

Regulators

File 69

Records Facilities Branch (2)
016 Phil

NUCLEAR REGULATORY COMMISSION



IN THE MATTER OF:

TOLEDO EDISON COMPANY and
CLEVELAND ELECTRIC ILLUMINATING CO.

Docket Nos.

(Davis-Besse Nuclear Power
Stations, Units 1, 2 and 3)

50-346A
50-550A
50-501A

and

CLEVELAND ELECTRIC ILLUMINATING
CO., et al.

50-440A
50-441A

(Perry Nuclear Power Plant,
Units 1 and 2)

Place - Silver Spring, Maryland

Date - Monday, 28 June 1976

Pages 1 - 67

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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

In the matter of:	:	Docket Nos.
TOLEDO EDISON COMPANY and	:	50-346A
CLEVELAND ELECTRIC ILLUMINATING CO.	:	50-550A
	:	50-501A
(Davis-Besse Nuclear Power	:	
Stations, Units 1, 2 and 3)	:	
	:	
and	:	
	:	
CLEVELAND ELECTRIC ILLUMINATING	:	50-440A
CO. <u>et al.</u>	:	50-441A
	:	
(Perry Nuclear Power Plants,	:	
Units 1 and 2)	:	
	:	

First Floor Hearing Room,
7915 Eastern Avenue,
Silver Spring, Maryland.

Monday, June 28, 1976.

Prehearing conference in the above-entitled
matter was convened, pursuant to notice, at 1:00 p.m.

BEFORE:

- ROBERT M. LAZO, Esq., Chairman,
Atomic Safety and Licensing Special Board
- ANDREW C. GOODHOPE, Esq., Member.
- DANIEL L. HEAD, Esq., Member.

APPEARANCES:

JAMES B. DAVIS, Esq., Hahn, Loeser, Freedheim,
Dean & Wellman, National City E. 6th Building,
Cleveland, Ohio, 44114; on behalf of the
City of Cleveland.

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MICHAEL R. GALLAGHER, Esq., Gallagher, Sharp,
Fulton, Normal & Mollison, 630 Bulkley Building,
Cleveland, Ohio, 44115; on behalf of
Squire, Sanders and Dempsey.

W. BRADFORD REYNOLDS, Esq., Shaw, Pittman, Potts
and Trowbridge, 1800 M Street, N.W.,
Washington, D.C.; on behalf of Applicants

JACK R. GOLDBERG, Esq., Office of Executive
Legal Director, Nuclear Regulatory Commission,
Bethesda, Maryland; on behalf of the Nuclear
Regulatory Commission

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P R O C E E D I N G S

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2 CHAIRMAN LAZO: This is an administrative pro-
3 ceeding before an Atomic Safety and Licensing Special Board
4 established for a proceeding concerning the provisions of
5 Section 2.713 of the Commission's Rules of Practice relating
6 to suspension of attorneys. The Special Board has been
7 established to rule on the motion of the City of Cleveland
8 to disqualify the law firm of Squire, Sanders and Dempsey
9 from further participation as Counsel for the Cleveland
10 Electric Illuminating Company in the on-going antitrust
11 proceeding identified as In the Matter of The Toledo Edison
12 Company and the Cleveland Electric Illuminating Company
13 (Davis-Besse Nuclear Power Stations, Units 1, 2 and 3), and
14 the Cleveland Electric Illuminating Company et al. (Perry
15 Nuclear Power Plant, Units 1 and 2). And those are Nuclear
16 Regulatory Commission Docket Nos. 50-346A, 50-550A, 50-501A,
17 50-440A and 50-441A.

18 Now we're meeting here today for a prehearing
19 conference pursuant to the Notice issued by the Special
20 Board on June 21, 1976 ordering that Counsel for the parties
21 meet here in this room at 1:00 p.m. for a prehearing con-
22 ference in this matter.

23 Could we now call, please, for appearances by
24 the parties?

25 For the City of Cleveland?

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MR. DAVIS: James B. Davis for Cleveland.

CHAIRMAN LAZO: Thank you, Mr. Davis.

And for the firm, Squire, Sanders and Dempsey?

MR. GALLAGHER: Michael R. Gallagher, Cleveland, Ohio.

CHAIRMAN LAZO: Thank you, sir.

For the NRC Regulatory Staff?

MR. GOLDBERG: Jack R. Goldberg.

CHAIRMAN LAZO: And Counsel for all the Applicants, are you entering an appearance?

MR. REYNOLDS: Yes, sir. William Bradford Reynolds, Shaw, Pittman, Potts and Trowbridge.

CHAIRMAN LAZO: Thank you, Mr. Reynolds.

Are there any other appearances?

(No response.)

To avoid confusion we will instruct the Reporter to begin the transcript of this proceeding with the pre-hearing conference today with page 1, and ask that the transcript and all pleadings which may be filed hereafter specifically identify in their caption that this is the Atomic Safety and Licensing Special Board.

In order to begin --

MR. GOLDBERG: Excuse me, Mr. Chairman. I've spoken with the Chairman of the antitrust proceeding, Chairman Rigler, and he expressed an interest in having the

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1 pagination of this prehearing conference continue from the
2 pagination of the antitrust proceeding. All prior proceed-
3 ings regarding the disqualification issue have been in-
4 corporated directly into the antitrust transcript, and I
5 just wanted to point out that that was the wish of Chairman
6 Rigler.

7 CHAIRMAN LAZO: As far as the papers, pleadings,
8 are concerned, it nonetheless appears to us that it would
9 be advantageous to both Boards to have some way of iden-
10 tifying the papers that specifically relate to this special
11 proceeding.

12 Let us take your comments under advisement for
13 the moment. I don't believe that will cause the Court
14 Reporter any problem, at least until he is ready to start
15 typing.

16 As a first order of business, Mr. Goldberg,
17 perhaps you could tell us the extent, if any, of the parti-
18 cipation in this special proceeding by the NRC Staff.

19 I'll ask the same question of Mr. Reynolds. And
20 I think this would be a first order of business.

21 Could you give us an answer?

22 MR. GOLDBERG: Certainly.

23 The Staff has attended every aspect of the dis-
24 qualification proceeding and has participated in every
25 aspect of the disqualification proceeding. Our purpose is

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1 to keep fully informed as to all aspects of the Perry/
2 Davis-Besse antitrust proceeding, to advise the Board in
3 whatever way we can to assure that the record is complete.
4 And we would continue to participate in that manner.

5 CHAIRMAN LAZO: If this proceeding goes to a full
6 evidentiary hearing would it be the intention of the Staff
7 to participate actively in the sense of offering evidence
8 or seeking to cross-examine the testimony of others?

9 MR. GOLDBERG: We would certainly reserve the
10 right to cross-examine whatever witnesses were presented,
11 and to make objections if appropriate to documentary evi-
12 dence that might be introduced.

13 Once again, our purpose would be to assure that
14 the record is complete, and to represent the public interest,
15 and to assist and advise the Board in every way we could.
16 We would certainly want to reserve that right. I do not
17 anticipate the Staff presenting a full case, however, of
18 documents and witnesses. That would be, I think, more
19 appropriate for the two main parties in this proceeding.

20 CHAIRMAN LAZO: Naturally the Board appreciates
21 all the help it can get, and the participation of the Staff
22 is most welcome.

23 Mr. Reynolds, the extent of the participation
24 of your client in this phase of the proceeding would be
25 what?

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2 MR. REYNOLDS: I would anticipate that it would
3 be minimal, Mr. Chairman. It would seem to me that my role
4 in this proceeding, should it go to an evidentiary hearing,
5 would be confined to insuring that the interests of my
6 clients, to the extent that there is an overlap with this
7 particular evidentiary hearing and the antitrust hearing
8 that is on-going, would be fully protected.

9 But I would not envision that that would require
10 very active participation on my part. On the other hand,
11 to the extent I did feel it necessary to protect those
12 interests, it may well be necessary for me to participate
13 to a limited extent.

14 CHAIRMAN LAZO: Mr. Davis, does the City of
15 Cleveland have any objection to the participation of the
16 other two parties as has just been expressed by Mr. Reynolds
17 and Mr. Goldberg?

18 Of course it's your problem, but in terms of the
19 obligation to file responsive pleadings and participate and
20 respond to motions of that sort, both of these parties have
21 indicated a desire to participate in order to assist the
22 Board and assure that the record is complete.

23 Does the City of Cleveland have any objection to
24 that?

25 MR. DAVIS: I don't believe so, Mr. Chairman.
The Staff has been present throughout all of this. I don't

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1 think there is any particularly added burden for the City
2 of Cleveland about the presence of these parties.

3 CHAIRMAN LAZO: Very well.

4 Mr. Gallagher, may I ask the same question of you,
5 sir?

6 MR. GALLAGHER: Yes, Mr. Chairman.

7 Our position with respect to the Staff would be
8 that although the Board has indicated that it would welcome
9 its participation, we are somewhat concerned about it and
10 would like to register an objection to it at the outset.

11 We had understood when these proceedings first
12 began that the Staff would assume essentially a neutral
13 position, advising the Board in an objective manner. How-
14 ever, a brief filed by the Staff before the Appeal Board
15 denied what we believed to be the objectivity required of
16 the Staff in this matter. It took a strong position. It
17 acted in fact as another fact-finding body. And for this
18 reason we would at the outset register our objection to its
19 participation in this matter.

