAN BENNETT: How long will it take you to do
17 this?

18 MRS. GOLDEN: I think between travel and everything
19 else you would have to spend at least seven working days with
20 them, if that is the procedure we are going to follow. Perhaps
21 we could finish it up by the end of the month. We don't know
22 what their schedules are. Somebody might have a complication
23 down there. That is something out of our control.

24 CHAIRMAN BENNETT: Can you get these people together
25 with Mrs. Golden in a reasonable time?

1 MR. BOUKNIGHT: Judge Bennett, we will make every
2 effort. We will do everything we can to accommodate Mrs. Golden.
3 Of course, there are conflicts from time to time, just as I am
4 sure she has. But I don't think it will be difficult. I think
5 if Mrs. Golden wants to block off a number of days to be in
6 North Carolina and gave us a little time in which to juggle
7 among those days, I think we could do it, yes, sir. We will
8 sure try.

9 MR. BRAND: May I be heard on this point, your
10 Honor?

11 CHAIRMAN BENNETT: Yes.

12 MR. BRAND: The parties spent a good deal of time
13 yesterday hammering out a new schedule that was agreed upon by
14 all parties. The parties took into consideration not only this
15 piece of discovery but all pieces of discovery and all problems.
16 I just think it is an eminently sensible suggestion for the
17 Board at this time to entertain a new schedule agreed on by all
18 parties.

19 CHAIRMAN BENNETT: All right.

20 MR. BRAND: I feel I had to come to Mrs. Golden's
21 defense, even though she needs no defense. But I think it is
22 a good suggestion.

23 MR. TUBRIDY: We are not on the defensive.

24 CHAIRMAN BENNETT: Mr. Brand, if you gentlemen have
25 mutually agreed, all of you, on a particular schedule, and this

1 seems reasonable to all of you, you have much more acquaintance
2 with what your problems are than we have. All we are trying to
3 do is to move this as rapidly as we can and we feel somewhat
4 frustrated at this point because it has been over a year in
5 burning.

6 Let's hear your overall schedule.

7 MR. BRAND: We have it printed, your Honor.

8 Mr. Avery has kindly reproduced the schedule.

9 MR. AVERY: Mr. Brand, or I called him actually on
10 something else, and he brought up the subject of scheduling,
11 and suggested a schedule and we worked out a couple of aspects
12 of it, and after the discussion he asked if I could get it
13 typed up for the Board and for the parties to present today.

14 So this represents the results of a discussion we
15 had yesterday.

16 (Document handed to the Board.)

17 CHAIRMAN BENNETT: Now, is this the best you
18 gentlemen can do?

19 MR. BRAND: Yes, your Honor.

20 CHAIRMAN BENNETT: Ladies and gentlemen.

21 MR. BRAND: We have considered any number of
22 aspects. One important one is I think my eyesight. It got
23 so a week ago that I just could not keep my eyes open. They
24 kept blinking in looking at these documents. I have been
25 through 65,000 pages of them. I have 30,000 yet to go. I can

1 do about 5000 a week without losing my eyesight.

2 This is one of the many considerations we took into
3 account in setting a schedule.

4 We believe the schedule is a reasonable schedule.
5 It is predicated on our getting all discovery no later than
6 ten days from today, and I was assured yesterday by counsel
7 that there are only 2000 pages remaining that we can accommodate
8 within this --

9 MR. AVERY: Those, Mr. Brand, if I might interrupt,
10 those are the 2000 that are furnished as of today. So the
11 only thing outstanding now are those five or ten matters.

12 CHAIRMAN BENNETT: The only thing outstanding is
13 the matter of the motions.

14 MR. AVERY: Yes. Except for the ones I mentioned
15 they are looking for in Charlotte.

16 MR. BRAND: There may be a few more motions. For
17 example, it is quite possible we will want to see some of the
18 documents that they claim are under attorney-client
19 privilege that we don't believe fit within the privilege.
20 But this is all contemplated by the schedule, the discovery
21 as a discovery request is within this time frame.

22 CHAIRMAN BENNETT: On that, why do you have to do
23 that in advance of trial? Why can't you --

24 MR. BRAND: Because otherwise we won't see the
25 documents, your Honor.

1 CHAIRMAN BENNETT: You know what it is.

2 MR. BRAND: No, sir.

3 CHAIRMAN BENNETT: It is listed.

4 MR. BRAND: Well, the general subject matter is
5 listed. We don't know what the contents are, though.

6 CHAIRMAN BENNETT: Well, we would have to look at
7 the document, it would seem to me, and also look at the
8 context, to determine whether or not it was actually
9 privileged, wouldn't we?

10 MR. BRAND: Yes, sir, that is correct. And we
11 propose by motion to carry this forward within the time frame
12 of this schedule.

13 CHAIRMAN BENNETT: Within what time frame?
14 September 17?

15 MR. BRAND: Yes, your Honor.

16 Now, there is only one remaining point of disagree-
17 ment between Applicant and the Department and the other
18 parties -- I believe Intervenors are at one with the
19 Department on this point. That is whether all witnesses
20 should provide canned testimony or only hired consultants
21 should provide canned testimony.

22 We think that the witness that is in charge of a
23 system that is going to testify on two points of information
24 with regard to that should testify live, and we think that
25 a summary of his testimony can be prepared and exchanged,

1 which would satisfy the purposes of avoiding surprise.

2 We think only hired consultants should prepare
3 canned testimony, and the Applicant disagrees with us on that
4 point.

5 (The Board conferring.)
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1 CHAIRMAN BENNETT: I am just suggesting, gentle-
2 men, that the Chairman is going to be out of the country
3 from the middle of March until the 1st of May. So filing
4 these things, fine. But the hearing, the hearing
5 commencing on February 11, yes, we can go through with that.
6 But the hearing on rebuttal can't be before the 1st of May.

7 MR. AVERY: Mr. Chairman, it probably wouldn't
8 come out much different -- that might work out perfectly.

9 CHAIRMAN BENNETT: I just wanted to let you know.

10 MR. AVERY: I am going to make a guess, and I
11 would be interested in Mr. Brand's reaction, I am going to
12 guess maybe a couple of weeks for the hearing that starts
13 on February 11.

14 MR. BRAND: I would agree with that, your Honor.

15 MR. AVERY: So probably somewhere around the 1st
16 of March we will be through with that hearing. Then a 50-
17 day period under this schedule, a 50-day period then ensues,
18 30 days to prepare rebuttal and 20 days between the filing
19 of rebuttal and the testimony. So it looks like it might
20 work out perfectly. If we did have to delay the hearing a
21 little beyond that 50-day period, it wouldn't be --

22 CHAIRMAN BENNETT: I just wanted to let you know
23 as far as the Chairman is concerned, I wouldn't be available
24 at that time. Now the other members of the Board can proceed.

25 MR. AVERY: We would much prefer to have you here,

1 frankly.

2 CHAIRMAN BENNETT: I would prefer to be here,
3 because I would like to participate. I have spent this much
4 time on it.

5 MR. AVERY: Could I address myself to the question
6 of prepared testimony?

7 CHAIRMAN BENNETT: Just a second. I think the
8 Board maybe can save you some time.

9 (Board conferring.)

10 MR. TUBRIDY: It has been my experience that I
11 have never yet seen a schedule that has been prepared
12 that has been adhered to.

13 CHAIRMAN BENNETT: If the parties agree they are
14 going to adhere to this --

15 MR. TUBRIDY: This is just a proposed operation,
16 it is just a best guess as to the time elements. It is
17 the best that can be done. All we can say about this is
18 this is purely tentative, because as you can see, and as
19 has already developed here, as I suggested to you, in fact,
20 it was reported that I made a remark and it was laughed at,
21 when I said I don't think you have to regard that date as
22 a firm date, Mr. Avery. We were talking then in terms of
23 November, if you recall. Now we are back six months from
24 November. This is just purely a tentative schedule, and
25 let's proceed on that assumption. We can't possibly predict

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1 how much these time factors are going to enter into this
2 thing when you are producing testimony and all kinds of
3 factors enter into this thing. I have found that you can at
4 least add 25 percent more time onto all of these calendars
5 when you present them as you can possibly predict now. So
6 I think when we look at this, we ought to look at that with
7 that kind of telescope, that this cannot be something that
8 you can firmly set the dates on, it will probably be an
9 extended period of time in order to fulfill all of the
10 requirements you set out in the schedule now.

11 Now I think if we are talking in terms of the
12 Chairman being absent for six weeks, I think we can easily
13 adjust around that time frame and I don't think that should
14 be a factor at all -- a factor, but not a worry we should
15 have to worry about at the present time.

16 With that in mind, I think we can discuss these
17 things.

18 We have not yet come to what originally produced
19 this thing, and that is this August 20 date. We didn't set
20 August 20 as a date. I originally backed up, and the question
21 was raised by Intervenor here, when he raised the question
22 about August 20, and why you had to wait until August 20
23 before you submitted these things. And we found out you
24 don't. You can submit these things and let them work on it
25 in the meantime. But we haven't resolved that factor, so

1 I think we should go back to that and see what we can do
2 with that and then come back to the overall schedule.

3 MR. AVERY: What I had in mind in saying why
4 don't we lay the schedule before you, what I had in mind
5 is when you saw on the schedule the September 17 date for
6 the completion of all discovery requests, it seems to me
7 starting this process that we have been talking about with
8 Mr. Stover, i.e., furnishing the list on a piecemeal basis,
9 with all of it furnished by the 20th, with discussions
10 to ensue, I assume we could finish that process within this
11 time frame, so by the 17th of September, this process of
12 identifying the additional material that we want will be
13 completed and it would fall right into this schedule.

14 So it makes the August 20 date a little less
15 curcial if you see we are all contemplating finishing up
16 the filing of all discovery requests by the 17th of
17 December.

18 CHAIRMAN BENNETT: Is there a discovery request
19 for completion of discovery?

20 MR. AVERY: That is item 3. Completion of pre-
21 trial discovery is September 14.

22 CHAIRMAN BENNETT: Is it going to take you that
23 long to get these materials together?

24 MR. BOURNIGHT: Oh, no, Judge Bennett. I don't
25 think that is what Mr. Avery has in mind at all in item 3.

1 I think he has in mind there that we will all complete
2 our depositions and answers to interrogatories on the
3 second round of discovery by that date. If M.s. Golden can
4 provide us these lists at staggered intervals, beginning
5 as soon as she can, then we can have the city ready to meet
6 with her within five days after we receive the list from
7 her, and at the end of that meeting, then we ought to know
8 whether we are in agreement.

9 CHAIRMAN BENNETT: That is 35 days and that is
10 some time in the middle of September.

11 MR. BOUKNIGHT: Right. Yes, sir.

12 MR. FARMAKIDES: What happens, then, sir, if
13 you are not in agreement? Does this schedule factor that
14 situation in?

15 MR. BOUKNIGHT: I don't think this schedule
16 hurts that situation at all. I believe there is plenty of
17 time in there for Mrs. Golden to go ahead and file a motion,
18 if there is something we can't agree on. We have five days
19 to answer a motion. If all of that has been preceded by a
20 list and a conference, we can answer that motion within
21 five days and the Board can decide it. There is no need,
22 when I mention a five-day interval, there is no need why
23 there ought to be seven five-day intervals. She can get
24 us a list on Monday and a list on Thursday for respective
25 cities, we can have two of the five-days period overlapping

1 one another and we can probably finish the process by the
2 end of August. I see no reason why we can't.

3 CHAIRMAN BENNETT: Are you contemplating some
4 other program that won't permit you to do this, or can you
5 do it, Mrs. Golden?

6 MRS. GOLDEN: Beginning the week of the 20th, I
7 am free to meet with the people here in Washington or to go to
8 North Carolina. I would hope that we could space it so I
9 would not have to necessarily go back and forth every time,
10 and we could do it, you know, Monday through Thursday of one
11 week. I think if we can probably finish by the end of the
12 month, that if we do resolve our problems, there won't be
13 anything further to come to the Board with and we will
14 have ample time between the end of this month and the September
15 17 date to come forward with any follow-up questions regard-
16 ing those documents, and therefore would not delay this
17 September 17 date.

18 Of course, if we do get into a dispute and have
19 to come to the Board, I would presume that there would be
20 sufficient flexibility in the schedule, since the December
21 14 date is really the cut-off date, to renew or to come
22 forward with follow-up questions once the Board has decided
23 any matter on which we have a dispute.

24 CHAIRMAN BENNETT: My feeling was with respect
25 to the present discovery that is going on, that we ought

1 to have all your motions completed and answered by the
2 17th of September. In other words, that is the way I feel
3 about this discovery request.

4 MRS. GOLDEN: I think we can work within that.

5 CHAIRMAN BENNETT: Can you do that?

6 MRS. GOLDEN: Yes, I think so.

7 CHAIRMAN BENNETT: So this all-discovery requests
8 then includes all motions which are to be made with respect
9 to deficiencies as to the present discovery. And your
10 request for admissions, I take it, includes your depositions
11 as well?

12 MR. BRAND: Your Honor, we had contemplated that
13 the notice of the deposition be made no later than September
14 17, the earlier date.

15 CHAIRMAN BENNETT: I see.

16 MR. BRAND: That the request for admissions,
17 the usual request for admission under the federal rules, and
18 we agreed a little longer for that, and we agreed informally,
19 I think, that request for admissions as to authenticity
20 of the documents within the business record statute would
21 continue on.

22 CHAIRMAN BENNETT: I thought it had been decided
23 some time ago that nobody was going to raise any question
24 about the authenticity of something which came from a
25 particular file.

1 MR. AVERY: The problem we have with that is Mr.
2 Brand, we got into a discussion of this yesterday, Mr.
3 Brand mixes up authenticity and the shop book rule.
4 Certainly as to anything that comes from our files, we are
5 not going to have a problem with authenticity.

6 CHAIRMAN BENNETT: In other words, it is signed
7 by the man, purports to be signed at or about that date and
8 was sent to the person to whom it was supposed to be
9 sent. But there are a thousand other reasons why it may be
10 inadmissible.

11 MR. AVERY: Right, and there is certainly no
12 problem on our part with regard to the authenticity of
13 documents from our files. But Mr. Brand sometimes wraps
14 up into authenticity the so-called shop book rule and while
15 we will try to stipulate to anything we can on that, I am
16 not going to make the same kind of blanket assertion that
17 there wouldn't be any problem in that regard, as there will
18 not be with regard to authenticity.

19 MR. BRAND: I don't say there is not going to be
20 any problems, but we just took out that separate subject
21 and said we could let that go on until the very time of
22 hearing, to avoid bringing back a witness to Washington
23 when there is no need to do so. But with that exception --

24 CHAIRMAN BENNETT: If this witness, if all he is
25 going to testify to is he signed it, and he sent it to the

1 person it purported to be sent to, or he filed it with
2 the records of the company --

3 MR. TUBRIDY: All you are asking is admission of
4 the authenticity of the documents.

5 CHAIRMAN BENNETT: No, is it kept in the regular
6 course of business.

7 MR. TUBRIDY: That is the same thing, whether it
8 is the shop book rule, if it is actually an entry that
9 was made, then the question of admissibility is something else.

10 MR. BRAND: Sir, what I sought to do was to say
11 in item 2, we did not intend to preclude that kind of
12 trying to reach agreement past November 14, but with respect
13 to all other admissions, all other kinds of admissions as
14 to facts were intended to be cut off, request for such
15 admissions were intended to be cut off following November
16 14. That is the only thing I tried to bring out here.

17 CHAIRMAN BENNETT: Let me see if I understand it,
18 then. All discovery requests, including motions to compel --

19 MR. BRAND: By September 17.

20 CHAIRMAN BENNETT: And notices to take depositions.

21 MR. BRAND: Yes, sir.

22 CHAIRMAN BENNETT: By September 17. Now requests
23 for admissions will include what? Are you going to have a
24 long statement that asks them to concede that everything you
25 charged them with is true? Because I have seen that happen,

1 and that is not the kind of thing you contemplate?

2 MR. BRAND: Your Honor, we contemplate any request
3 for admission that is appropriate under the rules.

4 MR. AVERY: You might tell the Board a little
5 bit about the request for admissions you filed in the
6 Consumers case.

7 MR. BRAND: Yes, your Honor. In an attempt to
8 avoid controversies as to basic industry principles, we
9 tried to get this out of the way by writing down those
10 principles and asking them to admit them, and they did not
11 admit them, and they contested their admissibility. In
12 every antitrust case I know of, the Court is interested
13 in the principles of the industry, the technical facts or
14 how the thing works.

15 CHAIRMAN BENNETT: Sure, but you don't prove it
16 by an admission, because nobody in their right mind is
17 going to admit it. Because you never can tell what this
18 admission is going to mean to a Court, the words are going
19 to mean something different than they do to the parties.
20 And the words are going to mean something to one party and
21 a different thing to the other party.

22 So I don't think you ever can expect to obtain -
23 am I not right on that?

24 MR. TUBRIDY: We are talking about a generality
25 here. We would have to look at it.

1 CHAIRMAN BENNETT: That is true.

2 MR. AVERY: I wanted to bring out to the Board
3 that in the Consumers case they filed something like 500
4 requests for admission, I don't know how many pages, but I
5 have seen the thing, about that thick. So when you said
6 something about, well, are you planning on some big long
7 thing, I just thought the Board -- I don't know what he is
8 planning in the Duke case, but I thought the Board would be
9 interested in knowing what was done in Consumers.

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1 CHAIRMAN BENNETT: Mr. Brand, if you are going to
2 have canned testimony of somebody who has studied the
3 industry --

4 MR. BRAND: Yes, your Honor.

5 CHAIRMAN BENNETT: -- then why do you need a lot of
6 this kind of stuff?

7 MR. BRAND: We haven't offered such a pleading
8 in this case, your Honor, and we don't contemplate doing so.

9 CHAIRMAN BENNETT: I don't like to have you waste
10 your time doing something like that.

11 MR. BRAND: I don't have any time to waste, your
12 Honor. We thought it would be helpful if we could agree.
13 We were urged to stipulate. We were urged to reach agreement
14 by the Chairman of that Board and we attempted to do so in
15 good faith. We were surprised to learn that not only would
16 they not agree, they didn't want to even answer the request
17 for admissions, and were successful in avoiding answering
18 the request for admissions on basic principles that if
19 I get one hundred people who know about power pooling in the
20 industry, ninety-nine of them will give me a yes answer to
21 every one of those admissions.

22 MR. TUBRIDY: They don't have to admit anything.
23 They can just say put you to your proof.

24 MR. BRAND: They either had to admit or deny or
25 say I don't know.

1 MR. TUBRIDY: The only penalty is you have to pay
2 for the cost of proving it, but it doesn't deny them the
3 right to refuse to admit.

4 MR. BRAND: Yes, your Honor. I just wanted to
5 point out with respect to the 237 requests for admission we
6 had in that case, we don't apologize for them, we did it in
7 good faith, attempting to get out some matter we thought
8 could easily be admitted. But we are prepared to go forward
9 with the expert proof and we propose to do so in that case.
10 Having tried in that case and found it was a waste of time, we
11 don't propose to waste time in this case.

