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UNITED STATES ATOMIC ENERGY COMMISSION

IN THE MATTER OF:

TOLEDO EDISON COMPANY and
CLEVELAND ELECTRIC ILLUMINATING CO.

Docket No. 50-346A

(Davis-Besse Nuclear Power Station)

and

CLEVELAND ELECTRIC ILLUMINATING
COMPANY, et al.

Docket Nos. 50-440A
50-441A

(Perry Nuclear Generating Station,
Units 1 and 2)

Place -

Washington, D. C.

Date -

Tuesday, 25 June 1974

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ATOMIC ENERGY COMMISSION

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COMPANY :

(Davis-Besse Nuclear Power Station) :

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(Perry Nuclear Generating Station, :
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Postal Rate Commission
Suite 500
2000 L Street, N. W.
Washington, D. C.

Tuesday, 25 June 1974

A prehearing conference in the above-entitled matter
was convened, pursuant to notice, at 9:30 a.m.

BEFORE:

- JOHN FARMAKIDES, Chairman,
Atomic Safety and Licensing Board Panel
- JOHN BREBBIA, Esq., Member
- DR. GEORGE R. HALL, Member

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APPEARANCES:

GERALD CHARNOFF, Esq. and W. BRADFORD REYNOLDS, Esq.,
Shaw, Pittman, Potts & Trowbridge, 910 Seventeenth
Street, N. W., Washington, D. C.; on behalf of the
Applicants.

REUBEN GOLDBERG, Esq. and DAVID HJELMFELT, Esq.,
Suite 550, 1700 Pennsylvania Avenue, N. W.,
Washington, D. C.; on behalf of the City of
Cleveland, Ohio.

JON T. BROWN, Esq. and FREDERICK L. MILLER, Esq.,
Duncan, Brown & Palmer, 1700 Pennsylvania Avenue, N.W.,
Washington, D. C. 20006; on behalf of American
Municipal Power-Ohio, Inc.

STEVEN M. CHARNO, Esq., Antitrust Division, United
States Department of Justice, Washington, D. C. 20530;
on behalf of Department of Justice.

BENJAMIN H. VOGLER, Esq., Office of the General Counsel,
United States Atomic Energy Commission, Washington,
D. C. 20545; and
ANDREW POPPER, Esq., 7920 Norfolk Avenue, Phillips
Building, Bethesda, Maryland; on behalf of the
Regulatory Staff, Atomic Energy Commission.

P R O C E E D I N G S

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2 CHAIRMAN FARMAKIDES: Let's begin.

3 It is 9:30 a.m., and we are having this pre-
4 hearing conference. I guess it is the second one in this
5 consolidated proceeding involving Perry and Davis-Besse.

6 Pursuant to a notice and order for this pre-
7 hearing conference which we initially issued calling for
8 the prehearing conference on June the 14th, and by agreement
9 of the parties we switched to June the 25th. I notice that
10 all the parties are here this morning for the Staff and for
11 the Department of Justice, for the Applicant, for the City
12 of Cleveland, and for the AMP-O.

13 The State of Ohio is not represented this morning.
14 They are excused. They submitted a letter to us dated June
15 20, 1974, confirming a telephone conversation that we had
16 in which they asked that they be excused from participating
17 today.

18 They also submitted by attachment to that June 20
19 letter a statement on participation by the State of Ohio.
20 So far as I have been led to understand, all the parties have
21 agreed to the nature and scope of participation of the State
22 of Ohio as articulated in that statement on participation.

23 That being the case, the Board has no objection,
24 and we will permit then the State of Ohio to participate in
25 the manner outlined therein.

1 Also, we are on notice of the Appeal Board
2 decision, ALAB 202, issued June 10, 1974, resolving the appeal
3 matters raised by the City of Cleveland, and we will proceed,
4 then, pursuant to that decision and pursuant to the order of
5 this Board of April 23, 1974, as modified by our later order
6 following the prehearing conference. I think that order was
7 May 31, 1974.

8 There is a preliminary matter that one of the
9 parties would like to present. Sir, I think for AMP-O?

10 MR. BROWN: Yes, Mr. Chairman, members of the
11 Board, I would like to enter the appearance of Mr. Frederick
12 L. Miller of our firm.

13 Mr. Miller is a member in good standing of the
14 Bar of the District of Columbia, and is formerly trial
15 attorney with the Department of Justice.

16 CHAIRMAN FARMAKIDES: Thank you, sir.

17 Nice to see you, sir.

18 All right, we had an agenda listed for this
19 morning. And the first item on the agenda was the issues in
20 controversy. We thought what we could do is to take the
21 joint statement of AEC Regulatory Staff, Department of Justice,
22 and the Intervenors, regarding the contentions and matters
23 in controversy and go over each of those in turn.

24 Following that, we would discuss in more detail
25 the scope and extent of discovery.

1 On the matter of consolidation, I think we are
2 going to hold off for a while until after we have seen what is
3 produced through discovery, and getting closer, then, some
4 time in the future to the actual trial date.

5 At that point in time we will sit down and discuss
6 the details of proceeding along with the case.

7 I think the general consolidation matters that
8 you all raised initially in your response to the Board's
9 request are sufficient for purposes of discovery. And later
10 on we will get down to the details of presenting a case.
11 I don't think it need be done at this point in time.

12 There is one other point that I would like to
13 note, and we will get to this later because I would like to
14 put that last on the agenda, and that is that the parties
15 have presented a proposed expedited hearing schedule. I think
16 it is fine insofar as it goes.

17 I am sorry, not the parties, two of the parties,
18 Department of Justice and the AEC Staff, and I very much
19 appreciate what these two parties have done here in trying
20 to move the hearing along.

21 I think, however, that there are several other
22 dates that have to be fitted in there.

23 For example, one of these dates is the final date
24 for written testimony. That should be cranked into that
25 schedule.

1 I would also like in that schedule motions for
2 summary disposition, if any, the date for filing of those
3 motions.

4 Then the third item that should be cranked in there
5 is the responses with respect to those motions for summary
6 disposition, if any, again.

7 Now, the proposed expedited hearing schedule
8 didn't consider a split hearing possibility. This is some-
9 thing we are going to be discussing this morning because
10 it seems to us that this is an item that should be discussed
11 by all parties, and as quickly as possible, because it will
12 govern some of your discovery.

13 Also, one caveat that the Board would like to throw
14 out: The last item on the agenda, proposed is, of course, open
15 to discussion. And I think if the intent of the parties were
16 to suggest that we have more than 30 days, we welcome that
17 observation, and we certainly will take more than 30 days
18 in a case like this.

19 If the intent, however, was to put a deadline on
20 us, why, I think they will have to understand that some of
21 these decisions take a little bit longer than others. They
22 can appreciate that.

23 Getting to the joint statement, the Board, Dr. Hall,
24 Mr. Brebbia, myself, all of us have gone over this in great
25 detail. We very much appreciate that the parties, at least

1 four of the parties, were able to resolve whatever differences
2 they had among themselves and generate a document such as
3 this. We appreciate that.

4 We also appreciate that the Applicant in its
5 response may well have problems with some of these contentions
6 and we are going to resolve them either today, following
7 discussion on the record and a short recess, or if the Board
8 can't do it in that fashion, we will resolve it within the
9 next few days by issuing an order.

10 So unless someone else has a different method of
11 proceeding, the way we would do it is to go over each of these
12 contentions raised, the issues raised, broad issue one first,
13 of course, then all the subsidiary issues thereunder.

14 Then broad issue two, and we would like to discuss
15 the need for and the question of broad issue three in detail,
16 at this point in time, especially in view of what I said
17 earlier with respect to consideration of whether or not a split
18 hearing is feasible and perhaps preferable to a one-hearing
19 session.

20 Any thoughts, gentlemen?

21 Is this acceptable to you all, that we go through
22 each of these contentions, Mr. Charno?

23 MR. CHARNO: Mr. Chairman, I think there is some
24 confusion in my mind, at least, when you talk of a split
25 hearing. Do you mean liability and remedy?

1 CHAIRMAN FARMAKIDES: That's right. That is what
2 I mean by split hearing.

3 Is this all right, then? We will go through each
4 of the contentions.

5 All right, let's turn then to the joint statement
6 of the AEC Regulatory Staff.

7 Also we will keep in front of us the response
8 of the Applicant to second follow Applicants' position on each
9 of these.

10 We would ask if there is any further clarification
11 that can be made or any response to the questions the Board
12 would ask, we would welcome these.

13 If you have already responded on the record, either
14 in a formal document or in prior prehearing conferences,
15 why, there is no need to repeat.

16 The first one is broad issue, whether the Applicants
17 have the ability in the relevant markets to hinder or prevent,
18 and they list two activities. Let's go to the first one.

19 Other -- quoting -- "Other electric entities
20 from achieving access to the benefits of coordinated operation.
21 Either among themselves, or with Applicants, or other electric
22 entities."

23 Now, the Board here must also point to this fact,
24 in going over this joint statement, we have looked at the
25 nexus that we, the Board, articulated in our May 31 order, as

1 we understood the party of Cleveland to be stating that nexus,
2 and AMP-O.

3 So again, the nexus that we have looked at is the
4 nexus that we articulated in the order of the Board dated
5 May 31, 1974. And we have gauged these contentions against
6 that nexus. If the parties have any other nexus or nexuses
7 that they would like to suggest other than that which
8 appears in our order of May 31, we would appreciate it.

9 MR. GOLDBERG: Mr. Chairman?

10 CHAIRMAN FARMAKIDES: Mr. Goldberg.

11 MR. GOLDBERG: You are referring to the articula-
12 tion of the Board's concept of nexus in an order of May 31.
13 I think the reference really is to your prehearing order No. 1
14 of May 2nd, 1974, where on page 2 the Board states it is
15 understood that the party Cleveland alleges the nextus identified
16 by the Board in its final memorandum and order of April 15,
17 1974.

18 CHAIRMAN FARMAKIDES: Mr. Goldberg, I stand
19 corrected. That's correct, sir. I didn't have that with me,
20 and I was taking a guess. But that is the correct date,
21 and that is the correct reference, yes.

22 MR. BROWN: I believe it is May 6.

23 CHAIRMAN FARMAKIDES: Is it May 6?

24 MR. CHARNOFF: The order is dated May 2, but there
25 is a docket stamp of May 6 on it.

1 CHAIRMAN FARMAKIDES: That's correct.

2 Now, any comments on that broad A-1 or broad A-2?
3 I am not going to read the rest of these into the record.
4 Other than those comments that have already been made through
5 pleadings?

6 MR. GOLDBERG: I think I might have more to say
7 when the Board's position with respect to any of these
8 becomes more apparent in relation to the Board's reference
9 to its concept of nexus because I am a little bit in doubt
10 about that, about the Board's concept of the nexus.

11 (The Board conferring.)

12 CHAIRMAN FARMAKIDES: I think in order to promote
13 some additional and further comments from the parties beyond
14 their pleadings, the Board would ask this question:

15 With respect to broad issue 1, the Applicants have
16 indicated that they would stipulate to these contentions, if
17 the term "Applicants" is limited to CEI, and if the term
18 "other electric entities" is limited to Cleveland.

19 Now, what would be the problems if these terms
20 were not so limited, if the term "Applicants" meant all of
21 the Applicants in Perry and Davis-Besse, Mr. Charnoff?

22 MR. CHARNOFF: Let me say specifically, sir, two
23 things to that, one of which is that as we understand
24 AEC procedures, matters to be subject to discovery are
25 limited to those principal matters in controversy which are

1 established by way of the pleadings in the case.

2 The pleadings in this case are entirely limited to
3 relationships between CEI and primarily the City of Cleveland

4 CHAIRMAN FARMAKIDES: Did you say "entirely," sir?

5 MR. CHARNOFF: Yes, sir.

6 CHAIRMAN FARMAKIDES: Or primarily?

7 MR. CHARNOFF: Well, it is primarily and entirely.

8 Let me get at this: It is entirely CEI and its
9 relationships primarily with the City of Cleveland; less
10 directly CEI's relationships with the City of Painesville
11 and primarily CEI's denial of the request by AMP-0 for
12 transmission of the PASNY power.

13 We think that in that context, it would be in-
14 appropriate to address ourselves at this point to discovery
15 addressed to the other parties, and I would point to the
16 fact that in the Just Department letter of advice in the
17 Perry case -- let me say first that the Justice Department
18 letter in the Davis-Besse case indicated no hearing was
19 required as to any of the parties.

20 Insofar as the Perry case is concerned, the Justice
21 Department letter clearly stated that there was nothing new
22 except with respect to CEI's relationships with some of the
23 entities in its area.

24 They clearly indicated that there was no change
25 with respect to the status of the other members of the

1 Applicants' group.

2 We think, therefore, that the pleadings are quite
3 clear with respect to who the parties at issue are insofar
4 as this particular set of proceedings is concerned based
5 upon the pleadings.

6 Secondly, sir, the problem, as I see it, is that
7 discovery addressed to four or five parties insofar as the
8 other Applicants are concerned, could be quite lengthy and
9 quite extensive. They certainly multiply by the number four
10 or five the scope -- not the scope, but the number of people
11 who are involved in furnishing discovery.

12 Secondly, the way in which that contention, if it
13 is a contention at all -- and we would suggest it is not --
14 is framed, is in terms of other entities. I must say
15 with all due respect to all the pleadings in this case that
16 until we saw this particular paper, we didn't have any idea
17 from anybody that there were any other entities involved in
18 anybody's mind at the time of the advice letter, or in the
19 context of the pleadings by AMP-0 or the City of Cleveland.

20 To talk about discovery addressed to unnamed,
21 unidentified "other entities" suggests boundless discovery,
22 so we would feel that it is entirely inappropriate for us to be
23 talking about those unnamed, unidentified entities at this
24 particular juncture in this particular proceeding.

25 I might say, sir, and maybe this is not quite the

1 time for it, that we are really quite at a loss to understand
2 what the issues are in this case based upon the papers filed
3 and the joint statement and the joint response.

4 As we see it, this case is to be distinguished
5 really from the numerous other cases that have gone or are going
6 to hearing under Section 105(c). In those other cases, there
7 is an issue of access to the plant.

8 In this particular proceeding, we suggest to you
9 that the pleadings demonstrate that there is no issue of
10 access to the plant. There is only an issue as to the terms
11 of access to the plant.

12 We submit that if there are any issues at all in
13 controversy, they would relate to what are those terms.

14 We have endeavored through the course of our various
15 pleadings to try to get the other parties to respond in some
16 way, either to propose participation agreement, or more
17 directly to a license condition, and we have been unable to
18 get a response that tells us what these issues are.

19 CHAIRMAN FARMAKIDES: Let me ask one more thing,
20 Mr. Charnoff:

21 What do you mean when you say that you would
22 stipulate to those contentions if the definitions were as you
23 have suggested them?

24 MR. CHARNOFF: We will limit it to CEI, limit it to
25 the City of Cleveland. We would stipulate that CEI has the

1 ability in the relevant market to hinder or prevent the
2 City of Cleveland from achieving access to the benefits
3 of coordinated operation; and similarly with respect to
4 paragraph A-2 --

5 CHAIRMAN FARMAKIDES: In other words, you would
6 stipulate to the ultimate conclusion?

7 MR. CHARNOFF: Yes, sir. If there was any doubt
8 about that in our pleading, I apologize for it, but it is clear
9 that what we have in mind is as between the City of Cleveland
10 and CEI, we would stipulate to this.

11 Therefore, we don't see an issue further worth
12 pursuing and worth litigating and taking the time of the Board
13 and the process of the agency.

14 CHAIRMAN FARMAKIDES: You are saying more, sir.
15 You are saying to me right now that there would be no need
16 for discovery as to this issue, because you would stipulate
17 to it.

18 MR. CHARNOFF: Absolutely, sir.

19 CHAIRMAN FARMAKIDES: If the issue was limited to
20 CEI and the City of Cleveland?

21 MR. CHARNOFF: Absolutely, sir.

22 And we believe it has to be so limited based upon
23 all the pleadings in the case.

24 CHAIRMAN FARMAKIDES: Let me ask one more thing,
25 Mr. Charnoff:

1 Would you be willing to stipulate further, would
2 you be willing to stipulate as to the entire factual case
3 sought by the other parties? And then go to remedy, only?

4 MR. CHARNOFF: I really have to address that, sir,
5 by stating that I have no idea what the entire factual
6 case is, or even the partial case, if I am to look at this
7 joint statement, because it asserts no facts.

8 It asserts a series of possible interrogatories
9 or a checklist of investigational areas, but in concept, sir --

10 CHAIRMAN FARMAKIDES: Let me ask a little
11 differently:

12 Would you assume, arguendo, that all of which
13 they contend is true, would you be willing to stipulate to
14 that? For purposes --

15 MR. CHARNOFF: I really don't meant to be difficult
16 with this.

17 CHAIRMAN FARMAKIDES: No, I am just exploring this
18 thought.

19 MR. CHARNOFF: I can't answer that question in
20 the terms in which you asked it because I don't think
21 they have contended anything in this document. They have
22 asked a series of -- they have posed a series of inquiries.
23 I think I know what the gist of what it is that they are
24 trying to contend by way of turning around, if you will, the
25 ultimate, the inquiries that are in A-1 and 2, and clearly

1 we are prepared to stipulate to that.

2 I am not prepared to stipulate to B, has that
3 ability of CEI been used to maintain and create a situation
4 inconsistent with, because I don't believe that that is an
5 issue in that case, sir.

6 The issue is whether the plant will create or
7 maintain. But I think I understand the thrust of your
8 question, and I think I agree with it. We are prepared to
9 look at remedies, because as we indicate in our paper,
10 they have listed nine potential remedies regardless of
11 whether there were any stipulations or proof of guilt or
12 proof of bad conduct or anything of the sort.

13 What we proposed in our paper is that even had we
14 not stipulated to any of the fault or any of the conduct, if
15 we look at the nine or eight areas of remedies posed as
16 possible remedies, and if I assume hypothetically that we
17 would want all eight areas, or all nine areas of remedy, then
18 again the question is posed as to what is the purpose of
19 the litigation.

20 In our case, there is a shade difference, because
21 we have only agreed, as we understand it, and we think
22 we have provided it, to give all of the remedies that they
23 seek, with the exception of one. And it is in that context,
24 sir, that I don't think there is anything left to litigate
25 except possibly the terms of which we have -- of that offer

1 that we have made.

2 CHAIRMAN FARMAKIDES: Which is the one that you
3 feel you are not prepared to give?

4 MR. CHARNOFF: In terms of remedy, sir, it is under
5 broad issue 3, and it is under (a)3, where the discussion is
6 transmission services to facilitate the exchange of bulk
7 power between and among other electric entities with which
8 Applicants are or may be interconnected.

9 We have provided, we think, everything else they
10 have asked for. Maybe people would disagree with the terms,
11 but either those issues, that is the terms, should be litigated
12 or they ought to be settled.

13 But that is the only remaining area of contro-
14 versy.

15 CHAIRMAN FARMAKIDES: Let me pose it this way:

16 Assuming this Board decides that all of these
17 contentions are valid for purposes of discovery, and we
18 so rule, at that point in time then would you be willing to
19 stipulate as to whatever factual -- by stipulate, I don't mean
20 for the truth of the matters involved. I am talking about
21 assuming arguendo that those contentions are in fact proven,
22 would you be willing then to go that route, and then proceed
23 to remedy?

24 MR. CHARNOFF: The answer is, if I understood
25 what they were stating in some affirmative allegation of

1 contention, something of this sort, the answer, in principal,
2 as long as we are talking about CEI and the City of Cleveland,
3 I would be prepared to do that.

4 I am not prepared to do that in terms of any of
5 the other Applicants or unnamed entities. I don't know who
6 they are. I don't even know what we are talking about in those
7 other cases, sir.

8 CHAIRMAN FARMAKIDES: Assuming now that we are
9 talking about Applicants, the five people involved in Perry,
10 other entities, AMP-0, and the City of Cleveland.

11 MR. CHARNOFF: No, sir, I am not prepared to
12 stipulate with regard to the other Applicants or the other
13 entities. I have to see an allegation in that context. I
14 haven't seen one. I don't think this paper presents one.

15 CHAIRMAN FARMAKIDES: All right, sir.

16 Any other comments on the broad issue 1?

17 We will get into the subsidiary issues, but now I
18 am looking for broad comments.

19 Mr. Charno?

20 MR. CHARNO: Mr. Chairman, I would like to reply
21 in part to Applicants' statements. At several times during
22 this hearing, the fact that the Department's Davis-Besse
23 letter did not recommend a hearing has been brought to light
24 by various parties.

25 If only to clarify the record, what that means

1 as far as the Department is concerned is at the time the
2 Department was not in possession of sufficient evidence to
3 recommend a hearing.

4 I don't think it should be presumed to mean
5 anything more than that.

6 Now, on the limitation of these issues to CEI and
7 to the City of Cleveland, we have some severe problems:

8 One, the Department's letter does make specific
9 reference to Duquesne, and says specifically that Duquesne
10 denied access to all of the nuclear units that are in question,
11 in this proceeding, as well as Beaver Valley.

12 It says that they denied access to the CAPCO Pool.
13 This is separately, perhaps independently, perhaps not.
14 And we have a very unusual situation here. We have the CAPCO
15 Pool, which as Applicants are willing to stipulate, or perhaps
16 they are not, it is our contention at least that they have
17 structural control of power supply over a very broad area.
18 That as it is written--

19 CHAIRMAN FARMAKIDES: Who is "they," Mr. Charno?

20 MR. CHARNO: "They" is CAPCO. That as it is
21 written is the first half of broad contention one. That they
22 have this structural power to control power supply.

23 Now, MELP, M-e-l-p, is in a sort of a bellweather
24 position in the CAPCO service areas. They are the largest
25 municipal utility or one of the very largest. If they are

1 successful in obtaining alternative sources of bulk power
2 supply, other municipal systems may attempt to do so. If the
3 largest system cannot do so, it is unlikely that other systems
4 are going to try.