20 We feel further that this is essentially a ques-
21 tion between the City of Cleveland and the firm of Squires,
22 Sanders and Dempsey. We feel that Mr. Davis is a competent
23 lawyer and well capable of advocating his clients' position
24 in this matter without need of intervention by the Staff.

25 CHAIRMAN LAZO: Would you object, sir, to the

eb7 1

Staff simply being present during the proceeding and filing
an amicus brief or something of that sort?

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MR. GALLAGHER: I would not object to its being
present. I would not object to an amicus brief that was of
a dispassionate character.

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mpbl 1 CHAIRMAN LAZO: Mr. Goldberg?

2 MR. GOLDBERG: I would submit that the Staff has
3 an obligation and indeed a right to participate in this
4 disqualification aspect of the Perry/Davis-Besse antitrust
5 proceeding in the same way that it has participated in the
6 prior aspects of disqualification proceeding.

7 There is more involved in this proceeding than
8 simply the disqualification of a law firm. We're dealing
9 with the Commission's rules of practice and we're dealing
10 with a case which will certainly have precedential value and
11 I think since the Staff is a party to the Davis-Besse/Perry
12 antitrust proceeding and since the Staff was asked by the
13 Appeal Board to address all issues on appeal, that we certainly
14 do have an obligation and a right to carry through with
15 our participation as we have in the past, and I would urge
16 the Board to allow us to do that.

17 CHAIRMAN LAZO: Thank you, Mr. Goldberg.

18 We would note, Mr. Gallagher, that in its decision
19 of June 11th the Appeal Board in referring to Section 2.713C,
20 and that's at the top of page 29 of that decision, said that:

21 "An attorney charged with misconduct shall
22 be afforded an opportunity to be heard thereon."

23 And then continues by saying:

24 "We hold this to mean that he's entitled to a
25 full evidentiary hearing with all parties having

mpb2 1 the right to present evidence and conduct cross-
2 examination."

3 Presumably the Appeal Board was referring to all
4 the parties who have participated in the principal antitrust
5 proceeding.

6 But nonetheless, it appears that there is a ques-
7 tion involved here regarding the participation of the parties

8 We have heard from everyone on the point now.

9 Before going on to the first matters in our
10 agenda I would briefly like to introduce the Board members
11 to you.

12 Daniel M. Head who is seated at my right is a
13 full time member of the Atomic Safety and Licensing Board
14 panel and has been a member since 1972. Mr. Head received
15 his law degree from Georgetown University, the same school
16 in which he received his Bachelor's Degree.

17 From 1962 to 1963 Mr. Head was Trial Attorney
18 Discriminatory Practices Division, Bureau of Restraint of
19 Trade at the Federal Trade Commission. For eight years
20 during the period 1963 to 1971 he was an associate and then
21 later a partner in the law firm of Fletcher and Mahoney in
22 Washington, D.C.

23 In 1971 and 1972 he was Trial Attorney with the
24 Pollution Control Section, Land and Natural Resources
25 Division of the Department of Justice.

mpb3 1 Mr. Head is a member of the D.C. Bar, the Maryland
2 Bar and the Virginia Bar and a member of many professional
3 organizations.

4 Mr. Andrew C. Goodhope, who is seated at my left,
5 received his law degree from Columbia University in New York.
6 From 1948 to 1962 he was a Trial Attorney for antitrust
7 cases with the Federal Trade Commission. From 1962 until
8 1974 he was an Administrative Law Judge with the Federal
9 Trade Commission.

10 Mr. Goodhope is now a part time consultant member
11 with the panel and he is also a member of the District of
12 Columbia Bar.

13 My name is Robert M. Lazo. I received my law
14 degree from Rutger's University. My law practice consists
15 of five years of corporate practice with Bell Telephone
16 Laboratories and Standard Oil of New Jersey. Thereafter I
17 served in private practice for 13 years in Milwaukee and
18 Chicago and joined the Atomic Safety and Licensing Board panel
19 as a part time member in 1970. I have served as a full time
20 member since 1972.

21 Now, we think the second order of business is to
22 hear from each of the parties regarding the need for discovery.
23 The need and extent of discovery and a proposed schedule for
24 discovery.

25 I wonder, Mr. Davis, are you prepared to give us

1 your ideas on that?

2 MR. DAVIS: Mr. Chairman, yes. I have submitted
3 an application for a subpoena which I hope has reached the
4 Board and that the Board has had some chance to scan.

5 I would go back to, briefly, to the proceedings
6 before the special Board that was created previously and in
7 which, upon the demand of Squire, Sanders for a full evidentiary
8 hearing, was given an application for a subpoena by the City
9 and at that time allowed that subpoena. But time was so
10 short when we had our hearing that there was no chance to
11 really go forward with it and after reconsideration of that
12 hearing back in the spring, the Special Board decided not to
13 allow the City to go forward with enforcing its subpoena and
14 then finally dispensed with all evidence anyway.

15 Now what we have done is to take that subpoena
16 and condense it and eliminate certain materials from it and
17 try to address the questions and the opinion of the Appeal
18 Board. We have tried to limit it so that we are really
19 avoiding for the most part questions of privilege that
20 have been discussed in prior episodes of the full hearing
21 before the Board.

22 I think the City, if it were to have a full
23 chance to explore everything that might bear upon the matter,
24 could well and under normal rules of Federal discovery would
25 go well beyond what is in this particular subpoena.

mpb5 1 We have in light of our recent experience in the
2 federal court in Cleveland attempted to particularly address
3 the issue of those matters learned by Squire Sanders and
4 maybe I can explain a little bit more what I'm trying to get
5 at there.

6 The position of the City is that by virtue of
7 some 60 -- I don't want to discuss the merits of the case,
8 but I think I can give you some background to explain what
9 I'm trying to do here, at least in major part.

10 It's the contention of the City that Squire,
11 Sanders and Dempsey, which has been the City's bond counsel,
12 virtually the only bond counsel of the City of Cleveland
13 for some 60 years has in the course of that lengthy period
14 of time and certainly over that period of time which is
15 pertinent to this case on the merits, which is 1965 to the
16 present, done virtually all the City's financing and that
17 they have done the financing for the City's general fund
18 operations and for the Municipal Electric Light Plant as well.

19 Now, to get at what financial information SS and D
20 really gleaned over all those years and from various City
21 officials we have asked them to produce those files that they
22 prepared for its client, the City of Cleveland so that we
23 may see exactly what they have.

24 You might ask does the city not have such files
25 itself and the answer is no, the City never did have such

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1 files. We have the further problem that the City's filing
2 system is, what exists of it in the Cleveland Law Department,
3 quite inadequate. Much of it has been dispersed. We've had
4 many public officials come and go. We simply have no way
5 of knowing or reconstructing and in a collateral matter,
6 it's enormously burdensome to try to reconstruct what it is
7 our own lawyer generated for us in that period of representa-
8 tion from '65 to now. So what we're asking them to do is to
9 let us, the clients, see our own files, see what financial
10 information was obtained from the City over that period of
11 time as one of the essential matters that we would like to
12 see.

13 The rest of the matters are essentially self
14 explanatory. There are a number of specific files that we
15 called for dealing with the Municipal Electric Light Plant,
16 or MELP as we call it and if the panel I see, perhaps one of
17 the subpoenas has reached the panel, I would like to have the
18 discovery proceeding go forward this week as promptly as
19 possible and I would like access to those files and a chance
20 to study them.

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2 CHAIRMAN LAZO: We would say, Mr. Davis, that
3 we have received the application for a subpoena. We have
4 withheld issuing it because on its face there is no clear
5 showing of general relevance to the testimony or evidence
6 sought. And part of the problem of course is that this
7 Board does not at this time know precisely what issues are
8 in controversy in the on-going antitrust proceeding.

9 I might say that on the face of it it does appear
10 to be unnecessarily broad. But nonetheless we would have
11 been prepared to issue it. The other party of course has
12 all of its rights to bring any motion regarding the quash-
13 ing of the subpoena.

14 But the problem of relevance remains, and I think
15 that may be a problem for us here in terms of discovery;
16 unless and until this Board has placed before it a clear
17 identification of the issues in the antitrust proceeding
18 I don't see how we're going to be able to rule on questions
19 of relevance regarding discovery.

20 Is there, Mr. Davis, somewhere in the other
21 proceeding, a clear category listing of the issues that
22 have been placed in controversy and which I understand
23 have been pretty well tried?

24 MR. DAVIS: Well, yes. I think you can say that
25 the issues are pretty well defined by now. The City says
that by virtue of having done all its financial work for

eb2 1 this period of time and certainly all its financial work
2 with one or two exceptions out of many, many dozens of
3 financings that SS&D had a total mastery of the City's
4 financial position, a total mastery of the financial posi-
5 tion of MELP at all relevant times during this entire history
6 of controversy with CEI.

7 I don't know if this panel has had a chance to
8 read some of the briefs that have been filed previously by
9 the City, but the City alleges actual misconduct of SS&D
10 going far beyond simply gleaning information. We cite
11 various instances of where this information was transmitted
12 to CEI and made of use to CEI.

13 In the precise issues, the City's financial
14 ability to pay for certain of the things that it has wanted
15 to have over the years has been put in contest in the main
16 antitrust here on the merits. The financial pressures--
17 At least the City's position is generally that the finan-
18 cial pressures created by CEI in a host of ways were de-
19 signed to force the City's light plant into a position of
20 virtual bankruptcy and eliminate it as a competitor.