12 CHAIRMAN BENNETT: All right. Then the
13 admissions are going to be things where there is a problem
14 about a particular what, document?

15 MR. BRAND: Any admission of fact, your Honor,
16 that is appropriate under the rules. But we don't propose in
17 this proceeding to ask them to stipulate to basic power
18 pooling principles. As a matter of fact, we have documents
19 already in, the ones we have already listed, that echo this
20 request for admissions that we filed in consumers. They state
21 in almost the parallel terms these are documents prepared by
22 people giving speeches on power pooling, either of Duke Power
23 Company or Carolina Power and Light, and we really don't need
24 the admissions.

25 MR. TUBRIDY: You can get them to admit that the

1 president on this occasion said this, can't you?

2 MR. BRAND: Yes, your Honor, if necessary. But
3 we don't need that. We have the documents. They are not going
4 to contest the documents.

5 MR. TUBRIDY: I am talking about you can get
6 admission to. If you get the president saying this is the
7 practice of this corporation you are entitled to request an
8 admission from that and get one.

9 MR. BRAND: Yes, sir, that would be one of the
10 kinds of things.

11 MR. TUBRIDY: I understand why they are entitled
12 to take the same position, despite the fact it looks as
13 though they are denying what is obviously true. They are
14 entitled to that.

15 MR. BRAND: All I can state now is we do not
16 intend to write down the principal gain of power pooling and
17 ask they be admitted. We would propose to request any other
18 admission of fact that we think appropriate. It is quite
19 possible we would request no admissions of fact.

20 CHAIRMAN BENNETT: I just wondered whether we
21 couldn't collapse the months for the request for admissions.
22 I take it that also includes time for taking depositions?

23 MR. BRAND: Yes, because the completion of that
24 time for taking depositions would run through September 14
25 and response to interrogatories, so a request for admissions

1 of fact filed November 14 would have thirty days in which to
2 respond and that would be adequate.

3 CHAIRMAN BENNETT: Is it your present feeling that
4 you have a lot of requests of that kind?

5 MR. BRAND: I don't know of any we have at the
6 moment.

7 CHAIRMAN BENNETT: How about interrogatories?

8 MR. BRAND: We have some interrogatories we will
9 request and then we will propose to take depositions. The
10 depositions that we took in the Consumers Case occupied
11 approximately four business weeks, spread out over I think a
12 five-week period.

13 CHAIRMAN BENNETT: So that you believe that having
14 sent your notices to take depositions on September 17, you
15 will complete it by December 14?

16 MR. BRAND: Yes, your Honor, but that would also
17 include any depositions scheduled by the Applicant against
18 the Department or the Intervenors and vice versa.

19 CHAIRMAN BENNETT: Do you contemplate taking any?

20 MR. AVERY: Yes, your Honor.

21 CHAIRMAN BENNETT: And you think you can include
22 that, conclude that within that time?

23 MR. AVERY: Yes. We specifically discussed that
24 particular period at some length yesterday, Mr. Chairman. I
25 proposed the 90-day period between the filing of the request

1 on September 17 and the completion on December 14, principally
2 on the basis of the experience that took place in the Consumers
3 Case, where there were more than -- well, about four weeks of
4 time, as Mr. Brand said, but with a break, it took about five
5 weeks. Just on the assumption that roughly you would be
6 dealing with the same amount of time in this case for the
7 government's own depositions, it just seemed to me to think
8 about sixty days rather than eighty was unrealistic because
9 we would probably want to take depositions, we know we will
10 be filing interrogatories on the Department and probably on
11 the Intervenors, they will have to be working on them, they
12 are going to file further requests on us.

13 With everything there is to be done, it seemed to
14 me the ninety-day period was realistic.

15 CHAIRMAN BENNETT: I just hope you are not going
16 to gild the lily, and I also hope we are going to be sufficiently
17 precise on the requests so that we are not going to have a
18 motion made to quash it or deny it because it is too broad and
19 general.

20 MR. AVERY: Which request is that?

21 CHAIRMAN BENNETT: Let's pinpoint all of these
22 things. I don't care whether it is a request for a deposition
23 or a request to admit or an interrogatory, let's make it
24 sufficiently accurate, sufficiently clear and precise so that
25 we don't ask for a speech, we ask for a particular point.

1 MR. BRAND: Yes, your Honor. We have found that
2 general questions got us nowhere in the Consumers Case. It
3 is only because we brought a long document about which we
4 wanted questions responded to that we got any intelligible
5 answer at all. And we propose to use the same methods in this
6 case.

7 CHAIRMAN BENNETT: There is a very interesting
8 study in the files of the Department of Justice made by a
9 gentleman who is a master at procedure and maybe one of my
10 co-Board members recalls Mr. Justice Medina, actually took
11 one of these depositions to show counsel how he thought it
12 ought to be done when there were documents available.

13 I recommend it to you as a model method of
14 conducting one of those depositions.

15 MR. BRAND: Your Honor, I will look it up, if I
16 can get a better reference to it and would be delighted to
17 study it.

18 CHAIRMAN BENNETT: There were only about twenty-five
19 depositions that were taken and my recollection is it was in
20 connection with the Swann Deposition. Is that right?

21 MR. TUBRIDY: I don't remember.

22 CHAIRMAN BENNETT: You remember he did that?

23 MR. TUBRIDY: Yes. The Judge sat at the taking of
24 a deposition.

25 CHAIRMAN BENNETT: That is right. I think it was

1 Swann.

2 MR. BRAND: We would be delighted to have a member
3 of this Board sit in the taking of our depositions so as to
4 get immediate rulings on directions by counsel to refuse to
5 respond to a question.

6 CHAIRMAN BENNETT: Thank you very much. I don't
7 think the members of the Board would be available to do it
8 and I think if the whole Board was not here there might be
9 some question about the validity of the rulings that were
10 made.

11 I don't think it is one of the things that the
12 Board members can do.

13 MR. TUBALDI: That was Smith, Smith-Bond, I think.

14 CHAIRMAN BENNETT: Well, I thought it was Swann.

15 All right, gentlemen, I take it that is all we can
16 do about this, to accept this and we understand this is the
17 best you can do. I think that we should accept it as a firm
18 schedule, however, while I realize that there is many a slip
19 between the cup and the lip, this I would think we would try
20 to make it as firm as we possibly can.

21 I take it that that is the intention, that this is
22 not something which is merely a proposed schedule, but it is
23 a schedule which you believe you can meet.

24 MR. AVERY: Yes, Mr. Chairman. The burden of the
25 discussion on it yesterday, it was really a follow-up on the

1 conference call with Mr. Farnakides that preceded that conference.
2 He had asked us to be prepared to talk about scheduling. I
3 think it is fair to say that what Mr. Brand and I were trying
4 to do, we were the discussants with Mr. Bouknight present in
5 Mr. Brand's office and concurring in what was going on, and I
6 think we were trying to help the Board by coming up with what
7 we thought was a realistic schedule that could be adhered to.

8 I don't think we can conclude the possibility that
9 something may come up that we don't know about.

10 CHAIRMAN BENNETT: Yes. I mean if you break your
11 leg or Mr. Brand --

12 MR. AVERY: Couldn't it be Mr. Brand's leg?

13 CHAIRMAN BENNETT: No. I am going to make Mr. Brand
14 temporarily blind. I mean something like that. But let's not
15 just push it off.

16 MR. AVERY: Or the kind of thing that might
17 realistically happen, if Mr. Brand or us, for that matter,
18 suddenly found us for some reason taking six or eight weeks
19 in depositions, we might have to come in and say we guessed
20 wrong on the 90 days, that 90-day period was based on the
21 premise we could get the depositions done in six or seven
22 weeks.

23 CHAIRMAN BENNETT: I would think with 96,000
24 documents, if you haven't got all of the information you
25 really need, the amount of information you need in addition

1 to that should be minimum. Maybe I am wrong.

2 MR. BRAND: Well, your Honor, there are a number
3 of documents that will be helpful to us, but some of the
4 questions are not fully answered by the documents focused
5 around the period, but when you get to the center of the period
6 where the decision was made or action taken, you find no
7 reference, or there doesn't seem to be a document.

8 We have to find out about that.

9 CHAIRMAN BENNETT: All right. Things like that are
10 relatively small, however, I would assume, and you could take a
11 deposition directed to that point without taking an enormous
12 amount of time.

13 MR. BRAND: We would certainly hope so.
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1 MR. TUBRIDY: May I ask how many depositions you
2 intend to take at the present time, Mr. Brand?

3 MR. BRAND: We have identified a number of persons
4 who are central to the power pooling area --

5 MR. TUBRIDY: How many, five or six?

6 MR. BRAND: I think the last list I made had five
7 to seven names on it. I am trying to eliminate some of these.

8 MR. TUBRIDY: That is good enough. I just wanted
9 to know if it was 25 or 30, 4 or 5, or what-not. Because the
10 larger the number, the larger possibility that the time will
11 be extended. But five is reasonable. Very good.

12 MR. BRAND: There may be more. But some may only
13 require one or two questions.

14 MR. TUBRIDY: Thank you.

15 CHAIRMAN BENNETT: Very good.

16 MR. AVERY: We haven't heard from the Intervenors,
17 I wonder if they are planning on any depositions. I wonder if
18 I could inquire through the Board whether the Intervenors are
19 planning on any depositions or maybe they will rely on Justice's.

20 MR. BOUKNIGHT: Judge Bennett, of course it is our
21 desire to rely on the Department of Justice to the extent that
22 we can.

23 CHAIRMAN BENNETT: I would suppose that you would
24 be permitted to participate in those depositions, would you not?

25 MR. BOUKNIGHT: That is my understanding. And

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1 that being the case --

2 CHAIRMAN BENNETT: That is what we remember hopeful
3 of when we said in the beginning that we hoped the discovery
4 would be coordinated.

5 MR. BOUKNIGHT: We have attempted to coordinate
6 this with the Department of Justice and we will to the extent
7 we possibly can and if we take any depositions it will be
8 in areas that we think are necessary that the Department
9 choose not to pursue.

10 CHAIRMAN BENNETT: How many do you contemplate?
11 Do you have any contemplation now that there will be such?

12 MR. BOUKNIGHT: Judge Bennett, I just don't know, but
13 I can't conceive of there being more than a half dozen. if there
14 are.

15 CHAIRMAN BENNETT: I see.

16 How many do you think you will have, Mr. Avery?

17 MR. AVERY: Well, it partially depends on this review
18 of the documents that is going on.

19 CHAIRMAN BENNETT: In other words, if you are not
20 going to be able to get from the seven cities documentary
21 evidence or statistical evidence, you may have to take some
22 depositions to fill that in, but you don't think of any now.

23 MR. AVERY: You could say as a starting point, we
24 would be looking at the possibility of deposing somebody
25 from each of the seven cities. Then there is a possibility that

1 maybe a few other people in other areas, other than the seven
2 cities. So that sort of is where we are now.

3 We haven't firmed that up. We intend to do that
4 between now and the 17th of September. But our starting point
5 is do we need to depose somebody from the seven cities, and
6 then looking at the areas outside of that would be fairly
7 few, so maybe we are talking about 10 people.

8 CHAIRMAN BENNETT: All right, gentlemen, I see
9 we have been here better than an hour and a half, and I think
10 we should take a short break, after which we will hear
11 argument on the two motions and I would think 10 minutes a side
12 would be probably all we need.

13 MR. AVERY: Mr. Chairman, could I inquire, before
14 we break, where we are on the prepared testimony question?
15 Do you know what I am talking about?

16 Mr. Brand only wants to have a limited amount of
17 canned testimony. It is our position that you should have as
18 much prepared testimony as possible, consultants and other
19 people. The only area in which it seems to me a legitimate --

20 CHAIRMAN BENNETT: If it is an area where there
21 is reasonably a suggestion that credibility is going to be
22 a major factor, then I would suppose we should have the
23 witness testify and not canned testimony.

24 MR. AVERY: What I was going to suggest is this --
25 first of all, the Rule 2.743 --

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1 MR. TUBRIDY: I was going to say look at the rules.

2 CHAIRMAN BENNETT: It seems to indicate the
3 Commission wants canned testimony.

4 MR. AVERY: It says, it is 2.743 of the Commission's
5 Rules of Practice, 2.743(b). It says, "The parties shall submit
6 direct testimony of witnesses in written form unless otherwise
7 ordered by the presiding officer on the basis of objections
8 presented."

9 So it seems, I would say, it is not a directive
10 there must be canned testimony, but it obviously is the
11 Commission's expression of a preference for canned testimony,
12 unless there is good reason to have some other approach.

13 Now my feeling is maybe one area where you would
14 have good reason is if it was a hostile witness. In other
15 words, I would be willing to concede to Mr. Brand, if he decided
16 he wanted to call somebody from Duke Power Company, it is
17 a bit unrealistic for him to sit down with that witness and
18 have prepared testimony. Or vice versa.

19 CHAIRMAN BENNETT: I would assume that would be
20 a case in which there was a question of credibility.

21 MR. AVERY: But his proposal is much broader than
22 that. He is saying the only people as to whom you will have
23 prepared testimony is hired consultants.

24 Now it is entirely possible they will be putting
25 on somebody --

1 CHAIRMAN BENNETT: How many other people is he
2 going to have? I would suppose he wasn't going to have too
3 many more people.

4 MR. AVERY: He might want to the manager of one
5 of the co-ops, and there is no situation of hostile witness
6 involved, there is a completely cooperative relationship, and
7 it seems to me there is no reason whatever why he shouldn't sit
8 down with that person and give prepared testimony. I think
9 it obviously expedites the hearing.

10 I have had a lot of experience with prepared
11 testimony, as I assume the Board members have, and I think
12 it clearly expedites the hearing to have prepared testimony.

13 CHAIRMAN BENNETT: The only case in which I had some
14 prepared testimony in the Federal Trade Commission was one and
15 I don't think it saved very much time.

16 MR. AVERY: I have had a lot of it when I was on the
17 Public Service Commission and the Transit Commission. Of course
18 it is used all of the time in the Federal Power Commission and
19 it really saves time, there is no question about it.

20 CHAIRMAN BENNETT: When you have an expert consultant,
21 I grant you it is possible that it does. Although in this
22 instance it was an expert, and it didn't save any time in my
23 opinion.

24 MR. AVERY: I would like to suggest we follow the
25 Commission's rule and we have prepared testimony in all cases

1 except where a showing of good cause is made and I would
2 suggest that it is not good cause simply to say the person is
3 not a hired consultant and therefore he shouldn't have to put
4 in prepared testimony.

5 I would think that if they are going to call
6 anybody in a situation where there is not a hostile relation-
7 ship involved, where they can be reasonably expected to work with
8 that person in advance and prepare his testimony and put it in
9 prepared form, that we and they -- it is not a one-way street --
10 that we and they ought to do it that way.

11 I think it is what is contemplated by the rules;
12 I think it makes for a smoother and more expedited hearing and
13 I would like to express opposition to the procedure that is
14 being suggested by Mr. Brand.

15 MR. BRAND: May I respond?

16 CHAIRMAN BENNETT: Just a second.

17 (Board conferring.)

18 CHAIRMAN BENNETT: All right.

19 MR. BRAND: With respect to the rule, I would like
20 to note the rule was adopted subsequent to the noticing of
21 this hearing. In the Consumer's proceeding, the Commission
22 decided since the rule had been adopted subsequent to the
23 notice -- excuse me, the Board decided subsequent to the
24 notice of the hearing, that it was not bound by the rule.

25 CHAIRMAN BENNETT: We have specifically said, as

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1 I remember it, that we are bound by the new rules.

2 MR. TUBRIDY: That was Chairman Garfinkel, I remember
3 that.

4 MR. BRAND: Yes. The notice in this proceeding was --

5 CHAIRMAN BENNETT: We specifically said we were bound
6 by the new rules in an order, as I remember it.

7 MR. BRAND: I see.

8 CHAIRMAN BENNETT: To the extent that it was
9 possible to do so.

10 MR. BRAND: I would like to suggest --

11 MR. TUBRIDY: This is not ex post facto, this is
12 procedural, not substantive, so we follow the rules. That
13 is constitutional law.

14 MR. BRAND: I would like to suggest that there is
15 good reason for departing from this rule here.

16 MR. TUBRIDY: Why?

17 MR. BRAND: Because you have one the one side a
18 group of people who have appeared hundreds of times before
19 administrative agencies and are very used to preparing
20 canned kind of testimony. On the other side you have people
21 that have been operating a small power system over the years,
22 and have never participated in this kind of procedure before,
23 and I think you project them into an extremely artificial
24 situation, one that they may be prejudiced by in being put
25 into this kind of competition.

1 CHAIRMAN BENNETT: How? I just don't understand
2 it. You are going to prepare the testimony. You are going to
3 sit down with these fellows and talk with them and determine
4 what they are going to testify to, I assume.

5 MR. BRAND: Yes, your Honor, but I am not going
6 to write what they say, I am not going to do it.

7 CHAIRMAN BENNETT: No, they are going to respond
8 to your questions, you are going to ask them what they mean
9 by it.

10 MR. BRAND: You should be able to listen to these
11 people tell their story, you should not read their story. I
12 have spent some eight years before the Federal Power Commission.
13 Before that I participated before state commissions in many
14 parts of the country in public utility matters.

15 CHAIRMAN BENNETT: Don't they require canned testi-
16 mony?

17 MR. BRAND: No, sir. The FPC does. I think it is
18 poor practice. I think live testimony is much better even for
19 experts.

20 CHAIRMAN BENNETT: On cross-examination they are
21 going to be cross-examined, aren't they, each of them?

22 MR. BRAND: Your Honor, you get a witness testifying
23 canned, he works and polishes that testimony. That is not
24 his first response that you get. You get the result of his
25 thinking about that response four or five times, changing it

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1 four of five times --

2 CHAIRMAN BENNETT: Then you are suggesting there
3 is a real question of credibility in a particular instance?

4 MR. BRAND: Yes, sir, that is right.

5 CHAIRMAN BENNETT: I don't think there is any
6 question that when there is a question of credibility, if you
7 can say there is good cause here, because there is a real
8 question of credibility involved.

9 MR. BRAND: I believe that is correct and that is
10 correct not only for the witnesses that the Department will
11 call, but the non-hired consultant witnesses that the Applicant
12 proposes to call.

13 MR. AVERY: Is Mr. Brand suggesting there is a
14 question of credibility as to his witnesses he is proposing to
15 call? That is what I think I heard him say.

16 CHAIRMAN BENNETT: I thought he said Applicant.

17 MR. AVERY: I thought I heard him say there is a
18 question of credibility of his own witnesses?

19 MR. BRAND: Your Honor, you should get their story
20 live.

21 MR. AVERY: What Mr. Brand is saying, if I may
22 interject, he is saying he doesn't agree with the Commission's
23 ruling, he doesn't like prepared testimony, the Commission likes
24 prepared testimony, it said so in a rule, it is widely used in
25 the state commission, it is used reguarly in the Federal Power

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1 Commission and they have put out a rule here which says they
2 want it used here.