5 Now, CEI, with respect to CAPCO and MELP, is the
6 door tender to the CAPCO Pool. If CEI says, "No, you can't
7 become a member," it doesn't matter what the other members
8 of CAPCO say.

9 If CEI says, "No, you can't have access to CAPCO
10 generation," it doesn't matter what the other members say.

11 If CEI says yes, then the attitude of the other
12 members becomes very, very crucial. All of a sudden,
13 Cleveland would have the power to get into the CAPCO grid,
14 to receive bulk power supply from alternative suppliers.
15 And then the refusal of Duquesne becomes significant.

16 Then the question of whether this is a concertive
17 action by all members of CAPCO becomes very, very significant.
18 It is at least suggestive in that context that Duquesne,
19 while it is not a direct competitor of the City of Cleveland,
20 except in the power exchange market, independently, in an
21 independent statement, at least, denied the City of Cleveland
22 access to both nuclear, large scale nuclear generation, and
23 the benefits of CAPCO membership.

24 Now, broad issue 1, part B, relates to basically
25 practice evidence as opposed to structure evidence. We have

1 some problem with limiting the area of discovery at the
2 very least to something than less than all the issues in the
3 joint statement.

4 The Applicants have placed in the record the fact
5 that they have made an offer of settlement.

6 CHAIRMAN FARMAKIDES: Excuse me, Mr. Charno.

7 Arent' you also in a sense saying that, look, if
8 CEI says no to the City of Cleveland with respect to
9 participation in the benefits of CAPCO, that that would be
10 dispositive of your contention?

11 If CEI says no?

12 MR. CHARNO: I don't think so, Mr. Chairman. No,
13 I am not saying that.

14 CHAIRMAN FARMAKIDES: Because I thought you said
15 if CEI said yes, then the attitudes of the other Applicants
16 becomes important. But if CEI said no, would that not in fact
17 dispose of your contention? And if that is the case, why
18 must you discover anything more than CEI initially to determine
19 whether the answer is yes or no?

20 And then based on that, proceed with discovery
21 against the other Applicants? I am talking structure before
22 we get to practice.

23 But your practice statement led me to suggest
24 this.

25 MR. CHARNO: Well, it is very difficult to draw a

1 part remedy, and what could be an effective remedy, and liability.

2 If it were thought that CEI could offer a
3 complete remedy, then perhaps the liability of CEI would be
4 far more determinative of the question. But if it is not
5 possible for CEI to offer a complete remedy, for instance,
6 membership in a five-company pool, then the attitudes and
7 the activities and the structure of the other Applicants is
8 very important.

9 CHAIRMAN FARMAKIDES: Is membership in a five-
10 company pool really the ultimate goal here, or isn't it access
11 to the benefits of the nuclear power plant?

12 MR. GOLDBERG: Well --

13 CHAIRMAN FARMAKIDES: Excuse me, sir.

14 Mr. Charno, in your opinion, sir.

15 MR. GOLDBERG: I am sorry.

16 MR. CHARNO: I think the ultimate issue is
17 remedying a situation inconsistent with the antitrust laws,
18 and if we find that that situation is something that is based
19 upon activities and attitudes and structure of the entire
20 CAPCO pool, then it will have to be remedied in that manner.

21 Let me go into discussing practice, and perhaps
22 at that point our position will become a little clearer.

23 CHAIRMAN FARMAKIDES: All right, sir.

24 MR. CHARNO: There is a settlement offer out-
25 standing. That settlement offer, to the best of the

1 Department's knowledge, has not been accepted by anyone. It
2 is indeed unacceptable to us, the Department, as the offer
3 that was outstanding at the time we wrote our advice letter.

4 It may be possible at some further point to negotiate
5 a settlement, but I don't think anything should be held up,
6 especially not discovery, pending such a negotiated settlement.

7 Basically, the settlement negotiations and the
8 merits of the present offer beyond the -- certainly not the
9 jurisdiction of this Board, but should be beyond the interest
10 of this Board at this time.

11 Our biggest problem is that we are going to have to
12 litigate and discover about an entire situation inconsistent
13 with the antitrust laws. Not a single aspect of that
14 situation.

15 If the Applicants are unwilling to stipulate in
16 effect that they have created a situation inconsistent with
17 the antitrust laws, or alternatively, the factual under-
18 pinnings that we would argue would constitute such a situation,
19 the practices, then we are going to have to discover what those
20 practices are, and that will go with respect to both
21 coordinated operation and development, and we are going to have
22 to prove that a situation inconsistent with the antitrust
23 laws exists.

24 CHAIRMAN FARMAKIDES: You are talking wholesale,
25 sir?

1 MR. CHARNO: Yes, sir.

2 CHAIRMAN FARMAKIDES: All right.

3 MR. CHARNO: The fact that even in the future,
4 part of this situation might be remedied by conditions, by
5 stipulated or agreed-upon conditions, has no effect upon the
6 burden of proof that is on the Department of Justice and the
7 AEC Staff, and it has no effect upon the amount of material
8 we are going to have to discover to prove our case.

9 It is not the Department's contention that
10 third-party wheeling or refusal to engage in third-party
11 wheeling alone constitutes the situation inconsistent with
12 the antitrust laws which we originally noticed the Commission.

13 That is one aspect of it, certainly, but it is
14 not the only aspect. And the other activities are activities,
15 refusal to participate in CAPCO, refusal to allow participa-
16 tion in nuclear generation, are activities which involve at
17 least one of the other Applicants as well as CEI.

18 For this reason, we find it very, very difficult
19 to conceive of limiting the issues as suggested by Applicants.

20 DR. HALL: Mr. Charno, I wonder if you could clarify
21 for me your contentions or your views about the relationship
22 between CAPCO and the members of CAPCO. You have spoken
23 several times of CAPCO as though this were the organization
24 or the entity that you saw as the key actor in this situation.

25 At other times I have gotten the impression that

1 you viewed CAPCO as merely a way in which the individual
2 utilities that comprise the CAPCO membership carried out their
3 particular plans.

4 What is the Department of Justice's view about who
5 are the entities which are involved in the situation that you
6 allege to be inconsistent with the antitrust laws? Do I make
7 myself clear as to what --

8 MR. CHARNO: Let me give an answer to that, if I
9 still haven't answered, perhaps we can go further.

10 Well, obviously there is the fact that CAPCO is
11 composed of the five Applicants for this license. We know
12 that at least two of these Applicants have engaged in activity
13 which we allege has created a situation inconsistent with the
14 antitrust laws.

15 We do not know whether the other three Applicants
16 who share a community of interest through CAPCO and through
17 the benefits that CAPCO provides with those two that we have
18 specifically named have participated in the creation of this
19 situation, and we wish to have discovery sufficiently broad
20 to determine whether this is indeed the case.

21 Now, have I -- I take it I haven't answered your
22 question.

23 DR. HALL: CAPCO is a separate organization, a
24 separate legal entity, or is it merely a committee?

25 MR. CHARNO: I am not sure of its organizationl

1 structure.

2 I don't think it matters to the Department's con-
3 tentions.

4 DR. HALL: No, I wasn't saying that it did. I
5 am just trying to get some information about what CAPCO is.

6 MR. CHARNO: I think I would prefer to defer to
7 Applicants' counsel on that.

8 CHAIRMAN FARMAKIDES: Insofar as the Department of
9 Justice is concerned, it doesn't matter to you?

10 MR. CHARNO: It does not.

11 CHAIRMAN FARMAKIDES: You feel it is irrelevant?

12 MR. CHARNO: That's correct. It would be the --
13 the activities of the individual Applicants in concert that would
14 create the problem.

15 CHAIRMAN FARMAKIDES: Whether they are acting
16 through a separate legal entity or acting through a committee,
17 you don't care?

18 MR. CHARNO: That's correct.

19 DR. HALL: Thank you very much.

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CHAIRMAN FARMAKIDES: Thank you, Mr. Charno.

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Mr. Popper, would you like to further clarify broad issue 1,

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especially in view of what the Applicant has stated? And

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Mr. Charno has stated. Whatever has been stated before.

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MR. POPPER: Yes, your Honor. I would start out

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by saying that Mr. Charno has covered in large part many of

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what would have been my responses to the Applicant, the state-

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ments of the Applicant. And at a broad level I would like

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to clarify what the reasoning is behind our desire to keep

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the phrases applicants and other entities into broad issue 1,

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just at the outset.

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Now I think that factually it has been described

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by Mr. Charno that an exclusion at this point would preclude

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certain options that may or may not become extremely important

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as discovery proceeds. Now the Board has pointed out to the

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parties a suggestion that discovery initially against CEI

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may reveal certain factors that would then necessitate a broader

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based discovery. That particular position is not completely

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unlike what we have suggested.

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It is only a process of time that is involved

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that is a little different. An initial preclusion, discovery

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on the other applicants, may actually cause more time to be

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lost than saved. As we envision discovery in this proceeding,

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it would basically go to two sets of relationships. The first

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relationship is what we would consider the conduct or practice.

ra 4 1 relationship, or practices. That relationship is that which
Reb 2 2 exists between the City of Cleveland and CEI. We have specific
3 substantive allegations in this regard that we would in a
4 hearing have to substantiate.

5 The second series of relationships is the broader
6 relationship which would go to the issue of coordinated
7 development and coordinated operation over the broad area,
8 going to the issue of structure or dominance as we see that
9 as a part of our theory of the case. And in that regard the
10 relationship involved, is the relationship of the other four
11 CAPCO members to CEI and the other four CAPCO members, and
12 all five CAPCO members to the City of Cleveland, and to related
13 problems raised by American Municipal Power of Ohio.

14 Since discovery would be based on that bifurcated
15 approach, to eliminate the second issue and simply go to the
16 allegations of conduct as they now exist, or as they may be
17 broadened, would cause a loss of time, because we would be
18 in the position of limiting down to CEI something which we have
19 to prove as the second part of our case, that is, the dominant
20 structure of the coordinated applicants entity which con-
21 stitutes CAPCO.

22 It is further our position ---

23 CHAIRMAN FARMAKIDES: Before you go to that,
24 do you also agree with Mr. Charno that you are really talking
25 wholesale power?

a 4 1 MR. POPPER: I think we are talking about
Reb 3 2 competition on a number of levels. Certainly about wholesale
3 power, yes.

4 CHAIRMAN FARMAKIDES: I had not heard any retail
5 yet.

6 MR. POPPER: I think the allegations in the
7 petitions of the City of Cleveland and in AMPO in the letter
8 of the Department of Justice indicates that there are questions
9 of retail competition. So we are talking both.

10 CHAIRMAN FARMAKIDES: Could you pinpoint those,
11 do you recall at the moment?

12 MR. POPPER: I am sorry. No, I don't.

13 CHAIRMAN FARMAKIDES: Yes.

14 MR. POPPER: But I would be willing to expand
15 on that comment just to the extent that competition as it
16 seems to exist and that is all we have right now are allegations.

17 CHAIRMAN FARMAKIDES: Yes, but the allegations,
18 now, those allegations go to CEI, go to Toledo Edison and
19 go to Duquesne. They don't go to all five of the applicants.
20 And the allegations insofar as Toledo Edison and Duquesne
21 are concerned are very minor, not in terms of substance but
22 in terms of frequency at least.

23 MR. POPPER: A denial to coordinated operations
24 where you have an entity such as CEI which exists in harmony
25 with the four other utilities in the bulk mainstream of power,

1 is a serious denial. Whether that denial came in the corporate
2 person of CEI and is so surfaced by the department's investigation
3 is not a factor that is dispositive.

4 . What is dispositive is that the bulk, the major
5 utilities in the entire service area, of denied coordinated
6 operation, coordinated development to an individual entity
7 at least one of which we are presently aware.

8 It is that denial that constitutes a situation,
9 which situation we think would be maintained by the issuance
10 of the license which therefore requires us under our act
11 to pursue an inquiry, initially at discovery, and subsequently
12 at a hearing.

13 CHAIRMAN FARMAKIDES: Look, Mr. Popper, I hope
14 you understand, I hope all the parties understand that we are
15 asking questions. We do this of everyone. The thought is that
16 the board does not have any particular feelings in this area
17 at this moment. We are just trying to elucidate the record
18 and we feel by acting, for examples, as devil's advocate,
19 with respect to each of you we will get a better record.

20 MR. POPPER: I appreciate that.

21 CHAIRMAN FARMAKIDES: All right. I am sorry, sir.
22 You can continue with any further comments. We have another
23 question, sir, at this point.

24 DR. HALL: I wonder if you could clarify a point
25 for me. Who do you envision the City of Cleveland as competing

Cra 4 1 with? Which of these? We have mentioned a number of these
ab 5 2 entities, or a number of organizations, Toledo Edison,
3 Duquesne, the other members of CAPCO, AMPO, CAPCO itself. Who
4 do you see as the competitors?

5 MR. POPPER: At the wholesale level.

6 DR. HALL: Fine, at the wholesale level.

7 MR. POPPER: I think, your Honor, that the answer
8 to the question is what begs the question but I will give it
9 anyway.

10 DR. HALL: All right.

11 MR. POPPER: Because we have had what appears to
12 be or is alleged to be a concerted denial of coordinated
13 operations, where an entity of the potential size and growth
14 of the City of Cleveland has been denied access to coordinated
15 operations, coordinated development and has been restricted
16 in its ability to purchase wholesale bulk power to wheeling
17 power outside of what appears to be a locking circle around the
18 municipal, that is, the City of Cleveland, we have had to
19 this point, and I will stand corrected by the City of Cleveland
20 and I am sure they will elaborate on their position of their
21 potential to compete, we have had to our knowledge no full
22 wholesale competition, but the reason for that is not because
23 it was not a logical competitive process.

24 The reason for that is because there has been a
25 denial of access to high voltage transmission, the same high

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Reb 6 1 voltage transmission which is being used to supplement and
2 transfer the power coming out of these plants that are going to
3 be licensed by the Commission.

4 It is that same high voltage transmission system
5 and the entire system of coordinated development and operation
6 that has restricted the City of Cleveland from its ability
7 to compete.

8 So therefore at this point, we can't give a specific
9 example of where the City of Cleveland is in actual competition.
10 We know that the City of Cleveland for example, and these are
11 examples, not the prime allegations, had potentially access
12 to an additional 30 megawatts of power generated by an outside
13 power, a block of power that could have been used to compete
14 at the wholesale level.

15 Perhaps with one of the CAPCO members, one of the
16 municipalities that the CAPCO members serve. We know that
17 the power was cheap power. It was municipally generated power.
18 We could have had competition, potentially. It is a speculation.
19 But what we had was a denial to get that power into the City
20 of Cleveland, therefore a denial of the ability to compete.

21 DR. HALL: If I understand you correctly, and
22 let me see if I do understand you correctly, at the wholesale
23 level, we are talking about the wholesale level now, the
24 wholesale level there is very little actual competition between
25 MELP and any other entity, but you foresee a -- several

4 1 potential competitors, or there are several, there might be
Reb 7 2 several potential competitors. Is that a fair paraphrase of
3 what you said?

4 MR. POPPER: Yes, your Honor, that is.

5 DR. HALL: Okay now. Let's switch to the retail
6 level. Does the same proposition apply there?

7 MR. POPPER: No, your Honor. At the retail level
8 we have actual competition that is taking place between, so
9 far as we know, the City of Cleveland and the Cleveland
10 Electric Illuminating Company.

11 DR. HALL: But limited to that, in your view, in
12 your understanding now?

13 MR. POPPER: That is correct.

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1 DR. HALL: Fine. Thank you very much.

2 One other definitional question, as long as we
3 are in.

4 I am not sure that I understand just what you
5 refer to when ou speak of other entities, who you have in
6 mind.

7 Can you say a bit more about the definition of
8 other entities?

9 MR. POPPER: Well, another entity, I think that
10 we at this point would be discussing any entity which is
11 involved in the generation and distribution, transmission,
12 of electricity in the service area of any of the CAPCO
13 members.

14 DR. HALL: Can you give me some examples?

15 MR. POPPER: I can give you 42 examples.

16 DR. HALL: Forty-two -- you envision -- is that
17 a real number or just meaning a large number; 42?

18 MR. POPPER: That is the number of parties who
19 are in AMP-O to my knowledge.

20 DR. HALL: Fine. In other words, you have in
21 mind when you speak of other entities organizations such as
22 those that belong to AMP-O; is that a fair paraphrase of
23 your answer?

24 MR. POPPER: Individual or collective groups of
25 utilities.

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1 DR. HALL: Fine.

2 MR. POPPER: That have the potential to receive
3 wholesale power or compete at various levels of the power
4 exchange market. Whether or not that competition comes in
5 the form of organizational diversity by sharing reserves
6 or coordinated operation, whether it comes in the form of
7 actual transfer of bulk power in smaller lots obviously than
8 the CAPCO members have the ability to, or whether it comes
9 in retail competition as in the City of Cleveland, we do
10 envision that there are entities.

11 We know an inquiry was initiated by the Department
12 of Justice, not a dispositive finding, which revealed in a
13 number of letters sent out that there were other interested
14 parties interested in the generation of power in this area.

15 We know further that that inquiry was not a final
16 inquiry. There was more of a finding: is there a problem?
17 Well, there seems to be.

18 I think we are at the stage we are at. We are
19 not at the stage of saying there is actual competition or
20 there has been a definite denial. Those are conclusions.

21 Perhaps those are in the form of factual
22 substantive allegations that would be best suited after
23 discovery is concluded or part of the way through discovery
24 when we know or can begin to speculate on the effect of
25 what we allege the details to be.

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1 CHAIRMAN FARMAKIDES: Mr. Popper, that last point
2 Dr. Hall asked you now, is it 42, are you talking about other
3 electric entities being the members of AMP-O?

4 MR. POPPER: I would not restrict it to AMP-O.
5 AMP-O is actually, for purposes of bargaining, one entity,
6 although within the organizational structure of AMP-O I
7 wouldn't want to speculate on how they would divide them-
8 selves up as having the ability to compete within their own
9 system.

10 CHAIRMAN FARMAKIDES: Where are these other
11 entities located?

12 MR. POPPER: Within the service area of CAPCO.

13 CHAIRMAN FARMAKIDES: So you are limiting the
14 other entities to those entities within the service area
15 of CAPCO?

16 MR. POPPER: I think there is a conclusion that
17 comes out in the definition of the term entity depending on
18 where it is located and how it is used.

19 If it is used in a --

20 CHAIRMAN FARMAKIDES: No, sir. How are you
21 using it?

22 MR. POPPER: In a broad sense, an entity with two
23 meanings in this case. It could be one who is going to
24 directly benefit from the receipt of power, or a benefit
25 of coordinated operation within the CAPCO pool. Or it

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1 could be be a generating entity which could transmit power
2 and wheel power within that CAPCO area.

3 CHAIRMAN FARMAKIDES: From outside the CAPCO
4 area?

5 MR. POPPER: Yes. I think there is a reason-
6 able relationship between that transmission system of the
7 CAPCO members and the entities within the CAPCO group, the
8 power generated outside of the CAPCO group geographically.

9 CHAIRMAN FARMAKIDES: All right, sir.

10 MR. BREBBIA: Mr. Popper, if you proved dominance
11 at the wholesale level, would you explain to me then why
12 this Board would have to concern itself with the retail level?

13 MR. POPPER: I am sorry, your Honor. Would you
14 repeat your question?

15 MR. BREBBIA: Yes. If you proved that there is
16 dominance at the wholesale level on the part of either CEI
17 and/or CAPCO and/or the members of CAPCO, why does this
18 Board have to be concerned with the effects at retail in
19 order to dispose of this case or these two cases?

20 MR. POPPER: I think, your Honor, that there are
21 a number of things that you are bringing up in question.

22 CHAIRMAN FARMAKIDES: Just to be clear about it,
23 we are talking to subsidiary issue 5 or your matters in
24 controversy Number 5, just so you are aware of that.

25 MR. BREBBIA: Well, he raised the retail issue.

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1 CHAIRMAN FARMAKIDES: Yes.

2 MR. BREBBIA: And stated that there is a necessity
3 for us going into these entities, allegations, regarding CEI's
4 conduct at the retail level.

5 I am curious to know whether, or why, if you are
6 able to establish the dominance at the wholesale level on the
7 part of the Applicants, why must we concern ourselves with
8 these retail -- allegations of misconduct at the retail
9 levels?

10 MR. POPPER: I think, in answer to your rephrased
11 question, two initial considerations: first of all merely
12 from the standpoint of the fact that this case is appeared to
13 be headed for litigation unless settlement occurs, we have an
14 obligation to prove that a situation exists that is incon-
15 sistent with the antitrust laws before a remedy can be fixed.

16 Purely from a due process standpoint we would have
17 great objection to trying to fix a remedy on a situation where
18 we have proved no inconsistency with the antitrust laws --

19 MR. BREBBIA: Let me interrupt you right there at
20 that point.

21 Are you suggesting that the proof of dominance
22 would not suggest a situation inconsistent with the anti-
23 trust laws?

24 MR. POPPER: Your Honor, you are touching on an
25 extremely important issue for both the Commission and the

1 Department.

2 It is an issue that is -- I will leave it at that.
3 It is extremely important.

4 Whether or not dominance alone constitutes an
5 inconsistency with the antitrust laws, without any additional
6 allegations of showing how that dominance has been used --

7 MR. BREBBIA: At retail?

8 MR. POPPER: Pardon me?

9 MR. BREBBIA: Let's talk about the case we are
10 talking about. At retail.

11 MR. POPPER: Assuming that we prove dominance and
12 an abuse at the wholesale level; is that what you are
13 suggesting?

14 MR. BREBBIA: Right.

15 MR. POPPER: Is there any need to prove an abuse
16 at the retail level.

17 MR. BREBBIA: My question was why is there a need
18 to prove anything with regard to problems at the retail level
19 in order for us to fashion a remedy in this case if that is
20 the way it turns out?

21 MR. POPPER: In order to develop a record so
22 that the Board and public would be apprised of what the
23 problems are that would necessitate the remedy I think you
24 would have to show the abuses at the retail level.