21 And I think a great deal of evidence has come
22 along to substantiate that.

23 Where one law firm is at one time privy to all
24 the financial information of the City's municipal electric
25 light plant this could be of enormous benefit to the major

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1 competitor. We say it was actually put to the use of the
2 major competitor.

3 To give you an idea of the controversy that has
4 arisen around these files, SS&D said they learned nothing
5 from the City that was not already public information. I
6 think the Appeal Board has ruled on this particular issue
7 confidentiality is not in issue; it is not a necessary
8 showing by the City. Any information given by the City is
9 going to be treated under the case law as coming within the
10 protections of Cannon 4.

11 But basically SS&D has tried to claim -- and we
12 think if we can see our own files we can prove to the
13 contrary that they gleaned a great deal of information
14 about us that was highly relevant to the financial pressures
15 brought by CEI upon the Cleveland Electric Light Plant.

16 We further think that we can show with even
17 greater detail than we already have that they learned a
18 great many things about us that were non-public even though
19 again confidentiality or the non-public nature of the infor-
20 mation is not critical in any way.

21 So what we're saying is we want to see our own
22 files, and I think it is a novel notion that a client has
23 no such right to see its own files from its own lawyers.

24 I would further say in general -- and correct me
25 if I'm wrong -- that the general standard of discovery is

eb4¹ whatever might possibly lead to evidence that is relevant,
2 so I think it is a fairly broad and sweeping general standard
3 that we're normally entitled to in the federal courts. If
4 that is not the standard before this Commission I certainly
5 would appreciate being told that.

6 The basic relevance, however, is that this is an
7 antitrust case which is almost by definition a study in
8 financial pressures. Those pressures were exerted against
9 the City's Light Plant over a period of years in a host
10 of ways. And the key to it all was on-going, constant,
11 detailed information about the City's financial posture
12 at any given time that was open totally to its own lawyers,
13 SS&D, who were then at the same time the attorneys for the
14 Cleveland Electric Light Plant.

15 Now if that helps a little bit?

16 CHAIRMAN LAZO: That does help, sir.

17 Let me ask, Mr. Davis: You alluded earlier
18 to a recent experience in Federal Court in Cleveland. And
19 might I ask, was a similar subpoena issues in that pro-
20 ceeding which would permit you to see your own files?

21 MR. DAVIS: Well, we used a subpoena in that case
22 that was considerably more sweeping. The time periods are
23 not identical. In that case we went back in periods of
24 time prior to the fairly limited period here.

25 The Federal Judge in Cleveland rules two ways

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1 against the City's having any right to any single document
2 which we are firmly convinced was an erroneous ruling.

3 But in any event, in an attempt to get at and to get
4 around the problems there, we have very substantially res-
5 tricted the subpoena that we are putting before this Board.
6 There we sought a host of documents that we were told
7 there were privileged and I believe are deemed privileged
8 at this point in this proceeding.

9 I feel fairly strongly that we were entitled
10 and should be entitled to those documents because they are
11 a series of documents that were prepared by our own lawyers
12 concerning our affairs and were sent to CEI. But in any
13 event, those have been stricken from the subpoena.

14 And as to the rest, I have attempted to make it
15 as precise as I can without knowing actually the labels
16 that our own lawyers used for our own files, particularly
17 in Item 2.

18 CHAIRMAN LAZO: Mr. Gallagher, I believe Mr. Davis
19 did refer to the fact that he was considering issuing a
20 subpoena during our telephone conference among all of you
21 on the 21st. Have you seen the subpoena?

22 MR. GALLAGHER: I received it Saturday morning
23 and have examined it.

24 You asked that we address ourselves to the ques-
25 tion as to the need for discovery and proposed schedule.

eb6 1 Addressing myself first if I may to the need for
2 discovery, while this Board hears for the first time what
3 Mr. Davis has to say on the need to secure these records,
4 this Board should be reminded that the original Licensing
5 Board heard essentially the same thing, and the other
6 Special Board heard it. It has been heard at least on three
7 separate occasions in Federal Court. And on each of those
8 occasions the effort of the City to secure essentially the
9 records that are identified in his duces tecum feature has
10 been denied.

11 It's been denied on the ground of privilege;
12 it's been denied on the ground of relevancy. The Licensing
13 Board has examined a host of these records and if it please
14 this Board, I intend to file a motion for a protective
15 order, and I have many things which I will attach to it,
16 among which will be a reference to what the Special Board
17 said in its certifying opinion.

18 There will be reference to what the initial
19 Special Board said with respect to a subpoena essentially
20 requiring many of the same documents at the time of its
21 hearing. I will submit to this Board a portion of the
22 transcript consisting of some 12 pages from the District
23 Court where, for the third time, the City filed a similar
24 subpoena.

25 Let me say this, that there has been discovery

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1 in this matter. Not only have we had the various other
2 proceedings before this Board but depositions of those
3 witnesses whom Squire, Sanders and Dempsey indicated would
4 testify and did in fact testify in Federal Court were taken.

5 A duces tecum feature was attached to the sub-
6 poena with respect to those depositions. A motion was filed
7 and the duces tecum feature of it quashed by the Federal
8 District Court.

9 Subsequently the Court made a similar ruling on
10 a separate occasion. Most, if not all, these documents have
11 been turned over to the Federal District Court and he has
12 in camera examined them himself. Most of them also have
13 been examined by the Licensing Board in camera in its
14 determination of non-relevance.

15 Finally, last week when we had the hearing before
16 Judge Krupansky there was served upon each of the Squire,
17 Sanders and Dempsey lawyers who were to testify a subpoena
18 duces tecum consisting of many, many pages, again re-
19 questing these same documents and again essentially the
20 argument you heard presented by Mr. Davis urged upon the
21 Court. And the Court again denied it.

22 And it is with respect to that, if you will,
23 the fifth denial of essentially access to the same infor-
24 mation, that we will provide this Board through the trans-
25 cript so you will have the full flavor of it.

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2 There has been discovery here; there has been
3 every opportunity on the part of the City through deposi-
4 tions and otherwise to properly discovery in this case.
5 It's been pending-- The motion has been pending for a good
6 deal of time as of now. We've gone through the Federal
7 Court matter.

8 I submit to this Board that we're beyond the
9 discovery stage, far beyond the discovery stage in this
10 matter, and that we have reached the point where really any
11 further effort on the part of the City constitutes harrass-
12 ment.

13 MR. GOODHOPE: What is the issue in the District
14 Court case? What's the litigation about?

15 MR. GALLAGHER: It's an antitrust case for treble
16 damages, and it's the contention of the City in that case
17 that the CEI engaged in conduct, the purpose of which was
18 to do it in economically.

19 So in a very broad sense, the issues of that
20 case encompass in many respects the issues of the antitrust
21 hearing before the Nuclear Regulatory Commission.

22 MR. GOODHOPE: Well, that's not an attempt to
23 get the Squire firm out?

24 MR. GALLAGHER: Oh, yes. I'm sorry, I misunder-
25 stood you. Yes, they filed a separate motion to disqualify
in the antitrust case in Cleveland and it was on that motion

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to disqualify that we had a full evidentiary hearing.

MR. GOODHOPE: Is that what that subpoena in the District Court was directed to?

MR. GALLAGHER: Precisely, yes. The only matter that has had any trial or any evidence in the Federal District Court has been on the motion to disqualify filed therein.

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mpbl 1 We will have some difficulty because we will
2 assume as we move along that there is a good deal of informa-
3 tion that you have that you do not have.

4 MR. GOODHOPE: Well, the issue there in the
5 District Court decision, then, in that regard is identical
6 with the issue here before this Board, is it not?

7 MR. GALLAGHER: I hesitate to use the word
8 "identical." Certainly it's very similar. There may be a
9 time when I'll argue that it is identical. At least the
10 evidence presented there was the evidence that will be present-
11 ed before you. We have files full of exhibits submitted by
12 us and by the City and in some respects culled from our
13 files. For the City, now, to argue that it's going to make
14 some sort of a different evidentiary showing just beggars
15 the imagination after in excess of six months of preparation
16 for that hearing in that tribunal and I might add with
17 respect to that that there has been an indication that we
18 can anticipate a ruling there on the outside in perhaps ten
19 days. And I would think that when that ruling comes down
20 that both sides ought to be afforded an opportunity by
21 filing or otherwise to indicate what each side thinks its
22 impact will have upon this hearing. It may be argued by one
23 or more of the parties that it should be dispositive of the
24 matter before this Board without further need for an evidentiary
25 hearing. But without attempting to anticipate that for

mpb2

1 a moment I think at least this Board should know it is
2 essentially the same matter. It requires essentially the same
3 evidence, that discovery has been had in that and that we
4 will in a sense, in a very real sense be putting the same
5 show on the road here.

6 MR. GOODHOPE: Excuse me. Mr. Davis, do you agree
7 with this?

8 MR. DAVIS: No, I do in part but I take strenuous
9 objection to some part of it.

10 MR. GOODHOPE: Let me hear what Mr. Davis has to
11 say.

12 MR. DAVIS: Mr. Gallagher is correct that there
13 are a number of similarities between what is going on in
14 Cleveland and what is going on here as to this collateral
15 proceeding on disqualification. There are major similarities.
16 The time frame here is different. There are some rather
17 critical differences in the facts because of the nature of
18 the pleadings in this Nuclear Regulatory Commission antitrust
19 review, differences between that and the City's private
20 tribal damage antitrust case which was filed July 11, 1975 in
21 Cleveland for the first time.

22 Where I take exception with Mr. Gallagher is his
23 notion that there has been sweeping and total preparation
24 in the hearing there. That is, I'm afraid, quite misleading.