3 You do have an opportunity to test the witness"
4 credibility through cross-examination. You have a chance to
#7 5 hear him say what he has to say.

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1 CHAIRMAN BENNETT: I take it that the Board members
2 still reserve the right to question if they don't think counsel
3 have done an adequate job.

4 MR. AVERY: Of course. And the idea, if I can use
5 the word, it seems to me the first point he made seems a little
6 ridiculous to say that somehow he is at a disadvantage, because
7 he is using prepared testimony and is not used to teaching.

8 It seems to me just the opposite, if the man is not
9 used to being on the stand, and if he is a little nervous, he
10 would be better off putting in his story in prepared form and
11 having a chance to look at it, work on it. I think that was a
12 little overreaching in trying to make Mr. Brand's point. I
13 really felt quite strongly that the hearing will run more smoothly
14 if the Board follows the Commission's rules and requires
15 prepared testimony in all cases where there isn't a something
16 of good cause for other treatment.

17 MR. BOUKNIGHT: Judge Bennett, we support the
18 Department of Justice and I have two things to say. First, I
19 support Mr. Brand in his statement that the credibility of the
20 Department witnesses and the intervenors' witnesses is important
21 to this case. We are not suggesting that the witnesses we are
22 going to put on the stand are not going to tell the truth about
23 something, but you do have a group of people who are not accustomed
24 to the kind of articulation and preparation required in preparing
25 testimony before administrative agencies.

1 We intend to put on the stand some people who run
2 electrical systems in North Carolina, and can tell you something
3 about the problems they have with Duke Power Company. I think
4 it will help the Board considerably to see these men testify,
5 to hear them, to judge for yourselves the weight that ought to
6 be given their testimony.

7 The second thing I wanted to say --

8 CHAIRMAN BENNETT: Wait a minute. Aren't we going
9 to have these gentlemen present? They present their testimony,
10 and they are subjected to cross-examination, and then rebuttal,
11 or redirect examination. If we are not going to in that point
12 of time, going to be able to, or after that period of time, if
13 we are not going to be able to judge their credibility then, what
14 is it going to add to have them state their usually rehearsed
15 direct testimony? I would assume you would rehearse their
16 direct testimony with them, or you wouldn't be doing your job.

17 MR. BOUKNIGHT: I concur, but perhaps Mr. Brand and
18 I will just have to stand on your differences with the applicant,
19 and perhaps with the Chairman. We think there is a substantial
20 difference, when you have a man that is not a professional
21 witness. We think it is very substantially different if he
22 testifies live.

23 MR. FARNAKIDES: I join with the Chairman. Very
24 frankly, I have had an awful lot of direct testimony in writing.
25 I can appreciate why you want oral testimony, there is no doubt

1 about it, I appreciate why you would like to have it. But I
2 don't see the danger and I don't see a problem in the written
3 direct testimony that you and Mr. Brand seem to see.

4 As I understand it, the only point you made so far
5 is that your witnesses are better able to articulate orally
6 than in writing. That doesn't seem to me that that is a very
7 sound position, if that is what you are saying.

8 MR. BOUKNIGHT: Judge Farmakides, I think there is
9 another point I want to add to this. This rule we are talking
10 about here was written by the Commission. I think more in
11 contemplation of hearings that it normally holds concerning the
12 safety of a nuclear reactor or the environmental impact of a
13 nuclear reactor.

14 In this case, without attempting at all to espouse
15 the credibility of any of the witnesses Applicant is going to
16 put on the stand, there are accusations by the Department and
17 by the intervenors of improper conduct by this applicant.

18 Now, the Applicant's witnesses, the very executives
19 whose deliberations led to the conduct here in issue, are going
20 to be on the stand. We think that their testimony may perhaps
21 be more revealing if their testimony is more spontaneous.

22 I think that that point is equally important.

23 MR. FARMAKIDES: But wouldn't it be less revealing,
24 wouldn't they have more of a difficulty articulating their
25 position if they are on the stand, rather than if they are able

1 to prepare the testimony beforehand and give it polishing, as
2 Mr. Brand said?

3 MR. BOUKNIGHT: That is correct, they would be better
4 able, articulately, to state their position. It would be
5 a coordinated position, that is what all us lawyers endeavor to
6 present in prepared testimony, it will be testimony which is
7 coordinated through Applicant's counsel, and in which the
8 testimony of all of the witnesses for Applicants will be
9 prepared and compared and redrafted in advance.

10 We see a possibility we may get some more revealing
11 responses by having these men on the stand.

12 CHAIRMAN BENNETT: That is great, so far as you
13 are concerned, because here you can point this out, didn't you
14 coordinate your testimony with Johnson's before you wrote it?
15 How do you reconcile the testimony which you have written down
16 here and not about with this letter which you wrote on such and
17 such a date when you said so and so.

18 It would seem to me you could make a very strong
19 cross-examination in connection with prepared testimony, even
20 stronger than if the fellow was able to say well, I just made
21 a mistake, I was inadvertent in my answer to you when you asked
22 me so and so.

23 This is something that they have thought about,
24 they have written it down, they have polished it very carefully.
25 No, I think that your cross-examination can be much more effective

1 wit: canned testimony than it can when you had to write it down
2 with the stub of a pencil during the course of the proceeding.

3 It seems to me it is going to be a lot more effective.
4 You can show that all of this keys in very carefully, but it
5 doesn't quite take into account this letter which you have in
6 your possession, which was written by this very man and doesn't
7 agree at all with the story, if they are not telling the truth.

8 I would assume that counsel would very carefully
9 go over all of the pieces of paper that are in the file and
10 make perfectly certain that no witness would give testimony
11 that was not in accordance with all of the documents, because
12 he realizes that if he does something like that, it is going
13 to have a very serious effect on the credibility of the
14 witness, because these documents, you know, that were written
15 at the time are about as strong a testimony of the credibility
16 of the witness who comes to you today, unless of course there
17 is one of those things where there was a reason to not tell the
18 truth at the time the letter was written.

19 MR. BOCKNIGHT: Judge Bennett, I certainly understand
20 your point, but nonetheless, we feel that the very sizeable
21 differences in sophistication of the litigants here is equalized
22 at least somewhat by having oral testimony.

23 CHAIRMAN BENNETT: Counsel, there is no difference in
24 the sophistication of the lawyers, it seems to me. The lawyers
25 are pretty well experienced and certainly Mr. Brand has had a

1 very long experience in this particular area, and certainly
2 you have had experience along this line, and so I don't think
3 anybody can claim they are not well-represented.

4 I haven't seen any indication from the papers I have
5 seen that they are not well represented. And I would expect that
6 witnesses would have their testimony rehearsed. I think that is
7 the job of a lawyer, to go over it.

8 So, when you do it by rehearsing it and then writing
9 it down, and having it pretty well nailed down beforehand or
10 when you rehearse it and then stand the possibility that when
11 the man gets on the stand, he will forget what he told you, or
12 think of something else -- I think you are much more likely to
13 get a true statement if you do prepare it in advance.

14 MR. BRAND: Your Honor --

15 CHAIRMAN BENNETT: With sophisticated counsel.

16 MR. BRAND: We would like to offer an alternative
17 suggestion that is also appropriate under the rules we believe,
18 appropriate under the federal rules, as well as the Commission's
19 rules, and this is the way that testimony is often provided in
20 antitrust cases, and that is by way of deposition, where the
21 parties have an opportunity to cross-examine at the time of the
22 taking of the deposition, then the deposition is offered subject
23 to relevancy and competency at the hearing.

24 This is provided by the rules, we think it would be
25 an acceptable alternative for the witnesses that are non-hired

1 experts. We believe that we would not be as prejudiced as we
2 would be by this following of the rules by the procedures --

3 CHAIRMAN BENNETT: Is there any reason why you
4 can't introduce the evidence by deposition?

5 MR. BRAND: No, sir. The rules contemplate it. I
6 would want some expression from the Board. In the consumer's
7 Board, there seemed to be some reluctance to doing this. I
8 would propose to do it. It would make the Department's job much
9 easier as far as marshalling witnesses. It is very difficult
10 to marshal witnesses to appear at a specific time and place,
11 particularly when it is many hundreds of miles from where they
12 live.

13 MR. AVEPY: We would --

14 CHAIRMAN BENNETT: I don't see any objection to
15 that.

16 MR. TURBRIDY: For a long time, in federal court,
17 persons beyond a certain milcage from the courtroom --

18 CHAIRMAN BENNETT: You are entitled to put his
19 deposition in evidence. And then if the other side wants to
20 bring him there in rebuttal, I suppose they can. But they have
21 had an opportunity to cross-examine.

22 MR. BRAND: Yes, sir, and the cross-examination would
23 go into the record, too.

24 MR. FARMER: We have used this before and it
25 does work. If you want to go that way, it doesn't make that

1 much difference.

2 MR. AVERY: Mr. Chairman, I have to, at the very
3 least, express a reservation, if there are circumstances in
4 which we feel that the other side of the coin, where you have the
5 prepared testimony and cross-examination, at least the Board
6 gets an opportunity to observe the witness and form its own
7 impression.

8 MR. FARMAKIDES: We will still have that. As I
9 understand it, he will support that deposition with a live
10 witness here.

11 MR. BRAND: No, I didn't intend to do that.

12 MR. AVERY: He is saying Mr. Jones is going to tell
13 a story about something that supposedly happened --

14 CHAIRMAN BENNETT: He has a right to do that if the
15 witness is a certain distance away, doesn't he?

16 MR. AVERY: I know that is the federal rule. I was
17 looking for it in the rules while we were talking about it. Maybe
18 we could look for that during the recess.

19 CHAIRMAN BENNETT: I think we should take a recess.
20 We have been going two hours now.

21 MR. AVERY: Let me finish with the expression of
22 reservation, if we feel it is important for the Board to have
23 an opportunity to get a look at the witness, and hear him tell
24 a story, to put in the deposition as a substitute for that is
25 very questionable.

1 CHAIRMAN BENNETT: If he is entitled to take a
2 deposition, and to offer the deposition under the rule, which I
3 think he is if the witness becomes unavailable or is a certain
4 distance away.

5 MR. AVERY: Let me look for the rule and maybe we
6 can talk about it afterward.

7 MR. BRAND: Your Honor, I would like to point out that
8 I have seen some witnesses testify here in Washington who can
9 testify that black is white, and you get them on the stand and
10 you can't get a bit out of that witness, because he has
11 testified for 200 times and you can't change his testimony.

12 Now, you are going to have that kind of witness on
13 the side, and you are going to look at the other side, witnesses
14 that have never testified before and you are going to look
15 and listen only to their demeanor on cross-examination, not
16 to their demeanor on direct testimony.

17 MR. AVERY: I'm getting a little aggravated about
18 this. If Mr. Brand is suggesting that our witnesses are going
19 to get on the stand and not tell the truth, or to suggest that
20 they are professional witnesses and are going to mislead the
21 Board, I think it is highly questionable conduct by Mr. Brand.

22 CHAIRMAN BENNETT: I don't think he is trying to
23 impugn at all. He is talking about his own witnesses.

24 MR. AVERY: I am not talking about me, I am talking
25 about our witnesses.

1 CHAIRMAN BENNETT: He is talking about his own
2 witnesses.

3 MR. AVERY: He is saying the Duke witnesses are
4 very sophisticated --

5 MR. TUBRIDY: No, he didn't. He just mentioned
6 witnesses he had dealings with before. He talked about witnesses
7 I had on the stand. He didn't say anything about yours.

8 CHAIRMAN BENNETT: We are going to take a recess
9 right now for ten minutes.

10 (Recess.)
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1 CHAIRMAN BENNETT: All right, gentlemen, are
2 we through with this?

3 MR. BRAND: Your Honor, one of my associates
4 went after my book of rules, which has both the federal rules
5 and the Federal Power Commission rules, which has a practice
6 very similar to this. Perhaps I could discuss this briefly.
7 I would like to supplement from the materials that will be
8 available to me very shortly, if I may.

9 Section 2.740A(g) says, "A deposition will not
10 become a part of the record in the hearing unless received
11 in evidence."

12 CHAIRMAN BENNETT: That is right.

13 MR. BRAND: That is a backwards way of doing it.
14 It is possible that they copied it from the FPC rules. But
15 the practice under the federal rules is to admit depositions
16 where the party is over 100 miles away, as will be the case
17 in this proceeding, and under certain other subsections of
18 that same rule.

19 CHAIRMAN BENNETT: But the rule in the Federal
20 Court is that you can't, except in certain circumstances,
21 subpoena beyond a certain distance. Isn't that so?

22 MR. BRAND: But the antitrust cases --

23 CHAIRMAN BENNETT: In the antitrust cases, you
24 can subpoena them.

25 MR. BRAND: So the normal practice in antitrust

1 cases is to use this deposition evidence. In point of
2 fact, in the large antitrust cases under the Manual for
3 Complex Litigation, you use deposition summaries, you don't
4 use the whole deposition; you just use a summary of the
5 deposition. All I am suggesting is the normal practice in
6 antitrust proceedings is to use depositions, it is approved
7 by the courts, it is a practice used before the Federal
8 Power Commission under a provision that is very comparable
9 to 2.740A(g), and that is to use the deposition for all
10 purposes if the material that is in the deposition is
11 otherwise admissible. In the same way you would be using
12 canned testimony.

13 The only difference would be that the cross-
14 examination would be canned as well as the direct.

15 MR. AVERY: Mr. Chairman, could I be heard for a
16 moment? I have looked at 2.704A(g), and it tells me nothing
17 about the question to which Mr. Brand is addressing
18 himself. It says the deposition will not become a part
19 of the record unless received in evidence, and it says
20 nothing about when --

21 CHAIRMAN BENNETT: In other words, the Board has
22 discretion as to whether they are going to receive it and
23 whether they are going to want a particular witness to come
24 before them for additional questioning.

25 MR. AVERY: Except I am not sure that is the case.

3
1 I have before me the federal rule, Rule 32, that
2 lays out the circumstances. It is fairly lengthy. I would
3 be glad to put it before the Board.

4 MR. TUBRIDY: Let's not get confused between
5 different things. The procedural rights you have when
6 the United States is suing and when individual parties
7 are suing are two different things.

8 Is this 15 U.S. Code, or what?

9 MR. AVERY: Rule 32 of the Federal Rules of
10 Civil Procedure.

11 MR. TUBRIDY: That is what I wanted to know.
12 There is a difference between -- 15 U.S. Code provides for
13 the rules for subpoenaing witnesses, where United States is a
14 party. I wondered which you were talking about.

15 MR. AVERY: This is Rule 32. I think, as you know,
16 the rules of the Atomic Energy Commission closely parallel
17 the Federal Rules of Civil Procedure. They are in many
18 cases verbatim copies of the Federal Rules of Civil
19 Procedure. I think that the fact that the Commission did
20 not put in an equivalent of Rule 32 about using depositions
21 in proceedings in lieu of calling a witness is significant,
22 and it can be read as an expression of intent by the
23 Commission not to use depositions in lieu of live testimony.

24 So I see nothing in 2.740A(g) that authorizes the
25 use of a deposition in this way. It is simply silent on the

1 subject. It simply says when a deposition is used,
2 certain things, the other parties have certain rights.

3 CHAIRMAN BENNETT: It is no good unless it is
4 offered and received in evidence. Now objections can be
5 made to it at the time of the offer.

6 MR. AVERY: That is right.

7 CHAIRMAN BENNETT: And if the Board determines
8 in its discretion that it will only receive the evidence,
9 the deposition as evidence, if the party is brought before
10 the Board for additional questioning, I suppose the board
11 can make that determination.

12 MR. AVERY: I would respectfully suggest, Mr.
13 Chairman, that the issue ought to be resolved in advance of
14 the time of hearing.

15 CHAIRMAN BENNETT: Why?

16 MR. AVERY: So the parties will know. Suppose
17 Mr. Brand or us were planning to use a deposition, and one
18 of them offers a deposition in lieu of the witness' presence,
19 and then we object and you sustain the objection, and then
20 it turns out the witness is on a six-week trip in Europe,
21 the hearing is going to be held up. We ought to know in
22 advance whether the Board is going to permit the use of
23 depositions in lieu of the appearance of the witness for
24 live testimony or not. It is just much more orderly to
25 settle that issue in advance of the hearing.

1 MR. BRAND: I concur in that, your Honor.

2 CHAIRMAN BENNETT: It would seem to me it would
3 all depend on what the deposition was. If it was a relatively
4 noncontroversial thing, why, I wouldn't suppose that anybody
5 would want the witness. But if it was a matter in which
6 credibility was a real question, I would assume that the
7 Board would certainly want to see the witness and maybe ask
8 him some questions.

9 MR. AVERY: I think you should bear in mind that
10 the reason we are having this discussion is Mr. Brand
11 got up and proposed a general procedure that he was going
12 to use depositions in some unspecified cases in lieu of
13 testimony. So I think the issue is squarely before you.

14 MR. FARMAKIDES: Let me also make an observation
15 here. I misunderstood Mr. Brand. I thought very frankly
16 that what you were suggesting is that the use of deposition
17 format type direct written testimony in lieu of written
18 testimony required by the rules --

19 MR. BRAND: Yes, sir.

20 MR. FARMAKIDES: Excuse me, sir. In view of that,
21 I would assume, sir, that the witness who would support
22 that deposition would be here for the Board to ask questions.

23 MR. BRAND: No, sir.

24 MR. FARMAKIDES: That was my assumption.

25 MR. BRAND: My idea is the witness would be

1 cross-examined where the deposition was taken in his own
2 office --

3 CHAIRMAN BENNETT: Then you are depriving the
4 Board of its duty to document the record, Mr. Brand, if that
5 is the way I understand you, sir.

6 MR. BRAND: The practice I am suggesting is
7 contemplated by the rules.

8 MR. FARMAKIDES: I believe the results are the
9 reverse.

10 MR. BRAND: It says the deposition will not
11 become a part of the record in the hearing unless received
12 in evidence.

13 MR. FARMAKIDES: We are talking about written
14 direct testimony filed by a party. And you were suggesting
15 a deposition in lieu of, is what I took you to say, written
16 direct testimony.

17 MR. BRAND: That is right. The questions and
18 answers in the deposition, and the cross-examination, your
19 Honor. All I am suggesting is you are going to have
20 witnesses up here that are just as much at home in that
21 witness box as they are in their own offices, and those
22 are the people that have testified many times before.

23 On the other hand, you will have people that have
24 never testified before.

25 MR. FARMAKIDES: Don't you think we can appreciate

1 this difference and make allowances for it, if need be?

2 MR. BRAND: Yes, sir. All I am suggesting is if
3 we want to follow the rules, if we don't want to just tailor
4 the rules to one position, but follow the rules exactly, this
5 is a procedure that is permitted, it is the same procedure
6 that is done under the federal rules, the same procedure
7 that is done under the Federal Power Commission rules, it
8 is the procedure that is lawfully acceptable. If we want
9 to follow a procedure that is fair to both parties, let's
10 either have all of the testimony live except for the hired
11 consultants, or let's have an opportunity to put it in by
12 way of deposition, which is also permitted by the rules.