25 It would be impossible from the standpoint of

1 developing a clear record to have an entire factual presenta-
2 tion dealing with the denial at the wholesale level. And
3 as an appropriate remedy, to fashion relief in regard to the
4 retail level.

5 MR. BREBBIA: Let me pursue one more question.

6 If dominance alone presents us with a situation
7 that is inconsistent with the antitrust laws and we were to
8 find that, we were to make that finding, this Board was to
9 make that finding, I will ask you once more: why under those
10 circumstances would the Board have to concern itself with
11 allegations as to misconduct at the retail level?

12 MR. POPPER: If the Board were to find that
13 our burden of proof that is necessary to affix what is
14 envisioned in the final remedies listed in broad Issue 3
15 is now satisfied because we have shown that the utilities
16 or the Applicants in this proceeding are dominant, and
17 the Board indicates that satisfies our burden of proof,
18 although as we assess it that is not our strongest case.
19 Our strongest case is including all allegations that appear
20 to us in discovery and otherwise.

21 If the Board deems that that is in fact
22 meeting our burden of proof, then there is no reason. If
23 that is the decision of the Board. It simply would place us
24 in the position, if we were speculating that that was the
25 position of the Board, of presenting our less effective case.

1 We feel that showing an abuse at the retail level,
2 showing an abuse at the wholesale level, and showing
3 dominance is our strongest case for getting all the
4 remedies that we feel are necessary.

5 MR. BREBBIA: Connecting the dominance with
6 affects at the retail level, abuse at the retail level of,
7 say, monopoly power or dominance or whatever you might phrase
8 it, you feel you need to connect the two?

9 MR. POPPER: Oh, certainly. Yes, I do.

10 MR. BREBBIA: Okay.

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1 DR. HALL: I wonder, Mr. Popper, if I could go
2 back to your distinction between conduct, and the structure
3 and, I believe you related, structure, you broke that down
4 into two elements, coordinated development and coordinated
5 operations.

6 Am I correct?

7 MR. POPPER: Yes.

8 DR. HALL: Now, coordinated, let's then try to
9 impose another dimension here.

10 MR. POPPER: Very good.

11 DR. HALL: Retail and wholesale. Let's start
12 with coordinated operations, as I understand it, primarily related
13 to the wholesale market, at least as I have understood the
14 pleadings to date. Is that correct?

15 MR. POPPER: That is conceptually correct, but not
16 completely in terms of how we evaluate the term coordinated
17 operations.

18 DR. HALL: Could you correct me?

19 MR. POPPER: I could, your Honor. I think coordinated
20 operations where you have coordinated operations, system wide
21 coordinated operations, you have certain benefits that are
22 necessarily extant. One of them, for example, as we have cited
23 on page 2 in our footnote is coordination in the matter of
24 reserves, or just -- or are you just looking at surplus power
25 and energy? You are freeing up additional power that allows you

1 to compete because of freeing up that power at the retail
2 level.

3 DR. HALL: Okay. How is this different from any
4 other business organization where, if there is more competition
5 in an input market, market for a raw material, these benefits
6 can be passed on to the customers? Isn't that true?

7 Is this different?

8 Is it different somehow or other from that
9 relationship?

10 MR. POPPER: I don't see it as being particularly
11 different. Although I am not, I would say I am not necessarily
12 sure that I know what industry you are talking about.

13 DR. HALL: Well, just any industry. Just as a
14 general proposition, I mean you are concerned with competition
15 in markets for raw materials and other inputs because you hope
16 that eventually the benefits will be passed on to the final
17 customer, isn't that true?

18 MR. POPPER: That is true.

19 DR. HALL: Okay. Are you really significantly
20 different here, that if you improve the market for the kind
21 of power that people have to buy, that eventually the fellow,
22 the householder who turns on a light switch will get some
23 benefits?

24 MR. POPPER: Basically not, no. That is correct.

25 DR. HALL: Fine. Now let's turn then, so other

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1 than the fact that, sure, whatever happens in the wholesale
2 market will have some hopefully beneficial impact on the retail
3 market, aside from that point, coordination, coordinated
4 development and operation primarily relates to wholesale markets
5 or markets for bulk power.

6 Now conduct, I take it, can relate to both wholesale
7 markets and retail markets, is that true?

8 MR. POPPER: That is correct.

9 DR. HALL: And you have plead both. But you also
10 have alleged, or if I understand correctly the pleadings
11 to date, there have been allegations of anticompetitive conduct
12 or anticompetitive behavior in the wholesale markets and
13 in the retail markets, is that true?

14 MR. POPPER: That is true. Those allegations are
15 on the record.

16 DR. HALL: In both markets.

17 MR. POPPER: Excuse me.

18 DR. HALL: Has there been any allegations with
19 respect to structure in the retail market?

20 MR. POPPER: If you -- no, aside from the fact
21 that we consider structure to be, the structure of an industry
22 to be generally related to the wholesale market. Whether we
23 are talking about structure we are talking about its dominant
24 structure as it exists in the bulk mainstream. We don't
25 generally tie in the structural analysis, or we have not in

a6 1 any other case to date tied in a structural analysis with
ab 4 2 the retail competition.

3 DR. HALL: Okay. So that the structural case
4 is primarily wholesale, or is limited to wholesale. Your con-
5 duct case involves both wholesale and retail levels, is that
6 a fair paraphrase of your answers?

7 MR. POPPER: At this point, yes.

8 DR. HALL: Thank you very much.

9 CHAIRMAN FARMAKIDES: Did you have anything else
10 then, Mr. Popper?

11 MR. POPPER: I did have one other point. Hopefully
12 I can make it very briefly. And that is that when I initially
13 delineated our bifurcated approach to discovery, breaking it
14 down into two sets of relationships, I did want to indicate
15 that there is a caveat and the caveat is that if in the
16 second level of discovery, not necessarily in time, but where
17 we are investigating or looking for information regarding the
18 CAPCO entities as they exist and their relationship to CEI,
19 the CAPCO entities as they now exist and their relationship
20 with the City of Cleveland, that in the event that discovery
21 reveals a course of concerted action between the CAPCO members,
22 which would be an additional consistency that has not been
23 a specific allegation at this point, then we would have to have
24 a more broad based discovery to see what the extent of
25 that concerted action was.

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1 And that is primarily due to a directive that
2 has come out of another proceeding where in the event that
3 the staff study should become aware of a conservative course
4 of action that would be inconsistent with the antitrust laws
5 that consists of a pooling arrangement, then we have an obligation
6 to pursue beyond that which we had originally delineated
7 as being our area of discovery.

8 Aside from that point, our analysis of the other
9 CAPCO entities not including CEI would not be related to any
10 allegations of conduct or practice in their service areas
11 because we have made no such allegations. It is primarily
12 their relationship to CEI, their relationship to the City of
13 Cleveland, that is the statement of limitations.

14 CHAIRMAN FARMAKIDES: I see. You would suggest
15 then that discovery as to those other applicants would be so
16 limited.

17 MR. POPPER: Yes, I would, to the relationships
18 with the City of Cleveland and with CEI unless something else
19 came out in discovery, and AMPO.

20 CHAIRMAN FARMAKIDES: Yes. Is that limitation
21 shared by the Department of Justice?

22 MR. CHARNO: Yes, it is.

23 CHAIRMAN FARMAKIDES: It is shared by the other
24 signatories to the joint statement of matters in controversy?

25 MR. POPPER: I think that ---

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1 CHAIRMAN FARMAKIDES: We will ask them, too. What
2 was your understanding, sir?

3 MR. POPPER: Our understanding when we filed our
4 joint statement of contentions, matters in controversy, was that
5 discovery would be broad based, would go to all five applicants,
6 and go to other electric entities. The reason behind that
7 was the necessity of providing relief if perhaps CEI could not
8 provide the relief envisioned and because there was a perhaps
9 a necessity to show structure of dominance in the CAPCO pool.

10 CHAIRMAN FARMAKIDES: The limitation you now
11 suggest is yours and Justice's, and not the other parties?

12 MR. GOLDBERG: Could we have that limitation stated
13 again? I was unable to follow it.

14 CHAIRMAN FARMAKIDES: We will restate it.

15 Mr. Knowles has just reread the limitation stated
16 by Mr. Popper. And Mr. Charno indicated agreement with that
17 limitation. Mr. Goldberg?

18 MR. CHARNO: Mr. Chairman, if I may, our agreement
19 is qualified. Mr. Popper's caveat extended to investigation
20 discovery beyond the allegations presently before this board.
21 And the Department regards one of the allegations presently
22 being before this Board the conduct of Duquesne. So that
23 we would envision discovery going to the activities of CEI
24 and Duquesne and farther, if necessary.

25 CHAIRMAN FARMAKIDES: So the limitation then
voiced by Mr. Popper would go to the other three?

a 6 1 MR. CHARNO: That is the Department's position, yes.

eb 7 2 MR. CHARNOFF: Can we have a little clarification
3 of that, sir?

4 CHAIRMAN FARMAKIDES: All right, look, Mr. Popper,
5 this is important I think. And it does go to the extent of
6 discovery and this is what this perhearing conference is all
7 about. Could you kindly, sir, restate that limitation, ---

8 MR. POPPER: Your Honor, could I request ten
9 minutes to discuss it?

10 CHAIRMAN FARMAKIDES: Yes, let's take ten minutes
11 and you can formulate it.

12 (Recess) (10:44-10:54.)

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1 CHAIRMAN FARMAKIDES: Are you ready?

2 MR. POPPER: Yes, sir.

3 CHAIRMAN FARMAKIDES: All right. Mr. Popper,
4 could you restate the limitation, sir?

5 MR. POPPER: The limitation which actually
6 constitutes our scope of discovery, I would imagine, does not
7 apply to structure of the CAPCO pool.

8 Let's make that clear. We are going to show the
9 structure of the pool itself. That is part of the case.
10 Part of dominance.

11 CHAIRMAN FARMAKIDES: All right.

12 MR. POPPER: The second exception to it is that
13 it doesn't apply to activities in concert, if those came out,
14 because of the directions of the Board.

15 What the limitation does apply to is conduct, and
16 in analyzing the conduct we will analyze through discovery
17 the relationships of CEI, City of Cleveland, AMP-O, as one
18 set of relationships.

19 Second set of relationships we would analyze will
20 be the remaining four applicants only regarding conduct now,
21 only, as they relate to the City of Cleveland and to AMP-O.

22 The last set of relationships that we would
23 analyze are relationships within the CAPCO group. How
24 each CAPCO member has related to CEI.

25 DR. HALL: Could you restate your first set of --

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1 first type of conduct that you expect to look at?

2 MR. POPPER: Certainly. It was the City of
3 Cleveland -- the Cleveland Electric Illuminating Company,
4 City of Cleveland, AMP-O, and Painesville.

5 DR. HALL: You add --

6 CHAIRMAN FARMAKIDES: You added the last one?

7 MR. POPPER: Did I neglect to state Painesville?

8 MR. BREBBIA: Yes.

9 DR. HALL: So your first one is you are going to
10 look at the relationships and conduct among that set?

11 MR. POPPER: In that set, that's correct.

12 DR. HALL: Your second one is you are going to
13 look at the conduct, only, among all four applicants as
14 they relate to Cleveland, the City of Cleveland, and AMP-O?

15 MR. POPPER: That's correct.

16 CHAIRMAN FARMAKIDES: How about Painesville there?

17 MR. POPPER: Yes.

18 CHAIRMAN FARMAKIDES: You are going to include
19 Painesville?

20 Look, your first set is City of Cleveland, CEI,
21 AMP-O and Painesville. What is your second set? Does it
22 include Painesville?

23 MR. POPPER: Yes.

24 DR. HALL: Then your third set of relationships
25 that you will be looking at are the relationships among the

1 CAPCO entities within CAPCO?

2 MR. POPPER: Only within those five entities. Only
3 as they have related to each other, if they from the stand-
4 point of conduct, has there occurred within CAPCO a decision
5 as it relates to CAPCO to participate in a refusal. For
6 example, with the City of Cleveland.

7 DR. HALL: Thank you.

8 CHAIRMAN FARMAKIDES: Your limitation does not
9 apply to structure, however?

10 MR. POPPER: Not to structure of the CAPCO pool.
11 I think it is necessary by virtue of the way the applications
12 are phrased and the way the entire case is being made to
13 show the CAPCO pool is or is not a structural dominant area
14 in the Northern Ohio and Western Pennsylvania area. And
15 whatever comes within that structural analysis.

16 That which does not come within the structural
17 analysis is other relationships.

18 CHAIRMAN FARMAKIDES: Mr. Popper, do I understand
19 you to say, too, that this limitation is agreed to by
20 Mr. Charnoff and the other two signatures?

21 MR. CHARNOFF: That was Mr. Charno.

22 CHAIRMAN FARMAKIDES: Charno. I am sorry. Mr.
23 Goldberg and Mr. Brown?

24 MR. POPPER: I would really appreciate it if
25 other counsel would individually --

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1 CHAIRMAN FARMAKIDES: Yes, we will ask them, too.
2 But it is your understanding, sir, that these people have
3 agreed to this same limitation; is that correct?

4 MR. POPPER: I would believe so, subject to what-
5 ever they indicated their position to be.

6 (Laughter.)

7 CHAIRMAN FARMAKIDES: In other words, there is a
8 quid pro quo here and I would like to know what your under-
9 standing is.

10 MR. POPPER: I believe they all agree.

11 CHAIRMAN FARMAKIDES: All right.

12 Anything else, Mr. Popper?

13 MR. POPPER: No, your Honor.

14 CHAIRMAN FARMAKIDES: All right. The next one
15 then, Mr. Brown.

16 MR. BROWN: Yes.

17 CHAIRMAN FARMAKIDES: Your comments, wir, with
18 respect to Mr. Charnoff's initial statements --

19 MR. BROWN: First of all, your Honor, we do agree
20 to the scope of discovery as outlined.

21 CHAIRMAN FARMAKIDES: Thank you, Mr. Brown.

22 MR. BROWN: I would say with respect to the
23 matter of the relationships between AMP-O and CEI, as your
24 Honors are aware, CEI in its response to the joint statement
25 of the AEC Regulatory Staff, Department of Justice and

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1 intervenors regarding the contentions indicated at page 21,
2 and I quote the Applicants' proposed license conditions clearly
3 do not include a provision disposing of the contentions
4 raised in AMP-Ohio's petition to intervene as to the matters
5 of allowing the AMP-O access to CEI's transmission system
6 for the limited purpose requested the issue has been joined.

7 This alone remains an area where within the
8 confines of AMO-O's pleadings and the Perry advise letter,
9 it makes sense to proceed with discovery.

10 We certainly concur in that portion of the state-
11 ment which indicates that it makes sense to proceed with
12 discovery on those issues, and we would compare that it is
13 necessary for us to go forward on that issue regarding the
14 refusal of CEI to allow the wheeling of the PASNY power to
15 the City of Cleveland.

16 However, we have joined in the joint statement
17 of contentions because we think that there is a substantial --
18 there are substantial areas in which it will be necessary for
19 us to conduct discovery to determine precisely what the
20 reasons for -- the reasons were for the denial of CEI to
21 provide wheeling of PASNY power to the City of Cleveland,
22 and I can enumerate those precisely by going through the
23 joint statement of contentions, those areas where we believe
24 discovery is necessary.

25 But I believe that generally that has been taken

1 care of by our agreement to limit ourselves to the extent
2 as indicated by Mr. Popper.

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1 CHAIRMAN FARMAKIDES: What is your position, sir,
2 with respect to the need for discovery, the retail practices
3 of CEI? Your principal concern, as I understand it, is
4 wheeling.

5 MR. BROWN: That's correct.

6 CHAIRMAN FARMAKIDES: Why are you concerned, and
7 what is your interest in the retail discovery?

8 MR. BROWN: We would not anticipate as AMP-0, per
9 se, conducts discovery with respect to retail matters involving
10 relationships between, for example, the City of Cleveland
11 and CEI and their retail problems.

12 However, that is by no means intended to indicate
13 that that is not a proper subject of discovery for other
14 parties to the proceeding.

15 CHAIRMAN FARMAKIDES: Why is that, Mr. Brown?

16 MR. BROWN: Well, that is a matter that I would
17 prefer to have them present their views to the Board
18 individually. But I think that just as a general proposi-
19 tion, there are certainly subjects which involve a possible
20 violation of the antitrust laws which involve retail conduct
21 and certainly the parties, in our opinion, just as amicus
22 curiae or however you might wish to characterize us, the
23 parties shouldn't be precluded from discovery in those areas
24 which involve potential antitrust areas in the retail level.

25 CHAIRMAN FARMAKIDES: You suggest that the Board

1 has jurisdiction to remedy a retail practice problem?

2 MR. BROWN: I am not entirely with the matters in
3 which the Board has jurisdiction, but I would suggest that the
4 whole matter of inquiry into the wholesale structure leads
5 inevitably to the question of the retail structure. And I
6 think that I would certainly read within the areas of my
7 knowledge, I would read that the Board does have the jurisdic-
8 tion, and indeed the responsibility to remedy violations of
9 the antitrust laws at the retail level, yes.

10 CHAIRMAN FARMAKIDES: In other words, then, if we
11 can break up power into three categories -- generation,
12 transmission, and distribution -- are you saying that we have
13 authority to remedy a problem occurring in the distribution
14 sector?

15 MR. BROWN: Let me suggest that perhaps the best
16 way I can answer that is to simply refer to the areas of remedy
17 which were set out in our joint statement of contentions.
18 Since the question of retail distribution does not specifically
19 involve AMP-0, I quite frankly have not done the research which
20 would be necessary to answer your question properly.

21 CHAIRMAN FARMAKIDES: All right, Mr. Brown. Let's
22 get back into something that I think you undoubtedly have
23 done some research on. That is Mr. Charniff's initial statement
24 why he felt that issue No. 1 should be limited to the
25 Applicants -- I am sorry, CEI and the City of Cleveland.

1 Could you respond to that?

2 MR. BROWN: Yes. With regard to -- now we are
3 speaking, if I may inquire, with respect specifically to
4 broad issue 1?

5 CHAIRMAN FARMAKIDES: Yes, sir.

6 MR. BROWN: Now, under the matters in controversy
7 under broad issue 1, there is sub 2 and 3, which involve
8 whether Applicants have control over bulk power transmission
9 facilities in the relevant markets. Whether access to
10 Applicants' bulk power transmission facilities is necessary
11 to achieve the benefit of coordinated operation or coordinated
12 development.

13 Those are matters which bear quite closely upon
14 the relationships between AMP-0 and CEI in AMP-0's access for
15 PASNY power to the CEI and related transmission facilities.

16 So for Mr. Charnoff to suggest that broad issue
17 No. 1 ought to be limited to matters arising between CEI
18 and the City of Cleveland exclusively would completely freeze
19 out the question which follows quite naturally under broad
20 issue 1 as to whether Applicants have control over bulk power
21 transmission facilities in the relevant markets, because if
22 they do have control over bulk power transmission facilities
23 in the relevant markets, that, as your Honor will recall, is
24 precisely the allegation which we have established in our
25 nexus position, that if that transmission, if those

1 transmission facilities are controlled by CEI, then it is
2 quite possible that the PASNY power which would be otherwise
3 subject to wheeling over the CEI lines would then be frozen
4 out from wheeling because of the lack of transmission facilities
5 for that wheeling capacity.

6 CHAIRMAN FARMAKIDES: Sir, one more question:

7 What is your definition of the other electric entities?
8 I have asked the other parties, and I would like to have your
9 opinion.

10 MR. BROWN: The other electric entities, I think,
11 would certainly include potentially all those members of
12 AMP-0, and there are now 43 members of AMP-0.

13 We do not anticipate the conducting of discovery
14 with respect to each of the members of AMP-0 and their
15 relationship to CEI and the CAPCO Pool.

16 However, those entities ought not to be precluded
17 in, from the standpoint of the Department of Justice or of
18 the Atomic Energy Commission Staff, from looking into whatever
19 relationships might be involved between those entities and
20 CEI involving the possible existence of an antitrust viola-
21 tion.

22 CHAIRMAN FARMAKIDES: What if the Applicant then
23 were to propose discovery with respect to those entities,
24 to propose, suggest, or discover?

25 MR. BROWN: If they were to propose, we would

1 certainly be in attendance. We certainly would not take a
2 position adverse to discovery against those individual systems
3 which form the members of AMP-0.

4 CHAIRMAN FARMAKIDES: In other words, you are
5 saying that the definition of other electric entities includes
6 all of the members of AMP-0?

7 MR. BROWN: Yes, I don't think it should be limited
8 necessarily to all the members of AMP-0.

9 CHAIRMAN FARMAKIDES: Does it include any other
10 such entity located in the CAPCO service area?

11 MR. BROWN: I simply haven't -- my concern
12 primarily was with the membership of AMP-0.

13 CHAIRMAN FARMAKIDES: You have no opinion on that?

14 MR. BROWN: I would anticipate that there would be
15 other systems outside of AMP-0 who would have, within the
16 service area of CAPCO, who would fall within the definition
17 of "other entities."

18 CHAIRMAN FARMAKIDES: How about the other parameter
19 of Mr. Popper, and that is any other entity outside of the
20 CAPCO service area generating and feeding into the CAPCO
21 service area?

22 MR. BROWN: By all means.

23 CHAIRMAN FARMAKIDES: So you would agree with Mr.
24 Popper?

25 MR. BROWN: Yes, I would.

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In our instance, specifically, that would include

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9 1 CHAIRMAN FARMAKIDES: Thank you.

2 Mr. Goldberg?

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3 MR. GOLDBERG: First off, we do agree with the
4 limitation stated by Mr. Popper.

5 With respect to this matter of limiting other
6 electric entities to AMP-O and the City of Cleveland, I
7 have this basic difficulty.