25 I would say that the case has been thoroughly

1 briefed on the law. It's been heard three times down here.
2 It's been heard in Cleveland. I don't know that there are
3 going to be a great many cases that we're going to discover
4 that haven't already been cited by one of the panels or by
5 the lawyers. But the City protests vigorously that it has
6 never yet had a chance to see its own files. When Mr.
7 Gallagher talks about the documents that were presented up
8 in Cleveland for the City's part they consisted of those
9 very exhibits that are attached to our initial brief down
10 here which are documents that came to the City and documents
11 that precipitated the City's motion. Those documents were
12 discovered in discovery proceedings before the Nuclear
13 Regulatory Commission and the City was shocked and amazed
14 and then angered at what it learned from those documents.
15 And those documents in many cases show SS&D lawyers dealing
16 with the City's affairs behind its back and we feel that
17 never having had access to our files of SS&D regarding these
18 kinds of things, we've never had a chance to show what we
19 feel the evidence will show if we're allowed to get at it.
20 The City has never had a chance to get at its own files
21 dealing with its own affairs from its own lawyers, which I
22 consider shocking.

23 MR. HEAD: Might I ask, Mr. Davis, in response to
24 your request for a subpoena in District Court was any
25 portion of your subpoena granted? Were there any documents

1 produced?

2 MR. DAVIS: Not a one. And we feel we have been
3 substantially biased by many of the things that have happened
4 many of the actions taken by the federal judge up there and
5 we've made our record and we're ready to appeal.

6 MR. HEAD: What was the specific legal basis that
7 he gave for denying your request for a subpoena?

8 MR. DAVIS: On many of the documents -- there was
9 a list of documents. They are no longer a part of this
10 subpoena. I would like to have them but I don't consider
11 any of them totally critical. There were lists of work
12 papers prepared by SS&D. They are in the Nuclear Regulatory
13 papers. There is page after page showing on a given date
14 an SS&D lawyer preparing a memorandum dealing with MELP in
15 some fashion, sending it off to CEI. We submitted a list
16 of those documents and it is true that the Licensing Board
17 did undertake to go through them and did come up with a
18 couple of them that it felt were quite critical. It came up
19 with a couple that it felt totally undercut some of the
20 assertions of SS&D lawyers and were part of its main thrust
21 in deciding for the suspension of SS&D.

22 Our position is the City has never seen any of
23 those documents, was never given a chance to explain them.
24 But, all right, I'm willing to simplify matters and we're
25 not even raising the question of privilege documents in this

mpb5
1 point.

2 MR. HEAD: Are those the same 50 documents referred
3 to in the prior hearing?

4 MR. DAVIS: Right, the judge held those privileged
5 up in Cleveland. I strongly disagree with that but again
6 it's moot now because I'm not asking for them any more.

7 MR. HEAD: Privilege was the basis for his ruling,
8 is that right?

9 MR. DAVIS: Right, one basis. The other basis was
10 insufficient particularity which I think is a nonsense ruling
11 to put a kind word on it. How can we, without knowing the
12 filing system of our own lawyers, identify by number the
13 precise files? We could have gone through, I suppose, had
14 we treated this as a full scale federal trial, the interroga-
15 tories and the rest. But it has been treated as a collateral
16 proceeding. We were initially ready to go forward on motion
17 on exhibits and the whole thing has escalated. We have
18 never gone through the phase of written interrogatories to
19 identify documents which is the usual course. Now, we can do
20 that but I have attempted to bypass that with a written
21 subpoena here, a subpoena to one of the SS&D lawyers because
22 of the indications in the Appeal Board's opinion that time
23 is critical. This whole thing has dragged a half a year
24 past where it should have. It has dragged in both cases to
25 such a point that SS&D has in fact been in the proceedings

mpb6 1 all the way through, it's the notion of the City that the
2 damage is done by their being there. So I have attempted
3 to simplify and expedite the thing. I have asked for certain
4 files which will show if I'm correct SS&D bleeding rather
5 critical financial information about the City's Municipal
6 Electric Light Plant.

7 MR. HEAD: Are you indicating, Mr. Davis, and if
8 your subpoena were to be granted that that would in effect
9 as far as you know now constitute the sum total of the
10 discovery that you would consider necessary for this proceed-
11 ing?

12 MR. DAVIS: I think so, your Honor, yes. We have
13 had a chance to do some discovery, what Mr. Gallagher
14 referred to there was we took oral depositions of witnesses-
15 preliminary to this evidentiary proceeding at federal court
16 in Cleveland and they were unfortunately not always prepared,
17 in a couple of cases they were but in most cases they were
18 not prepared to preserve evidence. They were taken by one
19 or the other of the lawyers to pin down the other witness,
20 so they aren't full cross and direct examination.

21 CHAIRMAN LAZO: Now you say you have never done
22 this subpoena compared to the subpoena before the other
23 special board and we heard the talk of 50 documents that the
24 actual antitrust board looked at. Do you have any idea in
25 connection with the subpoena now before this Board as to the

apb7 1 volume or amount of the documents or files that you are talk-
2 ing about, physically? In other words you want to get into
3 the files. What are we talking about? 300, 50, 25?

4 MR. DAVIS: I would think over the period of time
5 we are talking about here it might run 100, it might run 150.

6 MR. HEAD: But you are unable to identify what
7 proceedings those files might relate to, particular bond
8 issues or other particular matters, is that right?

9 MR. DAVIS: I have asked for all of them.

10 MR. HEAD: I know you have asked for all of them
11 but can you identify how many proceedings you have had or how
12 many cases you have had with Squire Sanders?

13 MR. DAVIS: We've already done that. In fact,
14 attached to the initial brief of the City we have set forth
15 based on billing a great many of them, if not all of them.

16 MR. HEAD: How many cases were involved? About
17 100?

18 MR. DAVIS: I think it's between 100 and 150,
19 something like that for the period in issue here. There
20 could be a good deal of duplication. I don't think it would
21 take forever to go through them and the kinds of things I
22 think the City would be interested in could be determined
23 fairly readily.

24 MR. HEAD: If your subpoena were to be granted,
25 what about time? How much time do you think would be needed

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1 to go through the 100 to 150 cases or files that are currently
2 at issue in connection with your subpoena?

3 MR. DAVIS: 2 or 3 days maybe.

4 MR. HEAD: So if you were granted the discovery,
5 you took your deposition, you would have access to the files,
6 we're only talking about a week or maybe 10 days time from
7 your standpoint?

8 MR. DAVIS: I think that's really about all I would
9 need.

10 MR. HEAD: Of course, we are going to have a
11 motion that will come up which will reargue substantially
12 some of the points we're talking about here today.

13 The last question I have, Mr. Davis, would be
14 in connection with a specific ruling by the appeal board that
15 what we're supposed to be concerned with is whether there is
16 a substantial relationship between the issues in the antitrust
17 proceeding and the prior work done by the firm. Are all
18 these documents actually necessary to make that determination,
19 the specific files or would not a description of the type
20 of work that was involved, would not that be sufficient for
21 the purposes of this hearing and if so, why not?

22 MR. DAVIS: Well, I can argue that one of several
23 ways. I felt and do feel that the Board has before it in
24 documentary form sufficient evidence to decide the matter
25 except for possibly the question of what SS&D lawyers told

mpb9

1 the City. I have always taken the position that there is
2 more than enough evidence but this has always been in dispute
3 and in what is now apparently heading for a full evidentiary
4 hearing. I feel if it is going to be that way the City
5 should be in a position to fully answer the position of
6 SS&D that they never learned anything about us at all
7 doing all our financing for 60 years, which is essentially
8 the position they take.

9 MR. HEAD: I guess my point is are the specifics
10 relevant and all we have to determine is the substantial
11 relationship between the work done and the issues in the
12 antitrust case?

13 MR. DAVIS: Well, they help. I adopt a number of
14 approaches trying to get before the Board the essence of
15 what it is that SS&D knows about us and how it could help in
16 an antitrust case and I argue it several ways. What we're
17 really talking about now is my so-called shotgun approach
18 which I do not for a second, however, concede any invalidity
19 to. I am saying that somebody who has the voluminous detailed
20 information about a municipality's finances that SS&D necess-
21 arily did from the massive amount of financial legal work
22 they did in doing all our bonding is in a total position of
23 knowledge with regard to many, many things that bear on many
24 faces of the antitrust review and I can show that relevance.
25 One of the clearest, simple listings was in the Staff's brief

mpb 10 1 when they set forth some 14 areas of financial concern in the
2 antitrust review, where the kinds of information the City
3 says that SS&D got from its work for the City would be highly
4 relevant.

5 MR. HEAD: Thank you, Mr. Davis.

6 Mr. Gallagher, let me try to complete the circuit
7 with you on similar type questions. We have heard counsel's
8 estimate of what he considers would be involved from a file
9 standpoint in connection with the subpoena before this Board.
10 Do you have any knowledge as to how many files might be
11 referred to in the subpoena that we're discussing here?

12 MR. GALLAGHER: I really don't, Mr. Head. I
13 received this on Saturday in my office. I've not had a chance
14 to consult with my client. It relates to different kinds of
15 files. I presume it would take some time for them to review
16 their files to find out what there is, but I am in no position
17 at this moment to suggest a time element to the Board on this
18 matter.

19 MR. HEAD: When you file your motion would you be
20 in a position to provide that type of information about what
21 we're talking about physically and what your estimates might
22 be time-wise with regard to what it would take?