13 MR. AVERY: Mr. Chairman, 2.740A(g) does not
14 authorize it. Mr. Brand is relying on that. It does not
15 say a deposition can be used in that way, it simply does not
16 say that.

17 It says, "A deposition will not become a part of
18 the record in the hearing unless received in evidence.

19 "If only part of a deposition is offered in
20 evidence by a party, any other party may introduce any other
21 parts. A party shall not be deemed to make a person his
22 own witness for any purpose by taking his deposition."

23 All that says is in order to get something in a
24 deposition in evidence, you have to offer it. That could
25 apply to the impeachment situation.

1 CHAIRMAN BENNETT: It would also apply if the
2 witness were dead.

3 MR. AVERY: Right. But it does not say you can
4 use a deposition in lieu of the appearance of the witness,
5 that can be done under the federal rules, but it can be done
6 because the rules specifically so state, and there is no
7 such rule at the AEC.

8 (Board conferring.)

9 CHAIRMAN BENNETT: Gentlemen, we feel that the
10 rule provides that unless there is some cause given for it,
11 that written direct testimony will be used. Depositions, if
12 there is some reason for offering a deposition, may be used,
13 such as if the witness is dead or otherwise unavailable,
14 sickness, or for the purpose of using the deposition to
15 contradict or refresh the recollection of the witness,
16 something of that nature.

17 MR. BRAND: Your Honor, suppose the witness is
18 100 miles from the place of trial?

19 CHAIRMAN BENNETT: Can you still subpoena him here?

20 MR. BRAND: I believe we can subpoena him here,
21 yes.

22 CHAIRMAN BENNETT: All right.

23 MR. BRAND: Put the practice in antitrust courts
24 is even though you can subpoena him to the antitrust court,
25 if he is over 100 miles from the place of the trial, you

1 put in the deposition evidence. It is the normal practice,
2 it is a practice used before SEC, a practice used before
3 the Federal Power Commission, it is a practice that I
4 believe is contemplated here, but the rules are in such a
5 form, they are all cut up. It is very difficult to extract
6 that from the rules, but I believe that is what the rule says.

7 MR. AVERY: I would like to take exception to
8 Mr. Brand's characterization that it is done, it is the usual
9 thing in antitrust cases. I have tried a few antitrust
10 cases, and I think it is very unusual to do it, except within
11 the circumstances allowed by the federal rules.

12 CHAIRMAN BENNETT: Well, gentlemen, we now
13 determine that we are going to follow the rule that there
14 will be written direct testimony unless there is good
15 cause shown why written direct testimony will not be received.

16 Now one good cause which I think everyone will
17 agree to is that there is an adverse witness that you are
18 calling and you couldn't get his direct testimony down in
19 writing. If that be the case, of course, you are going to
20 have to call that witness before the Board and we are going
21 to have to take his testimony here.

22 But that is going to be the rule and the deposi-
23 tion will be used as is appropriate for depositions in and
24 under the usual federal rules.

25 Do I have your agreement, gentlemen?

1 MR. TUBRIDY: Yes.

2 MR. FARMAKIDES: Yes.

3 MR. AVERY: Could I have that last portion read?

4 THE REPORTER: "Chairman Bennett: But that is
5 going to be the rule and the deposition will be used as is
6 appropriate for depositions in and under the usual federal
7 rules."

8 MR. AVERY: I think that is a change from what
9 you said earlier, because the federal rule has this hundred-
10 mile rule in it. I am not sure that either that you earlier
11 contemplated or you are authorized to contemplate the 100-
12 mile rule, in other words, that the Board can create the hundred-
13 mile rule where it is not authorized by the AEC's rules.

14 CHAIRMAN BENNETT: I thought you were arguing
15 that the federal rules should apply?

16 MR. AVERY: No. I was saying that you have got
17 to look to the AEC rules to find out what use can be made
18 of depositions. There is nothing in 2.740A(g) that authorizes
19 the use of depositions.

20 CHAIRMAN BENNETT: Therefore we should look to
21 what is in the federal rules about it, should we not?

22 MR. AVERY: No. You misunderstood me. What I
23 was saying was in the absence of a specific rule, you are
24 not authorized to use depositions in this way. And that the
25 fact that the AEC did not include a rule like Rule 32

1 indicated that they did not intend to have depositions used
2 in this way. I don't think you can, as a Board, create a
3 hundred-mile rule in the absence of authority from the
4 Commission in its rules of practice.

5 MR. FARMAKIDES: Can I ask the reporter to read
6 back the initial ruling of Mr. Bennett? There was some
7 discussion and then Chairman Bennett restated the ruling.

8 THE REPORTER: "Chairman Bennett: Well, gentlemen,
9 we now determine that we are going to follow the rule that
10 there will be written direct testimony unless there is good
11 cause shown why written direct testimony will not be received.

12 "Now one good cause which I think everyone will
13 agree to is that there is an adverse witness that you are
14 calling and you couldn't get his direct testimony down in
15 writing. If that be the case, of course, you are going to
16 have to call that witness before the Board and we are going
17 to have to take his testimony here."

18 MR. FARMAKIDES: I thought there was --

19 MR. AVERY: That was the second time he spoke.
20 Did you want the earlier time?

21 MR. FARMAKIDES: Yes.

22 THE REPORTER: "Chairman Bennett: Gentlemen, we
23 feel that the rule provides that unless there is some cause
24 given for it, that written direct testimony will be used.
25 Depositions, if there is some reason for offering a

1 deposition, may be used, such as if the witness is dead or
2 otherwise unavailable, sickness, or for the purpose of
3 using the deposition to contradict or refresh the recollec-
4 tion of the witness, something of that nature."

5 CHAIRMAN BENNETT: All right. Now my Board
6 members tell me the initial statement I made with respect
7 to the use of depositions is the one they believe should be
8 followed here, that we should not follow the federal rules
9 because that, in effect, would be our making a different
10 rule apply than the one which should apply, because in the
11 case of the federal rule, the 100-mile proposition is there,
12 which is not appropriate in a case like this, where the
13 witnesses can be subpoenaed.

14 MR. TUBRIDY: Off the record.

15 (Discussion off the record.)
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CHAIRMAN BENNETT: On the record.

We would like to go first to the argument for a motion for a protective order.

MR. AVERY: Mrs. Golden is going to argue the protective order motion, and I will argue the other motion, Mr. Chairman.

CHAIRMAN BENNETT: Can you do it in 10 minutes, Mrs. Golden?

MRS. GOLDEN: I expect so, your Honor. In making the motion, we have tried exceedingly hard to relate it only to those documents which the company felt, not for reasons of antitrust implications, but solely for reasons of its internal business dealings and policies needed protection.

The Department and the Intervenor have strongly objected to our seeking a protective order for a particular document involving EPIC. This document is numbered 95,306 and they have vociferously but inaccurately tried to speculate as to what information is contained in the document.

It is our feeling that the document in no way shows a strategy being used by Applicant to prevent the advent of EPIC, but to the contrary, it shows the company's policies in the negotiating with some of its wholesale customers, assuming the advent of EPIC. We think in this instance the harm to Applicant that may result from the disclosure of the document is far overshadowed by the

1 insinuations and aspersions being made by the Department and
2 the Intervenor, and for this reason and to limit further
3 argument on this aspect of the motion, we are agreeing to
4 produce the document and will either be glad to give it to
5 them today. I have it here for them, or will include it
6 with the materials we are providing today.

7 This particular document is mentioned on page 7
8 of our motion.

9 CHAIRMAN BENNETT: Now are you saying that you
10 withdraw from the position you have taken there and that
11 you are going to present that?

12 MRS. GOLDEN: Yes, in regard to that particular
13 document we do withdraw.

14 CHAIRMAN BENNETT: Now you have suggested in one
15 of the pages here that you would like to have the Board look
16 at certain documents.

17 MRS. GOLDEN: Your Honor, if I may go on, we have
18 some suggestions which may resolve the entire problem.

19 CHAIRMAN BENNETT: All right. Good.

20 MRS. GOLDEN: We know that the Board in deciding
21 this motion has to weigh the competing interests of our
22 need for protection of certain documents and the claimed need
23 of the other parties for the disclosure. The first group of
24 documents for which protective order was sought relate to
25 pending negotiations, facilities owned by Cannon Mills, the

3
1 University of North Carolina, and the State of North Carolina.
2 Neither the Department nor the Intervenor have denied that
3 these materials, if disclosed, would put Applicant in a very
4 disadvantageous negotiating posture. We believe such a result
5 is obvious from the nature of the documents.

6 We think this is particularly underscored in the
7 case of the acquisition of the UNC facilities, since the
8 Intervenor have pointed out that their counsel represents
9 parties actively seeking to acquire that system; well.

10 The only reason stated by either party in support of
11 nondisclosure of these documents is that they might contain
12 information that Duke is willing to pay an inflated price
13 for these facilities because the acquisition would affect or
14 in some way eliminate actual or potential competition.

15 Applicant has already produced a vast number of
16 documents on its acquisition policies in general and on
17 specific acquisitions. The Department in fact has attached
18 some of it to its answer to the motion Mr. Avery argues.

19 Accordingly, we believe the Justice Department
20 and Intervenor have had substantial opportunities to
21 discover Applicant's posture in its acquisition policies.
22 However, in an attempt to give you a solution that might be
23 satisfactory to both sides, that will fairly balance the
24 competing needs involved, we would propose to offer to make
25 available to counsel for the Department and the AEC all of

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1 the documents that relate to these three pending negotiations
2 which show that Duke is considering the payment of an inflated
3 price for the facilities because the acquisition would result
4 in eliminating actual or potential competition.

5 This is the stated reason they want the documents
6 disclosed, the Intervenorers have indicated in their objection
7 a willingness to forego seeing the documents except upon
8 further order of the Board and we feel that this position
9 would accommodate the interests of all of the parties.

10 CHAIRMAN BENNETT: Now you say you are willing
11 to give it to the Justice Department only?

12 MRS. GOLDEN: To counsel for the Justice Department
13 and AGO, with the further limitation that of course another
14 application could be made upon a showing of good cause for the
15 further use and disclosure of the documents.

16 CHAIRMAN BENNETT: I take it you agree with that?

17 MR. BOUKNIGHT: Judge, I don't. If I understand
18 Mrs. Golden, she is going to ferret out of all of these
19 documents only those that in her judgment indicate that Duke
20 was willing to pay an inflated price for the facilities. We are
21 at a terrible disadvantage in responding to a motion for a
22 protective order on documents we haven't seen. We used as an
23 example the possibility of an inflated price. There are
24 other ways in which a company, which is the exclusive whole-
25 sale supplier to a system, can, through its negotiations

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1 with that system, further the possible future takeover by
2 the company of that system.

3 I don't think I have to point out the possibilities
4 that are present there. If I did so, it would be, it would
5 perhaps result in aspersions on the Applicant, which we can't
6 support, because we haven't seen the documents. So we would
7 be satisfied only if the Department of Justice and AEC Staff
8 could see them all. That is not going to be a disclosure
9 that will hurt Duke in negotiations.

10 These counsels are not going to give these
11 documents to anybody else without order from the Board.

12 MR. LECKIE: Your Honor, we agree entirely with
13 counsel for the intervenors. There has never been any claim
14 these documents are irrelevant, or that they are privileged,
15 either attorney-client privileged or the so-called political
16 privilege.

17 We believe the statement made in our pleading that
18 we would hold the documents confidential, we would not use
19 them without making a showing of good cause to do so, should
20 be sufficient to protect the Applicant from any unwarranted
21 disclosure.

22 We would like to see the documents to compare them
23 with other documents to determine ourselves whether they will
24 be useful to our case.

25 CHAIRMAN BENNETT: Are you willing to let counsel

1 for the AEC and Department of Justice look at these documents,
2 and are you willing to produce all of the documents?

3 MRS. GOLDEN: No, sir, our proposal was since
4 the stated reason for the disclosure --

5 CHAIRMAN BENNETT: That apparently is not acceptable.

6 MRS. GOLDEN: Is it not acceptable to the Board as
7 well?

8 CHAIRMAN BENNETT: Well, I am suggesting it is not
9 acceptable to these parties. Now I am asking you now whether
10 you want to change your proposal in view of it being
11 unacceptable to them?

12 MRS. GOLDEN: I think our proposal possibly could
13 be extended to a broader definition of what might be
14 considered anticompetitive implications.

15 CHAIRMAN BENNETT: You have got these documents
16 that you have selected, they are right there, you have got them
17 all collected, can't you let counsel for the government look
18 at them?

19 Counsel for the Intervenor have said "We don't
20 want to look at them if you think we will make improper
21 use of them"

22 Counsel for the government says "We won't tell
23 anybody about what is in the documents, we won't try to offer
24 them without coming back and telling you we are going to
25 offer them" and then showing cause to the Board as to why

1 they should be offered, at which point if there is still a
2 need for in camera, I suppose you can make the usual motion.

3 MRS. GOLDEN: With all due respect to the intention
4 that I know he would seek to keep these documents confidential,
5 there have been instances --

6 CHAIRMAN BENNETT: We will direct they would.

7 MRS. GOLDEN: If PC received documents in
8 confidence from certain natural gas-producing companies and
9 they were assured they would maintain confidentiality, and
10 for some reason, whatever reason, they got disclosed.

11 CHAIRMAN BENNETT: This is not the question of
12 a company doing it; this is a question of turning them over
13 to a particular named counsel.

14 MRS. GOLDEN: Those documents were turned over to the
15 Federal Power Commission, named parties.

16 CHAIRMAN BENNETT: These will be turned over to
17 particular named counsel and those named counsel will not
18 disclose them to anybody else without a further order of this
19 Board.

20 MR. FARMAKIDES: Or perhaps they could see them in
21 your offices?

22 MR. LECKIE: We would agree to inspect the documents
23 in their office, and not remove them except for a showing of
24 good cause to the Board if it were warranted. We would not
25 take or make copies of them.

1 CHAIRMAN BENNETT: Is that satisfactory?

2 MRS. GOLDEN: No, your Honor. Our feeling is the
3 nature of these documents -- we realize the Department is
4 not involved, as far as we know, in negotiating to buy any
5 of these facilities -- but we feel these are very important
6 to the business interests of Duke Power Company.

7 I have seen the documents; I have no reason to
8 believe that any of them are incriminating or show anticompeti-
9 tive implications. The Department and the Intervenor have
10 stated very clearly that their only interest in the documents
11 is seeing whether there is anticompetitive implications in
12 the documents.

13 We feel that since there must be a balancing, and
14 since there is no denial that disclosure of the documents
15 would impair Duke's negotiating position, that the solution
16 we have offered fairly balances the interests of all concerned.
17 And we propose to stand on that.

18 CHAIRMAN BENNETT: You may proceed with the rest
19 of your argument. That means we will have to make a decision
20 on the subject.

21 MRS. GOLDEN: Yes.

22 The second group of documents relate to the method
23 used by Duke to compute cost and price estimates. In the
24 last group of documents which we reviewed, and some of which
25 are being produced today, we have come across some documents

which fall into this category, and if I may, I would like to add these numbers, in essence amend our motion to add these numbers to the motion.

MR. TUBRIDY: Do you have a reference to the page numbers on this when you talk about Category 2? Is that page 4?

MRS. GOLDEN: That is correct.

No. 2, cost and price estimates.

I would like to add these numbers, document page 95,737 --

CHAIRMAN BENNETT: Under which footnote?

MRS. GOLDEN: The first two I will give you will be under note 4 and the next group will be under note 5.

Under note 4 would you add 95,737, and 95,738.

Under note 5, would you add 96,063 through 96,102.

The documents specified in those two footnotes are called for by Items 4(e), 6(f) and 6(g). These documents in a business sense are highly sensitive in that they show the way in which Duke formulates the price it will offer for facilities it seeks to acquire or the method by which it evaluates its own system facilities where those facilities are sought to be acquired by another system.

Both the Department and the Intervenor indicate that they have no interest in pure mathematical formulations, formulas, or application of those formulas. And only seek

1 documents insofar as the methodology reveals or that the
2 methodology employed takes into account the competitive
3 implications of the transaction.

4 In light of this declared desire, and in an effort
5 to balance the competing interests, we feel that, and would
6 propose in lieu of the relief sought in the motion to modify
7 Items 4(e), 6(f) and (g), to eliminate any documents
8 relating to the method of computing the value of Duke's
9 facilities or the offering price for another system
10 facilities.

11 Other than those showing that in computing such
12 offering or asking price, Applicant took into account the
13 competitive implications of the transactions.

14 We believe such disclosure, however, should be
15 limited to counsel in this proceeding and no further use
16 or disclosure should be made except upon further application
17 to the Board upon a showing of good cause.

18 CHAIRMAN BENNETT: Wait a minute.

19 It would be clearly very relevant to this proceeding
20 if there were such papers, wouldn't it?

21 MRS. GOLDEN: Such papers being those that show
22 that Applicant took into account --

23 CHAIRMAN BENNETT: Yes, that would be very relevant,
24 wouldn't it?

25 MRS. GOLDEN: Yes. And these are the ones we

1 propose to disclose.

2 CHAIRMAN BENNETT: But you are proposing they would
3 not be disclosed to anybody except, and would not be
4 introduced in evidence.

5 MRS. GOLDEN: We can't determine at this time
6 whether counsel will find them sufficiently of evidentiary
7 value that they would want to use them. These documents would
8 still likely indicate the formulas and mathematical
9 applications of those formulas, in addition to surrounding
10 discussion that might be there.

11 It is under those circumstances that we feel the
12 additional limitation should be placed at this time. And
13 of course upon a showing of good cause, the Department or
14 Intervenor could apply --

15 CHAIRMAN BENNETT: It would be merely a showing of
16 relevancy, wouldn't it?

17 MRS. GOLDEN: No, I think you would have to show more
18 than that under the circumstances, because you would still
19 have to weigh the competing interests of the parties here.

20 The Applicant needs to retain these formulas, and
21 not have them introduced to their competitors, who are
22 Intervenor in this area, who are actively seeking the UNC
23 facilities, for example, or in the case of High Point, which
24 is an Intervenor, depending upon the results of certain
25 litigation that is now pending, there in fact may have to be

1 a sale of certain of Duke's facilities to the site at the High
2 Point.

3 That is why we feel the limited disclosure now to
4 counsel is sufficient for its purposes for which they seek
5 the documents, and at some later date, if they determine they
6 want to attempt to disclose them further, they should come to
7 the Board.

8 (Board conferring.)

9 CHAIRMAN BENNETT: Is that proposal satisfactory,
10 counsel?

11 Just yes or no.

12 MR. BOUKNIGHT: Judge Bennett, part of it is and
13 part of it isn't

14 CHAIRMAN BENNETT: How about you?

15 MR. LECKIE: Your Honor, we don't feel it is
16 satisfactory.

17 CHAIRMAN BENNETT: All right.

18 We will let you have an opportunity to answer. I
19 just thought maybe we could short-cut this if you agreed.
20 Apparently you don't.