8 It would seem to me that with respect to the
9 matter of whether a situation inconsistent with the
10 antitrust laws is created or maintained, so far as the
11 duty of this Board in the first instance is concerned, and
12 subsequently of the Commission itself, under the Atomic
13 Energy Act, it seems to me the Board has to address itself
14 to that matter in terms of all entities, whether or not they
15 are a party to the proceeding, that could be affected in
16 that adverse manner by the granting of an unconditioned
17 license.

18 I therefore feel that to limit the investigation
19 in terms of just the City of Cleveland and AMP-O would
20 fail to fulfill the obligation of the Atomic Energy
21 Commission under the Act.

22 Certainly it is very conceivable, for reasons
23 that are not known to us, that someone who may be very much
24 interested in access or participation is not before the Board
25 today in this proceeding.

1 Maybe they don't have the financial resources to
2 get involved, or whatever the reason may be. And it is
3 the responsibility of the Commission to deal, generally,
4 with all entities that may be affected in the service area.

5 CHAIRMAN FARMAKIDES: Something similar to a
6 class action, Mr. Goldberg?

7 MR. GOLDBERG: Well, I don't think I would call
8 it similar to a class action. I put it in these terms: if
9 the City of Cleveland were to file a civil antitrust suit
10 for treble damages against the members of CAPCO, in that
11 situation the matter of concern before the court would simply
12 be the relationships between the City of Cleveland and the
13 defendants in the case.

14 But when you get into an administrative proceeding
15 of this nature, involving the fulfillment of the obligations
16 of the Atomic Energy Commission under the Atomic Energy Act,
17 the duties and responsibility of the agency are not limited
18 by the identity of the parties before the agency in the
19 particular proceeding.

20 This is why I say it would be inappropriate, I
21 actually think unlawful, for the Board in the first instance
22 and the Commission subsequently, to limit the inquiry of
23 other entities simply to AMP-O or the City of Cleveland,
24 and/or the City of Cleveland.

25 Mr. Charnoff at the very outset undertook to

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1 distinguish this proceeding from other antitrust review
2 proceedings on the grounds that there is no issue as to
3 access in this case, but only as to the terms of the access.

4 I would like to emphasize that if the terms of the
5 access do not provide viable, appropriate access, there is
6 an issue as to access, and there is that issue in this case
7 because the terms of the access proposed outside of this
8 record as a matter of settlement simply do not meet the
9 requirements and needs which would eliminate the situation
10 inconsistent with the antitrust laws.

11 For example, this matter of third party wheeling.
12 What is its significance with respect to just access to the
13 nuclear units?

14 It is obvious that when some of these nuclear
15 units come on the line, the City of Cleveland's load may be
16 such that there are times when the availability of power
17 would be surplus to the City of Cleveland's needs.

18 Under those circumstances the City of Cleveland
19 would have to make arrangements to dispose of that power to
20 which it has access.

21 Without third party wheeling, the City of
22 Cleveland cannot make the best possible deals that it ought
23 to be able to make for this temporary disposition of that
24 power.

25 Without third party wheeling, it is in the

1 position of having to make the only deal that CEI might be
2 willing to take, to take that surplus power off the hands of
3 the City of Cleveland.

4 It is obvious, therefore, that any proposal that
5 offers simply transmission services to move the power from
6 the unit down to the City of Cleveland's service area does
7 not cure the situation inconsistent with the antitrust laws,
8 because part of the situation inconsistent with the antitrust
9 laws has been this throttling of the City of Cleveland by
10 reason of the wall that surrounds it so that it cannot reach
11 any other entities to coordinate development or to coordinate
12 its operations and to have those benefits.

13 With respect to the relevance of the activities
14 at the retail market, I don't see how the Board can fashion
15 remedies to eliminate the situation that is maintained or
16 created inconsistent with the antitrust laws without at the
17 same time knowing what the consequences have been of that
18 situation inconsistent with the antitrust laws.

19 You have to know what you are called upon to
20 remedy.

21 I am not suggesting that you have to reach into
22 areas over which you may not have any jurisdiction at the
23 retail level.

24 Your remedies conceivably at the wholesale level
25 or power exchange market could preclude the recurrence of

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1 the activities at the retail market which have resulted from
2 the situation inconsistent with the antitrust laws.

3 CHAIRMAN FARMAKIDES: Well, Mr. Goldberg, look,
4 that is really what the Board was driving at. We were saying
5 something akin to what you have just said, the last part of
6 your statement.

7 That is: look, if you are given discovery access
8 to the wholesale level and if you can show dominance or you
9 can show a situation inconsistent with the antitrust laws
10 at the wholesale level, the Board is saying why, then, are
11 we concerned about retail? Why go to all the extent, the
12 time, the effort, the cost of discovery at the retail level?

13 MR. GOLDBERG: You cannot fashion remedies without
14 knowing what has been going on at the retail level. You can-
15 not know what the situation inconsistent with the antitrust
16 laws has been without getting into what is going on at the
17 retail level.

18 CHAIRMAN FARMAKIDES: Excuse me, sir. I am saying
19 that assuming that we know what the situation is at the whole-
20 sale level, the situation that may well be as you suggest,
21 inconsistent with the antitrust laws, if we know that at the
22 wholesale level, would not the curing of that also cure the
23 retail level problem?

24 MR. GOLDBERG: Not without knowing what has been
25 going on at the retail level. You cannot fashion a remedy

1 in a vacuum. You cannot fashion a remedy without
2 knowledge of the full scope of the antitrust situation.

3 CHAIRMAN FARMAKIDES: Give me an example sir;
4 would you? Give me an example.

5 MR. GOLDBERG: Well, we know that the denial, for
6 example, of the City of Cleveland to cheap power which would
7 enable them to compete on a better basis --

8 MR. GOLDBERG: I am sorry.

9 DR. HALL: Go ahead.

10 CHAIRMAN FARMAKIDES: No. Go ahead. We are very
11 interested in this, of course, Mr. Goldberg, as I know you
12 all are.

13 We are all concerned here with the extent and the
14 scope of discovery, and really none of us, including your-
15 self, sir, want to engage in unnecessary discovery.

16 So we are seeking to focus on where the cut-off
17 should be. So we are very interested in this.

18 MR. GOLDBERG: All right. Let me start over.

19 CHAIRMAN FARMAKIDES: An example.

20 MR. GOLDBERG: The City of Cleveland, with access
21 to third party wheeling, access to cheaper power, may be
22 able to coordinate development and operations with the City
23 of Painesville, for example.

24 Painesville could have the benefits, as well as
25 the City of Cleveland, of cheaper source of power, the

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1 economies of scale.

2 Additionally, one of the important factors in the
3 City of Cleveland has been this factor of reliability.
4 Reliability of service, as you can well imagine, is one of
5 the important incidences of attaching customers and keeping
6 customers and competing for customers.

7 By being blocked off from coordinated develop-
8 ment, coordinated operation, third-party wheeling which is
9 an essential element of it, the reliability of operations of
10 the City of Cleveland's system is seriously affected. And
11 being seriously affected, its ability to compete is affected.

12 CHAIRMAN FARMAKIDES: Wouldn't that be a wholesale
13 level problem?

14 MR. BREBBIA: Why do we have to know about alleged
15 retail abuses in order to remedy that problem if we make
16 the requisite finding at the wholesale level, Mr. Goldberg?

17 MR. GOLDBERG: I don't see how you can fashion a
18 remedy without knowing what the abuses have been.

19 MR. BREBBIA: For instance, you have, in your
20 pleadings, mentioned among the alleged deceptive acts and
21 practices engaged in by CEI the switching of customers.

22 Now, I would like to know how proof of switching
23 of customers is going to assist us in fashioning a remedy
24 that we couldn't otherwise fashion if we made the requisite
25 finding at the wholesale level.

1 This is one of the areas, I presume, that
2 discovery at the retail level would go into, and I just
3 don't understand why, you know, or how we would deal with
4 that at the wholesale level any differently than we might
5 deal with other problems by going into that proof at the
6 retail level.

7 MR. GOLDBERG: A situation inconsistent with the
8 antitrust laws does not simply mean at the wholesale level.
9 It means at the retail level as well, particularly if a nexus
10 can be established.

11 MR. BREBBIA: That was not the thrust of my
12 question. The thrust of my question is cannot we, this
13 Board, remedy, you know, whatever problems there are if we
14 make the requisite finding at the wholesale level?

15 MR. GOLDBERG: How can you know whether you are
16 remedying the problems without having explored the problems
17 nad having made a record on them?

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1 CHAIRMAN FARMAKIDES: All, right, look: Let's
2 make an assumption here, Mr. Goldberg. Assuming that you
3 are granted discovery as to the retail practices of the
4 Applicants, and you thereafter produce evidence tending to
5 prove a situation inconsistent with the antitrust laws involv-
6 ing the retail market, then what added effect would such proof
7 have on the Board's ability to condition the license?

8 MR. GOLDBERG: Well, I think that with knowledge
9 of those activities, the Board would be in a better position
10 to determine what the remedies should be, and whether the
11 remedies it fashions cure that situation. But it just doesn't
12 seem to me conceivable that the Board can determine whether
13 the conditions it attaches to the license eliminate the abuses
14 which are inconsistent with the antitrust laws without knowing
15 what they were.

16 CHAIRMAN FARMAKIDES: Look, this Board and any
17 Board here is concerned primarily with the licensing of a
18 nuclear power plant and the conditioning of that nuclear power
19 plant.

20 MR. GOLDBERG: Yes.

21 CHAIRMAN FARMAKIDES: Now the additional factor
22 under 105 is the introduction of the antitrust philosophy
23 into that licensing process, right?

24 MR. GOLDBERG: Yes.

25 CHAIRMAN FARMAKIDES: So we are primarily concerned

1 with licensing and a factor introduced into that consideration
2 is the antitrust philosophy.

3 In the nuclear power station concern of ours,
4 we are talking about generation, transmission, and distribu-
5 tion of power as earlier clarified by Mr. Brown. We really
6 are talking primarily of generation and transmission of power,
7 and not of distribution of power.

8 So again I get back to you, and I don't think you
9 have really responded, sir, either to Mr. Brebbia's question
10 or to my own.

11 MR. GOLDBERG: I think you are taking a view of
12 what is involved that is erroneous.

13 CHAIRMAN FARMAKIDES: All right.

14 MR. GOLDBERG: If I may say so.

15 CHAIRMAN FARMAKIDES: I would love to hear your
16 clarification, sir.

17 MR. GOLDBERG: You may be concerned in fashioning
18 remedies, with remedies at the generation and transmission
19 level. But the basic concern that you must investigate
20 initially is what are the antitrust abuses.

21 And that is not limited just to the wholesale
22 or power exchange market. It applies as well to the retail
23 markets. And you cannot determine what remedies you should
24 fashion with respect to generation and transmission without
25 knowing what those abuses were.

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1 CHAIRMAN FARMAKIDES: Are you saying that assuming
2 that we find a situation inconsistent with the antitrust
3 laws at the retail level, and not find it at the wholesale
4 level, that this Board would have jurisdiction?

5 MR. GOLDBERG: Yes, I think so.

6 CHAIRMAN FARMAKIDES: What is the nexus there,
7 sir? How do we connect that retail then to the nuclear
8 generation?

9 MR. GOLDBERG: To begin with, I think it would
10 have to be connected to the wholesale level.

11 CHAIRMAN FARMAKIDES: Then let's get back to the
12 initial question raised by Mr. Brebbia.

13 MR. GOLDBERG: But the point is that even if there
14 is a connection to the wholesale level, you cannot fashion
15 the conditions that are necessary to eliminate the abuses
16 without knowing what those abuses are. That involves knowing
17 what the abuses are at the retail level as well as the whole-
18 sale level.

19 CHAIRMAN FARMAKIDES: I think you have made your
20 point clear, sir. I don't know whether I agree with it or
21 not as an individual. But please proceed, Mr. Goldberg.
22 There were some other points raised by Mr. Charnoff that
23 you might like to address.

24 Dr. Hall would like to ask a question.

25 DR. HALL: I have just two quick questions of

1 clarification.

2 Do I understand you to say it is your view that
3 there could be no situation inconsistent with the antitrust
4 laws at the retail level that did not involve a situation
5 inconsistent with the antitrust laws at the wholesale level?

6 MR. GOLDBERG: Well, if I did say that, I think
7 I probably was going too far. But I would expect that
8 normally there would be some connection.

9 DR. HALL: Okay.

10 MR. GOLDBERG: You could have a situation incon-
11 sistent at the retail level that does not involve a situation
12 at the wholesale level.

13 DR. HALL: When you first gave us an example of
14 the kind of problems at the retail level that you thought
15 were pertinent, you mentioned the problem of reliability.

16 MR. GOLDBERG: Yes.

17 DR. HALL: And you suggested that the advantages
18 of having reliable power were intuitively obvious.

19 Then, if that is true, why, then, do we need
20 discovery? What is it that you would seek to discover at the
21 retail level?

22 MR. GOLDBERG: We would seek to discover the
23 activities of the CEI vis-a-vis the City of Cleveland, which
24 in turn will bear on the question of nexus and the remedies
25 required to eliminate those abuses.

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1 DR. HALL: Let us say that you were able to
2 demonstrate your contention that CEI is sending around
3 inspectors to harass City of Cleveland customers. What would
4 then be the implication for a remedy to be fashioned by this
5 Board?

6 MR. GOLDBERG: With that particular incident,
7 perhaps there isn't any remedy that could be fashioned by
8 the Board. It may be that particular allegations in our
9 petition would be irrelevant to the matters of discovery, and
10 I am not at this moment attempting to argue that each and
11 every one of them are relevant.

12 DR. HALL: Could you give me some examples of
13 your allegations with respect to the retail level that you
14 feel are pertinent to the Board's potential remedies?

15 MR. BREBBIA: That can't be dealt with at whole-
16 sale.

17 DR. HALL: I accept that.

18 MR. GOLDBERG: I would say this: Even if they can
19 be dealt with at the wholesale level, you don't know
20 whether they can be dealt with at the wholesale level without
21 knowing what the conduct was at the retail level.

22 MR. BREBBIA: I have a question for, Mr. Goldberg:
23 Did I understand you to say that you thought that it
24 would be improper for this Board to limit discovery to known
25 entities against which allegations have been made?

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1 MR. GOLDBERG: I said that it would be improper
2 to limit other electric entities to the City of Cleveland
3 and AMP-0, because the responsibility of the Board and
4 of the Commission under the act runs to all entities that
5 could be affected by the operation of that license by reason
6 of activities inconsistent with the antitrust laws.

7 MR. BREBBIA: Do you think that there is any duty
8 on the part of this Board to approach discovery from a stand-
9 point of at least some allegations, concrete allegations
10 being made, or those that aren't concrete against, or specula-
11 tive allegations involving other known entities?

12 I mean how do we go about discovering unknown
13 entities without providing -- you are familiar with the term
14 "fishing expedition"?

15 MR. GOLDBERG: Yes.

16 MR. BREBBIA: As it applies to discovery?

17 MR. GOLDBERG: Yes.

18 MR. BREBBIA: There is a lot of law on the books
19 with regard to fishing expeditions. And I would like to know
20 how we avoid an attack on fishing expedition grounds by
21 opening up discovery to unknown entities?

22 MR. GOLDBERG: I think with respect to this matter
23 of fishing expeditions, probably it is a phrase more appropriately
24 used in terms of applications for subpoenas than it is in
25 terms of discovery matters. But I don't think that there is

1 any fishing involved. The service areas of the Applicants
2 are known. The entities in those areas are known.

3 So I don't think we are speculating about who
4 those entities are.

5 CHAIRMAN FARMAKIDES: Yes, we are, sir, because you
6 see, the problem has been, as I understand you, there is not
7 agreement between you and Mr. Charno, Mr. Popper, and Mr.
8 Brown, on these other entities.

9 Let me ask you, sir, the definition as I understand
10 it to date by the three gentlemen I refer to, is all such
11 entities in the CAPCO service area, plus any other entity that
12 feeds into the CAPCO service area.

13 Would you limit your definition to that?

14 MR. GOLDBERG: I would certainly go with the first
15 part of it. I am not too sure about other entities that feed
16 into the CAPCO service area.

17 CHAIRMAN FARMAKIDES: What is your thought on that,
18 Mr. Goldberg?

19 MR. GOLDBERG: Well, I don't know that I would have
20 any thought on it at the moment. I have no problem with the
21 definition of entity including those entities within the
22 service area of CAPCO. I am not too sure that I know what is
23 meant by "feed" into the CAPCO service area.

24 CHAIRMAN FARMAKIDES: Well, I think Mr. Popper ex-
25 pressed it a little differently. His concept, however, is

1 embodied in the words we have just used. That is that you
2 have generation outside the CAPCO service area, however,
3 transmitting into the CAPCO service area.

4 And I assume some sort of an outlet within the
5 CAPCO service area.

6 MR. GOLDBERG: Well, PASNY, for example.

7 CHAIRMAN FARMAKIDES: Would be one example?

8 MR. GOLDBERG: Would be one example.

9 CHAIRMAN FARMAKIDES: You would agree, however,
10 that that definition, using PASNY as an example, would be
11 agreeable to you?

12 MR. GOLDBERG: Yes, I think so.

13 (Pause.)

14 There were some questions about the nature of
15 CAPCO. Is it a separate legal entity or what is it. I hope
16 I am not conveying the idea that I am an authority on the
17 legal status of CAPCO, but as I understand it, it is not a
18 separate legal organization. It is the vehicle through whom
19 the members, the Applicants, act. But really the members
20 are CAPCO. And CAPCO is the members.

21 And here is another reason why it seems to me
22 inappropriate to limit other electric entities just to the
23 City of Cleveland -- I am sorry, to limit Applicants to CEI.

24 The members of CAPCO plan and construct generation
25 facilities as though they were a single system. One single

1 company. The activities of one are the activities of all the
2 others.

3 Under those circumstances, I don't see how you could
4 limit Applicants just to CEI. They act in concert, they plan
5 in concert, they are one. You just cannot separate CEI from
6 the rest of them.

7 When there is a denial to any outsiders of member-
8 ship, when there is a denial of coordinated operation and
9 development to anyone outside of CAPCO, it is the act of all
10 of the members of CAPCO.

11 It seems to me that in all of the discussion we
12 have been having about the retail and wholesale, that there
13 seems to be the idea that they are entirely separable. But
14 in my judgment, I think that they are inseparable, because
15 what is happening at the wholesale level affects what is
16 happening at the retail level.

17 And it is for that reason, too, that I think that
18 when we talk about a situation inconsistent with the anti-
19 trust laws under the Atomic Energy Act, you are not just
20 simply talking about the power exchange market or the whole-
21 sale market, but you are talking about all three markets,
22 the retail market, the wholesale market, and the power
23 exchange market.

24 I don't think there is anything further that I
25 have to say because so much of what has been said by the

1 Department of Justice's representative, by Mr. Popper,
2 I would endorse without repetition.

3 CHAIRMAN FARMAKIDES: All right, sir, thank you.

4 We will go one more round. Let's limit ourselves,
5 gentlemen, to what has been said and let's be pertinent.

6 Mr. Charnoff?

7 MR. CHARNOFF: Yes, sir, just a few observations.

8 One is I think that it is pertinent with respect
9 to Mr. Charno's remarks in connection with the Davis-Besse
10 letter to remind the Board that in the December 17, 1973
11 letter on Perry, on page of the typewritten version of that
12 report under the heading "competitive considerations," the
13 Department of Justice just as recently as December stated
14 that the competitive situation outlined in the Department's
15 advice letter dated April 1973 on the Beaver Valley facility,
16 which, of course, came in between the Davis-Besse letter and
17 the Perry letter, and again in which the Department of
18 Justice recommended no hearing, the Department of Justice said
19 that that competitive situation appears to be unchanged with
20 respect to all but one of the Applicants, CEI.

21 Therefore, we will not at this time reiterate the
22 conclusions concerning the activities of the other Applicants
23 which we set forth in our prior correspondence.

24 Now, there was something stated in the Staff's
25 and the Justice Department response to our reply to this

1 joint statement that was particularly bothersome. I think
2 the Board must take cognizance of it. And that is the
3 question was to what extent does the Department of Justice
4 or AEC, which seems to be, but we still don't know --
5 seems to be embracing the Department of Justice letter, to
6 what extent is it at liberty, if you will, to continue
7 purusing new areas just because it has now recommended a
8 hearing on the grounds that it didn't conduct any formal
9 discovery during the course of its investigation?

10 I think it is important that the Board take
11 cognizance of Section 105(c)(1) which particularly established
12 a 180-day limit on the Department of Justice investigation.

13 If the Justice position is such that they conduct
14 something less than a complete investigation during that
15 180-day period, but they would need more to conduct something
16 that would satisfy them, then in a sense they are always in a
17 position to in effect subvert the intention of the Congress
18 when it established the 180-day limitation by simply saying,
19 "Let's have a hearing, let's go further."

20 I don't believe that is really the Justice
21 Department position because, in fact, that would disavow
22 the validity of all their letters in all the other cases
23 that they have issued.

24 In other words, they must come to a conclusion. And
25 they are not powerless. 105(c)(4) says upon the request of

1 the Attorney General, the Commission shall furnish or cause
2 to be furnished such information as the Attorney General
3 determines to be appropriate for the advice called for in
4 paragraph 1 of this subsection.

5 So that the AEC, through its rulemaking power and
6 through its regulations which require the submission of
7 information, is in a position to get further information if
8 the Attorney General deems it appropriate during the course
9 of that 180-day period.

10 Indeed, the suggestion there is that the AEC is
11 getting appropriate information and the Staff, too, was supposed
12 to have developed some position.

13 We have heard this morning a strange statement by
14 Mr. Popper with regard to conduct. He said that we have --
15 these were his words -- specific substantive allegations in
16 that regard, having to do with the conduct between City and CEI.

17 We have yet to see a document that sets forth
18 from the AEC one specific substantive allegation, unless
19 they are embracing the Justice Department letter or the City's
20 petition or AMP-0's or something else.

21 It seems to me that the Staff is quite late in just
22 filing a joint statement which has nothing but a series of
23 inquiries. It has made no substantive allegations. It
24 certainly has had the power to get the information it wanted.