23 MR. GALLAGHER: I will confer with my client and
24 attempt to get some reasonable estimate at that time.

25 I would want to urge back, if I may, upon the Board

mpb 11

1 that there has been discovery in this case, that the deposi-
2 tions of all the witnesses and anyone else that the City
3 wanted has been taken by the City, and while the City contends
4 apparently at this time that those depositions were not taken
5 on direct examination, that is true. He took them on cross-
6 examination and had ample opportunity to explore every facet
7 of this matter. So there has been thorough discovery already
8 in this case by both sides.

9 MR. HEAD: There was one more question I had for
10 you, Mr. Davis, if I could -- thank you, Mr. Gallagher.

11 Is the information sought in this subpoena exactly
12 the same or broader than the 50 documents that the antitrust
13 board has reviewed in camera, or, in other words, are you
14 broadening those 50 documents or is it the same material?

15 MR. DAVIS: I have eliminated them, sir.

16 MR. HEAD: Those are not involved at all?

17 MR. DAVIS: No.

18 MR. HEAD: All right, thank you.

19 MR. DAVIS: I would like to rejoin Mr. Gallagher
20 on one thing. I want to give you an example of the kind of
21 thing I am looking for.

22 In 1972 the City asked Squire, Sanders and Dempsey
23 to prepare a revenue bond issue for the Cleveland Electric
24 Light Plant. Now, this particular episode is of great
25 interest to them for certain reasons. They attempt to argue

apb 12 1 that the City waived certain things because of the way the
2 matter was handled. The SS&D partner who is handling this
3 bond issue was Mr. John Brueckel. The City does not
4 consider this particular episode critical in any particular
5 way, but as a sample of a specific kind of an issue it serves
6 to illustrate my point. I did take Mr. Brueckel's deposition.
7 Mr. Brueckel asserted generally that he didn't learn anything
8 in particular about the City in the course of all his dealings
9 with it in preparing the revenue bond issue beyond what was
10 publicly available. Fine. Let's see your file. Presumably
11 in the file of SS&D there would be work papers, notes,
12 memorandum to the file, his conversations with other SS&D
13 lawyers, memoranda of his conversations with the variety of
14 City officials that he dealt with.

15 Now it would be very interesting for a lawyer to
16 have something like that to see whether his own lawyer is
17 telling the truth and I have asked for similar files with
18 regard to a variety of other financings. We have never seen
19 those files. I am cross-examining my own lawyers blind
20 about an area of high technical expertise, that is Ohio
21 bond finance law which is an esoteric specialty and I've had
22 to do it without one document to see whether they are telling
23 the truth or not and that's why I would like the benefit of
24 our own files prepared at our expense by our own lawyers.
25

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1 MR. GALLAGHER: May I respond to that? I think
2 it is important that I do so in the context in which it is
3 stated.

4 the 1972 bond ordinance matter has been held
5 by Mr. Rigler and the Licensing Board not to be relevant
6 to the proceedings before it. He pointed out that there was
7 no issue made with respect to it by the City and has
8 stricken all of the evidence from the record of this matter
9 that relates to that issue. So that we have precisely here
10 the kind of situation to which the Board has addressed
11 itself, to wit., relevance.

12 And in our motion for a protective order we
13 will point out to this Board that that is not part of the
14 original proceedings and therefore there is no nexus between
15 the evidence which is sought by Mr. Davis and the matter
16 before the Licensing Board.

17 CHAIRMAN LAZO: Mr. Gallagher, perhaps you can
18 explain. Is it not unusual for a lawyer to deny the right to
19 his client to inspect his own files? It's not a question
20 of privilege.

21 MR. GALLAGHER: Well, of course what they sought
22 all along was an inspection of CEI's files.

23 CHAIRMAN LAZO: Well, Mr. Davis is talking about
24 their own files. Presumably there's a file in the SS&D
25 law firm that says "City of Cleveland" and it may say MELP

eb2 1 or "City of Cleveland Bond Issue." Presumably they have
2 paid their fees. There is no lien on those files. Why is
3 the client not entitled to inspect their own files?

4 MR. GALLAGHER: Well, relevancy for one thing;
5 two, the characterization of the file is not quite as
6 simplistic as Mr. Davis would suggest it is.

7 All I can say to you at this particular juncture
8 is that these are not City files as he suggests. He suggests
9 perhaps that some papers had come over to SS&D from the City.
10 There are some papers in SS&D's possession that were self-
11 generated essentially in connection with some of the matters
12 for which it worked on the City. These were called for in
13 the prior subpoenas and these are the very matters through
14 relevance or other grounds both the District Court and
15 the prior Boards that have passed upon this matter have
16 held that we were not required to produce.

17 MR. HEAD: Mr. Gallagher, I know you're going
18 to have your motion coming up, and I won't hold you to this
19 if you want to change your mind in your motion, but are you
20 relying on privilege at all as an opposition to the sub-
21 poena?

22 MR. GALLAGHER: Yes, I'm relying on privilege
23 but more specifically I think that Mr. Reynolds would
24 address himself to that point. I think he strongly feels
25 that privilege protects against the disclosure of the files.

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1 MR. HEAD: Of the City files.

2 Mr. Reynolds.

3 MR. REYNOLDS: Yes, sir. As I read the request
4 for documents it seems to me that a request for all files
5 referring to, and then the list of a number of items, would
6 clearly require the production of material in Squire,
7 Sanders and Dempsey's possession which CEI would consider --
8 that's Cleveland Electric Illuminating Company -- would
9 consider to be privileged matter.

10 And I would oppose, and intend to file a motion
11 opposing the disclosure of any information which would be
12 entitled to the protection of privilege by the Cleveland
13 Electric Illuminating Company.

14 MR. GOODHOPE: What specification in the sub-
15 poena are you referring to now, Mr. Reynolds?

16 MR. REYNOLDS: I'm looking at the schedule of
17 documents to be produced and under Paragraph 2, for example,
18 "all files referring to. . . ." and the first item, for
19 example, is "City of Cleveland Municipal Electric Light
20 Plant, MELP."

21 To the extent there are files that would make
22 reference to that that would be entitled to a claim of
23 privilege by CEI I would certainly want to assert that claim
24 of privilege.

25 And I would point out to this Board that a request

eb4 1 in almost identical terms was made of CEI, not of Squire,
2 Sanders and Dempsey, by the City in the NRC antitrust
3 proceeding and pursuant to that request, some 500 documents
4 were claimed to be privileged and that privilege claim has
5 been upheld. It is now on appeal in the United States
6 District Court for the District of Columbia, but it has been
7 upheld by a Special Master and then on a procedural question
8 went up to the Licensing Board and the Appeal Board and
9 the privilege has been sustained.

10 To the extent that that claim of privilege which
11 was sustained to those 500 documents would under this request
12 also embrace the same 500 documents I would certainly not
13 want the City to invade the privilege indirectly when it
14 had been precluded from doing it directly.

15 So I would intend to oppose this subpoena or
16 move to quash the subpoena, at least to the extent that it's
17 necessary to protect the claim of privilege by the Cleveland
18 Electric Illuminating Company.

19 I also would add that as to Item No. 1, for
20 example, which does ask for all files pertaining to the
21 issuance of notes, bonds, or other debt instruments for
22 the City of Cleveland, I believe that the Licensing Board
23 has specifically ruled that the matter of bond ordinances
24 and debt financing is not a matter at issue in the anti-
25 trust proceeding.

ab5 1 And it seems to me that to the extent we're going
2 to open the door at this late date to discovery of the City
3 for this kind of information which, I might add, parallels
4 a similar request for discovery in the antitrust proceeding
5 filed just last week by the City, a request to reopen
6 discovery to get the same information as asked for here in
7 connection with bond ordinance and bond indebtedness, I
8 would also feel compelled to resist that because I believe
9 we're at the end of the antitrust hearing. The door has
10 been closed on that issue by the Chairman. It really is not
11 relevant or could lead to anything that is relevant in that
12 proceeding.

13 And it would certainly be in the interests of
14 the Applicants not to have discovery reopened at the eleventh
15 hour in this whole area.

16 MR. HEAD: Mr. Reynolds, let me ask you something
17 in connection with, for example, looking at the schedule
18 of documents in Paragraph No. 2, just for my own clarifica-
19 tion, are you indicating that, for example, some of the
20 CEI files might refer to the Municipal Electric Light Plant
21 and that therefore they would be within the context of this
22 subpoena and you would claim privilege as to them?

23 In other words, I presume there are CEI files
24 at Squire, Sanders and also City of Cleveland.

25 MR. REYNOLDS: I guess my position would be that

eb6 1 as to files in the possession of the Cleveland Electric
2 Illuminating Company we've gone that round and it's behind
3 us.

4 To the extent there are files in Squire, Sanders
5 and Dempsey's possession which are either internal to
6 Squire, Sanders and Dempsey or are in a file marked for
7 CEI or maybe in a file marked for the City that are files
8 that would be entitled to a claim of privilege by my client,
9 I would want to assert that claim of privilege and maintain
10 the protection.

11 I don't know how Squire, Sanders and Dempsey
12 maintain their files so I don't know what documents we're
13 talking about here. But I would not want a document which
14 I claimed as privileged, because it was in the possession
15 of CEI, for example, I would not want another copy of that
16 document then to be turned over in this discovery without
17 having an opportunity to claim the same privilege for the
18 identical copy.