21 MRS. GOLDEN: The third group of documents for which
22 a protective order is sought is described on page 5 of our
23 motion, Category 3, future plant sites.

24 We have agreed on behalf of Applicant to produce
25 pages 95,524 through 95,639, except for those portions in the

1 documents which identify the location of possible sites on
2 which Duke may in the future construct system facilities.

3 CHAIRMAN BENNETT: What are you going to do, just
4 not state them and leave that space out?

5 MRS. GOLDEN: That is correct. All we would be
6 deleting is the absolute identification of the site, none
7 of the surrounding textual material will be deleted.

8 I think this very nicely takes care of the concerns
9 of the parties, that some anticompetitive preempting
10 consideration has been made.

11 CHAIRMAN BENNETT: Is that satisfactory to you
12 gentlemen?

13 MR. BOURNIGHT: No, sir.

14 MRS. GOLDEN: I would like to point out, your
15 Honor, that much of the land around these areas that are
16 identified has not as yet been purchased by Duke. Disclosure
17 would clearly create great land speculation --

18 CHAIRMAN BENNETT: There are two different cir-
19 cumstances. One is where it has been, and the other is where
20 it has not yet been.

21 MRS. GOLDEN: These are only future sites.

22 CHAIRMAN BENNETT: All future sites?

23 MRS. GOLDEN: That is correct. And it is a
24 fairly limited number, perhaps a half dozen or so. Land
25 speculation could only redound to great disservice to the

1 ratepayers, because invariably if Duke does acquire these
2 sites, the price would be inflated and would be included in its
3 rate base.

4 We feel the objections made by the parties only go
5 to be factor of possible preemption, possible anticompetitive
6 considerations, and all of this will be revealed in the
7 portion of the documents that we intend to produce.

8 All we seek to do is physically delete the name of
9 the site, together with, in some cases, certain financial
10 information related to that named site. And we believe that
11 this is a fair solution, and would not impair either parties
12 ability to go forward.

13 The last group of documents for which there is a
14 dispute appears on page 6 and involves three documents
15 involving a purchase by Duke from the Blue Ridge Electric
16 Cooperative of some lines resulting from flooding.

17 The Intervenors have indicated they have absolutely
18 no interest in these documents. The Department, on the
19 other hand, takes a somewhat less flexible position, and
20 would like the documents produced.

21 We think that in light of these considerations,
22 where they deal with business dealings, those who are most
23 interested in the business dealings, the Intervenors, find
24 they have no problem with this.

25 We would be willing to review the documents, as we

1 have done I think in other regards, and I would like to point
2 out, as you recall, your Honor, we came to an agreement with
3 the Department and the Intervenor on the intent and anticipated
4 effect of rate changes, and schedules, rate schedules and
5 contracts, and we think that that is the same type of agreement
6 which we are asking for here, both in regard to the pending
7 negotiation documents and in regard to the cost and price
8 documents.

9 At that time the Department had no problem with our
10 determining which documents showed an intent and we feel that
11 under those circumstances the same type of application could
12 be made here.

13 To return just briefly to these Blue Ridge documents,
14 we would again be willing to give them any of those documents
15 which show that the Blue Ridge Electric Co-op received special
16 treatment by reason of its competitive status with the
17 Applicant in this particular negotiation.

18 CHAIRMAN BENNETT: How can you show, without having
19 a comparison with something else, whether there is any special
20 treatment?

21 MRS. GOLDEN: We believe that what they are asking
22 is that on the face of the documents there is something which
23 indicates that in negotiating with Blue Ridge, Duke took
24 into consideration the competitive posture of the Blue Ridge
25 Co-op.

We believe that there will be future purchases by Duke of this nature, in the nature of their construction program there is bound to be, and that balancing our need to keep the methods by which these facilities are valued will be fairly protected if the request is modified so that only that information is disclosed which meets the Justice Department's objection.

Under those circumstances, we think that the Board can strike a fair balance and protect everybody.

As I understand it, the final group of documents mentioned in No. 5, on page 8, there is no dispute that the parties are willing to agree to the protective order we have proposed.

CHAIRMAN BENNETT: That is correct, you agreed to that?

MR. BOUKNIGHT: Yes, your Honor.

MRS. GOLDEN: I think we have tried to be fair and reasonable and have only sought protection for those documents again which the company believes are sensitive to their business dealings, not which have any antitrust implications in them.

Since the Board must strike a balance, we feel the procedures we have proposed will accommodate the interests of both parties, or all three parties in this case, and the AEC, in having disclosure of necessary information without impairing the company's negotiating abilities.

1 Thank you.

2 MR. BOUKNIGHT: Do you want us to proceed with a

#10 3 response, your Honor?

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44 1 CHAIRMAN BENNETT: You may proceed.
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2 MR. BOUKNIGHT: We have responded, I think, to the
3 Applicant's Item Number 1, that is the item with which we have
4 suggested that the Department of Justice and AEC Staff alone
5 look at these documents. We were very careful in our answer to
6 disclose to the Board and to all parties that we are interested
7 in the Chapel Hill situation on behalf of a client.

8 Having the Department of Justice and AEC Staff look
9 at these documents just can't possibly hurt Duke, that we
10 can see.

11 Item Number 2, I said yes and no a few minutes ago.
12 I have no objection to a protective order limiting those
13 documents to counsel, so long as that protective order can be
14 removed in the Board's discretion upon a showing by either of
15 these two parties, without any artificial standard being imposed
16 now as to what these parties will have to show.

17 I think that those can be considered as we go along
18 and that the Board should simply keep its discretion open to
19 act as to a particular document brought to the attention by the
20 Department of Justice.

21 CHAIRMAN BENNETT: Well, now we can receive documents
22 in evidence in camera, you know.

23 MR. BOUKNIGHT: Yes, sir. I think that is possible,
24 I think there are a number of possibilities which we just cannot
25 begin to appreciate at this point when no one has seen the

1 documents. The only thing that -- the only reservation I'm
2 stating is that Mrs. Golden stated a standard for inducing these
3 documents into evidence, which would be good cause, not merely
4 relevance.

5 So long as no standard --

6 CHAIRMAN BENNETT: It was my understanding she wasn't
7 going to produce anything unless she said she felt that this
8 particular material was relevant and did show certain things.

9 MR. BOUKNIGHT: Absolutes help. That is the second
10 part of my argument on that. I disagree totally with Mrs.
11 Golden's position on that. There is no reason at all why the
12 Department of Justice and the AEC staff can't look at these
13 formulas, can't decide for themselves whether there is any
14 anticompetitive effect of these formulas.

15 The formulas themselves, what Duke is doing, not just
16 what they say about them, is awfully important. Here again,
17 you have got two parties here, the Department of Justice and
18 AEC staff, and a group of counsels who are never going to be
19 involved in any purchase from or sale to Duke Power Company
20 concerning electric plants.

21 So we object very much to Mrs. Golden deciding
22 first whether it is relevant. We think that agreeing that
23 counsel for the intervenors will not even look at these
24 documents is going far enough on our part. We admit the
25 seven cities are going to be involved in these transactions with

1 Duke. We, as counsel for the intervenors, don't want to know
2 these things unless the Department of Justice gets an order from
3 you saying that they are relevant to our case.

4 So I think that protects them from the people who
5 could use it against them.

6 Item Number 3, we really have a problem with Mrs.
7 Golden's suggestion that she remove the location of the specific
8 sites and provide the rest of these documents. You will recall
9 while we were arguing discovery a few months ago, we discussed
10 the Green River Pump Storage project that is proposed to be
11 constructed by EPIC.

12 Duke, since the -- I wouldn't say since the
13 commencement of this hearing, but certainly since that provision
14 was filed by EPIC with the Federal Power Commission has gone
15 out and acquired the actual dam site of the Green River
16 Project itself.

17 Now, a few hundred yards in that area could make
18 a lot of difference in deciding what Duke's motivation was in
19 purchasing that property and in deciding exactly where and
20 why Duke plans to build the facility on the Green River.

21 As to whether there are other examples of this
22 kind of conflict in siting, we don't know. But the particular
23 site, not just the words surrounding it, but the particular
24 site may be very important.

25 As Mr. Brand emphasized time and again in discovery

1 and in other arguments before this Board, what Duke says about
2 what they do is less important than what they actually do.
3 When you look at where they are planning to put their plants,
4 when they decided to put it there, and the extent to which that
5 siting plan may conflict with what some competitor is planning
6 to do, then I think a story unfolds that requires no words.

7 So we would object to any deletion as to these
8 future plant sites. Again, we have agreed that the intervenors,
9 not even the intervenors' counsels, will not look at these
10 documents until ordered by the Board. These seven cities are
11 members of EPIC, and it would be difficult, if not impossible,
12 to sort out in our own minds as counsels and in their minds
13 as our clients in this case, information that you know for one
14 case and don't know for another.

15 So, we don't want to look at them. But we have
16 every confidence that the Department of Justice and the AEC
17 staff will both preserve the confidentiality ordered by this
18 Board and will look at these documents closely enough so that
19 if there is evidence that will help in this case in those
20 documents, that it will come to the attention of the Board.

21 CHAIRMAN BENNETT: Well, now, you agree that the
22 documents on confidential business strategy are of no interest
23 to you.

24 MR. BOURNIGHT: They are of no interest to us.

25 CHAIRMAN BENNETT: And also the documents on

1 particular individuals.

2 MR. BOUKNIGHT: We would like to see those
3 documents, but we don't object to the protective order that
4 no one beyond counsel for the intervenors will see those
5 documents without cause.

6 CHAIRMAN BENNETT: And that is what you proposed?

7 MRS. GOLDEN: Yes, your Honor.

8 MR. LECKIE: Your Honor, first of all, there is no
9 question that these documents are relevant for discovery pur-
10 poses. There has been no argument made they are not. Applicant,
11 however, claims to have looked at the documents and determined
12 that they probably won't be very useful to us in preparing
13 our case and I would balance this claim of lack of usefulness
14 against their claim of possible embarrassment or harrassment if
15 the documents were disclosed.

16 We believe our proposal that the Department be
17 provided the documents for in spection, the Department would not
18 further disclose or use those documents without first coming
19 to the Board and showing good cause for such use, we believe
20 that this will properly protect Applicant. And at that time
21 real balance is between our need, our needs to examine documents
22 that we think contain relevant information that no one has
23 argued otherwise, against their need for non-disclosrure, and we
24 are solving that, we are agreeing not to disclose the documents.

25 CHAIRMAN BENNETT: Are you agreeing, individually,

1 as counsels, to be personally responsible to see that these
2 documents are not disclosed to anyone else?

3 MR. LECKIE: Yes, your Honor, I am. And I have
4 further agreed in my previous statement that we would be willing
5 to inspect these documents at Applicant's or Applicant's
6 counsel's office and not remove them from there.

7 CHAIRMAN BENNETT: And this goes for the whole five
8 categories?

9 MR. LECKIE: We are amenable to that for all five
10 categories, yes, sir.

11 MR. TUBRIDY: How many are there all told, do you
12 know?

13 MR. LECKIE: I believe there are about 2500 in all.

14 MR. TUBRIDY: Pages or documents?

15 MR. LECKIE: Pages. I think we have already
16 responded sufficiently to Item 1. As to Item 2, we did say
17 in our pleadings, we have no interest in mathematical applications,
18 mere mathematical applications.

19 However, it may be that some of the documents which
20 do go into the mathematical applications could be the documents
21 that would show possible anticompetitive intent or anticompetitive
22 effect. We would like to be the ones to determine where the
23 anticompetitive effect may be.

24 Mrs. Golden has said that they can't really determine
25 what documents will be useful to us, what documents we might

1 want to come to the Board on and possibly introduce in evidence.
2 We are the ones who have the obligation to determine what our
3 case will be. We would like to look at all of the documents,
4 we would like to compare them with other discovery, the 90,000
5 pages we have received, and see if perhaps a formula for dealing
6 with a certain system differs somehow from a formula that we
7 received elsewhere in the documents discovery with different
8 systems.

9 Documents dealing with the mathematical applications
10 may, for example, show that on one occasion, Applicant has been
11 valuing facilities at, say, three times annual income from those
12 facilities, on another occasion, ten times. The document
13 itself wouldn't indicate anticompetitive effect or intent, but
14 comparing that document with others would.

15 So, it wouldn't be feasible for counsel for
16 Applicant to make the determination of whether a document on its
17 face shows that.

18 CHAIRMAN BENNETT: If you are going to just look at
19 these documents in Mrs. Golden's office, I don't see how you
20 are going to be able to compare them with something else?

21 MR. LECKIE: We have our documents in our office.
22 If a question came up concerning a document that we inspected in
23 Mrs. Golden's office, we could take our copies from our office
24 to hers and make the necessary comparison or do the research
25 there. We understand that Applicant is worried about possible

1 inadvertent disclosure, just because the documents are lying
2 around.

3 CHAIRMAN BENNETT: So you are not going to take any
4 or take any notes on it, except if you think this is one you
5 will have to bring before the Board?

6 MR. LECKIE: That is right, sir. On Item 3, the
7 location of future plant sites, we share Mr. Bouknight's
8 concern that without the plant site actually being indicated to
9 us in the document, the relevance may be lost. It comes directly
10 from knowing what plant sites Applicant has in mind that we
11 will be able to determine whether the documents concerning those
12 plant sites might deal with anticompetitive effects against EPIC
13 or other potential entrants into the generating business.

14 The site location is important. I do have a proposal
15 where we can possibly get around that. We would be willing to
16 take those documents without the site location initially. We
17 would be willing to look at the documents and then determine
18 if there is anything there that would warrant further inspection
19 on our part, that would warrant our needing to know the actual
20 plant site location.

21 CHAIRMAN BENNETT: I thought counsel for intervenor
22 just indicated to us that you couldn't tell from the four
23 corners of the document itself, you would have to have something
24 else before you could determine whether there was any possible
25 anticompetitive effect.

1 MR. LECKIE: We could tell from the four corners
2 of the document, we believe, whether we would need to know the
3 plant site in order to make something of the document, in order
4 to make some use of the document in the proceeding.

5 CHAIRMAN BENNETT: Do you agree with that? I thought
6 you didn't. That is why I want to make sure I understand.

7 MR. BOUKNIGHT: I want to make sure I understand,
8 too. If Mr. Leckie is proposing to look at the document and
9 then decide whether he needs to see the omitted portions, and
10 if he will be permitted to exercise his discretion in so
11 doing, we have no objection to that.

12 CHAIRMAN BENNETT: No, I suppose counsel for the
13 Applicant says you have got to come to the Board if you want
14 to see any more.

15 MR. BOUKNIGHT: Right. That is where we can
16 visualize that this dispute won't end right there. I think that
17 if Mr. Leckie is --

18 CHAIRMAN BENNETT: You are satisfied that Mr.
19 Leckie can't tell whether he needs any more by looking at
20 the document itself.

21 MR. BOUKNIGHT: Yes, sir.

22 Mr. Leckie knows the contents.

23 CHAIRMAN BENNETT: I didn't understand that.

24 MR. LECKIE: We would be willing to come to the
25 Board asking for the name of the plant site if the documents

1 indicated we could make some use of it.

2 MRS. GOLDEN: I think that is really quite specifically
3 what we proposed.

4 MR. LECKIE: I didn't understand your proposal to
5 be that limited, just excluding the names, nothing wrong.

6 MRS. GOLDEN: Yes. I did say there might be certain
7 financial information directly related with the name, a column
8 of figures. Those would be the only deletions.

9 MR. LECKIE: We are not entirely sure what Mrs.
10 Golden means by the financial information. It may be that
11 would be called for also later on.

12 MRS. GOLDEN: It may be. It may be a number like the
13 size of the area, I can't really recall offhand, compared to the
14 size of some other area.

15 CHAIRMAN BENNETT: If you think value will be obtained
16 by your being able to look at this, and determine from that whether
17 you need some more --

18 MR. LECKIE: We are willing to do this initially.
19 We think we can tell from looking at the documents, and then
20 we would presumably show it to you if we needed more, we could
21 make a showing at that time why we needed the name of the
22 location of the plant.

23 CHAIRMAN BENNETT: When you say show it to me,
24 you mean show it to the Board.

25 MR. LECKIE: Yes, sir.

1 MRS. GOLDEN: With the understanding that there
2 would be no disclosure, not only of the document itself, but
3 of any of the notes or information that Mr. Leckie might obtain,
4 I don't have any problem with it.

5 MR. LECKIE: Mr. Brand reminds me that we do have
6 consultants in this case working directly for the Department
7 of Justice, employed by the Department for this proceeding.
8 It may be that in some of the areas of their work, in preparing
9 testimony or studies for the proceeding, that they would have
10 an interest in some of these items.

11 CHAIRMAN BENNETT: Now, if you get to that point, it
12 would seem to me that you would have to still either get the
13 consent of the Applicant or the consent of the Board to turn it
14 over and you would have to specify the name of the consultant,
15 and have a commitment on his part similar to the one that
16 counsel has.

17 If these matters are of that significance business-
18 wise, then I would think there would have to be some means of
19 controlling it. And I think these would have to be placed in
20 the same position as counsel, because leaks, as you may
21 remember, have caused considerable difficulty in this government.
22 And when there is a particular lawyer who is responsible for
23 preventing a leak, then that lawyer is under a serious professional
24 responsibility, which I believe the Bar Association of the
25 District of Columbia is presently prepared to enforce.

1 When you get some other person in, I think we ought
2 to have another motion, if you are going to use it for somebody
3 else.

4 MR. LECKIE: It would be used as part of preparing
5 our case.

6 CHAIRMAN BENNETT: All right. If you are going to
7 be using it for some other purpose that counsel's looking at
8 himself and determining whether it is necessary to use it, then
9 you are going to have to come up with a motion.

10 MR. LECKIE: Your Honor, we are not experts in
11 engineering, although Mr. Brand is to some degree. That is why
12 we do need engineers.

13 CHAIRMAN BENNETT: Right. And if you are going to
14 disclose something which is of this nature, which is confidential
15 business information, to anyone else, you are going to have to
16 specify who else, indicate what kind of a commitment he makes,
17 and tell us about that, it seems to me.

18 MR. TUBRIDY: What is the likelihood of this? What
19 is it?

20 MR. LECKIE: We have hired an engineering consultant.

21 MR. TUBRIDY: And you probably would have to impart
22 this informatio to him?

23 MR. LECKIE: As part of the information as to whether
24 the plant sites would be important in developing the overall
25 picture, our engineer has been studying the other aspects of

13 1 the case, other developments, other potential developments by
2 third party systems to set up alternative means of generation
3 along with Duke's. He is going to be very much our expert on
4 the engineering.

5 CHAIRMAN BENNETT: Yet you think you are going to
6 be able to tell whether you need this document at all by
7 looking at it?

8 MR. LECKIE: We think we will be able to tell
9 the usefulness of the documents. But we think we may need the
10 assistance of the consultant.

11 CHAIRMAN BENNETT: And you are going to give it to
12 somebody else, you will specify who the other person is, and
13 you will have a commitment from him with respect to this similar
14 to the commitment you gave us.