25 The Department of Justice has had that power. And

1 now for the Department of Justice and AEC to say time hasn't
2 run on us in order to make something specific at this point
3 in time is in derogation of the provisions of Section
4 105(c)(1) and 105(c)(4).

5 Now, Mr. Charno indicated a remark that he was
6 concerned about the other members of CAPCO, because he said
7 if CEI says yes to access, which indeed we have, if CEI
8 says yes to access, he said then the question is what about
9 the other members such as the Duquesne Light refusal? I would
10 like to say that I don't know whether that document has been
11 made a matter of record, and perhaps that is a matter of
12 factual interpretation, but I must say, Mr. Chairman, that
13 the Department of Justice has made much more of the December
14 10 letter from Duquesne Light to the City of Cleveland than
15 is apparent in any reading, fair reading of that particular
16 letter.

17 It indicated why in Duquesne Light's view member-
18 ship in CAPCO would not be a workable addition. It indicated
19 why it would be complicated to have the City of Cleveland
20 become an owner of the existing stations. It is suggested
21 that they might work out their situation with the Cleveland
22 Electric Illuminating Company.

23 I don't know that it is fair to read that as an
24 approval or a denial. But I would say it is clearly not the
25 way the Department of Justice has simply treated it. But

1 the more important factor is that time has passed since then.

2 And the fact is that we have submitted documents
3 in this case, license conditions affording access to the City
4 of Cleveland, and that set of CEI conditions has been
5 concurred in by the other members of CAPCO. That was stated
6 specifically in our filing of June 3, 1974 with the Appeal
7 Board which asked what the status was of the situation with
8 regard to negotiations and so on.

9 And we said on page 4 of that filing that those
10 license conditions are agreeable to all of the Applicants.

11 I recognize that one can say, well, is it access
12 if we disagree with the terms of it. I would submit to you
13 that we don't have to have a full trial of all sorts of
14 antitrust conduct in order to establish or get at the heart
15 of the issues that may be existent in the nature of the
16 differences over the terms.

17 If we can't resolve those by settlement, we ought
18 to litigate those before the Board and get the Board's
19 determination. But I don't believe that we have to have a
20 full-blown, very timely, very costly, extensive hearing on
21 the issue of access, when the issue of access in principal
22 has been afforded by the Applicants, all of the Applicants
23 in this case, by virtue of that acceptable license condition.

24 It seems to me that it is in that area that the
25 Board ought to get the parties to focus on what are the

1 remaining issues. There is no issue that we will not afford
2 access.

3 We would afford ownership, if that is what they
4 wish, and we think they are not legally capable of getting
5 that, and we think they are in agreement with that.

6 As a matter of fact, the City of Cleveland in
7 its filing with the Appeal Board vaguely suggested that
8 maybe ownership is not what they want, anyway. But that
9 would help focus on real issues in this case and not this broad
10 general investigation.

11 We would urge the Board to really examine that set
12 of license conditions and determine whether there are any
13 reasons why they are not acceptable for disposing of this case.

14 Perhaps it would be appropriate to ask the other
15 parties to show cause why they don't resolve the problems.
16 Maybe that is a way of getting at what the real issues are
17 in the situation.

18 Now I think that the discussion by all of the parties
19 here with regard to the term "other entities" simply has totally
20 emphasized our dilemma with the proposed contentions in terms
21 of its identification of other entities. The parties have
22 different views, the parties who joined in a joint statement
23 have different views as to what "other entities" means.

24 CHAIRMAN FARMAKIDES: I think they have all
25 agreed on that one.

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1 MR. CHARNOFF: As to what the "other entities"
2 means?

3 CHAIRMAN FARMAKIDES: I think they have all agreed
4 in the conduct of answering your statement this morning,
5 they have all agreed as to what it means.

6 MR. CHARNOFF: I don't believe so. At one point
7 Mr. Popper talked about all the members of AMP-0, most of
8 which are not within the service area.

9 On the other hand, Mr. Goldberg has indicated that
10 the entities outside of the CAPCO area, well, maybe if
11 PASNY is an example, then that is an example.

12 I would say to you in that context, sir, I don't
13 know what electrical entity outside of CAPCO is not within
14 that group. And if we are to have discovery on all those
15 types of relationships, we are talking about endless and
16 boundless definition --

17 CHAIRMAN FARMAKIDES: Let's clarify this matter
18 right now.

19 As I understand the definition, that it includes
20 any entity within the CAPCO service area, and also any other
21 entity outside the CAPCO service area that transmits power
22 into the CAPCO service area.

23 MR. CHARNOFF: Sir, if you go through the pool
24 arrangements --

25 CHAIRMAN FARMAKIDES: There is no debate, Mr.

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1 Charnoff, on this.

2 Mr. Charno, is that your understanding, sir?

3 MR. CHARNO: My problem is with the term as
4 you used it of "generates power outside and transmits
5 it in," at this point that would seem too narrow a definition,
6 because it would exclude PASNY because it has been denied
7 the opportunity to transmit power in.

8 CHAIRMAN FARMAKIDES: How would you clarify it,
9 then? I want a definition that you either all agree on, or
10 you disagree on, so we can resolve the issue at this point
11 in time.

12 How would you restate it?

13 MR. CHARNO: I would have to give it some thought
14 in order to keep it from being too broad.

15 CHAIRMAN FARMAKIDES: It's already been stated,
16 sir, on the record. I am giving you a second opportunity.

17 Perhaps Mr. Popper who stated it earlier -- what
18 was your definition, sir?

19 MR. POPPER: I would like to refer back to the
20 record.

21 MR. CHARNOFF: Mr. Chairman, I think that illustrates
22 my problem.

23 CHAIRMAN FARMAKIDES: Off the record.

24 (Discussion off the record.)

25 CHAIRMAN FARMAKIDES: Back on the record.)

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Let's take a recess of 10 minutes.

(Recess.)

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1 CHAIRMAN FARMAKIDES: May we proceed, then,
2 either Mr. Popper or Mr. Charno?

3 MR. CHARNO: I think that we have agreed upon a
4 definition of entity.

5 CHAIRMAN FARMAKIDES: You mean other electric
6 entities?

7 MR. CHARNO: That's correct. Other electric
8 entities would mean any generating, transmitting, or
9 distributing electric entity within the service area of the
10 five applicants. And outside the service area of the five
11 applicants it would be any electric entity which has the
12 potential to generate power, Lulk power, which might be
13 transmitted into the applicant's service areas.

14 CHAIRMAN FARMAKIDES: All right, sir. We are
15 going to be getting into this in greater detail under
16 Subissue 1.

17 Let's proceed.

18 Mr. Charnoff?

19 They have agreed, then, as to that definition so
20 what is your next point, sir?

21 MR. CHARNOFF: I want to be sure that we have an
22 understanding. This means any electric entity outside of
23 the service area which has the potential for generating
24 power for transmission into the service area.

25 CHAIRMAN FARMAKIDES: That is what Mr. Charno said.

1 MR. CHARNOFF: That is not necessarily then some-
2 body who is directly capable of transmitting this in. It
3 might be somebody, as I understand the pool and -- the
4 interpools are set up in this country with the possible
5 exception of Florida, sir, any generating company anywhere in
6 the country can generate power until it gets in.

7 If we are talking direct or indirect, I think we
8 need to do that.

9 CHAIRMAN FARMAKIDES: You may disagree. He
10 has stated it --

11 MR. CHARNOFF: I am simply trying to get a
12 clarification of it.

13 CHAIRMAN FARMAKIDES: Insofar as I am concerned,
14 the Board is clarified. And we are going to get involved
15 in it insofar as what the Board's concerns are under Sub-
16 issue 1.

17 What is your next point, sir?

18 I don't really want to hang up on this. It is
19 an important matter. Don't misunderstand me. It goes right
20 to the relevant market. A very important matter.

21 But I think we are clarified now and we will
22 proceed further under 1.

23 MR. CHARNOFF: I would just like the record to be
24 clear that I don't understand yet whether we are talking
25 about companies immediately adjacent, capable of transmitting

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1 it directly, or whether it is generating companies located
2 somewhere else that have to transmit it through other
3 facilities. I don't think we have that clarified on the
4 record, sir.

5 If the Board would clarify that, that would be
6 satisfactory to me. But I think we do need that. That
7 could hang up discovery.

8 I will, also on the question of entities,
9 address myself to the remark Mr. Goldberg made, that it is
10 the Board's duty, or the AEC's duty to examine the question
11 of the impact on all entities whether or not they are
12 parties to this particular proceeding.

13 I would say to you, sir, that it is the Board's
14 duty to look at the other entities to the extent that they
15 are part of the admitted contentions to this case.

16 It is those rules that govern this Board's
17 jurisdiction.

18 Not, it may well be that there are other
19 entities within somebody's contentions. But I would submit
20 to you that unless the Board examines -- that if the Board
21 examines the petitions and the Justice Department letter,
22 and, of course, we have received nothing from the AEC Staff,
23 the only entities mentioned there are AMP-O, City of Cleveland
24 and Painesville. Other than the names of the Applicants.

25 There are no other names of anybody else.

1 We have no idea what other entities they are
2 talking about.

3 Now, in connection with, I believe it was
4 Mr. Brebbia and Mr. Hall's questions of Mr. Goldberg, with
5 respect to what retail abuses that have been allged by
6 Mr. Goldberg in his petition which wouldnot be resolved by
7 any relief at the wholesale level, I would submit to you,
8 sir, that the Board never received an answer to that question.

9 I think the Board should take full cognizance
10 of it.

11 I do believe that the observations by the Board
12 with respect to examining the situation at the wholesale
13 level and determining that any relief afforded at that level
14 would be sufficient to take care of any abuses at the
15 retail level is a fair and appropriate approach to this
16 particular proceeding, particularly in the absence of an
17 answer by the City of Cleveland to the Board's question
18 which was very pointed and very direct and very much
19 unresponded to.

20 The Board didn't ask Mr. Goldberg to examine
21 hypothetical retail abuses in the abstract. The Board
22 asked Mr. Goldberg to examine the abuses alleged in
23 his petition and to identify one in that petition which
24 would not be remedied by some remedy at the wholesale level.

25 Mr. Goldberg did not answer that question.

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1 There was discussion by Mr. Goldberg of a point
2 that when a nuclear unit comes on line the power that may be
3 available may be surplus to the city's needs and, therefore,
4 the city needs third-party wheeling.

5 I would remind the Board that nowhere, nowhere
6 until today have we heard Mr. Goldberg make that point.

7 The Board may examine all of the pleadings and
8 all of the transcript, and the only time there is any
9 reference to any third-party wheeling by any party in this
10 case it is only in the context of the AMP-O's PASNY question.

11 That, I might point out, was specifically set
12 forth in the petition by AMP-O, as AMP-O's request to obtain
13 PASNY power for the City of Cleveland, not for a whole host
14 of other AMP-O members and not for transmittal by the City
15 of Cleveland to other persons.

16 We have never had any allegation by the City of
17 Cleveland of any competition that it wishes to enter into
18 with the -- with CEI at the wholesale level.

19 It is only today, for the first time, Mr. Goldberg
20 is now talking about taking that surplus power and selling it
21 to somebody else.

22 His example was Painesville.

23 I think, sir, that I could only summarize my
24 point here best by again reiterating the fact that we
25 honestly do not believe that there is a need to engage this

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1 Board in full-fledged antitrust inquiry, a year after
2 the inquiry started by the AEC and Justice.

3 All we have are allegations of non-access, when
4 in fact the record now shows access will be given by CEI on
5 behalf of the Applicants to the City of Cleveland in this
6 case.

7 There may be issues as to terms, but we are
8 prepared to either negotiate or litigate those particular
9 terms.

10 With respect to AMP-O, AMP-O, of course, stated
11 that it agrees with Paragraph 26 in our reply wherein we
12 said that that issue is joined and we ought to proceed with
13 discovery.

14 I would remind the Board that in its April 15
15 order it specifically called upon AMP-O to make certain
16 showings prior to discovery.

17 On page 5 of that order, Paragraph D, the Board
18 noted difficulty in understanding the technical economic
19 and marketing relationships that AMP-O asserts could lead to
20 AMP-O being unable to fulfill its commitment to Cleveland.

21 The Board will require that these be clarified
22 before the start of discovery.

23 The Board then asked Mr. Brown for some elaboration
24 on that at the last prehearing. Mr. Brown said he couldn't
25 answer it at that time but he certainly can be definitive

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1 about it in his contentions.

2 The Board had originally said could you do that in
3 five days and he said he would like as much time as any of
4 the parties get.

5 The Board afforded him twenty days.

6 I venture to say that the Board could not find
7 anything in the joint statement that was filed by the parties
8 to which AMP-O is a party which is at all responsive to that
9 inquiry by the Board very explicitly in its April 15 order.

10 I would also remind the Board that insofar as
11 Mr. Brown said this morning that he would like to pursue
12 discovery possibly broader than just the question of
13 transmitting power or wheeling power from PASNY, that the
14 Board has very clearly ruled what the nexus question is
15 insofar as AMP-O is concerned. It has to do with the
16 capacity and stability of the transmission system to handle
17 the 30 megawatts of power from PASNY.

18 That is the sole nexus of AMP-O as determined
19 by the Board in its order.

20 In that context, sir, there is no basis for
21 Mr. Brown or AMP-O engaging in any discovery unrelated to
22 the transmission of power, the 30 megawatts of power from
23 PASNY.

24 If nexus has any meaning in terms of limiting
25 pleadings, limiting discovery, delimiting the hearing, it

1 seems to me that the Board's ruling is quite clear insofar
2 as AMP-O is concerned and that is that, A, they have to
3 still come up with some statement in response to the Board's
4 observation in its April 15 order before they engage in
5 discovery and their discovery is limited to that which is
6 bounded by their nexus which is limited again to the PASNY
7 30 megawatts.

8 We haven't seen that, sir, and I would suspect
9 that the Board is anxious to still get that from Mr. Brown
10 sometime today.

11 Thank you very much.

12 CHAIRMAN FARMAKIDES: Mr. Brebbia has a question,
13 Mr. Charnoff.

14 MR. CHARNOFF: I am sorry, sir. May I make just
15 one other observation?

16 I assume the Board will be getting to this
17 proposed expedited hearing schedule at the end of the day.

18 CHARIMAN FARMAKIDES: Yes,

19 Mr. Brebbia?
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1 MR. BREBBIA: Mr. Charnoff, in view of the
2 failure of the parties to these two matters, cases, to a degree
3 on the proceeding conditions, how is it that you feel that
4 it is within the power of the Board to limit discovery
5 beyond the board, say, granting an extra two weeks or a month
6 for the parties to get together and see if they could agree
7 on the contentions?

8 MR. CHARNOFF: I would not think that simply
9 stating to the parties to get together on the contentions
10 would be an adequate way of handling that matter because
11 I think we would simply just delay the proceedings unnecessarily.

12 I think we are at a situation, sir, where if we
13 were a court of law the court would say to the parties, folks,
14 you are not at issue on access. You are at issue with one
15 another on what the terms of that access is. We will be glad
16 to adjudicate that for you but let's find out what that is
17 and let's decide that.

18 It seems to me that the Board here has three options
19 in effect. One is it could take the statement of contentions,
20 and I use that word with some hesitation in applying it to
21 the joint statement since it is no more than a checklist
22 of inquiries, wholly inappropriate at this stage of the proceeding
23 or it could turn around and say yes, indeed, here are the
24 proposed license conditions.

25 Almost the party defendant in this type of

13 1 proceeding, one party has agreed we will give access. Now then
Feb 2 2 other parties, manufacturers or producers whatever you may
3 be, tell us what is wrong with that or we will say they have
4 given access and the only remaining issue is the question of
5 wheeling.

6 And we will order license conditions such as
7 the type that have been proposed. We don't -- the board does
8 not have to wait in effect for the parties to agree on license
9 conditions. The board can use those license conditions to
10 define what is at issue in this case. That was not unheard
11 of in normal court practice and it seems to me it is entirely
12 appropriate for the court to do that here.

13 MR. BREBBIA: Let me pose this question to you ---

14 MR. CHARNOFF: I am sorry, I said there were
15 three alternates. The first is to accept their statement,
16 the second is to accept ours. The third is for this board,
17 applying AEC regulations on particularization of contentions
18 at the outset of discovery on the basis of all the pleadings
19 before it, the Board could itself define what those contentions
20 or matters at issue may be.

21 It could be broader than the question of just
22 wheeling. They may go to the issues related to the question of
23 what is at issue on the terms of access. They certainly don't
24 have to go nor should they go in our judgment to a whole broad
25 initial inquiry into antitrust matters. I am sorry, sir.

1 MR. BREBBIA: I am not hearing you to say that is,
2 I don't believe I am. You can correct me if I am wrong, I am
3 not hearing you to say that you have agreed to stipulate that
4 there is, that the parties are entitled to access and now the
5 only question therefore on access before this board is on what
6 basis they should be entitled to access, and if I am, then
7 how hwerein the parties are not able to agree on the conditions
8 are we able to decide on what kind of access is necessary
9 without granting discovery.

10 Again, on the question of access.

11 MR. CHARNOFF: First, I think we are in effect
12 stating that we have accepted the proposition of access in
13 the form of some form of ownership or some form of unit power,
14 though I think that that is clear. I think we have proposed
15 it to be obtained through the CEI share. But I think we
16 are stipulating that we are not fighting access to this particular
17 matter.

18 With respect to what the terms are and if there
19 is a difference you said, doesn't the Board have to order
20 discovery? The Board might have to order discovery but dis-
21 covery related to what the differences are on the terms, but
22 not necessarily discovery on how CAPCO in its entirety behaves
23 or how CEI has behaved at the retail or wholesale level, vis-
24 a-vis the city of Cleveland. That is not the issue anymore.
25 The issue therefore is what does the City of Cleveland need

ra 13 1 in the way of terms of access, what does it really want?

Feb 4 2 Does it really want ownership? Is that really
3 what they want? That was in their pleadings at one point but
4 they seem to be backing away from that. I am saying to you
5 that I don't understand and I don't think that in many other
6 forums that we would have a full blown litigation when the
7 party against whom the litigation is addressed is saying we
8 are giving access.

9 So the answer to your question in short is yes,
10 we are stipulating to the question that access can be
11 given and we have suggested the mechanism for it to be done.

12 MR. BREBBIA: I want to remind you that this is
13 not a court of law, it is an administrative body. We are all
14 familiar with courts and we have all been in court cases
15 I presume. And the rules are not the same.

16 MR. CHARNOFF: I would agree with that. I am
17 not sure that the AEC is interested in having full blown hearings
18 when there is a way to narrow the issues. I think what we
19 are submitting to you, sir, is that we have proposed unpro-
20 ductively, but we have proposed a way to narrow the issue.
21 We have gotten away from the issue of no access. We are
22 saying there is access.

23 Now let's talk about the terms of access.

24 DR. HALL: Mr. Charnoff, I am still a little bit
25 confused about what this offer is. I am not a little bit
confused, I am considerably confused about what your offer is.

1 Do you recall the footnote in the Commission's
2 Memorandum and Order of February 23rd, 1973, in the Louisiana
3 Power & Light Company matters in which they suggested, the
4 Commission suggested, rather, that Louisiana Power and Light
5 might wish to assume arguendo that the allegations of the various
6 parties to that proceeding were true, and simply then move
7 to the question of what relief, if any, were adequate.

8 Now how does -- I take it you are not proposing
9 to do that, or are you proposing to do that?

10 MR. CHARNOFF: We have proposed to do that, sir.
11 But we had to do it in the context of a series of questions,
12 not allegations by the other parties. We then turned around
13 and looked at it and said, are they concerned with dominance
14 of CEI versus the City of Cleveland because we only saw that
15 in the pleadings.

16 If that is what they are concerned with, yes,
17 we are willing to assume arguendo or we are willing to
18 stipulate that, yes, the City of Cleveland in its relationship
19 to Cleveland Electric Illuminating is subservient or CEI
20 is dominant, both with respect to generation and transmission
21 in that area.

22 That is what our stipulation was designed to do.
23 It is directly responsive to both the form of the pleadings
24 and that footnote approach ---

25 DR. HALL: Correct me if I am wrong here because

13

Reb 5

ra 13 1 maybe the hangup is semantics. I did not understand that
Reb 6 2 a stipulation and an assumption arguendo are the same thing.

3 MR. CHARNOFF: I think that is correct. We
4 went beyond the assumption arguendo but in order to move this
5 hearing to focus on real issues. We were saying to you and
6 to the other parties, we are willing to stipulate that we are
7 in effect dominant, City of Cleveland, CEI, the type of
8 relationship.

9 That we are. And we have gone beyond. We have
10 gone further than what the Commission in effect was suggesting
11 in its footnote. In order to narrow this issue.

12 DR. HALL: But you are, just to clarify your
13 original question, you are prepared to adopt the procedure
14 outlined in the footnote in the Waterford Memorandum?

15 MR. CHARNOFF: In concept, sir, we think that what
16 we tried to do by way of saying we will stipulate to these
17 allegations to the extent we could understand them, they are
18 not particular. They are not defined factually, but let's
19 get beyond that and get to the remedy situation, that is
20 precisely what we tried to do.

21 DR. HALL: The answer I take it is yes.

22 MR. CHARNOFF: The answer to your question is yes
23 that was the procedure we tried but I must say we were
24 frustrated because we had no allegations by the other side.

25 CHAIRMAN FARMAKIDES: Mr. Charnoff, would you

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1 stipulate to issue number 5? Sub-issue number 5?

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2 DR. HALL: Under broad issue number 1.

3 CHAIRMAN FARMAKIDES: Let's make the assumption,
4 first, that the term applicants means all of the applicants.
5 Then the second assumption, the term applicants is CEI. But
6 the first assumption is the most important one. Do you
7 stipulate to that, sir?

8 MR. CHARNOFF: The first assumption being all
9 applicants, sir? We had trouble with the term relevant market.
10 That is what we said, sir, was that we don't know what relevant
11 market is. We did not think it was necessary to define it.
12 There is -- may I have a moment?