19 And it seems to me that I would be entitled to a
20 claim of privilege as to all copies of that document that
21 are in the possession of my client or in the possession of
22 co-counsel for the client.

23 So I just don't know how they maintain their
24 files.

25 MR. HEAD: You don't know specifically whether

eb7 1 there is any such overlap or privileged document, though,
2 do you?

3 MR. REYNOLDS: No, sir, I don't. I guess my
4 problem is that-- The claim of privilege is CEI's to make
5 and not Squire, Sanders and Dempsey's to make, as I under-
6 stand it, under the law of privileged communications and
7 therefore it would have to be asserted by me on behalf of
8 CEI, and that's all I'm suggesting.

9 I think because of the unique posture of Squire,
10 Sanders and Dempsey in this proceeding that's all I'm say-
11 ing, that to the extent the request is made of Squire,
12 Sanders and it's a claim of privilege and must be asserted
13 by the client, I want to indicate at this juncture on the
14 record that the client intends to claim the privilege and
15 to maintain the claim of privilege that it has asserted
16 throughout this proceeding.

17 CHAIRMAN LAZO: This would appear to be an
18 appropriate time to take a brief recess. Let's recess for
19 15 minutes, please.

20 (Recess.)

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1 CHAIRMAN LAZO: Mr. Davis, in the schedule of
2 documents to be produced which you attached to your subpoena
3 form you refer in paragraph 2 to "All files referring to...."
4 And then there's a list of specific subjects.

5 Do you mean by that all City files, all of your
6 files, the files of the City of Cleveland; or is that as
7 broad as it is written? It could be anybody's files, some
8 other clients of the Squire law firm; is that correct?

9 MR. DAVIS: Yes, it could.

10 But I would say if they deal with our affairs
11 and the information submitted by the City is being used by
12 its lawyers for somebody else's benefit, that gets into
13 another area of ethical conduct. There is something called
14 the lawyer-client privilege, and I don't think information
15 supplied by the City of Cleveland about its own affairs is
16 something that its lawyers may freely transfer to other
17 clients without the City's written consent; which was never
18 given.

19 CHAIRMAN LAZO: But is that relevant to our
20 determination here?

21 MR. DAVIS: I think it may turn out to be very
22 highly relevant. I think it may get us into the very area
23 of conduct the City alleges that has been going on all these
24 years behind its back. We have a few samples of it in the
25 exhibits to our first brief.

wb2 1 CHAIRMAN LAZO: In sustaining the City's burden
2 in this proceeding, is not all the City has to do is to show
3 that matters were communicated that had a substantial re-
4 lationship to the issues in the antitrust proceeding? It
5 doesn't matter, does it, what the law firm with those com-
6 munications?

7 MR. DAVIS: Mr. Chairman, you're quite correct.
8 I think that accurately states the City's understanding of
9 the law.

10 We have gone somewhat beyond our burden of proof,
11 but here we are in June and they're still in the case. I'm
12 not quite clear what it does take to get them off.

13 CHAIRMAN LAZO: Well, we're near the end of
14 June.

15 If your application for a subpoena was to be
16 denied, Mr. Davis, when would the city be ready to go to
17 hearing on this case? The middle of July?

18 MR. DAVIS: Yes. We're essentially ready. This
19 would be the last major piece in our preparation. My only
20 problem at that point would be the availability of witnesses.

21 My general problem on that, without getting
22 into it in any great detail, is that from the City's stand-
23 point we used, if I recall, four rather critical City high
24 officials, the heads of four major departments, as our main
25 witnesses. And it's their availability that is of

wb3 1 considerable interest to me. And I would have to check that
2 pursuant to a determination by this panel when it wants to go
3 forward.

4 CHAIRMAN LAZO: Thank you, sir.

5 MR. GOODHOPE: Let me ask a question. Is it
6 your contention that any statement that the law firm,
7 the Squire firm, to any of its clients, not only CBI, which
8 referred in any way to the City of Cleveland must have
9 necessarily come to their knowledge as representatives of the
10 City of Cleveland?

11 MR. DAVIS: No, I would not contend that.

12 MR. GOODHOPE: I wouldn't think so either.

13 MR. DAVIS: I would say this--

14 MR. GOODHOPE: How are we going to separate
15 this out, now? How is the Board going to do that if it
16 decides to-- Supposing they made a reference to the City
17 of Cleveland: how are we going to determine whether or not
18 this information was obtained by the Squire firm as legal
19 representatives of the City of Cleveland?

20 MR. DAVIS: Well this is the dilemma they find
21 themselves in, Mr. Goodhope.

22 MR. GOODHOPE: It's a dilemma you find yourself
23 in. And us, too.

24 MR. DAVIS: Well, I would say that without insist-
25 ing that that be the case, any practicing lawyer who is dis-

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1 cussing one client's affairs with another client owes the
2 duty of disclosure that is a part of all this. And if we
3 discover episodes where this was going on through the
4 documentary discovery that I'm requesting, and we then dis-
5 cover there was no disclosure of that, I think that has a
6 tremendously direct bearing on what we're about here.

7 In any event, I tried to, in this Item 2, be
8 as precise as I could with, again, not having any notion
9 of exactly how they keep their files any more than Mr. Reynolds
10 does. I'm using certain subject matters that are directly
11 pertinent.

12 And I would say that, without getting into these
13 files, there no, really no real way of knowing.

14 It seems to me at that point where we have
15 looked at the files and they feel certain documents are
16 privileged, they then have the right to object to their
17 being introduced in evidence.

18 MR. GOODHOPE: On the basis of relevancy?

19 MR. DAVIS: Relevancy, privilege or whatever else
20 they have.

21 But it seems to me the City ought to have the
22 right in the first analysis to see what is in its own files,
23 or in files dealing with its own affairs.

24 CHAIRMAN LAZO: Mr. Davis, if the Board does
25 issue your subpoena, when would you then be ready to go to

wb5 1 hearing? Can you estimate?

2 MR. DAVIS: I was trying to indicate earlier, I
3 would think that a week after actual access.

4 CHAIRMAN LAZO: Mr. Gallagher, I wonder if you
5 could elucidate, please: You referred to an application
6 for a protective order. Precisely what is the nature of
7 the protective order that you would propose asking the Board
8 to grant?

9 MR. GALLAGHER: Yes. It would be in the nature
10 of asking the Board in the first instance to quash the duces
11 tecum feature of the subpoena. Our contention in that
12 respect would be that the City has already engaged in dis-
13 covery, it has already taken the deposition of Daniel J.
14 O'Laughlin, it has already listened to him testify in this
15 very room before the Special Board, it has had an opportunity
16 to cross-examine him in the Federal District Court in
17 connection with this same proceeding conducted there. It has
18 had an opportunity to cross-examine, both in court and on
19 deposition, all of the other lawyers associated with SS&D.

20 It has sought, in addition, as the second ground,
21 to quash the duces tecum feature, these very records, in con-
22 nection with other subpoenas which it has served on
23 Mr. O'Laughlin and other members of the firm.

24 The District Court has passed on it, the other
25 Boards have passed on it. We feel that this is a redundant

wb6 1 effort, that it is harrassment, and we think that to be an
2 independent ground to quash it.

3 We think, further, that although it is limited
4 to fewer items, the generality of the kinds of records it
5 seeks is really not limited beyond what the other depositions--
6 what the other subpoenas called for.

7 We would propose, in connection with our motion,
8 for example, to attach copies of the other subpoenas served,
9 the duces tecum features. We would propose to submit to you
10 the rulings of the prior boards that have considered it
11 here. We would have the transcript of Judge Krupansky's
12 remarks with respect to it for your examination.

13 This matter has been before this Commission and
14 it has been before the District Court for an extended period
15 of time. There has been ample opportunity to discover.

16 I submit the time for discovery is long past.
17 We are at the eleventh hour and we ought to proceed with
18 this matter. And that's basically our position.

19 I do have one additional problem which I should
20 draw to the Board's attention. I did not receive a copy
21 of the application. The subpoena itself came to my atten-
22 tion on Saturday. It calls for the deposition of Mr. O'Laughlin
23 the day after tomorrow, on Wednesday. And I will be in
24 Philadelphia on that day in any event.

25 And we do wish to file this motion for a protective

wb7 1 order.

2 So that under the circumstances we would ask
3 leave of the Board to a date certain on which to file it,
4 or, concomitant with that, an extension of the return date
5 on the subpoena itself.

6 CHAIRMAN LAZO: How much time would you need,
7 Mr. Gallagher, to prepare -- to file your application for a
8 protective order?

9 MR. GALLAGHER: I think if we have to July 6th
10 that we can have it filed by that time. That would give me
11 the balance of this week to work on it, and then perhaps
12 get it mailed out over the weekend so that it's here by the
13 6th.

14 CHAIRMAN LAZO: And, Mr. Reynolds, you, too,
15 would file a --

16 MR. REYNOLDS: I would ask a similar extension
17 until July 6th. I have not received any of the papers yet.
18 And I would request, if we're not on the service list, that
19 I be added to the service list so that we do get a copy of
20 all filings.

21 MR. DAVIS: You are.

22 MR. REYNOLDS: I guess I just haven't received
23 any thing.

24 CHAIRMAN LAZO: Well then we will direct you,
25 Mr. Gallagher and Mr. Reynolds, to file your motions so that

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1 they are served on or before July 6th, and provide until
2 July 12th for any answers.