15 In other words, I want to nail this thing down so
16 there won't be any business leaks.

17 MR. LECKIE: That will be satisfactory to us, sir.

18 MRS. GOLDEN: It is my understanding --

19 CHAIRMAN BENNETT: Counsel is going to have an
20 opportunity, before you propose any such thing, to object to
21 it. You are going to have to tell us all of these things, and
22 give her an opportunity to object.

23 MR. LECKIE: All right, your Honor.

24 MRS. GOLDEN: It is my understanding of what you
25 propose is -- are we talking now only of the documents relating

14 1 to future sites?

2 CHAIRMAN BENNETT: I'm not talking about kinds of
3 order we will issue, because there has been no agreement.

4 MRS. GOLDEN: I understand that. I somewhat
5 heard the conversation turn from future site documents to
6 documents in general and I'm trying to focus in on it.

7 CHAIRMAN BENNETT: No, this is documents as to
8 future sites that he is talking about as I understand it.
9 He says you can delete from the future sites this matter. And
10 if I decide, having looked at the documents with the deletions,
11 that I'm going to need the deletions, and I'm also going to
12 need to turn it over to a particular individual to get his
13 advice with respect to it, then, say I, you are also going to
14 have to come to the Board with that, unless you get consent of
15 counsel and you are going to specify who the individual is and
16 obtain from him a similar commitment that he will not disclose
17 it, except on the future order of the Board.

18 MRS. GOLDEN: That is satisfactory.

19 CHAIRMAN BENNETT: Does everyone understand that?

20 MR. LECKIE: Yes, your Honor, except this business
21 of possible disclosure to engineering consultants working
22 directly for us might apply also the the other categories
23 of documents we are talking about.

24 CHAIRMAN BENNETT: All right. Then a similar
25 understanding would have to take place. In other words, you

1 have got to either get the consent of the other side or the
2 consent of the Board to do it and give the other side an
3 opportunity to object. You have got to nail down these
4 confidential documents so there won't be any leaks.

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1 MR. LECKIE: The last item as to which there has
2 been any dispute concerns the compensation for line relocation
3 because of flooding. We tend to believe that this probably
4 won't be very important to us. We would accept a statement
5 from Applicant's counsel that the three documents that are
6 being withheld do not in fact indicate a difference in treatment
7 of Blue Ridge Cooperative from other systems that Applicant
8 might be dealing with in that way.

9 I believe this is what Mrs. Golden offered, or
10 something close to it. I didn't have a chance to respond at
11 the time.

12 MRS. GOLDEN: I think in essence that is about what
13 we offered in a different fashion. I think we could proceed
14 on that basis.

15 CHAIRMAN BENNETT: Then you are willing to say,
16 all right, don't give us these documents, but give us in lieu
17 a statement which says there is no difference between the way
18 they are treating Blue Ridge and everybody else.

19 Is that satisfactory to you, too?

20 MR. BOUKNIGHT: Yes, Mr. Chairman. It is fine.

21 MRS. GOLDEN: If for some reason we decide to
22 disclose these documents without making such a statement, I
23 would like there to be no inference that the disclosure
24 implies that there is a difference.

25 MR. LECKIE: They would be treated similar to the

1 other documents disclosed and that would be perfectly fine with
2 us.

3 CHAIRMAN BENNETT: All right. In other words, if
4 she says rather than by bothering to go through it I will let
5 you do it.

6 MR. LECKIE: I should make clear our statement
7 with regard to this line, the line flooding compensation,
8 shouldn't be taken to apply to Items 1, 2 and 3. In other
9 words, we want to look at all of the documents that are being
10 withheld under those items. We cannot accept under those items
11 a determination by Applicant's counsel.

12 CHAIRMAN BENNETT: All right.

13 MR. TUBRIDY: When you say one, two and three,
14 would you tell us what documents you are referring to?
15 The Applicant's are numbered differently than your's.

16 MR. LECKIE: Maybe I should say for the record the
17 documents concerning pending negotiations, and this is from
18 Applicant's --

19 MR. TUBRIDY: Just give us whether it is the
20 Applicant's motion or your answer or what?

21 MR. LECKIE: I am referring to the Applicant's
22 motion. This is pending negotiations, cost and price estimates,
23 and future plant sites. In those areas we remain of the opinion
24 that we should look at all of these documents. They are
25 relevant for discovery purposes. No one has claimed they are

1 not. We should determine whether there is cause to bring them
2 to the Board in that they may be relevant evidence in the
3 proceeding.

4 I should say in conclusion that we don't agree
5 with Mrs. Golden's characterization that if the documents
6 are relevant evidence in the proceeding that -- let me think
7 this out -- that a balancing between relevancy as evidence
8 in the proceeding, which is a higher standard than relevancy
9 for discovery, would somehow be outweighed by Applicant's need
10 for confidentiality.

11 We do believe the appropriate procedure in that
12 case would be an in camera submission of evidence to the Board.

13 CHAIRMAN BENNETT: In other words you have no
14 objection to maintaining these confidential, and if you
15 decide that you are going to offer these in evidence so that
16 the Board or anybody else will get information about them,
17 you will inform counsel, you will make a motion to that
18 effect, and counsel will have a right to show why they should
19 be maintained by the Board in confidence or rejected entirely.

20 MR. LECKIE: Yes, sir. We want to make our position
21 clear that if the documents are relevant evidence in the
22 proceeding, as opposed to merely relevant for discovery
23 purposes, which is what we are talking about now, we believe
24 that relevancy for evidentiary purposes should outweigh
25 Applicant's claim that the documents should not be introduced

1 at all.

2 CHAIRMAN BENNETT: But they still may be introduced
3 in camera, in which case there will be appropriate means
4 taken to prevent their being disclosed.

5 MR. LECKIE: Yes, sir, we agree entirely.

6 CHAIRMAN BENNETT: But, and I think counsel
7 should recognize this, the Commission, the Appeal Board, and
8 the Courts will have a right, if they decide to do so, to
9 disagree with our decision on whether or not it should be
10 in camera. I think everybody recognizes that.

11 MRS. GOLDEN: I think for some of the reasons that
12 we discussed this morning, the tenuous degree of relevancy
13 against Applicant's need to preserve its negotiating ability,
14 to keep these documents from getting out, and, as you,
15 yourself, pointed out sometimes that is a difficult thing to
16 be sure of, that those considerations are the very ones which
17 prompted us to propose the compromise we did.

18 Under those circumstances we think the Board
19 should, in regard to Categories 1 and 2, the pending
20 negotiation, and price and cost estimate documents, find that
21 an agreeable accommodation.

22 I have stated that we have reviewed the documents
23 and feel as far as I can see that most of them have this
24 tenuous relevancy, and we are willing to back that up by
25 giving the documents to the Board to examine now in camera.

1 CHAIRMAN BENNETT: I think you are aware of the
2 fact that the Commission in a recent brief, I think the
3 Dinsmore Case, made it very clear that they didn't want
4 Courts or Boards to be examining things in camera extensively,
5 that it was up to counsel to do that and to bring something
6 before the Board when there was a particular matter that is
7 involved.

8 In that case, as I remember it, the District
9 Court took that very position. They took a very limited group
10 and examined them. And when we get to a situation where
11 counsel for the Department or counsel for the AEC thinks we
12 ought to look at a particular document we will, if he is going
13 to introduce that in evidence or offer it into evidence.

14 But we don't want to get into the business of
15 examining a lot of documents at this point without having had
16 the benefit of counsel's assistance because, frankly, we
17 would get a perhaps slanted result. I mean we would get
18 something we didn't know anything about, just look at it in
19 vacuo, so to speak.

20 MRS. GOLDEN: I have read the cases involving
21 in camera inspection and I appreciate the Board's position.
22 We felt in attempting to strike the balance that it would be
23 helpful in this case, and under the considerations we have
24 been discussing this morning I think if the Board does not
25 choose to do that at this time that the compromise we have

1 offered is highly appropriate, considering the nature of the
2 documents involved in Categories 1 and 2.

3 It is my understanding we have resolved 3 and 4.
4 So basically we are talking about the most crucial type of
5 business documents that a company can have, and under those
6 circumstances we feel that the Board would be warranted in
7 entering the compromise order that we have proposed.

8 CHAIRMAN BENNETT: Well, we will undertake to
9 discuss this a little bit later and issue this as part of
10 our order.

11 MR. BOUKNIGHT: I wanted to comment and inquire
12 about one related item. As we understand Item 4 in Applicant's
13 motion, which is Document 95306, we understand that that is
14 going to be produced today with no strings attached.

15 I raise that because Mr. Leckie indicated willing-
16 ness by the Department of Justice to agree not to disclose
17 beyond counsel any of the documents to be produced.

18 We have great reluctance about that because we are
19 in a bit of a different position from the Department of
20 Justice. We do have clients that we must report to directly
21 on this case, and we just want to be clear that the Document
22 Number 95306 is not going to be a document confidential to
23 us.

24 MRS. GOLDEN: I am afraid I really don't understand
25 Mr. Bouknight's problem in regard to this document. We are

1 going to produce it.

2 CHAIRMAN BENNETT: You mentioned a fourth document
3 which you said would be produced.

4 MRS. GOLDEN: In the ordinary course, your Honor.

5 MR. BOUKNIGHT: Mrs. Golden, may I show it to
6 our clients?

7 MRS. GOLDEN: Of course.

8 CHAIRMAN BENNETT: You are withdrawing any claim
9 of confidentiality about that particular document?

10 MRS. GOLDEN: Yes, sir. I began with that this
11 morning.

12 CHAIRMAN BENNETT: He didn't understand, and he
13 wanted to be sure he understood.

14 MRS. GOLDEN: I think he understood that. I think
15 it does point out our fears about the harm of disclosure.

16 CHAIRMAN BENNETT: All right. May we go to the
17 second motion now. And thank you very much, Mrs. Golden.

18 MR. AVERY Thank you, Mr. Chairman.

19 CHAIRMAN BENNETT: I have personally two problems.
20 One is what took nine months and the second is isn't this
21 in a different category from situations where the governmental
22 authority is not in business. Those are my problems.
23 I don't know about the other members of the Board.

24 I think you had a different problem, didn't you?

25 MR. TUERIDY: Wait until I get organized here.

1 Which motion are we talking about now?

2 MR. AVERY: Our motion is designated Applicant's
3 motion to amend Paragrahp B2B of Prehearing Order Number 2.

4 MR. TUBRIDY: B2B. All right. I have it.

5 MR. AVERY: I will be glad to address myself to
6 both of those points, Mr. Bennett. I had intended to do so.

7 On the first point you said why did it take nine
8 months. What we are seeking to do here is to correct an
9 inadvertent omission in the items that we listed in our
10 original objections. We pointed out in the motion that it
11 was inadvertent, that in a similar motion filed by our same
12 firm in another case --

13 CHAIRMAN BENNETT: Why does it take nine months
14 after you find out?

15 MR. AVERY: I am having my usual slow windup here.
16 I said it was inadverent. It didn't take us nine months to
17 find out. It was some time in the course of going over the
18 documents we discovered that this had happened. We talked
19 at that time about what we would do about it. At that time
20 we had not reviewed all of the documents. We didn't know
21 the dimensions of the problem. And we decided -- I hope the
22 Board won't object to our having done it that way -- we
23 decided among ourselves, as counsel for the Applicant, that
24 we knew we would have loose ends to wrap up at the end, and
25 we decided the best way to handle it was to include this on

1 a list of matters that we would have in this wrapup period
2 we are going through right now and that we would segregate
3 all of those documents and look at them and put that in the
4 motion now just because -- we could have done it then because
5 we would have been shooting in the dark.

6 Now we know what documents are involved, we
7 could discuss it intelligently, and we just decided it
8 made a lot of sense from our point of view, it didn't
9 hurt the Justice Department --

10 CHAIRMAN BENNETT: Did they know about it? Did
11 you tell them?

12 MR. AVERY: No. We told them when we filed the
13 motion. But we don't consider any harm has been done to any-
14 body.

15 As a matter of fact, Mrs. Golden points out to
16 me we, for unrelated reasons, we did the documents on
17 acquisitions last, in reviewing the documents we reviewed
18 the documents on acquisitions last so we didn't get to them
19 ourselves until the end of the documentary production.

20 CHAIRMAN BENNETT: So that you didn't know about
21 this inadvertence or didn't realize it?

22 MR. AVERY: I remember, it must have been four
23 months ago, sometime when we were in the throes of this
24 process, that the problem came to our attention that 6F2
25 has been left off the list.

1 We talked about should we go to the Board with
2 this now, we made a mistake, we made a decision that a
3 sensible way to handle it was to continue with the documentary
4 production, not get into another hassle at this time about
5 it, when nobody knew what we would be talking about, so we
6 decided we would provide with the discovery, we would mark
7 all of these documents that are covered by this 6F2 thing,
8 and number them separately, so we would know what we were
9 talking about, come to the Board with a motion asking to
10 have this error corrected.

11 CHAIRMAN BENNETT: But you didn't think the
12 Board would be interested at this point.

13 MR. AVERY: I knew you would be interested, but
14 we just tried to figure out an orderly procedure to handle
15 this, and this was the conclusion we reached.

16 We don't think any harm has been done to any
17 parties and we hope the Board doesn't take it amiss that we
18 decided on that procedure.

19 We didn't see, and I don't see now, how any harm
20 has been done to anybody in handling it this way, rather
21 than immediately coming to the Board when we discovered the
22 error, not knowing at that time what documents would be
23 involved.

24 So that is the story on why we are here now with
25 this problem. If we have offended the Board by waiting,

1 I apologize for it.

2 CHAIRMAN BENNETT: You are not offending the
3 Board. It is a question about whether or not when you sit
4 on a thing for four months, whether we ought to even bother
5 about it.

6 MR. AVERY: Sit on it, I think sitting on it is a
7 mischaracterization. We made a decision as to what we
8 thought was an orderly way to bring the problem before the
9 Board. We weren't trying to hide anything at all, if that
10 is the implication of sitting on it.

11 We have never an intention to hide anything.

12 CHAIRMAN BENNETT: I shouldn't use a slang
13 expression. What I intended to convey to you is that you
14 kept it within your own group and did not inform either
15 counsel for the Department of the Board that what we thought
16 you had agreed to hadn't been agreed to through inadvertence.

17 MR. AVERY: As I said, that is the course we
18 took. We did it because it seemed an orderly way to go
19 about it, a way which imposed no hardship or harm on anyone.

20 I would like to get now to the substance of the
21 matter and the second question you asked, and that is whether
22 these documents do in fact fall within your prior ruling.

23 MR. TUBRIDY: Mr. Avery, would you mind reading
24 Item 6F2?

25 MR. AVERY: Reading it aloud? I would be glad to.

1 Item 6F2 appears on page 8 of the document
2 entitled "First Joint Request, Department of Justice, AEC
3 Regulatory Staff and Intervenors for Production of
4 Documents by Applicants for Period Since January 1, 1960."

5 CHAIRMAN BENNETT: May I suggest to counsel,
6 because it has happened in other matters, that when you
7 do have a particular section which you are referring to
8 that you don't refer to another document, put it down so
9 you have it right in the same paper.

10 MR. AVERY: You mean we should have had it in the
11 motion?

12 CHAIRMAN BENNETT: I think it is much wiser to
13 have it in the motion paper.

14 MR. TUBRIDY: I had to go look up a paper to
15 see what you were talking about.

16 MR. AVERY: I agree with you. We should have
17 done that.

18 CHAIRMAN BENNETT: I am just suggesting in the
19 future please do it that way because we have had it in
20 other matters where people will make a motion and refer to
21 something else, and maybe it has been amended by agreement
22 between the parties or maybe it hasn't, and we just don't
23 know what you are talking about.

24 MR. AVERY: I see we did quote it, quote 6F2
25 itself on page 2, but maybe it would have been better to give

13 1 a complete excerpt.

2 In any event, you start on page 7 of the Joint
3 Request with the general lead-in of Item 6, which is very
4 short. It says "Documents relating to the following." Then
5 you get over to F, and F asks for documents relating to
6 inquiries, invitations, negotiations, evaluations and
7 proposals for the acquisition of electric power facilities
8 of municipalities, electric cooperatives or other electric
9 utilities, including -- and skipping over 1 and going to
10 2, "communications to or about elected officials,
11 counsels and Boards."

12 MR. TUBRIDY: That is what we don't have to look
13 at here.

14 MR. AVERY: I agree we should have done that.
15 I apologize for not having done it. All right. I had
16 started to talk about the second element that the Chairman
17 raised. Does this fall within the Noerr-Pennington Ruling
18 which the Board made on November 17, 1972.

19 I don't, unless the Board wishes me to do so,
20 propose to go over the whole Noerr-Pennington argument
21 itself.

22 CHAIRMAN BENNETT: No. All we are trying to
23 say is isn't this a slightly different proposition, because
24 this is a municipality, which is engaged in something which
25 is not a governmental function, but is a proprietary

1 function, if you will; that is the thrust of what I am
2 trying to ask you.

3 MR. AVERY: I anticipated that and I want to
4 address myself to that, but I want to make a preliminary
5 point first.

6 The impression seemed to be conveyed, at least
7 to me, from the responses of the Department and the
8 Intervenors to our motion that what we are talking about
9 here is whether we should produce anything on acquisitions.

10 This comes through particularly clearly in
11 the Justice pleading which simply argues that evidence
12 about acquisitions is germane and the Board might gather
13 the impression, not knowing about what has been produced,
14 that what we are talking about here is whether anything
15 should be produced on acquisitions.

16 That is not the case at all. We didn't object
17 to 6F generally, nor did we object to 6F1, which says
18 "including offers to serve at wholesale."

19 In response to this inquiry on 6F we have
20 produced a very substantial volume of documents relating
21 to acquisitions. We tried to make an estimate of that
22 yesterday.

23 I can't give you an absolutely fixed figure, but
24 I can tell you with certainty that it is in excess of
25 10,000 documents, 10,000 pages, I should say. We have

1 produced in excess of 10,000 pages of documents dealing with
2 acquisitions.

3 So I would like the Board to clearly understand --

4 CHAIRMAN BENNETT: Acquisitions of municipals?

5 MR. AVERY: Some of them are municipal, some are
6 privately owned.

7 Those mill villages, for instance, sometimes
8 they acquired a system owned by a mill that is privately
9 owned. So sometimes it is private, sometimes public. But
10 they are acquisitions and the material called for by 6F.

11 So I would like to make it clear to the Board as
12 a preliminary matter that we are not talking about here whether
13 or not anything should be produced on acquisitions. We have
14 produced a great deal of material, and in attempting to
15 include 6F2 we are trying to draw precisely the distinction
16 you have alluded to in the question you raised.

17 We are asking recognition of the line that must
18 be drawn because of the fact that at some point the
19 acquisition of a municipally owned system becomes involved
20 in the political process and thus is entitled to the
21 protection of the Noerr-Pennington Rule.

22 All we seek in attempting to add 6F2 on to the
23 list as we had originally intended is protection of those
24 documents which involve communications to or about elected
25 officials.