13 (Counsel confers)

14 CHAIRMAN FARMAKIDES: Let's take a recess.

15 MR. CHARNOFF: We can go on, sir.

16 CHAIRMAN FARMAKIDES: No, this is important and
17 the board would like a recess of its own. You think about it
18 and let's get back at, as a matter of fact, look, it is 12:20.
19 Let's recess until 1:30 for lunch.

20 MR. CHARNOFF: It might help the board if I just
21 answer that question very briefly.

22 CHAIRMAN FARMAKIDES: All right, sir.

23 MR. CHARNOFF: The answer is yes, each of the
24 applicants dominate the generation of bulk power in their
25 service areas.

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MR. BREBBIA: The answer is you would stipulate.

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MR. CHARNOFF: Yes.

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CHAIRMAN FARMAKIDES: You have stipulated to that now on the record?

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MR. CHARNOFF: Each of the applicants is dominant as to the generation of power in their service areas.

7

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Perfectly clearly I don't think we could dispute that even if we wanted to.

9

CHAIRMAN FARMAKIDES: All right, sir.

10

Let's recess until 1:30.

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(Whereupon, at 12:20 p.m., the hearing recessed, to reconvene at 1:30 p.m.)

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AFTERNOON SESSION

(1:30 p.m.)

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CHAIRMAN FARMAKIDES: I am sorry for the delay.

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I am sure all the parties have realized that that last stipulation of the Applicant is quite significant with respect to this proceeding, the extent of it. And we wanted to be sure that we understand fully what the Applicant has in fact stipulated to and what this means to further actions in this proceeding.

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Now, as I understand it, the Applicant stipulated to what the Board considers to be a primary issue, extremely serious. And that is Issue No. 5, framed by the joint statement of the AEC Regulatory Staff, Department of Justice, and Intervenors regarding the contentions and matters in controversy. The Board asked the Applicant's counsel as to whether or not he was stipulating to Issue No. 5 under broad Issue 1. The response was as the Board understood it, an unqualified yes. We have a number of options now.

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MR. CHARNOFF: Mr. Chairman, I think there has to be one clarification. I did stipulate that we are dominant, each of the companies is dominant, dominates the generation of bulk power in their service territories. I did not use the term relevant market because I don't know what that term is.

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CHAIRMAN FARMAKIDES: All right, sir. We will be corrected insofar as that is concerned. You did stipulate that each of the Applicants is dominant with respect to the

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1 generation of bulk power in their service areas?

2 MR. CHARNOFF: That's correct.

3 CHAIRMAN FARMAKIDES: Now, we have a number of
4 options. We can, number one, proceed and go through every one
5 of these subsidiary issues and see which of these subsidiary
6 issues the Applicant is willing to stipulate to in the same
7 vein. We also have another option and that is to cut through
8 going through each of these at this point in time and go to
9 some general stipulations. If the Applicant is willing to
10 accept the general stipulations, then of course, that would
11 have a great bearing on what this Board will consider to be any
12 need for additional discovery in those areas where the
13 Applicant has stipulated. We can then proceed to those areas
14 in which there still is issue in which there is no stipulation
15 and talk to discovery with respect to those areas.

16 How do the parties react to the Board's comments
17 so far? Let's go from left to right this time. Mr. Popper?

18 MR. POPPER: We have no objection, your Honor.

19 MR. CHARNO: No objection.

20 CHAIRMAN FARMAKIDES: To which one?

21 MR. CHARNO: I prefer the second alternative.

22 CHAIRMAN FARMAKIDES: General first, then specific.
23 Applicant?

24 MR. CHARNOFF: We have no objection to either
25 course.

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1 MR. GOLDBERG: I have some problems about understand-
2 ing the significance, if I may say so. I had understood that
3 at the very outset of today's proceeding, Mr. Charnoff had
4 declined to accept, even on an arguendo basis, the proposition
5 that there is a situation inconsistent with the antitrust
6 laws. Now, in the absence of his accepting that even on an
7 arguendo basis, I have some trouble with really understanding
8 that his concession, if I can call it that, has that much signi-
9 ficance to the proceeding.

10 CHAIRMAN FARMAKIDES: Well, excuse me, sir. The
11 ultimate issue that you posed, of course, is the ultimate
12 issue. And stipulation to Issue No. 5 does not equate with
13 stipulation to the ultimate issue, if that is what you are
14 saying.

15 MR. GOLDBERG: I realize that.

16 CHAIRMAN FARMAKIDES: What the Board has said,
17 Mr. Goldberg, the stipulation to Issue 5 as we have reformed
18 it, is a significant step towards that ultimate issue, and now
19 the question before this Board is how much discovery has that
20 stipulation resolved?

21 MR. GOLDBERG: It is in those terms that I am
22 addressing myself to its significance. I think absent the
23 acceptance of the ultimate matters on even an arguendo basis, it
24 has no significance whatsoever with regard to limiting dis-
25 covery.

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1 I can't understand your position, Mr. Goldberg.
2 Look, if you were to take, and that was the option I was
3 suggesting to you all, if we were to go through each of these
4 issues that you have identified and articulated and ask the
5 Applicant if he stipulated to every one of them, wouldn't the
6 sum total of those issues --

7 MR. GOLDBERG: Sum total might, but not No. 5 alone.

8 CHAIRMAN FARMAKIDES: Agreed, sir; that is the whole
9 point. The sum total would, as you say, No. 5 is just one of
10 the steps toward that sum total. So my question then was, we
11 have an assumption here. I am asking the parties as to their
12 preference. I am saying we can go through each of these
13 subsidiary issues in turn, No. 1, No. 2, we can simply take
14 a couple of very general, very general issues, if you will,
15 which the Board can formulate, and see if the Applicant will
16 stipulate to those general issues.

17 MR. GOLDBERG: I certainly have no objection to
18 that.

19 CHAIRMAN FARMAKIDES: Which of the two would you
20 prefer?

21 MR. GOLDBERG: I personally would prefer going
22 through each one and finding out which one he stipulates to
23 rather than the general. I don't know where the general is
24 going to get us if we are going to end up going to the
25 specific.

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1 CHAIRMAN FARMAKIDES: All right. Mr. Brown?

2 MR. BROWN: I would agree that we go through each of
3 them, and I would agree with Mr. Charno that it would be help-
4 ful to get some idea as to what the general stipulations might
5 turn out to be if we begin with the general ones first.

6 CHAIRMAN FARMAKIDES: All right, sir.

7 (The Board conferring.)

8 CHAIRMAN FARMAKIDES: We are going to post some
9 general questions first, then we are going down through the
10 specific. I think everyone is clear, and this is in the best
11 interests of everyone, if we are all agreed and if the
12 Applicant stipulates to certain ultimate conclusions,
13 ultimate issues, this would eliminate a great deal of discovery.
14 And I think it is clear to everyone that this is what we are
15 proceeding. Now we are going to revise our No. 5 as Mr.
16 Charnoff has indicated, so that it would be applicable to
17 each of the Applicants' service areas.

18 Now let me pose, then, the next -- a next issue to
19 Mr. Charnoff and see if he agrees. And perhaps what I ought
20 to do in all fairness is to pose three of them -- or four of
21 them at one time, so you can see the direction the Board is
22 heading.

23 The second issue for stipulation, if the Applicant
24 cares to so stipulate: Are each of the Applicants dominant
25 in their service area as to, A, generation, B, transmission,

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C, distribution?

The third issue, will the Applicant stipulate that there is, therefore, a need for access?

The fourth issue, will the Applicant stipulate that there is, therefore, a need for wheeling?

Fifth, will the Applicant stipulate that this Board has jurisdiction to provide a remedy based on the early stipulations? That is one through four.

No. 1, as I said before, is in fact what triggered this whole thing off, and that is the stipulation of the Applicant with respect to Issue No. 5 stated in the joint statement of the other parties, modified only in that we were talking about service areas rather than relevant market areas. Those are the five issues that I would post to the Applicant before we get into the specifics of going down through the list of the issues posed by the other parties to see how the Applicant treats each of them in turn.

I would like to have the Applicants' response on these. If you need time, sir, we would give you time. Mr. Charnoff.

MR. CHARNOFF: Yes, I would like to have about five minutes.

CHAIRMAN FARMAKIDES: All right, sir. Let's recess until 1:55.

(Recess.)

(1:45 p.m. - 1:55 p.m.)

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1 CHAIRMAN FARMAKIDES: Mr. Charnoff?

2 MR. CHARNOFF: Sir, I believe you outlined four
3 issues followed by a question as to the Board's jurisdiction.

4 The first, of course, was the one that we dealt
5 with before at the luncheon break, and that is whether the
6 Applicants dominate the generation of bulk power in each of
7 their service territories, and as you indicated, that we
8 have stipulated to, and that takes care of the first point.

9 Your second one, according to my notes, is each
10 of the Applicants are dominant in their service territories --

11 CHAIRMAN FARMAKIDES: Service areas is what I
12 used, Mr. Charnoff.

13 MR. CHARNOFF: Service areas, in three separate
14 subcategories.

15 The first was generation. We understand the
16 first of generation to be the same in that regard as the first
17 contention, namely Contention 5, that we do dominate the
18 generation of bulk power in our service area as the service
19 territory, so insofar as Issue No. 2(a), if you will, I think
20 that is taken care of by Issue 1.

21 As to Subissue No. 2(b), is each Applicant dominant
22 in its service area or service territory with regard to
23 transmission. Each of the Applicants is clearly the largest
24 in its service area in terms of miles of transmission line
25 and in terms of capacity of its transmission lines. So if

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1 the term "dominant," is it the largest, the answer is clearly
2 yes.

3 CHAIRMAN FARMAKIDES: What do you mean by largest,
4 sir?

5 MR. CHARNOFF: I indicated just now. That we
6 have substantially more miles of transmission line or
7 substantially more capacity of transmission. We clearly have
8 that.

9 CHAIRMAN FARMAKIDES: Do you have 90 percent of
10 the transmission lines in those service areas? Can you be
11 more specific, Mr. Charnoff?

12 MR. CHARNOFF: Let me try. I don't know that I
13 can give you that number.

14 (Counsel conferring.)

15 MR. CHARNOFF: Sir, I can't give you a percentage
16 number. It is in that general area. It is very large.

17 CHAIRMAN FARMAKIDES: Close to 90 percent?

18 MR. CHARNOFF: Yes.

19 MR. BREBBIA: Is it over 75?

20 MR. CHARNOFF: Is it over 75? I don't have that
21 number. It is in that ball park of over 75, yes.

22 MR. BREBBIA: It is over 75.

23 CHAIRMAN FARMAKIDES: All right, sir, how about
24 2(c)?

25 MR. CHARNOFF: I want to go on with 2(b).

1 CHAIRMAN FARMAKIDES: I am sorry.

2 MR. CHARNOFF: Now, then, I think it should be
3 clear that none of the companies has the power to exclude
4 or preclude the construction of new transmission lines
5 by any other entities in its service territory, from their
6 location to some other location. We don't control that kind
7 of activity. Nor are we aware of any allegation that we have
8 ever done that.

9 MR. BREBBIA: Construction of what kind of
10 facilities? Transmission?

11 MR. CHARNOFF: I am sorry?

12 CHAIRMAN FARMAKIDES: You are talking about trans-
13 mission facilities?

14 MR. CHARNOFF: I was talking transmission, that's
15 correct. As to presently existing lines, transmission lines,
16 the City of Cleveland and the City of Painesville are both
17 entirely surrounded by CEI's, and insofar as either one of
18 those cities would like to transmit power in or out, they
19 would have to use presently existing lines or -- which belong
20 to CEI, or, of course, they are free to construct new ones.

21 As to the other Applicants, of course, we don't
22 know what entities we are talking about at the moment in
23 terms of "other entities." But in terms of the party at
24 issue, namely City of Cleveland, City of Painesville, we
25 control the lines that surround those areas. So in that

1 context, the answer is as I have stated it.

2 As to 2(c), which is distribution, that's a little
3 bit more difficult.

4 For example, CEI does not distribute or sell power
5 in Painesville, in the area served by Painesville. There is
6 competition between Painesville and CEI on the periphery of
7 the City of Painesville service area.

8 So clearly we are not dominant within the Paines-
9 ville marketing area. The same thing would be true insofar
10 as certain of the sections of the City of Cleveland that
11 are served by the City of Cleveland Municipal Electric Light
12 & Power.

13 In the total city, I believe CEI services 80 percent
14 of the customers. and MELP services 20 percent. But there
15 are certain areas where competition could go on, but doesn't
16 exist in certain limited, defined areas, or undefined areas
17 where in those limited sub-areas, if you will, MELP is
18 dominant and we are not there.

19 MR. BREBBIA: Excuse me. Is the market in
20 Cleveland, Cleveland; or is the market in Cleveland four
21 streets -- are there submarkets in Cleveland, or is it Cleve-
22 land?

23 MR. GOLDBERG: Cleveland the competition could be
24 house by house.

25 MR. BREBBIA: I didn't ask that question. I asked

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1 what the market was. Is the market in Cleveland, Cleveland?
2 Do you consider there are submarkets by streets, neighbor-
3 hoods, precincts?

4 MR. CHARNOFF: I can't answer that question because
5 I have had no allegation from anybody as to what market
6 they are talking about.

7 I can only tell you that as I understand it, they
8 are both legally capable of serving anywhere within the
9 confines of the City of Cleveland.

10 There are certain areas where they both do serve
11 house to house, certain sub-areas where they don't serve
12 house to house.

13 MR. BREBBIA: Well, is there a subservice area
14 in Cleveland, in your opinion, or is the Cleveland service
15 area one --

16 MR. CHARNOFF: Excuse me. I understand your
17 question. I am not sure I can answer it.

18 (Counsel conferring.)

19 MR. CHARNOFF: Sir, for this purpose, it seems to
20 me it is probably convenient to call the entire city one
21 service area and tell you that in that area, we service
22 80 percent of the customers, and MELP services 20 percent
23 of the customers.

24 MR. BREBBIA: Okay.

25 MR. CHARNOFF: Now as to the other Applicants,

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1 again we don't know whether we are dominant versus other
2 unnamed entities, but where there are other municipalities
3 or so, in those areas where they service and sell retail,
4 we don't.

5 So within the limits of their cities, we don't
6 have the situation that you have in the City of Cleveland where
7 you, at least conceptually and really, have house-to-house
8 competition in certain portions of the state.

9 MR. BREBBIA: Excuse me. In your last answer,
10 are you referring to all of CAPCO now, I mean all the members
11 of CAPCO: Are you relating --

12 MR. CHARNOFF: I said I was talking about the other
13 Applicants other than CEI.

14 MR. BREBBIA: Okay.

15 MR. CHARNOFF: May I have a moment?

16 (Counsel conferring.)

17 MR. CHARNOFF: To be sure the record is clear, as
18 to CEI, there are only two entities, namely Painesville
19 and City of Cleveland within its service territory. So we
20 have covered CEI.

21 As to the other Applicants, Duquesne, Toledo,
22 Ohio Edison, as I said, we don't know which entities we are
23 talking about, but in their service territories we don't have
24 the situation which prevails in the City of Cleveland, where
25 you do have house-to-house competition potentially.

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1 MR. BREBBIA: You don't have competition within
2 the service area of any city or town within the other four
3 members, if there is a municipal system operating in that
4 city or town?

5 MR. CHARNOFF: That's correct. There might be
6 competition on the periphery of those areas, but not in the
7 cities. We don't have that same situation that exists in
8 the city. That, I think, concludes Item 2.

9 Now, Item 3 was, I think as you stated it, sir,
10 "and therefore there is need" --

11 CHAIRMAN FARMAKIDES: No, do you stipulate that
12 there is therefore a need for access. Assuming dominance
13 in Issue 1, dominance in Issue 2, do you therefore stipulate
14 that there is a need for access?

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1 MR. CHARNOFF: We need a little bit of clarification
2 on that, sir.

3 Let me state it this way: we don't know whether
4 we are talking about access as you use it in terms of owner-
5 ship or unit power, or wholesale power or something else.
6 I don't quite know what you mean by access.

7 CHAIRMAN FARMAKIDES: Well, I would think that
8 you would, Mr. Charnoff, because you earlier this morning
9 said that you were prepared to stipulate to all the
10 remedies in Broad Issue 3 except one.

11 MR. CHARNOFF: I was stipulating in the sense that
12 I said we have afforded all of those remedies under Broad
13 Issue 3. But let me talk in terms of access as the term
14 has been used in the pleadings.

15 As it has been used in the pleadings it has been
16 talked in terms of either unit power or ownership of the
17 nuclear facility.

18 If that is what you meant, then the main question
19 I have is: access by whom?

20 Do you mean if we are to talk about these other
21 unnamed entities? I am a little confused on that one.

22 If we are talking about access to the nuclear
23 units, nuclear reactors in the form of ownership or nuclear
24 power by the City of Cleveland or the City of Painesville,
25 the position of the Applicant is not that there is need for,

1 but that we are prepared to make it available to them.

2 Now --

3 CHAIRMAN FARMAKIDES: In other words, you are --

4 MR. CHARNOFF: We are saying that yes, we will
5 make access available. We are not withholding access in
6 terms of either unit power or ownership to either of those
7 two cities. But we are not saying that there is, therefore,
8 need for access in that context.

9 (Board conferring.)

10 CHAIRMAN FARMAKIDES: Okay, Mr. Charnoff; proceed,
11 sir.

12 MR. CHARNOFF: Now, the fourth question was --

13 CHAIRMAN FARMAKIDES: The answer to the last
14 question, sir, is no?

15 Let me be clear about this because now the ball
16 game has changed back again.

17 Now, you see, you have said to us that you are
18 not prepared to stipulate that there is, therefore, a need
19 for access.

20 MR. CHARNOFF: That's correct.

21 CHAIRMAN FARMAKIDES: You would be prepared to
22 stipulate that you would make access available.

23 MR. CHARNOFF: Yes, sir.

24 CHAIRMAN FARMAKIDES: Based on the domination of
25 five, dominance of five, dominance of one, dominance of two,

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1 you are not prepared to stipulate that there is a need for
2 access; is that --

3 MR. CHARNOFF: I have to be a little careful
4 about the threshold because you said based on the dominance.

5 CHAIRMAN FARMAKIDES: As you have articulated it.

6 MR. CHARNOFF: As I have articulated or qualified
7 it in two, the answer is we are not denying access.

8 CHAIRMAN FARMAKIDES: All right. Let's go to four.

9 MR. CHARNOFF: But we will not stipulate to need
10 for as a result of.

11 CHAIRMAN FARMAKIDES: We understand you, sir.
12 Let's go to four.

13 MR. CHARNOFF: I believe your words were, and
14 therefore there is need for wheeling?

15 CHAIRMAN FARMAKIDES: No. The words of the Board
16 were do you stipulate that there is, therefore, and again,
17 the preamble for "therefore" is the dominance of one, the
18 dominance of two.

19 Do you stipulate that there is, therefore, a need
20 for wheeling?

21 MR. CHARNOFF: Again I have to qualify that in
22 terms of by whom.

23 I take it if we are only talking in terms of the
24 City of Cleveland, I can address that question, or the
25 City of Painesville. If we are talking about unidentified

1 entities in the context of which we have talked about it
2 this morning, I can't stipulate it.

3 As to the City of Cleveland and the City of
4 Painesville, our position is no, there is no need for
5 wheeling, even though we are giving them access and
6 transmission as necessary in order to move the power from
7 the nuclear units to their service territory, plus the other
8 related services that are set forth in our license conditions,
9 emergency power and so on.

10 CHAIRMAN FARMAKIDES: All right, sir.

11 MR. CHARNOFF: Then finally I believe your
12 question was -- again I just took notes of it. You
13 might have it more precisely -- is would we stipulate that
14 a Licensing Board has jurisdiction to provide remedies for
15 A through D, or 1 through 4.

16 I believe that is the way --

17 CHAIRMAN FARMAKIDES: In other words, what we
18 had said was that based on your earlier stipulations, and I
19 think the thought there is that assuming you were to stipulate
20 to each of those, that would have to be a basic assumption --

21 MR. CHARNOFF: Yes.

22 CHAIRMAN FARMAKIDES: Assuming you would stipulate
23 to each of those earlier statements, would you then stipulate,
24 further, that the Board has jurisdiction to fashion a remedy
25 based on those stipulations?

1 Now, you see, the question is moot. It no longer
2 is pertinent, sir, because your response to two of those
3 issues is no, you do not stipulate.

4 So, you see, this particular change of events is
5 no longer very relevant.

6 MR. CHARNOFF: I think that's correct.

7 I would make one observation, though. We would
8 stipulate that the Licensing Board can impose conditions
9 not on the basis of A through D but can impose conditions
10 such as those that we have proposed.

11 CHAIRMAN FARMAKIDES: All right, sir. I will
12 accept comments from each party with respect to those
13 comments and we will go on.

14 I want to go back to the specific matters in
15 controversy and we will ask the Applicant to address each
16 of those in turn.

17 Before we do that, Mr. Charno, any comments with
18 respect to the statements just made by Mr. Charnoff?

19 MR. CHARNO: I would like to reserve any comment
20 until after we have covered the specifics.

21 MR. POPPER: I have no comments at this time.

22 MR. BROWN: No comments at all, your Honor.

23 MR. GOLDBERG: None at this time.

24 CHAIRMAN FARMAKIDES: Let's go back through the
25 specific issues.

lmi1 1 (The Board conferring.)

2 CHAIRMAN FARMAKIDES: Okay. Let's go to No. 1,
3 on page 2, under matters in controversy under broad Issue 1.
4 Now, Point No. 1 thereunder, what are the relevant product and
5 geographic markets for antitrust analysis in this proceeding?
6 I am going to ask the four parties other than the Applicant.
7 Mr. Charno, what is your definition of the relevant market,
8 sir?