3 Mr. Davis, is that convenient? Or does that
4 press you?

5 MR.DAVIS: That will be quite satisfactory,
6 Mr. Chairman.

7 CHAIRMAN LAZO: And we would expect any answer
8 to be filed by you, Mr. Davis and Mr. Goldberg, by the 12th.

9 MR. GOLDBERG: That's acceptable.

10 CHAIRMAN LAZO: Thank you.

11 MR. HEAD: Mr. Gallagher, it would be helpful to
12 the Board if in your motion for a protective order, if you
13 would indicate some idea to the Board of what volume of
14 files you might be concerned with.

15 MR. GALLAGHER: I've made a note of that, sir.

16 MR. HEAD: Inthat regard, since the subpoena
17 appears on its face to be broader than just City of Cleveland
18 files, it might be helpful if you could give us some idea
19 of which are actual city files and which might be other
20 clients' files. We don't need a lot of specificity, but
21 just so we would have some idea of what actually we are
22 dealing with from the standpoint of papers and time.

23 CHAIRMAN LAZO: We had said earlier that it
24 would be very helpful, and I think necessary, at an early
25 date for the Board to have before it a listing of the issues

wb9 1 in controversy in the principal antitrust case. I note that
2 in its Pre-hearing Conference Order No. 2 back in July of
3 '74 the Antitrust Board did attempt to set forth the issues
4 in controversy in some detail. We, of course, do not know
5 to what extent those have been amended or augmented or
6 withdrawn or added to.

7 Who could tell us what is available here at
8 this stage?

9 MR. GALLAGHER: I'm not certain that my answer
10 is responsive, but I had contemplated if it pleased the
11 Board to add an additional witness to the four I had called
12 in Federal Court for this very purpose. And that witness
13 would be Mr. Reynolds. And I would expect to have him testify
14 and make part of the record of this proceeding what he,
15 from his peculiarly intimate relationship to this matter,
16 understands, and is prepared to advise the Court as to what
17 issues -- or the Board, rather -- as to what issues are or
18 are not before the Antitrust Board.

19 It occurred to me that he probably is best
20 prepared to do that and to aid the Board in this connection.
21 I conceived of him as a witness in this matter before this
22 Board.

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CHAIRMAN LAZO: Mr. Goldberg?

MR. GOLDBERG: The Staff would preserve the right to object to Mr. Reynold's testifying as to what the issues and matters in controversy are in the antitrust proceeding.

To answer the Board's inquiry a little more directly, issues and matters in controversy that were set forth in the prehearing conference Order No. 2 have survived and are viable issues in the proceeding.

In addition to that, the parties opposed to the Applicants for an unconditioned license on September 5th filed more specific allegations of the charges against Applicants with respect to the antitrust proceeding. But generally speaking those issues and matters in controversy which were set forth in the prehearing conference Order No. 2 are the general broad issues that we're dealing with in the antitrust proceeding.

CHAIRMAN LAZO: Mr. Goldberg, thank you.

And the September 5th filing, will you identify that again, please?

MR. GOLDBERG: The parties were requested by the Applicants for more specific information with respect to their contentions in the antitrust proceeding and on September 5th, the Department of Justice, the NRC Staff and the City of Cleveland filed what were called "Nature of the Case to Be Presented Pleadings" in which they set

1 forth specifically their allegations regarding the Applicants'
2 application for a license for the nuclear facilities.

3 Those have been amended to certain minor extents
4 throughout the course of the proceeding but generally speak-
5 ing, the broad issues we're dealing with in the antitrust
6 proceeding were the very ones set forth in prehearing con-
7 ference Order No. 2.

8 CHAIRMAN LAZO: Was that 1974 or '75?

9 MR. GOLDBERG: July '75 I believe.

10 MR. GALLAGHER: September.

11 MR. GOLDBERG: September 5th, 1975. I'm sorry;
12 yes.

13 CHAIRMAN LAZO: Thank you.

14 MR. GALLAGHER: I'm troubled by Mr. Goldberg's
15 statement for the simple reason that in the brief which the
16 Staff filed before the Appeal Board it purported to set
17 forth issues itself, and to take a pretty strong position
18 with respect to those issues.

19 I would submit if the Staff feels it can state
20 what the issues are for a Board that certainly we ought to
21 be entitled to give this Board what assistance we can with
22 respect to what those issues are. I'm not suggesting that
23 any other party be bound with respect to its testimony but
24 certainly we should be entitled to present our view.

25 CHAIRMAN LAZO: You're suggesting the answer to my

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1 next question, Mr. Gallagher. I was about to wonder whether
2 or not it might be possible to obtain a stipulation by the
3 parties as to what the issues are in the antitrust case.

4 MR. GALLAGHER: My answer is No.

5 MR. DAVIS: I would certainly object, Mr. Chairman,
6 to the type of proceeding suggested by Mr. Gallagher, to
7 have Mr. Reynolds, who is a highly partisan lawyer for
8 the CAPCO defendants, tell this panel of lawyers what the
9 issues are I think is a little bit superfluous.

10 Mr. Goldberg pointed out that they exist in
11 writing. I think the panel is entirely adequate to determine
12 what they are. If we were to get into the kind of a situa-
13 tion where a lawyer is telling other lawyers what the issues
14 are I suppose that I am then forced to the resort of bring-
15 ing in special counsel of the City of Cleveland or the local
16 Washington law firm of Goldberg, Fieldman and Hjelmfelt,
17 who are familiar with the issues, to testify in response.

18 I think that whole line of proceeding is in-
19 appropriate and I would object to it. I think the panel
20 can look at the prehearing list of issues and the other
21 documents they need to determine what the issues are.

22 CHAIRMAN LAZO: Well, I think principally we were
23 simply looking for identification in the record as to where
24 we might find these statements.

25 MR. REYNOLDS: I'm rising to speak only to that.

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1 I won't comment on anything else.

2 The prehearing order No. 2 which contains the
3 broad issues I think is probably the starting point. I
4 would submit that the September 5th, 1975 filing by the
5 City of Cleveland would be the most appropriate filing for
6 purposes of this Board's determination insofar as the motion
7 before it.

8 There was also a September 5th filing by the NRC
9 Staff and there was an answer to interrogatories filed by
10 the Department of Justice, both on September 5th, 1975.

11 The Department of Justice as recently as last
12 week ~~was~~ its filing and added some additional allega-
13 tions. And my recollection is that they do not concern
14 that part of the case that directly relates to CEI and the
15 City of Cleveland but, rather, relate to other issues in
16 the case involving some of the other Applicants. But that
17 filing was last week, and I can provide the exact date for
18 the Board.

19 I think in addition to that, in terms of trying
20 to determine what the issues are, the Licensing Board has
21 ruled and we can give you the transcript reference because
22 the ruling was made by the Board on the transcript. It
23 was not a separate written order.

24 The Licensing Board has ruled on Applicants'
25 motions to dismiss certain allegations as well as its motion

eb5 1 to dismiss the case generally. It denied the latter. As
2 to the former, it granted certain of the requests by the
3 Applicants to dismiss various allegations. Again my recol-
4 lection is that that part of the Licensing Board's ruling
5 relates to issues that would not be terribly germane to the
6 particular matter that's before this Board.

7 I believe that completes the paper record, if
8 you will, of the allegations, but for the ruling by
9 Chairman Rigler that appears at 7499 of the transcript in
10 the antitrust hearing, and that is the ruling that has
11 been referred to earlier to this Special Board relating to
12 testimony dealing with the bond ordinance, and the Chairman's
13 determination to strike all evidence concerning that matter.

14 His ruling there was based specifically on the
15 City's September 5th filing.

16 CHAIRMAN LAZO: Thank you, Mr. Reynolds.

17 MR. HEAD: Just one other brief item, gentlemen.

18 Referring back to the conference call we held
19 on June 21st, 1976, the Memorandum for the File that I
20 indicated I would prepare I have prepared. It's a memo
21 dated June 21st, 1976. It will not be in the Public Docu-
22 ment Room; it will be in the panel's document room at the
23 East-West Towers Building. It will be available for
24 inspection by any of the parties at any time.

25 I just wanted to note that on the record, that

eb6 1 the memorandum regarding possible withdrawal was made and
2 is available to the parties.

3 MR. GALLAGHER: I would have the record show at
4 this time that this was considered by Squire, Sanders and
5 Dempsey and we have no objection to the presence of Mr. Head
6 on this panel.

7 CHAIRMAN LAZO: Thank you, Mr. Gallagher.

8 MR. DAVIS: I would also add for the record that
9 the City has no objection to the presence of Mr. Head.

10 MR. HEAD: Thank you, Mr. Davis.

11 MR. REYNOLDS: The other Applicants have no
12 objection.

13 MR. GOLDBERG: The Staff has no objection.

14 MR. HEAD: Thank you, gentlemen.

15 CHAIRMAN LAZO: Well, it would appear that it
16 might be appropriate to adjourn this prehearing conference
17 now. I would ask whether there are any other matters that
18 any of you believe we could profitably attend to. I don't
19 know whether we should attempt to schedule another pre-
20 hearing conference at this time. We'll await the filing of
21 the motions and the responses thereto, and endeavor to act
22 on those promptly.

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1 MR. GOLDBERG: Mr. Chairman, in the event there is
2 not another prehearing conference here in Washington, one of
3 the items you mentioned during the conference call that
4 you wanted on the agenda for today was the location of the
5 evidentiary hearing and I was just wondering whether or not
6 you wished to discuss that at this time?