1 If you look at the language of 6F2, you will see
2 that is very clearly stated. We are not seeking protection
3 of all documents relating to the acquisition. We are
4 producing those documents and have produced a great number
5 of them.

6 The problem is at some point the decision becomes
7 a political one and is not decided as a business matter, but
8 as a political question.

9 The entire political process becomes involved, it
10 becomes a matter of discussion in the town, editorials are
11 written about it. It is not like going to a business and
12 trying to say okay, will you sell me thus and so. It becomes
13 a big political question. The town council has to vote as to
14 whether or not they are going to sell. It becomes a question
15 of public discussion. There are meetings held about it. It
16 becomes a subject of editorials in the newspapers. It becomes
17 a political question. And we think that the Board's ruling
18 on Noerr-Pennington falls directly into this political sphere
19 and provides the protection we are seeking for this limited
20 class of documents relating to acquisitions.

21 I might refer the Board, as evidence that you
22 understood in your original ruling that the line we are
23 seeking to draw does exist, to page 152 of the transcript of
24 the November 17 hearing.

25 There it was colloquy between the Chairman of the

1 Board and counsel for the Justice Department and the Chairman
2 there suggested that seeking to persuade political officials
3 not to start a new electric system was within the Noerr-
4 Pennington Rule, and the political aspects of its seeking to
5 acquire an existing municipal system is simply the other side
6 of the same coin to which the Chairman was referring in the
7 colloquy I just referred to.

1 CHAIRMAN BENNETT: I don't want to lull you into
2 a sense of my agreeing with you that it necessarily follows
3 that it is the same kind of a thing, to sell an existing
4 business which a municipality is in and deciding, as a
5 political proposition, whether they should go into a business.

6 MR. AVERY: Well, I wasn't intending to suggest,
7 Mr. Chairman, that you had in effect ruled on it in making
8 that statement. What I was saying was that in that colloquy
9 you touched on what I regard, at least, and I am suggesting
10 to you is essentially the same kind of question -- in other
11 words, the question whether to go into the electric business
12 can become for a municipality a political question. And
13 you were recognizing that at transcript 158.

14 And I am suggesting that the decision to go out
15 of the electric business by a municipality can equally be a
16 political question, and it is that area that we are seeking
17 the Noerr-Pennington protection for.

18 I would like to take a few moments to discuss the
19 pleadings in opposition to our motion filed by the Depart-
20 ment and the Intervenor. The Intervenor point out correctly,
21 I agree with their observation, and yours, that a municipal
22 electric system is both a business enterprise and a govern-
23 mental entity. We don't dispute that proposition. But we
24 think that line should be recognized in the Board's treatment
25 of this discovery request. And we seek protection only of

ar2

1 those documents which are political in nature, because of the
2 systems of governmental attributes.

3 We have produced those documents which deal with
4 all aspects of the transaction of the acquisition transac-
5 tion other than the political process. It is only
6 these dealing with the political process that we are raising
7 this question about. The documents are about elected
8 officials which are covered by 6-F2, and as to those we think
9 the Board's prior ruling holds.

10 Turning to the Justice Department's response,
11 they argue that documents as to acquisitions are relevant for
12 discovery purposes. We don't dispute that claim. And we
13 have produced over 10,000 pages dealing with that. Justice
14 doesn't deal with our argument that documents dealing with
15 the political aspects of an acquisition fall within Noerr-
16 Pennington, they haven't faced up to that question, and I
really have nothing to say in response to their pleadings
18 in that regard.

19 So, in summary, we had intended to include this in
20 our original motion. We think it clearly does fall within
21 the political sphere, it is not an attempt to block the
22 Department or the Intervenor from discovery with regard to
23 acquisitions generally.

24 It simply asks this Board to recognize the dual
25 nature of a municipal electric system and to accord the

1 company the protection to which it is clearly entitled
2 under Noerr-Pennington for attempts to influence government
3 agencies in pursuance of First Amendment rights.

4 Thank you very much.

5 CHAIRMAN BENNETT: Mr. Bouknight.

6 MR. BOUKNIGHT: I think in our answer to the motion,
7 we have said as well as we know how to say what we think
8 about a municipal corporation acting as a business enterprise
9 in this instance. Mr. Avery is attempting to turn the
10 coin from the November hearing over to the other side. I
11 think he fails.

12 There is a very substantial difference between
13 the Applicant suggesting to a city that has no electric
14 system that it not start an electric system on the one hand,
15 and on the other hand, having a competing electric system,
16 a business enterprise, in existence, and the Applicant
17 going in there and trying to put it out of existence. So
18 we stand on our answer on that aspect.

19 The second aspect which Mr. Avery did not even
20 touch on in his argument is that at this point, it seems to
21 me that even under Noerr-Pennington, even if you were to
22 assume there is some question as to whether these documents
23 could sustain a finding of violation of the antitrust laws
24 under the Noerr-Pennington doctrine, these documents at this
25 point are clearly relevant, or potentially clearly relevant

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1 as documents which might shed light on other activities of
2 the Applicant. We were very specific in our answer about
3 that, we didn't leave much to the imagination. We intend
4 to show in this case a pattern of monopolization, we intend
5 to show that there has been denial of coordination in one
6 market, which in turn has introduced a complete dependence
7 by these municipalities on Duke for their supply of electric
8 power.

9 Now we think that is a reasonable inference from
10 that that Duke might use that wholesale monopoly power to
11 gain advantage at the retail level. As we have discussed
12 many times with this Board, on the price squeeze question,
13 we intend to adduce evidence that would indicate the Applicant
14 has used its monopoly power at the wholesale level to affect
15 competition quite substantially in its retail markets. A
16 final step leading from all of that is acquisition of these
17 systems.

18 Even if attempts to acquire these systems is
19 relevant for no purpose other than to show why Applicants
20 may have been monopolizing in these wholesale markets, that
21 alone is reason enough to let us get it into evidence.
22 And certainly reason enough to let us discover it.

23 When we were arguing in November, we were arguing
24 about a very general request for information which we and
25 the Department of Justice and AEC Staff propounded to the

1 Applicant. That general request asked the Applicants to
2 respond as to all of its dealings concerning municipal
3 elections in North Carolina.

4 Now I believe that the argument then was a question
5 of the potential of getting relevant evidence, on the one
6 hand, relevant evidence under the exception I talked about
7 in the Pennington case, and on the other hand, the chilling
8 effect on the Applicant's activities.

9 The Applicant at that time mentioned it had
10 hundreds of dealings monthly with governments at all levels,
11 and if it had to expose or have exposed all of these contacts
12 with government officials at various levels, it would cripple
13 its efforts to work within the political structure in North
14 Carolina, and on the national level, and on many municipal
15 levels in North Carolina.

16 We just clearly don't have that situation here.
17 If the Applicant has been approaching municipal systems
18 or has been talking about approaching municipal systems
19 in an effort to attempt to acquire those systems, then we
20 don't have to worry about chilling the Applicant in other
21 things that it is doing, we can focus right in here on the
22 potentially relevant evidence without taking a chance of
23 grabbing in a lot of other things in a fish net, and the
24 evidence we are going to obtain is very likely to be relevant
25 under the portion of the Pennington case that we quoted in

1 our answer. So we think that 6-F2 is one of those very
2 direct questions which your Honor suggested in November the
3 portions that were excluded at that time should have been.

4 CHAIRMAN BENNETT: Mr. Leckie?

5 MR. LECKIE: Your Honor, we submitted our
6 discovery request, the joint discovery request for documents
7 to the Applicants in September of last year. The objections
8 were made and these were argued and an order was issued by
9 the Board in November of last year.

10 Now, in July, Applicant comes in with one
11 additional item that he should have objected to, or believes
12 he should have objected to then. They hadn't told us about
13 it in the meantime. We have gone ahead and collected the
14 documents, segregated them, the documents under 6-F2 exist
15 and would be available for production if production were
16 ordered.

17 We don't think it is appropriate to go through
18 the whole process of arguing relevancy at the time discovery
19 starts, and then after the file search has been completed
20 or nearly completed, to come back and argue relevancy again.
21 We think Applicant should be estopped to make the claim it
22 does here. We have argued before the inapplicability of
23 the Noerr-Pennington doctrine to discovery. We have stated
24 that Noerr was a case to enjoin such activity. So the
25 chilling effect of Noerr would be complete. The defendant

1 there would have had to stop influencing government in the
2 ways which might have been covered by the injunction. Nothing
3 of this sort is involved here. We are still at the discovery
4 stage in this proceeding.

5 We have argued before that mere discovery of
6 documents relating to government influencing activity shouldn't
7 be expected to chill certainly the government activities of
8 a large company such as the Applicant.

9 We have argued before the relevancy of citations
10 to NAACP versus Alabama, where the Court was dealing with
11 individual victims who had been harassed or who had lost
12 their jobs, who were likely to suffer bodily harm if their
13 government influencing activities became known.

14 This isn't that kind of a situation at all.

15 We have also stated that under Noerr-Pennington
16 there is a sham exception, where what purports to be govern-
17 ment influencing activity is not in fact such activity.
18 We have suggested that in order to determine whether activity
19 of the Applicant might fall into the sham exception, that it
20 would first be necessary to discover those activities, then
21 to offer such evidence of such activity to the Board and
22 let the Board make a determination of whether there is a
23 sham or whether the activity was legitimate.

24 I would also cite to the Board a recent decision
25 in United States of America versus Otter Tail Power Company.

1 The Board may rule that the Supreme Court in deciding the
2 Otter Tail case remanded to the District Judge in Minnesota
3 for a determination of whether the litigation activities
4 of Otter Tail would fall under the sham exception. Judge
5 McDevitt has issued an order in that record, and I will
6 read a portion of it.

7 "Upon consideration of the arguments and briefs,
8 and upon a reconsideration of the pertinent portions of the
9 record, I find that the repetitive use of litigation by
10 Otter Tail was timed and designed principally to prevent the
11 establishment of municipal electric systems and thereby to
12 preserve Defendant's monopoly. I find the litigation comes
13 within the sham exception to the Noerr doctrine as defined by
14 the Supreme Court in California Transport, and reaffirm the
15 findings and conclusions previously entered."

16 Now here is the latest decision as to the sham
17 exception to the Noerr-Pennington doctrine. It involves an
18 electric utility that attempted to foreclose municipals,
19 municipalities from organizing their own competing distribu-
20 tion systems.

21 I should say, to be completely fair, that the
22 attorney for Otter Tail has moved for reargument, and Judge
23 McDevitt has granted the reargument. So there is not a
24 final decision, but it reflects a decision after reconsidera-
25 tion and briefs by both the Justice Department and Otter

1 Tail's attorneys.

2 When we are talking about request 6-F2 of the first
3 joint request, we are really talking about a very narrow
4 request. We are not asking for all communications of
5 Applicant with elected officials --

6 MR. BOUKNIGHT: Excuse me. Would you read that
7 whole paragraph that this is the subsection of? Would you
8 start off with Section 6, so we know what we are talking
9 about? We don't know what you are talking about unless we
10 have the preamble to F2.

11 MR. LECKIE: Yes, sir. 6. "Documents relating
12 to the following: F. Inquiries, invitations, negotiations,
13 evaluations and proposals for the acquisition of electric
14 power facilities of municipalities, electric cooperatives,
15 or other electric utilities including (2) communications
16 to or about elected officials, councils and boards."

17 MR. TUBRIDY: So we are talking about in connection
18 with the acquisition of power systems, and this is what we are
19 talking about in connection with elected officials. It is
20 in connection with acquisition, it is very limited.

21 MR. LECKIE: Yes. And we know Applicant has been
22 involved in acquisitions. Appendix A to our answer to
23 Applicant's motion included material from Applicant's license
24 application. We chose to excerpt from the McGuire applica-
25 tion. The Oconee is very similar. In the Catawba application,

1 there are more indications or proposals for possible
2 acquisition or consideration of acquisition. And the
3 Applicant's responses to these questions indicates a great
4 many contemplated acquisitions and some actual acquisitions.

5 In its response to question 19, Applicant indicates
6 by an asterisk that the negotiations for the acquisition,
7 these are acquisitions that were consummated, the negotiations
8 were initiated by the system acquired. In other words,
9 everything started from the other direction, the small system
10 came to the Applicant and indicated interest in being acquired.

11 We would like to develop that a little further.
12 We would like to know how the small system came to the
13 Applicant. Who the Applicant talked to in the area of the
14 small system before the small system came up with a proposal
15 or at least asked Applicant to make an offer. We have
16 indicated or included as Appendix B in our answer a document
17 of the Applicant indicating a campaign or a plan to purchase --

18 MR. TUBRIDY: You mean the answer to their motion?

19 MR. LECKIE: Our answer to their motion, yes,
20 sir, the Department's.

21 MR. TUBRIDY: What is the date of that?

22 MR. LECKIE: The date, sir? It was dated July
23 30. It is styled "Answer of the Department of Justice
24 to Applicant's Motion to Amend Prehearing Order No. 2."

25 MR. TUBRIDY: All right. What page?

1 MR. LECKIE: Appendix B, just before the service
2 list.

3 MR. TUBRIDY: This is Duke Power Company letter-
4 head?

5 MR. LECKIE: Yes. It was obtained from Duke
6 Power Company on discovery, it is numbered 75226 through
7 75228. These are Applicant's numbers. This document
8 indicates a campaign on Applicant's part to acquire cooperative
9 systems in its area.

10 Going to document 75228, that page indicates
11 the plan and the procedure --

12 MR. TUBRIDY: I am still on Appendix B. You
13 have here Mr. Huff. May I ask who Mr. Huff is?

14 MR. LECKIE: I don't know who he is.

15 MR. TUBRIDY: Purchase of REA Cooperatives.
16 Who sent that? This is a communication between Duke Power
17 Company and some municipality, or is it an internal memoran-
18 dum?

19 MR. LECKIE: The communication is internal within
20 Duke Power Company. It is signed by Henry L. Cranford,
21 and it is to Mr. Huff.

22 MR. TUBRIDY: Thank you. That is enough for my
23 purposes.

0:44 1 MR. LECKIE: My last reference was also to this
dh1

2 document, which consists of three pages, I was referring to
3 Page 75228, which suggests a plan and a procedure. Under the
4 procedure, the bottom list of numbered items, Number 2, a
5 committee of co-op customers is formed.

6 Now, this would indicate that very likely when the
7 applicant goes about acquiring cooperative systems, or for that
8 matter other systems, and it can state in its list application
9 that the request came from the other systems, very likely
10 Applicant has laid the groundwork first to get those requests,
11 has talked to cooperative Board members, perhaps, or the mayor
12 of the municipality, with a view.

12 We think that the documents we supplied with our
14 answer show that there is a lot of smoke regarding Duke's
15 acquisition program. We would like to see the documents that
16 are being withheld, that have been segretated, now nine months
17 or so later a pleading is made to withhold them, we would like
18 to see those documents and see just what fire there is in
19 Duke's acquisition program.

20 We have just shown a few of the documents here,
21 there are more of a similar nature. We thought that this
22 would be a sufficient showing that we are not talking theoreti-
23 cally, we are not talking generally about political activity,
24 we are asking for specific information.

25 We have reason to believe there is something there,

1 because they have an acquisition program. We have reason to
2 believe that there may be something that isn't quite right about
3 that acquisition program. We would like to find out about it
4 and then if we think there is something not right, we would like
5 the Board to determine what the law is on the matter.

6 CHAIRMAN BENNETT: What do you contemplate
7 "communications or about elected officials" means? I understand
8 communications to officials, councils and boards. But "or
9 about." How would you ever find those?

10 MR. LECKIE: We wouldn't find out any other way
11 than through obtaining these documents from Applicant's files.

12 CHAIRMAN BENNETT: No, I mean what would you cover
13 in communications about elected officials?

14 MR. LECKIE: We would determine or might determine,
15 we don't know what the documents say, that Duke had a program
16 to study, prepare dossiers, even, on minor cooperative officials
17 or on leaders, elected or otherwise, in the areas in which
18 these small systems are serving, and in what Duke considers to
19 be the service area.

20 We think that there might be information, Memorandum
21 A, Internal Memorandum A, saying is and so would be a good
22 possibility to spearhead a committee in Blue Ridge co-op,
23 and that committee would get established, and then would ask
24 Duke to make an offer to take over the co-op. This is what I
25 think Applicant means by communications about.

1 CHAIRMAN BENNETT: You are the one that requested it.

2 MR. LECKIE: Excuse me, we made the initial request,
3 but I think this is what Applicant is withholding when we talk
4 about communications about elected officials. As Mr. Bouknight
5 has said, the elected officials are very much involved in the
6 running of these small systems.

7 MR. TUBRIDY: How much involved?

8 MR. LECKIE: When we made an investigation, in
9 conducting the investigation, we visited particularly the cities
10 Mr. Bouknight represents, we talked to the mayors. In one
11 case in particular, the mayor spent a great deal of time with
12 us and took us around to the system. He was the most knowledge-
13 able person in that system.

14 MR. TUBRIDY: What do you mean, knowledgeable?
15 He knew how much profit was being made, knew what the rates
16 should be, how the rates compared with others?

17 MR. LECKIE: Yes, and he knew what lines of
18 Applicants came into the substantiation --

19 MR. TUBRIDY: Was he like chairman of the board?

20 MR. LECKIE: He would be comparable to the chairman
21 of the board of a corporation. Yet this is the kind of material
22 Applicant would exclude. They say they have given us all of the
23 material about acquisitions, but this is what they are withholding
24 from us after nine months, particularly when the elected
25 officials are so involved in the small systems in these cities.

1 MR. TUBRIDY: You are saying they are going about
2 making acquisitions and this plan and arrangements has nothing
3 to do with their constitutional rights, but they are doing it,
4 in trying to pick up some business, and they are writing to
5 a man who can give them advice, who has influence, and can
6 tell them what the price is, if it is for same, and this is
7 really a business transaction they are interested in, so
8 you would like to see the correspondence in connection with it?

9 MR. LECKIE: I think that is very much a part of
10 it. I wouldn't exclude it; it does get into the political
11 process.

12 MR. TUBRIDY: They are not running for office, this
13 man is not running for office, they are trying to find out if
14 it is for sale, what the price would be, what the possibilities
15 would be, if this man would object to them purchasing it. What
16 you are interested in is finding out what business arrangement
17 Duke might be interested in and trying to find out whether they
18 could extend their system or not. Is that it?

19 MR. LECKIE: Yes, your Honor. I should say while
20 we already have a lot of information about acquisition, as
21 Applicants counsel said, they have give us a lot of documents
22 in this area, we don't think we should be limited in making
23 out the best possible case in this proceeding.

24 It the information is relevant for discovery, if
25 applicant has it, has it available, has it segregated, we don't

1 see why it should be withheld from us, even though we might be
2 able to get along, we might be able to prove our case without
3 it. We think it is there, we think it would help us, and
4 Applicant has not objected previously to this. That is all I
5 have, your Honor, unless you have any questions.