9 MR. CHARNO: Well, at this point, Mr. Chairman,
10 and subject to discovery to amplify, it would seem that the
11 possible markets would be retail competition in the city of
12 Cleveland. We know of no other retail market with any
13 specificity. As Applicants have pointed out there may be
14 retail competition existing in the geographic markets comprised
15 of fringe areas between municipal and cooperative and we don't
16 have any information prior to discovery on exactly what those
17 are. So certainly retail market within the geographic market
18 of the city of Cleveland. Wholesale competition is certainly
19 potentially available with respect to each distribution
20 electric entity located within the Applicant's service areas.

21 MR. BREBBIA: Can I interrupt you a minute? Could
22 you start with -- could you start for us not with submarkets,
23 which is what I think you were just talking about, or are
24 referring to. But start with the market. What is the
25 largest geographical market here, then if you want to talk about

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1 submarkets. I mean what are we talking about in geographical
2 markets for all the issues that are here?

3 MR. CHARNO: Largest geographic market would be
4 the combined CAPCO service area.

5 MR. BREBBIA: Would that be as defined in a couple
6 of pleadings? Yes, let's take the petition of the city of
7 Cleveland for leave to intervene set forth, or attempts to
8 define the square miles and numbers of people involved in the
9 area serviced by Duquesne, by Ohio, by all the members of
10 CAPCO. Have you had occasion to look at that?

11 MR. CHARNO: Not recently. But that would be the
12 type of data that would be relevant in determination of the
13 metes and bounds of the geographic market.

14 MR. BREBBIA: Of the service areas of the five
15 members?

16 MR. CHARNOA: That's correct.

17 MR. BREBBIA: Okay. Go ahead.

18 MR. CHARNO: The relevant service market would be
19 the sale and exchange of electric power. That would be
20 subject to submarkets in the extrajurisdictional market, the whole-
21 sale market, and the retail market. Each one of those would
22 have various geographical applications where it did. I think
23 that's what the department envisions as possible relevant
24 markets. But I think it is impossible to state what exactly
25 the relevant markets should be or what we even contend they

3mil 1 are prior to completing discovery.

2 MR. BREBBIA: Submarkets.

3 MR. CHARNO: Yes, sir.

4 CHAIRMAN FARMAKIDES: Anything further?

5 Mr. Popper, would you address number one, sir?

6 How do you envisage the relevant market?

7 MR. POPPER: Your Honor, the Staff's position is
8 consistent with that of the Justice Department with a similar
9 caveat, that the analysis of what the relevant submarkets are,
10 various forms of energy exchange, various forms of reserve,
11 dealings, would have to come out of some discovery. We don't
12 have sufficient information to determine whether or not there
13 is a competitive market there. Right now it appears there is a
14 likelihood that we will be able to determine different
15 various types of submarkets that exist in the framework that
16 Mr. Charno has developed. But I wouldn't want to speculate
17 on them now without getting additional information. That is
18 my position.

19 MR. BREBBIA: Are you agreeing with him on the main
20 market, if you want to call it that, the broad geographical
21 market?

22 MR. POPPER: Geographically? Yes.

23 MR. BREBBIA: Okay.

24 MR. POPPER: Now, as I understand, his answer is
25 that it is the CAPCO area?

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1 CHAIRMAN FARMAKIDES: Service areas. In other words,
2 then, sir, let's be specific about this, because I want to hit
3 this later on, with respect to five, issue five under broad
4 issue one, the only change to that was that the Applicant
5 stipulated to that, except that he substituted service area
6 rather than relevant market. You are now saying, as I under-
7 stand you, that they are the same thing? That you would
8 accept --

9 MR. POPPER: I see.

10 CHAIRMAN FARMAKIDES: Let's be very clear about this
11 and this is going to be an extremely important point. So this
12 is what I understand Mr. Charno to say, this is what I under-
13 stand Mr. Popper to say. Hold fast. Mr. Popper? Now if you-
14 all want to consult, sure.

15 MR. POPPER: I think since our position is being
16 jointly construed we should have a short period of time to dis-
17 cuss it.

18 CHAIRMAN FARMAKIDES: How much time do you need,
19 sir, two or three minutes?

20 MR. POPPER: Just a couple of minutes.

21 CHAIRMAN FARMAKIDES: All right, let's just hold
22 in place.

17 23 (Pause.)

24

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3mil 1 are prior to completing discovery.

2 MR. BREBBIA: Submarkets.

3 MR. CHARNO: Yes, sir.

4 CHAIRMAN FARMAKIDES: Anything further?

5 Mr. Popper, would you address number one, sir?
6 How do you envisage the relevant market?

7 MR. POPPER: Your Honor, the Staff's position is
8 consistent with that of the Justice Department with a similar
9 caveat, that the analysis of what the relevant submarkets are,
10 various forms of energy exchange, various forms of reserve,
11 dealings, would have to come out of some discovery. We don't
12 have sufficient information to determine whether or not there
13 is a competitive market there. Right now it appears there is a
14 likelihood that we will be able to determine different
15 various types of submarkets that exist in the framework that
16 Mr. Charno has developed. But I wouldn't want to speculate
17 on them now without getting additional information. That is
18 my position.

19 MR. BREBBIA: Are you agreeing with him on the main
20 market, if you want to call it that, the broad geographical
21 market?

22 MR. POPPER: Geographically? Yes.

23 MR. BREBBIA: Okay.

24 MR. POPPER: Now, as I understand, his answer is
25 that it is the CAPCO area?

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1 CHAIRMAN FARMAKIDES: Back on the record.

2 Mr. Popper, I think you had the floor, sir.

3 MR. POPPER: Your analysis is consistent with
4 what we are saying, your Honor. The limitation that you
5 construed between No. 5, on page 3, as it applies to No. 1
6 is correct.

7 But we view the relevant market collectively as the
8 largest area served collectively in CAPCO and not each
9 individual member.

10 I think they have to be taken as a group.

11 MR. BREBBIA: But service area?

12 MR. POPPER: That's correct.

13 MR. BREBBIA: We are just trying to get to some
14 point of definition. Geography means service area in this
15 case, if we can define terms.

16 MR. POPPER: That's correct.

17 CHAIRMAN FARMAKIDES: What in the world does this
18 quote "other electric entities" mean, if you don't equate it
19 to something in the relevant marketplace? This is your
20 contention, and I am asking you as counsel.

21 This, to me, is a very clear question. This is
22 your burden, not just the two of you, but the four of you
23 signing this document.

24 Mr. Popper?

25 MR. POPPER: I am not exactly sure I understand the

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1 clarity of your question.

2 CHAIRMAN FARMAKIDES: All right, fine.

3 MR. POPPER: I just am missing your question.

4 Maybe you can rephrase it for me.

5 CHAIRMAN FARMAKIDES: Well, then, look, we are
6 talking about you people asking for discovery on whether
7 the Applicants have the ability to hinder or prevent other
8 electric entities.

9 Now are you saying whether to hinder or prevent
10 other electric entities operating outside the relevant
11 market area, service area, and I equate service area with
12 relevant market area -- is that what you all are saying to
13 this Board?

14 And that is the way we read it loud and clear.
15 I tried to get to it earlier, and apparently there were some
16 difficulties. I am getting to it now because to us it is
17 important.

18 We have to understand what you mean by relevant
19 market. How in the world can we go to deciding discovery
20 unless we understand relevant market? The general relevant
21 market. Not the submarkets.

22 MR. POPPER: The general relevant market, as we
23 phrased it, is the geographic area served by the CAPCO Pool.

24 CHAIRMAN FARMAKIDES: All right, fine.

25 Mr. Brown?

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1 MR. BROWN: I have nothing to add except that our
2 position would be consistent with that of the Justice
3 Department and the Staff. It is somewhat of a burden to be
4 able to establish at this point precisely what the relevant
5 market is in the service area, because as the Board realizes,
6 these were contentions which were set forth jointly, and
7 therefore it is subject, of course, to a change by virtue
8 of the discovery process.

9 CHAIRMAN FARMAKIDES: We understand that, sir. But
10 we also have to have from your general concept of what we are
11 talking about here, and we can expect that from you.

12 MR. BROWN: That was our concept in drafting
13 the joint statement, your Honor.

14 CHAIRMAN FARMAKIDES: You equate relevant market
15 with the total service area?

16 MR. BROWN: That's correct.

17 CHAIRMAN FARMAKIDES: Of the Applicants?

18 MR. BROWN: Of the Applicants, yes, that's correct.

19 CHAIRMAN FARMAKIDES: Yes.

20 Mr. Goldberg?

21 MR. GOLDBERG: I have a little bit of problem with
22 the use of "service area." It is very often taken to mean
23 the franchised area. But these bit interstate companies
24 like the Applicants in this situation have more than just a
25 franchised area. Their lines traverse areas where they may

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1 not be engaged necessarily in distribution.

2 So I think that when we talk about service area,
3 we must be thinking in terms of more than just franchised
4 areas in which they may be engaged. I tend to think of the
5 relevant market area as the areas covered by the facilities
6 of the CAPCO members which generally is Ohio and Pennsylvania.

7 And for purposes of initiating discovery, I think
8 of it in those terms, recognizing that because of the restraints
9 that have existed, there may very well be more of a relevant
10 market area than that; for example, the State of New York,
11 where if we were able to reach it through transmission,
12 if the restraints had not existed, it would be part of the
13 relevant market area.

14 And I would just have this caveat, the discovery
15 may indicate that the market area is greater than just Ohio
16 and Pennsylvania.

17 MR. CHARNO: Your Honor, would it be possible --
18 I am afraid I gave the wrong impression. Maybe I can clarify
19 what I was originally saying.

20 Mr. Goldberg's comments make clear that there
21 may be one type of product or service market that is going
22 to have a wider geographic market. The retail and wholesale
23 markets can easily be confined in almost every circumstance
24 to a geographic market consisting of the CAPCO service
25 area.

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1 The power exchange market, on the other hand, while
2 it would have one participant in an exchange in the CAPCO
3 service areas, might well have the other participant out-
4 side the CAPCO service areas.

5 For instance, PASNY and the City of Cleveland,
6 that transaction, if one limited the geographic market area
7 to the CAPCO service areas in such a way as to eliminate
8 consideration of any outside generator of electric power
9 which could be transported into that area, would exclude a
10 broad segment of the power exchange market.

11 I think that is what is giving my compatriots
12 problems with the discussion of an entity. When we are talk-
13 ing about an entity in the service area, we are talking
14 about all of the electric entities in the service area. We
15 are talking about an entity outside, we are talking about
16 somebody who could be dealing with an entity in the service
17 area.

18 This does not broaden the scope of discovery that
19 we have considered, because we have specifically limited
20 the discovery that we are going, or that we intend to under-
21 take by Mr. Popper's statement at the outset this morning.

22 I think that no matter which way you define
23 "entities," the scope of discovery is going to stay pretty
24 much the same.

25 CHAIRMAN FARMAKIDES: All right, sir.

1 (The Board conferring.)

2 CHAIRMAN FARMAKIDES: All right, we are still --
3 I am sorry, we are taking time. But this -- it may or may
4 not be fruitful.

5 For a while we thought it was going to be fruitful;
6 now we are not so sure.

7 However, the exercise is still, I think, quite
8 important here. It may eliminate an awful lot of work later
9 on for all of you and for us, too.

10 Let's get back to 1.

11 Mr. Charno, again, with respect to your definition,
12 sir, of relevant market in 1, could you comment on how that
13 definition is treated in 2? What aspects of your definition
14 of relevant market in 1 do you consider fall -- or encompass
15 the term relevant market in 2?

16 MR. CHARNO: I think with respect to 2 --

17 CHAIRMAN FARMAKIDES: Are you talking power exchange
18 there, sir, or are you talking strictly -- go ahead. I see
19 that you see what I mean.

20 MR. CHARNO: As far as I am concerned -- and I am
21 not speaking for the other parties -- the Department would
22 interpret that or intends that to mean the CAPCO service
23 areas as the geographic area. As the broadest geographic
24 market.

25 CHAIRMAN FARMAKIDES: That is 2. So with respect

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1 to 2, the term "relevant market" is equivalent to the
2 CAPCO service areas?

3 MR. CHARNO: The relevant geographic markets,
4 yes, sir.

5 DR. HALL: Mr. Charno, do you have any comment
6 on Mr. Goldberg's remark that there is a problem with the
7 facilities, that certain facilities are located in areas
8 in which a utility does not serve any customers? Do you
9 find -- is your definition consistent with that view, or is
10 it different from that view?

11 MR. CHARNO: My definition is formed in basically
12 ignorance of the merits of that view. I do not know. I am
13 not aware of the transmission facilities outside the
14 certificated service areas for the CAPCO members or for the
15 Applicants.

16 CHAIRMAN FARMAKIDES: All right.

17 DR. HALL: Thank you.

18 CHAIRMAN FARMAKIDES: Mr. Popper, could you define,
19 sir, what you meant with respect to the term "relevant
20 market" in Item 2? Do you agree with the Department of
21 Justice?

22 MR. POPPER: Yes.

23 CHAIRMAN FARMAKIDES: All right.

24 Mr. Brown, do you agree with the Department of
25 Justice?

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1 MR. BROWN: Yes, I would, your Honor. I think
2 that since the Applicants have no transmission facilities
3 presumably outside the CAPCO service area, that it couldn't
4 mean anything else.

5 I might say with respect to your question regarding
6 your question, the franchise areas. My concept of the CAPCO
7 service area, I am sorry, it was your question, Dr. Hall --
8 in that regard is a large circumferential area, rather than
9 submarket spots which are the franchised areas for the CEI
10 service areas.

11 CHAIRMAN FARMAKIDES: Okay, Mr. Goldberg, do
12 you agree, sir, with respect to Item 2 with the Department
13 of Justice's interpretation of the definition of relevant
14 market?

15 MR. GOLDBERG: Yes, I think I could accept that
16 even with the caveat I had with respect to No. 1.

17 CHAIRMAN FARMAKIDES: All right, sir.

18 Mr. Charnoff, the next question is obvious. Sir,
19 would you stipulate to No. 2 with the definition of relevant
20 markets as proposed by Mr. Charno?

21 MR. CHARNOFF: I think in our pleadings, sir, we
22 had indicated that insofar as No. 2 would be limited to CEI
23 and City of Cleveland, I believe on page 16 of our filing,
24 we did say that CEI Has control over, and we mean there the
25 existing bulk power transmission facilities. That is, we

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1 don't preclude them from building any.

2 And we were talking here, we understood this to
3 be the transmission facilities relevant to transmission
4 of the nuclear power.

5 CHAIRMAN FARMAKIDES: We are shifting now, sir.
6 We know what you have stated in your pleadings. We are now
7 going to stipulating to 2 and "Applicants" means all five.

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1 MR. CHARNOFF: I think, sir, that if the word
2 "control" as used in number 2 is the same as "dominance" as
3 used in your second postulated statement, earlier, are each
4 of the applicants dominant in their service areas, with respect
5 to transmission, then I think I answered this question before.

6 CHAIRMAN FARMAKIDES: And your answer is yes?

7 MR. CHARNOFF: My answer there, sir, was that in
8 terms of size, in terms of capacity and distance, the answer
9 is yes, they are dominant. In terms of control, we don't
10 preclude the construction or development of other transmission
11 lines.

12 In terms of the municipal electric light power
13 of the City of Cleveland and in terms of Painesville, which
14 are the only two I can specifically address, yes, we have
15 all of the transmission lines surrounding those two cities
16 today.

17 CHAIRMAN FARMAKIDES: For purposes of this Board,
18 let's strike the word "control" and insert the word "dominance."

19 MR. CHARNOFF: Then I think I have answered the
20 question.

21 CHAIRMAN FARMAKIDES: Would you stipulate yes
22 unequivocally?

23 MR. CHARNOFF: Is this all applicants?

24 CHAIRMAN FARMAKIDES: All applicants, sir.

25 MR. CHARNOFF: Is it with respect to only the

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1 City of Cleveland and City of Painesville?

2 CHAIRMAN FARMAKIDES: No. All applicants.

3 MR. CHARNOFF: Sir, in the other service areas
4 there are other companies that have transmission lines that
5 we don't control.

6 CHAIRMAN FARMAKIDES: I am not saying control, sir.
7 I am saying dominance.

8 MR. CHARNOFF: I have to decide ---

9 CHAIRMAN FARMAKIDES: Look, we are trying awfully
10 hard here to see if we can't resolve some of these issues
11 to the point where we will not need the extent of discovery
12 we are talking about.

13 MR. CHARNOFF: We are trying to help in that regard.
14 I thought we had made the only positive gesture to do that,
15 sir.

16 CHAIRMAN FARMAKIDES: Now the board has posed an
17 assumption.

18 MR. CHARNOFF: I have to know whether we are
19 talking control in terms of legal control.

20 CHAIRMAN FARMAKIDES: I am talking dominance.

21 MR. CHARNOFF: Control in terms of dominance,
22 in terms of size. I have told you that each of the companies
23 has, as I think Mr. Brebbie had asked, is it upwards of 75
24 percent? Yes, it is upwards of 75 percent. In that contention
25 my answer is yes.

19 1 CHAIRMAN FARMAKIDES: In other words, it is in the
Feb 3 2 ballpark, of 90 percent.

3 MR. CHARNOFF: In that ballpark of 90, in that
4 context the answer is yes.

5 CHAIRMAN FARMAKIDES: Okay. Now, Mr. Charno, with
6 respect to the stipulation that we have just heard from Mr.
7 Charnoff, the only substitution is the word "dominance," which
8 we have equated earlier to say the ballpark of 90 percent,
9 would you agree that that would be a useful modification or
10 an amendment of that stipulation and would you accept it?

11 MR. CHARNO: We would accept it but we would not
12 find it dispositive of the issue that ---

13 CHAIRMAN FARMAKIDES: What do you see in the
14 word "control" then that you don't find in dominance?

15 MR. CHARNO: I have no trouble with either term.
16 But I think it is necessary from an antitrust viewpoint to
17 define either one so that it comes to mean the ability to
18 preclude competition or the exercise of that ability. I think
19 that is what it means in antitrust context. Applicants have
20 been very careful to say that they do not mean that. So that
21 I think it falls short of the issue that is to be determined
22 here.

23 I think it is a helpful stipulation.

24 MR. BREBBIA: You would agree that it should be
25 control then?

ra 19 1 MR. CHARNO: I don't care which term it is.

Feb 4 2 CHAIRMAN FARMAKIDES: So long as the term encompasses
3 precluding?

4 MR. CHARNO: That is correct.

5 DR. HALL: Do I understand you to say, Mr. Charno,
6 that given the stipulation, the issue then becomes does
7 applicant's dominance of the bulk power transmission facilities
8 in the joint CAPCO service area give it the ability to pre-
9 clude the transmission -- competition? Is that then, does
10 that then become the issue?

11 MR. CHARNO: Could you specify whether you meant
12 transmission or competition in that?

13 DR. HALL: I meant preclude competition.

14 MR. CHARNO: In the transmission of bulk power?

15 DR. HALL: Yes.

16 MR. CHARNO: Yes, sir, that is correct. That
17 is what we are stating.

18 DR. HALL: All right. So then that in your view
19 becomes the issue, not the issue that you now have listed
20 as number 2.

21 MR. CHARNO: Very good. We have taken a good
22 step then. Mr. Popper, what do you think, sir?

23 MR. POPPER: First I would agree with what was
24 just stated by the Justice Department. But I would add that
25 I believe I understood counsel for the applicant to state,

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1 and I could be very greatly mistaken, but was he discussing
2 transmission solely attendant to nuclear power generating
3 and if he was, that of course would make the stipulation
4 meaningless at this point regarding power supply options.

5 MR. GOLDBERG: Would make it what?

6 MR. CHARNO: Meaningless.

7 DR. HALL: I understood our discussion to relate
8 to total transmission facilities.

9 CHAIRMAN FARMAKIDES: Within the service area.

10 DR. HALL: Service area.

11 CHAIRMAN FARMAKIDES: That was my understanding.
12 That was the board understanding. Mr. Charnoff, is that
13 correct, sir?

14 MR. CHARNOFF: I think we said both things.
15 One is that in the written stipulation we were talking about
16 CEI's relationship to the city and we were talking about
17 transmission to accomodate power from the nuclear facility.

18 CHAIRMAN FARMAKIDES: What did you mean by bulk
19 power transmission facilities?

20 MR. CHARNOFF: In the context of the statement
21 that we have over 75, in the ballpark of 90 percent of the
22 transmission, we were talking total transmission.

23 CHAIRMAN FARMAKIDES: Thank you.

24 DR. HALL: Fine.

25 CHAIRMAN FARMAKIDES: Mr. Brown?

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1 MR. BROWN: I have nothing to add.

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2 CHAIRMAN FARMAKIDES: Do you agree, sir?

3 MR. BROWN: Yes, I do.

4 CHAIRMAN FARMAKIDES: Mr. Goldberg?

5 MR. GOLDBERG: So do we.

6 CHAIRMAN FARMAKIDES: Okay, gentlemen, we will take
7 that stipulation. We think that is an additional step towards
8 eliminating some of what we consider to be redundant discovery.
9 All right. Let's go to three.

10 MR. CHARNO: Mr. Chairman, before we go to number 3
11 would it be possible to get a formal restatement of exactly what
12 that stipulation is?

13 CHAIRMAN FARMAKIDES: I will tell you what we are
14 going to frame this in our prehearing conference order. You
15 people will have the opportunity for commenting and asking for
16 resettlement of that order and ask it on the record. Because
17 we are going to move.

18 (Board conference)

19 CHAIRMAN FARMAKIDES: Mr. Charnoff, with respect
20 to matters in controversy 3, under broad issue 1, do you
21 stipulate to that, sir?

22 MR. CHARNOFF: Yes, sir.

23 CHAIRMAN FARMAKIDES: Yes.

24 MR. CHARNOFF: Again we did stipulate to this
25 in the context of CEI and the City of Cleveland. Is the

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1 question now with respect to the applicants?

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2 CHAIRMAN FARMAKIDES: Yes, sir.