7 CHAIRMAN LAZO: I think that might well be an
8 appropriate thing to do.

9 During our prehearing conference -- at least our
10 conference with counsel by telephone, there was some discussion
11 I believe by you, Mr. Davis, regarding the number of members
12 of the Department who would have to come to Washington. In
13 most instances of antitrust proceeding, most of the attorneys
14 reside in Washington. The Staff is here and generally the
15 Board members are here. Simply adhering to the reason-
16 able rule of convenience of all the parties. Antitrust
17 proceedings generally are conducted in Washington. The
18 Commission's policy, of course, regarding nuclear facilities
19 has been to commence the proceeding in the proximity of
20 the facility. Very often those hearings are held in their
21 entirety in the field.

22 But the policy, again, is convenience of the parties
23 and we certainly would be open to a suggestion if Cleveland
24 is a more convenient location for the greater number of
25 people, that might be an appropriate location to conduct the

1 hearing.

2 Do any of you wish to speak to that?

3 Mr. Davis, you're first.

4 MR. DAVIS: I would say, Mr. Chairman, that I think
5 there are going to be certain extensions of the record beyond
6 what we did in Cleveland in the antitrust case up there. The
7 appeal board asked for specific consideration of certain
8 things that took place in 1968 that were not gone into at
9 all in Cleveland. All the documents, all the witnesses
10 were up there, the evidentiary hearing that we had before
11 Judge Krupansky was condensed into two and a half days
12 through the use of rather lengthy trial days. The first day
13 ran from 9:15 or thereabouts until 7:00 at night. We heard
14 in two and a half days from nine or ten witnesses at some
15 length with full direct and cross-examination. Now some
16 of this could be done by utilizing portions of the record
17 that was created up there, and supplemented possibly.

18 My dilemma with regard to City officials is this:
19 that the law director, the finance director, the public
20 utilities director and the airport director, who are probably
21 the four most critical directors to the operation of the
22 City, the directors in Cleveland being the executive heads
23 of the various operating departments of the City, would all
24 be tied up in this thing over a space of two days and it would
25 be pretty awkward for the City's operations to have that and

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actually have them all down in Washington waiting return.

I'm not saying it could not be done but it would be difficult. There are a great many demands on the time of these gentlemen. They come right under the Mayor of Cleveland in authority and responsibility.

If it were held in Washington I would have to very carefully consider presenting the testimony in some written form. I'm not saying that could not be done either. We have had Mr. Kadukis down in Washington on occasion, we could fly him in for one day, but it's taking half of the operating records in the City at one time; to tie them up in this case that is a problem.

Those would be the basic considerations I would have without attempting to dictate to the Board how it should be done.

I do suggest we're going to probably have to add to the record created up in Cleveland in certain areas and would hope that we're going to have to add to it in terms of documentary submissions. We did have on behalf of the City about 27 or 28 written exhibits, about half of which are already before this Board as attached to our first brief and SS&D presented something on the order of 15 or 20 written exhibits and documents. Those could be rather quickly gotten together. They exist and have been worked through by counsel. All of those pretty much were submitted by

1 stipulation up there.

2 CHAIRMAN LAZO: We're facing or anticipating a
3 problem and I guess you referred to it, Mr. Davis, in terms
4 of what is in the record before us and what is not. As we
5 go along here I think it will be necessary that any portion
6 of this rather voluminous antitrust record that you ask us
7 to rely on will have to be very carefully identified.

8 I think you should not assume we have read all those
9 transcripts.

10 (Laughter.)

11 MR. HEAD: Only the Chairman need read all the
12 transcripts.

13 (Laughter.)

14 CHAIRMAN LAZO: Mr. Gallagher, regarding location,
15 do you have any preference?

16 MR. GALLAGHER: My preference, Mr. Lazo, would be
17 in Washington as with the other hearings for two -- there are
18 two principal reasons for this: first of all, we think it
19 important that the testimony be from live witnesses. We
20 think credibility will be an important consideration for this
21 Board and therefore we think it important that you see the
22 witnesses live and hear their testimony live and be in a
23 position to judge credibility from that point of view.

24 Three witnesses of the five we would produce would
25 be in the Cleveland area. I suppose Mr. Davis would question

mpb5 1 Mr. Reynolds as an appropriate witness but nevertheless I
2 include him in the five as of this area. Mr. Lansdale is
3 here and Mr. Hope, the assistant secretary of the sinking
4 fund lives in Alexandria. He is, we think, quite critical
5 to our case and we prefer to have him testify live.

6 The second reason for urging that the hearings be
7 held in Washington is publicity. There has been considerable
8 publicity which has attended the disqualification proceedings
9 in Cleveland, considerable publicity which attended the
10 hearing before the District Court last week. This publicity
11 is something that unfortunately I suppose is inherent in
12 something like this. But in addition to that a number of
13 the people involved are people who are politically connected,
14 some of whom are running for office, without identifying any-
15 body specifically, and it would be in their personal interest
16 to have wide publicity given to this matter. We would feel
17 that that is not in the best interest of justice, it's
18 certainly not in the best interest of my client. And for
19 this reason as well, we urge that the hearing be held here
20 in the surroundings that we have here, in surroundings we are
21 familiar with.

22 MR. DAVIS: Well, I would certainly take exception
23 to any suggestion by Mr. Gallagher that there was any
24 substantial amount of publicity given to any of this in
25 Cleveland. For whatever reasons, the Cleveland papers

mpb6 1 barely mentioned the disqualification. I don't think one
2 article appeared on the front page of either paper. I don't
3 think one article appeared that covered more than about the
4 space of my open hand and the notion that Mr. Campanella, who
5 is the law director of Cleveland, is running for county
6 commissionership would have any bearing on publicity given
7 to this is totally without justification. One of the lawyers
8 in the case from the City of Cleveland is running for a
9 judicial position in Cleveland but I don't see what that has
10 to do with any of this. I don't think publicity is any
11 serious factor and I would certainly dispute that.

12 CHAIRMAN LAZO: Well, it's one of the factors and
13 really that's all we're looking for.

14 I think, too, that one should realize that when
15 the Licensing Board travels that also means that the Court
16 Reporter travels and the reproduction staff, it's a rather
17 large number of people involved in any move and we generally
18 try to accomodate the greater number of people taking into
19 account all the various interests. The obtaining of a
20 suitable hearing room is, of course, another consideration
21 and sometimes the federal courts are available during the
22 summer months and many times they are not.

23 Mr. Reynolds?
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2 MR. REYNOLDS: I'd like to add just one addi-
3 tional fact here to plug into the equation and that is that
4 we are coming to a close in the antitrust hearing. It is
5 now anticipated that we will conclude that hearing if not
6 by July 2nd by the following Friday, which is July 9th,
7 hopefully.

8 The Board has already indicated that the post
9 trial briefing schedule is going to be a very stringent one.
10 It has not yet ruled exactly how stringent, but it does mean
11 that during the month of July and into August my time at
12 least is going to be occupied fully, trying to get a handle
13 on the record that you have already recognized as being
14 voluminous, and completing a post-trial brief.

15 For that reason I would just like to add that
16 my own preference, since it would require my attendance
17 at the hearing irrespective of whether I do testify or don't
18 testify, my own preference would be to have it here in
19 Washington so that I do not take too much time away from
20 what is already going to be a very tight schedule in
21 completing the post trial briefs in the antitrust proceed-
22 ing.

23 CHAIRMAN LAZO: Thank you. We appreciate your
24 problem, and I'm glad you mentioned it.

25 Mr. Goldberg, do you wish to add to this dis-
cussion?

eb2 1 MR. GOLDBERG: The Staff has no objection to the
2 hearing taking place either in Cleveland or in Washington.

3 CHAIRMAN LAZO: Very well. Thank you.

4 Mr. Gallagher?

5 MR. GALLAGHER: May I just add one more thing,
6 Mr. Lazo?

7 A question occurs to me and the question does
8 not have to be resolved at this moment, but it ought to be
9 one. I think that we as lawyers and perhaps the Board should
10 consider, and that is whether it is appropriate to proceed
11 at all in this matter. And this I raise now in light of
12 what Mr. Reynolds said with respect to the conclusion of
13 the hearing on July 2nd or I believe you said at the latest
14 on July 9th.

15 This would terminate essentially for all practical
16 purposes under the present fact situation as we understand
17 it any active participation by Squire, Sanders and Dempsey
18 in the hearings themselves and therefore the urgency which
19 the Appeal Board reflected in its order, it would seem to
20 me under the facts of the case as they now exist, simply
21 are no longer with us.

22 While not addressing ourselves to what I raise
23 at this particular moment, perhaps after the motion for
24 protective order has been briefed and considered by the
25 Court, the Federal District Court will have acted and at

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1 that time it might be worth this Board's attention and
2 everyone's attention to take a fresh look at this in light
3 of that development.

4 CHAIRMAN LAZO: The motion filed by the City
5 of Cleveland requested the Board to suspend the law firm
6 from further participation in the proceeding, and I guess
7 that clearly would include participating in any appellate
8 review that might follow a decision.

9 But we agree there is that to be considered,
10 simply the situation which we all find ourselves in now
11 with the expected termination of the antitrust proceeding
12 in the very near future.

13 Well, perhaps we may want to address ourselves
14 to that, too, at a later date.

15 Are there any other matters that we can profit-
16 ably attend to here this afternoon before adjourning?

17 (No response.)

18 Hearing no response, we'll adjourn this pre-
19 hearing conference and we thank you all very much for
20 attending.

21 (Whereupon, at 3:15 p.m., the prehearing
22 conference was concluded.)
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