6 MR. BOUKNIGHT: I would like to attempt to answer
7 a question that Judge Tubridy put to Mr. Leckie.

8 A communication about elected officials, Judge
9 Tubridy, might be an internal memorandum from one official to
10 another saying the Municipality of River City is becoming a
11 real thorn in our sides, they are going out and getting indus-
12 trial customers, they are being us on this, they are suing us
13 before the Atomic Energy Commission, they are a real problem,
14 I think we should contact the mayor about acquiring that system.

15 That is just exactly the kind of document that
16 would be excluded under what the Applicant desires here. So
17 communications, planning an acquisition of a municipal system
18 is necessarily about an elected official.

19 MR. TUBRIDY: What I had reference to, I was inter-
20 ested in seeing if he was giving an example in this appendix
21 he had attached hereto, and that is why I was interested in
22 seeing whether it was to an outside official. That was the
23 point of my remarks in that regard.

24 I would like to hear Mr. Avery's response.

25 MR. AVERY: I would like a few additional moments,

1 if I might, Mr. Chairman. Let me take up what Mr. Leckie had
2 to say first. He started by rearguing the Noerr-Pennington
3 doctrine and the small exceptions. I proceed from the premis
4 that the Board has ruled on Noerr-Pennington applicability to
5 discovery --

6 CHAIRMAN BENNETT: We gave you a pretty wiesel-
7 worded ruling on that. If you may recall, we had an open end
8 on it.

9 MR. AVERY: Oh, yes, I agree with that. I wouldn't
10 agree with wiesel-worded, I think it was a clear ruling.

11 MR. TUBRIDY: We are not bothered by his reference
12 to sham, Mr. Avery.

13 MR. AVERY: I hadn't gotten to sham yet. I was
14 going to say you have ruled that Noerr-Pennington does apply
15 to the discovery process, and it is grounds, as you have ruled,
16 for not producing documents in certain political areas. I
17 did leave an open end on that, but we are not talking about
18 whether this falls into that open end.

19 That is not what is at issue here. As to the
20 sham exception, we aren't worried about the sham exception,
21 indeed Mr. Leckie didn't even suggest what he was talking about
22 here would fall into the sham exception. He simply reargued
23 the fact that there might be a sham exception. There is a
24 sham exception, and it is made pretty clear in Noerr-Pennington,
25 and California Motor Transportation what it is, but it has

1 nothing to do with what this situation is.

2 So I don't think the sham exception has anything
3 to do with the problem we are dealing with here. I think Mr.
4 Leckie went a long way toward proving my point when he started
5 getting into examples of what he might find, dossiers on elected
6 officials, that kind of thing, discussions about how to get the
7 necessary political approval for an acquisition. He also
8 referred repeatedly to his desire to want more information.

9 Of course, we know the Justice Department desire
10 for information in this regard is insatiable. They will take
11 anything they can get. We have already given them 100,000
12 documents and we can't reach any compromise on some fairly
13 sensitive business information as we discussed earlier because
14 they want all of that.

15 Sure, they want a lot of information. But the
16 bounds of what they are entitled to are established by law, and
17 the question that is before you is whether the documents that
18 would be covered by 6F2 fall within the Noerr-Pennington
19 exception.

20 So I come back, in answering the Justice Department
21 to my point that I made in my original argument, that we are
22 not seeking to protect all documents with regards to acquisitions,
23 we are pointing out to the Board -- and this goes to Mr.
24 Tabridy's observations -- a municipal electric system is not
25 a pure business enterprise. It is also a governmental entity.

1 When you get into dealings with it, you get into
2 the political process, and Noerr and Pennington say that
3 attempts to influence government actions are not violations of
4 the Sherman Act. And that being the case, documents dealing
5 with that aspect of the relationship with a municipal electrical
6 system, that is the political part of it, the attempt to
7 influence government action, are protected.

8 And you can't simply say this government happens to
9 be in a business and therefore we are going to sweep aside
10 Noerr-Pennington. I don't think, if you look at the Noerr-
11 Pennington case, that you can justify that result.

12 MR. TUBRIDY: In talking about the Noerr case, you
13 didn't have the industry engaged in a business, they were
14 talking about the legislature there, influencing various
15 governmental bodies, and the governmental bodies weren't
16 interested in the business, either.

17 MR. AVERY: In pennington, you were dealing with
18 Walsh-Helly determination, which is getting close to the
19 government in business.

20 MR. TUBRIDY: Let's talk about Noerr.

21 MR. AVERY: That was a private dispute between two
22 business entities, railroads and truckers.

23 MR. TUBRIDY: But they were trying to influence
24 the legislatures, and governmental bodies and they were
25 protected against that, even though what they used, I don't

1 see how they could possibly justify it in any court of law, but
2 they did.

3 MR. AVERY: Pennington involved attempts to influence
4 the Secretary of Labor. So Noerr says you are not liable for
5 attempts to influence elected officials, Pennington says you are
6 not liable for attempts to influence nonelected governmental
7 officials.

8 MR. TUBRIDY: But these were not talking about
9 a government that was engaged in a business activity.

10 MR. AVERY: It is true that in those particular
11 cases that was not involved, but the principle --

12 MR. TUBRIDY: That is right. So you can't make a
13 blanket statement from that situation or swing it into a
14 situation where they are engaged in business.

15 MR. AVERY: I simply disagree with you.

16 MR. TUBRIDY: Suppose you said all of the corres-
17 pondence you had with the mayors is protected by the Noerr
18 doctrine, when they are talking about rates, what you should
19 charge the municipalities, you can't claim that is protected
20 by the Noerr doctrine.

21 MR. AVERY: I don't know what I would claim there,
22 I am not faced with that problem. What I'm faced with here is
23 an acquisition, we are willing to produce the documents that
24 don't fall into the political sphere open.

25 MR. TUBRIDY: That is exactly it, they are going

1 to obtain a business deal, this is a business deal, they
2 are going to make an acquisition of a utility that is in
3 business.

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1 MR. AVERY: But it is a governmental entity and
2 therefore the principles enunciated in Noerr-Pennington, the
3 rights of citizens to deal freely with their government, apply
4 even in this area.

5 MR. TUBRIDY: I don't dispute that. But you are
6 not talking about their rights to deal with them, you are
7 talking about communications to elected officials, councils
8 and boards, everything they write to them.

9 If they say "Is your plant for sale," you wouldn't
10 be allowed to look at that. You say "That is protected."
11 They wrote a letter to the mayor saying "Do you want to sell
12 your electric plant down the street?"

13 MR. AVERY: Didn't we furnish the offering letter?
14 We have furnished that.

15 MR. TUBRIDY: This language bothers me. Communi-
16 cations to or about elected officials, councils and boards in
17 connection with the acquisition of plants. That goes for
18 everything they wrote to them.

19 MR. AVERY: What we are seeking to protect is those
20 documents which get into the political decision to be made
21 by the town --

22 MR. TUBRIDY: Do we decide it up? What language do
23 you suggest? I agree with you. But how do you separate the
24 other business communications?

25 MR. AVERY: I am sure language could be devised to

2
1 separate those out.

2 MR. TUBRIDY: I am open to suggestion and I think
3 the rest of the Board is. We want to be sure we observe the
4 Noerr doctrine, but to the extent they were engaged in
5 business they would not be protected, if they were dealing
6 with a co-op, say, but it was strictly a business enterprise,
7 they wouldn't have protection. That kind of letter you wrote
8 to them, I don't see why one should be protected and the other
9 not, the same letter asking for the same thing, because one
10 is written to a person in government and the other written
11 to the president of a board.

12 MR. AVERY: I think there is a difference between
13 the two.

14 By the way I meant to mention that Mr. Leckie had
15 referred that one of the documents dealt with co-op acquisitions
16 and he referred in his argument to the possibility of
17 communications with co-ops being covered by this. There aren't
18 any communications with co-ops covered in this group of 6(f)2
19 documents.

20 MR. TUBRIDY: That is not the problem. The problem
21 is the language.

22 MR. AVERY: There is a valid distinction to be drawn
23 between an electric system owned by a governmental agency and
24 a privately-owned or cooperatively-owned system. It recognizes
25 the fact that it is publicly-owned and therefore in the

3
1 political sphere.

2 The Noerr-Pennington protection should apply.

3 MR. TUBRIDY: That is where we jump from here to
4 there, an awful big leap, because they have certain government
5 functions that the Noerr doctrine applies to them, despite the
6 fact they are running a business.

7 MR. AVERY: You say you think that is a jump? I
8 think it is very clear from Noerr.

9 MR. TUBRIDY: They are running a business and the
10 Noerr doctrine applies to them when they are running a
11 business?

12 MR. AVERY: Noerr is talking about the rights of
13 citizens with regard to their government and the fact that you
14 can't apply the antitrust laws to the dealings of citizens
15 with their government.

16 MR. TUBRIDY: What rights? The right of petition?

17 MR. AVERY: That is one right.

18 MR. TUBRIDY: They are not attempting to exercise
19 the right of petition here.

20 MR. AVERY: That is exactly what they are doing.

21 MR. TUBRIDY: It is information. They want to
22 know if the property is for sale.

23 MR. AVERY: The documents we are concerned about
24 are the ones where, not that they made the offer, we furnished
25 the documents where Duke makes the offer. It comes down

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1 eventually to the situation where the town is going to vote
2 whether or not to sell the system. That is a political
3 question, it is decided as a political question, and there
4 when you get to that, I think clearly the Noerr doctrine
5 applies and you are entitled to petition your government and
6 the mere fact that the government in this instance happens
7 to be in a business does not destroy those rights.

8 MR. TUBRIDY: This is the trouble, it happens to be,
9 that is the whole point. They are in business. And does the
10 Noerr doctrine apply when a municipality is in business?

11 MR. AVERY: I think it does. I think if you read
12 the Noerr case and think about the basic principle that under-
13 lies it, which I understand to be the rights of citizens in
14 dealing with their government, I think it does apply.

15 MR. FARMAKIDES: It isn't only a question of
16 whether or not it applies to a municipality that is doing
17 business, there is also a question here does it apply in a
18 situation where you are discussing that particular business?
19 See what I mean?

20 MR. AVERY: I see. I was subsuming that. What I
21 am saying is you don't lose what is laid out in Noerr simply
22 because the municipality is in a business.

23 MR. TUBRIDY: I agree with that. But it is the
24 question of how do you --

25 MR. AVERY: It is tough enough to deal with a

1 government in a business without saying you lose your political
2 rights in doing so, that the exercise of your political rights
3 subjects you to --

4 MR. TUBRIDY: I don't say you are losing your poli-
5 tical rights. But when you are buying an electric business
6 from a municipality, they are engaged in a business, and
7 they don't have any rights that business don't have.

8 The problem is what are these rights that you have
9 when you are dealing with a municipality that is in a business.
10 I don't know how you devise language to apply to that.

11 MR. AVERY: Well, I really hesitate to try to stand
12 here and draft in my head a revision of 6(f)2 that might draw
13 that distinction.

14 If the Board would like us to come up with a
15 proposal in that regard, a suggested limitation on 6(f)2,
16 which would produce the documents which relate to the
17 business aspect but exclude documents relating to the
18 political decision whether or not to sell, perhaps we could come
19 up with some language and if the Board wants to give us a
20 little time to do that, we will try to do it.

21 I really hesitate to do it while standing on my
22 feet.

23 MR. TUBRIDY: I agree with you, don't even try,
24 Mr. Avery. It is enough of a problem without trying to do
25 it off the cuff. But I think we have exhausted the subject.

1 The problem is quite obvious, trying to draft language to
2 preserve your rights under the Noerr doctrine and at the
3 same time permit the people to handle the situation like a
4 business transaction.

5 MR. AVERY: I think that has been done, because
6 we have furnished them great masses of documents. It is
7 clear from the fact that we furnished them 10,000 documents
8 relating to acquisitions that you can still give a lot of
9 information about an acquisition, without running into the
10 elected official problem.

11 He says we want everything. Sure, we want
12 everything. But if we have the right of political protection
13 of certain parts of it, they have to be content with what they
14 are entitled to get. So his mere assertion, some of it is
15 being held back because you communicated with elected
16 officials and therefore we ought to have it all, that doesn't
17 make sense to me. That is just begging the question.

18 The question is whether or not you are entitled to
19 invade the area protected by Noerr-Pennington.

20 MR. TUBRIDY: That is right. That is the area to
21 be protected.

22 MR. FARMANIDES: But also the fact is that the
23 Department feels he is entitled to it, and he has given his
24 arguments substantially on that point.

25 MR. AVERY: But he begs the question whether Noerr-

1 Pennington blocks him from getting it. Just saying we think
2 we are entitled to it because it is relevant doesn't answer --

3 MR. FARMANIDES: He is nodding vigorously no, so let
4 him discuss it.

5 CHAIRMAN BENNETT: Anything further?

6 MR. BOCKNIGHT: I have two strong objections to
7 redrafting this interrogatory. The first is under the second
8 argument and our answer and the argument I enunciated a few
9 moments ago, all of this, involvement in elections concerning
10 the sale of municipal systems may well be relevant to put
11 other activities in a certain light. All of this certainly
12 may be relevant.

13 There is reason to believe that the footnote in the
14 Pennington decision is going to apply to every document
15 we are talking about here. Because we are talking only about
16 acquisition of municipal systems.

17 My second point in answer to Mr. Avery is that four
18 or six months ago a request that perhaps we should attempt to
19 redraft it and reconsider it and give every party an opportunity
20 to say what he wants to say might have at least been something
21 that could properly be put forth. We are now in a time bind,
22 we need to know about the acquisitions before we can preach
23 the notices of deposition and before we can prepare our
24 interrogatories, and we are in a time bind because Mr. Avery
25 puts us there by making a decision not to say a word about

ty 8

1 this until last week.

2 MR. LECKIE: I have just two points.

3 Mr. Avery mentioned the material we submitted
4 with our answer that I referred you to earlier dealt only
5 with cooperative systems. Included also in Appendix B,
6 documents No. 75,460, the last line says "It is recommended
7 to formulate a municipal purchase plan."

8 Secondly, I think there is an easy solution to
9 this problem Mr. Avery has raised of wanting to redraft Item
10 6(f)2. The solution, and I think what is intended under Noerr-
11 Pennington is we should have discovery of those documents.
12 When the time comes to introduce them into evidence, then we
13 can argue on both sides whether those documents are governmental
14 or whether they affect only the business operations of the
15 system.

16 That is what happened in the Johns Manville case.
17 The documents in that case were attempted to be introduced, the
18 court at that point, at the point of an evidentiary hearing,
19 not on discovery, determined that they would be inappropriately
20 introduced. There was no objection made in that case at the
21 discovery level.

22 MR. BRAND: Your Honor, I have one inquiry I would
23 like to make. It will take a short time.

24 I would like to propound a question as to whether
25 or not if two or more electric utilities conspired with one

1 another to refrain from business dealings with a company, if
2 the company did not refrain from addressing the legislature on
3 matters relating to, for example, liberalizing the financing
4 for electric cooperatives, would that be protected by the
5 Noerr-Pennington doctrine?

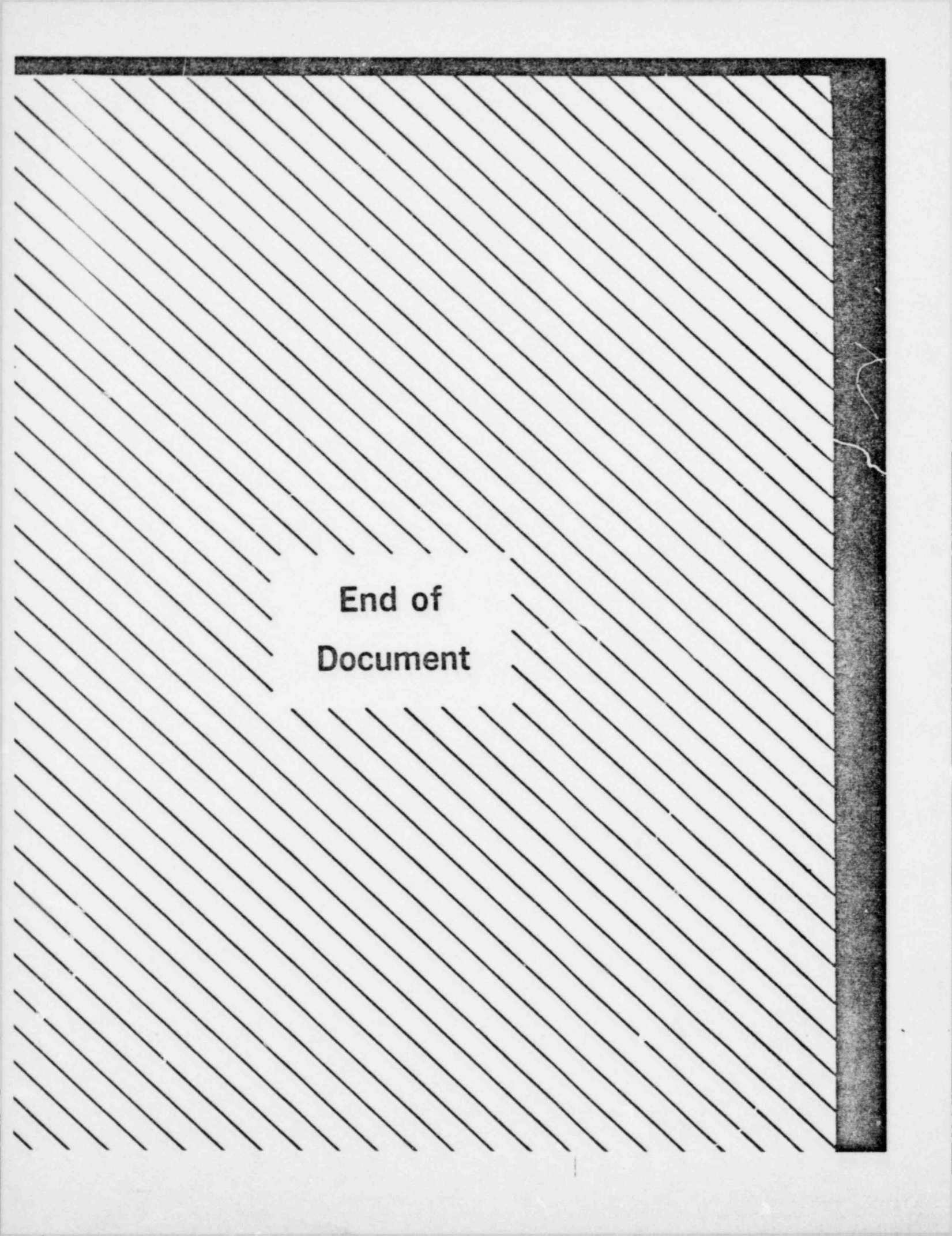
6 I think this is an inquiry to which Applicant should
7 respond, because I believe that the exemption so far for Noerr-
8 Pennington have spread far beyond anything every contemplated
9 by the court.

10 CHAIRMAN BENNETT: Thank you.

11 Thank you very much, ladies and gentlemen.

12 We will endeavor to get an order out at an early
13 date.

14 (whereupon, at 2. p.m., the hearing was adjourned.)
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