3 DR. HALL: Yes.

4 MR. CHARNOFF: I must ask the question then of
5 the board, if we are not -- are we limiting this to the City
6 of Cleveland? Or the City of Painesville?

7 MR. BREBBIA: No.

8 MR. CHARNOFF: Is it necessary for whom to
9 achieve a benefit of coordinated operation or coordinated
10 control.

11 CHAIRMAN FARMAKIDES: It would be any of the
12 electric entities within the CAPCO service area insofar as
13 I understand it.

14 MR. CHARNOFF: Sir, I can't stipulate to that
15 in the context of other electric entities at all. I don't
16 know what we are talking about.

17 CHAIRMAN FARMAKIDES: Four.

18 MR. CHARNOFF: May I ask a question on three,
19 sir?

20 CHAIRMAN FARMAKIDES: Yes.

21 MR. CHARNOFF: Do you understand the word
22 necessary in three to mean is legally necessary in order to
23 meet some antitrust laws or is practically necessary in order
24 to accomodate some other practical result?

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25 I am confused.

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1 CHAIRMAN FARMAKIDES: Let's say is required to
2 achieve the benefit of, rather than necessity. Is required
3 rather than necessary.

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4 MR. CHARNOFF: Not as a matter of law or legal
5 necessity?

6 CHAIRMAN FARMAKIDES: No. Not as a matter of law.

7 MR. CHARNOFF: Without examining the question of
8 who the other entities are, sir, I can't answer it. I would
9 restate, however, that in terms of the City of Cleveland,
10 we have made that stipulation.

11 CHAIRMAN FARMAKIDES: All right. How about four,
12 sir?

13 MR. BROWN: Your Honor, may I inquire for the
14 moment whether Mr. Charnoff would make that stipulation with
15 respect to AMPO in this regard?

16 DR. HALL: AMPO or the 43 members of AMPO, which
17 one?

18 MR. BROWN: With regard to each of the 43 members.

19 MR. CHARNOFF: If that is the question the answer
20 is absolutely not.

21 MR. BROWN: Very well. Thank you.

22 MR. POPPER: May I have one further point of
23 clarification?

24 CHAIRMAN FARMAKIDES: Mr. Popper?

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25 MR. POPPER: Was the stipulation, the restatement

ca 19 1 of what you would stipulate to, you used we would stipulate,
Feb 9 2 we, CEI ---

3 CHAIRMAN FARMAKIDES: There was no -- Mr. Popper,
4 excuse me, sir. I would not permit that. There was no
5 such assumption. That is not fair.

6 MR. BREBBIA: He is going back to what he stated ---

7 CHAIRMAN FARMAKIDES: You can ask the Board. We
8 will reframe it if we think it is in order. This is not
9 a cross-examination here of the Applicant. We are trying
10 awfully hard to see if we can't find areas of agreement among
11 you that will reduce the discovery. I don't want to go beyond
12 that.

13 Okay, four. Mr. Charnoff, I will ask you the
14 same question, sir.

15 MR. CHARNOFF: May I have a moment on that?

16 (Counsel confers.)

end 19 17

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1 mil 1 MR. CHARNOFF: Sir, if 4-A and B are going to be
2 stated again in terms of all other electric entities, the
3 answer is --

4 CHAIRMAN FARMAKIDES: Now, look, for purposes of
5 the Board's interest here, "other electric entities" means
6 all such electric entities within the CAPCO service areas,
7 period.

8 MR. CHARNOFF: Bulk power transmission facilities
9 is in the context of how I have been talking about it, that
10 is, the total net --

11 CHAIRMAN FARMAKIDES: Total.

12 MR. CHARNOFF: I, sir, have never determined
13 because we have never been asked that question.

14 CHAIRMAN FARMAKIDES: You are unsure at the moment?

15 MR. CHARNOFF: As to the other Applicants, we have,
16 for purposes of going forward here, made a stipulation as to
17 the relationship between CEI and the city of Cleveland. That
18 stipulation stands.

19 CHAIRMAN FARMAKIDES: That stipulation, would you
20 restate it in the context of 4-A, B, and C?

21 MR. CHARNOFF: I only did it as to A and B, sir, and
22 it appears on page 16 of our filing in response to the joint
23 statement.

24 CHAIRMAN FARMAKIDES: In other words, then, you are
25 stating that with respect to 4-A and B, you would so stipulate

2mil 1 as it applies to the city of Cleveland?

2 MR. CHARNOFF: And CEI, sir.

3 DR. HALL: Mr. Charnoff, you still stand on your
4 qualification in paragraph 20, on page 16, that transmission
5 facilities are limited to the facilities required to bring
6 power from the nuclear units involved in this proceeding?

7 MR. CHARNOFF: Let me determine that. I am not
8 certain.

9 (Counsel conferring.)

10 MR. CHARNOFF: Sir, we have made the stipulation.
11 And the only contextual situation we are aware of is in
12 terms of the denial of transmission to AMP-O PASNY power in the
13 city of Cleveland. In that context, that limitation on page
14 16, paragraph 20, the definition of bulk power transmission
15 facilities would not apply because in our view we are not talk-
16 ing about transmitting power from the nuclear facilities.
17 So in that context we may have been not very precise in
18 terms of the definition of bulk power transmission facilities.
19 It would apply to the definition for purposes of, as we did
20 it when we wrote it, in terms of paragrapha 2 and 3, but would
21 not apply in the limited sense in paragraph 4.

22 CHAIRMAN FARMAKIDES: I am not quite clear, Mr.
23 Charnoff. Let me restate this, sir. Insofar as I understand
24 your earlier position, when you talk about bulk power transmis-
25 sion facilities in response to our questions, we were talking

3mil 1 about total facilities to the CAPCO service areas.

2 MR. CHARNOFF: In 2, sir, I explained our situation
3 and I took the large definition of transmission facilities.

4 CHAIRMAN FARMAKIDES: Right.

5 MR. CHARNOFF: Total. In 3, I limited that to CEI
6 and the City of Cleveland and the transmission of the power from
7 those nuclear facilities. In 4, while our written statement
8 seems to have that limitation I don't mean it. I would say
9 that we are talking in the broad total sense.

10 CHAIRMAN FARMAKIDES: So in 4 when you say bulk
11 power transmission facilities, you are talking total transmis-
12 sion facilities?

13 MR. CHARNOFF: Correct.

14 CHAIRMAN FARMAKIDES: Now you are saying, sir, and
15 I understand you that you would stipulate 4-A and B, as to
16 CEI and City of Cleveland?

17 MR. CHARNOFF: Correct.

18 CHAIRMAN FARMAKIDES: But not as to anyone else?

19 MR. CHARNOFF: Correct.

20 CHAIRMAN FARMAKIDES: All right, sir.

21 5, we understand that.

22 MR. CHARNOFF: You have skipped over 4-C. I want
23 to be clear we didn't make any reference there. We don't know
24 what that really means.

25 CHAIRMAN FARMAKIDES: Yes. Let's ask the other

4mil

1 parties on 4. Any comments on 4, Mr. Charno?

2 Look, I am not soliciting comments. If you have
3 something to contribute to the record here to help us, fine;
4 otherwise --

5 MR. CHARNO: No, your Honor.

6 CHAIRMAN FARMAKIDES: Mr. Popper?

7 MR. POPPER: No, your Honor.

8 CHAIRMAN FARMAKIDES: Mr. Brown?

9 MR. BROWN: No, your Honor.

10 CHAIRMAN FARMAKIDES: Mr. Goldberg?

11 MR. GOLDBERG: No.

12 CHAIRMAN FARMAKIDES: I think 5 we are pretty well
13 agreed on. 6?

14 MR. CHARNOFF:

15 If that question is now addressed to me, sir, the
16 answer is that we have denied 6, and we would submit to you
17 that the license conditions that we have offered demonstrate
18 our policy to offer or sell unit power or ownership shares in
19 the nuclear units to the City of Cleveland. So clearly
20 we have to deny Paragraph No. 6.

21 CHAIRMAN FARMAKIDES: Excuse me just a minute.

22 (The Board conferring.)

23 CHAIRMAN FARMAKIDES: Let's go back to 6. Again,
24 apparently, 6 as the Applicant has just indicated, has been,
25 from his point of view, denied. And he isn't changing his

5mil 1 position from that that he articulated in his response to
2 the joint statement.

3 MR. CHARNOFF: I am sorry. I missed that. Did
4 you say he is --

5 CHAIRMAN FARMAKIDES: You are not changing your
6 position from that articulated in your joint statement.
7 There is a question of precision, however, here that has con-
8 fronted the Board. It seems to us that 6 is not very
9 precise, that in fact the Applicant has made, quote, offers
10 of access, and using his words it is only a question of what
11 the terms of that access might be. Well, now, we appreciate
12 Mr. Goldberg's position and that of the other parties as well,
13 that is, that you can get just as involved in what the terms of
14 access are as you can with the general word access. But 6
15 as now framed is not accurate, it is not precise, because he in
16 fact, the Applicant, has in fact made an offer. And you people
17 can, I think, talk more to 6 and what you now have in mind
18 in view of the offer of access of the Applicant. Who would
19 like to go first? I have been starting with Mr. Charno going
20 this way. Perhaps I ought to turn around and go from Mr.
21 Brown in this direction. Mr. Brown?

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1 MR. BROWN: Your Honor, this is an issue which
2 really doesn't affect AMP-O since we are not interested in
3 access and have not asked for access, so I would prefer quite
4 frankly that the other parties --

5 CHAIRMAN FARMAKIDES: All right, sir, you are
6 saying clearly then throughout these proceedings that your
7 only discovery will go towards, quote, wheeling?

8 MR. BROWN: That's correct.

9 CHAIRMAN FARMAKIDES: All right.

10 Mr. Goldberg?

11 MR. GOLDBERG: What the Applicants seem to be
12 saying through Mr. Charnoff is that the statement in 6 is no
13 longer accurate because in recent times, though this may have
14 been their policy in the past, it is no longer their policy
15 because they have offered access.

16 Assuming for the sake of argument that they now
17 have offered access and this is now their policy, perhaps
18 we need to have two statements rather than one. One would be
19 whether the Applicants' policy has been or was not to offer
20 or sell unit power, ownership shares in nuclear units to other
21 electric entities thus depriving such other entities that are
22 connected or could be connected with the Applicant from power --

23 CHAIRMAN FARMAKIDES: Could we restate that,
24 Mr. Goldberg, just to clarify; could you say, sir, that whether
25 the Applicant's policy on access, using your words, deprives

1 other electric entities that are connected or could be
 2 connected with the Applicants of the benefit of power from
 3 such nuclear plants?

4 MR. GOLDBERG: That would eliminate the time frame
 5 problem. And I think that I could go along with that.

6 CHAIRMAN FARMAKIDES: It would sharpen it down, I
 7 think, to the point where you people are then at issue.

8 MR. GOLDBERG: I think that could solve a problem
 9 that I raise when I say, have you really offered us access
 10 when you clothe it with these terms that are unsatisfactory?
 11 If I am carrying in my mind your restatement of it, I think
 12 I could go along with that.

13 CHAIRMAN FARMAKIDES: Okay. Do you want to restate
 14 it just so that I understand that you --

15 MR. GOLDBERG: I think you stated --

16 CHAIRMAN FARMAKIDES: Whether his policy --

17 MR. GOLDBERG: Whether the Applicants' policy
 18 deprives other electric entities that are connected or could
 19 be connected with the Applicants of the benefit of power from
 20 such nuclear units.

21 CHAIRMAN FARMAKIDES: Yes, sir. Whether the
 22 Applicants' policy on access.

23 MR. GOLDBERG: On access, yes, sir.

24 CHAIRMAN FARMAKIDES: Okay.

25 Mr. Charno? Would you accept that sixth contention

as so modified?

1 MR. CHARNO: I would strike the "such" since there
2 is no prior reference to nuclear units as reframed, but yes.

3 MR. GOLDBERG: I thought I had. I meant to.

4 CHAIRMAN FARMAKIDES: You would. Whether Applicants
5 policy on access deprives other electric entities that are
6 connected or could be connected with Applicants of the benefit
7 of power from nuclear units.

8 Mr. Charno, you agree with that, right?

9 MR. CHARNO: Yes, your Honor.

10 CHAIRMAN FARMAKIDES: Mr. Popper?

11 MR. POPPER: Yes, your Honor.

12 CHAIRMAN FARMAKIDES: Mr. Brown?

13 MR. BROWN: Yes, your Honor.

14 CHAIRMAN FARMAKIDES: Mr. Charno, would you comment
15 on that, sir; Charnoff, I am sorry, I have the Charnoff and
16 Charno right next to each other. I am sorry.

17 MR. CHARNOFF: For A, we would
18 deny that. We couldn't stipulate to a contention that
19 Applicant's policy does that because, again, we think that we
20 have offered, and therefore it does not deprive the City of
21 Cleveland. I am not sure what comment we have. Are we now
22 defining other electric entities as anybody in the service
23 territory again?

24 CHAIRMAN FARMAKIDES: The Board has one definition

1 and we are consistent.

2 MR. CHARNOFF: I would like to make an observation,
3 sir, that really applies to this term, "other electric
4 entities." I will be brief.

5 In my judgment, sir, if we go down the road of
6 defining other electric entities as the Board has so proposed
7 to do, for purposes of defining major issues, limiting the
8 areas of discovery, I would say to you first that I think that
9 we have grossly enlarged the potential for discovery far away
10 from any of the prior pleadings in this case; that in my
11 judgment that all of the exercise that has gone into either the
12 Department of Justice advice letter, particularly into the
13 petitions to intervene by the City of Cleveland or AMP-O, are
14 in effect now thrown away. They don't count for anything
15 because there is no showing of relationship between this context
16 of other electric entities to anything in those pleadings, sir.

17 I just want the record to be very clear that in our
18 judgment that walks away totally from the whole context of
19 AEC's policies and regulations governing limitation of issues
20 even for discovery.

21 MR. BREBBIA: The Board has made no decision. The
22 Board has stated that the position as we understand it of the
23 Department of Justice, the AEC Staff, and Intervenors is that
24 that is the definition that they will accept. We have in your
25 response the definition that you will accept qualifying. This

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round as I understand it is asking you whether you will accept this definition. Your answer is you are falling back on the one that you have submitted in your response to the joint statement.

MR. CHARNOFF: I appreciate that the Board hasn't yet made any such decision. I just want to be very clear.

CHAIRMAN FARMAKIDES: I think you have.

MR. CHARNOFF: That should be taken into account when the Board does make its decision and I would urge it to do so.

CHAIRMAN FARMAKIDES: I will accept now any comments on that last point. I think it would be fair.

Mr. Charno, do you have anything with respect to the other electric entities? And I will say, it is important.

MR. CHARNO: I have no problem with the use in No. 6. I do have a problem if you have a single unified definition with respect to No. 4. There we get to the exchange markets, and there has to be some consideration of electric entities outside of the service areas of the CAPCO members.

CHAIRMAN FARMAKIDES: All right, sir. Do you have anything else, Mr. Popper?

MR. POPPER: No, your Honor.

CHAIRMAN FARMAKIDES: Mr. Brown, do you, sir?

MR. BROWN: I would concur in the comments of

1 Mr. Charno, specifically with respect to the PASNY
2 power. Other than that, I have no further comments.

3 CHAIRMAN FARMAKIDES: Mr. Goldberg?

4 MR. GOLDBERG: I have nothing to add.

5 CHAIRMAN FARMAKIDES: All right, sir.

6 (Board confers.)
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CHAIRMAN FARMAKIDES: Let's go to broad issue 2.
I think the Board needs nothing further on 7, 8, or 9.
We have already discussed them to some extent.

We would give any party the opportunity to talking
to 7, 8, or 9, under broad issue 1, if they so choose.

Mr. Brown?

MR. BROWN: No, your Honor.

CHAIRMAN FARMAKIDES: Mr. Goldberg?

MR. GOLDBERG: I think not.

CHAIRMAN FARMAKIDES: Mr. Charnoff?

MR. CHARNOFF: We would stand on our written
pleading on that, sir.

CHAIRMAN FARMAKIDES: Mr. Charno?

MR. CHARNO: No comment.

CHAIRMAN FARMAKIDES: Mr. Popper?

MR. POPPER: No comment, your Honor.

CHAIRMAN FARMAKIDES: Let's go to broad issue 2,
let's go to the subsidiary issues, No. 9. We would like
some clarification of 9, 10, 11, and 12. They are framed in
such a way that the Board is not clear as to what is being
sought here. What are the issues? They are not framed in a
way that makes them as specific as the Board would like to
have them.

Who would like to talk to 9 first?

Incidentally, I might clarify that point further.

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1 We have spent a great deal of time this morning discussing
2 retail markets. And during those discussions, we have
3 received quite a bit of clarification with respect to broad
4 issue 2. So I don't think it is necessary to go back to broad
5 issue 2, in view of the clarifications we have received this
6 morning.

7 MR. GOLDBERG: I would just simply like to comment
8 at some appropriate time I would like to make some further
9 statement with respect to the matter of the relevance of the
10 retail markets.

11 CHAIRMAN FARMAKIDES: All right, sir.

12 MR. GOLDBERG: I had completely forgotten this
13 reference that I had made in some of the documents we had
14 previously filed, particularly an early document in the Davis-
15 Besse proceeding where we pointed out that the reference to
16 antitrust laws includes not only reference to the Sherman
17 Act, but includes reference to all those acts that are
18 administered and fall under the jurisdiction of the Federal
19 Trade Commission which involve unfair trade practices, unfair
20 methods of competition, and the like.

21 So that when there is an antitrust review proceeding
22 such as this one before the Atomic Energy Commission and
23 this Board, relevant considerations are the activities in the
24 retail market that may be running afoul of those statutes
25 which fall under the jurisdiction of the Federal Trade

1 Commission. And we indicated in those documents that some
2 of the activities that we had referred to fall in that
3 category, including, Dr. Hall, this harassment that you had
4 referred to.

5 In our judgment, if the evidence were to sustain
6 a finding with respect to the allegations we made, and perhaps
7 others that may develop through discovery about the activities
8 of CEI at the retail level vis-a-vis the City of Cleveland
9 in its operation of MELP, the Board would have to find that
10 there is a situation inconsistent with the antitrust laws.

11 There would have to be the question of remedy.
12 And in determining the question of remedy, the Board would
13 naturally have to have before it full information as to the
14 activities, the abuses it would have to remedy.

15 Now it is entirely within the realm of possibility
16 that the Board, in terms of the wholesale market, could
17 determine that there is no inconsistency with the antitrust
18 laws and no access in terms of the wholesale market or even
19 the power exchange markets need to be granted.

20 But that in terms of the retail market, a remedy
21 is required. And in view of the abuses involved, the Board
22 could well, notwithstanding its determinations respecting
23 the wholesale and the exchange markets, find that the license
24 should be conditioned to grant access and perhaps other remedies
25 to deal with the abuses at the retail market.

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1 It seems to us that the record would be deficient
2 if discovery were prohibited with respect to the matters
3 involved at the retail level for the reasons I have stated.

4 MR. CHARNOFF: May I respond to that, sir?

5 CHAIRMAN FARMAKIDES: Hold fast just a minute.

6 (The Board conferring.)

7 CHAIRMAN FARMAKIDES: Let's stay with this point,
8 then, and we will allow comment.

9 DR. HALL: You posed a hypothetical situation
10 where the Board found that there was no inconsistent antitrust
11 situation at the wholesale level, but there was an inconsistent
12 antitrust at the retail level. You then suggested that the
13 Board might provide access to a nuclear power plant in order
14 to deal with the abuses in the retail market.

15 How would access to the nuclear power plant deal
16 with an abuse?

17 MR. GOLDBERG: All right. The abuses at the retail
18 level would be abuses dealing with the ability to compete for
19 markets. Access to the nuclear unit could provide the City
20 of Cleveland with a source of power that improved its ability
21 to compete with the -- with CEI.

22 The improvement in the ability to compete with
23 CEI could eliminate those abuses.

24 DR. HALL: In other words, you have sort of a
25 countervailing theory, that is, because you have problems in

1 one area, you should have access to a nuclear power plant in
2 this situation to make up for that?

3 MR. GOLDBERG: No. What I am suggesting is that
4 in terms of determining whether there is a situation incon-
5 sistent with the antitrust laws, this Board must consider
6 the retail level because the reference to antitrust laws
7 encompasses those types of activities that are involved at the
8 retail level.

9 DR. HALL: My question did not go to that point.

10 MR. GOLDBERG: Then I have missed your question.

11 DR. HALL: The question went to the point of how,
12 in what way did access to a plant deal with, to use your
13 term, you spoke of "deal with," the abuses at the retail
14 market?

15 I don't understand the mechanism involved here.

16 MR. GOLDBERG: Well, one thing that I mentioned
17 was that access to this power would provide the economies
18 associated with that type of generation that would improve
19 the ability of the city to compete, and thereby that ability
20 to compete tends to eliminate the abuses.

21 Secondly, it would improve reliability of service
22 which I previously mentioned is a very important element in
23 your competition at the retail level.

24 DR. HALL: Fine. Thank you.

25 MR. BREBBIA: Mr. Goldberg, it seems to me that you

1 are saying that in the event there were no violations,
2 I use the term violations understanding the term inconsistent
3 with the antitrust law, that no violations are found at the
4 wholesale level.

5 However, we permitted the introduction of retail
6 testimony and violations were found at the retail level. You
7 are saying that we could grant the same relief, in your
8 opinion, as a result of finding violations at the retail level
9 as we could grant if we found violations at the wholesale
10 level?

11 MR. GOLDBERG: Yes, because as I am saying, the
12 question of violations is all pervasive, not only requires
13 you to look at the wholesale level and at the exchange markets,
14 but at the retail level as well.

15 CHAIRMAN FARMAKIDES: All right, sir.

16 MR. GOLDBERG: Because the antitrust connotation
17 encompasses activities that go all the way down to the retail
18 level.

19 CHAIRMAN FARMAKIDES: All right, sir.

20 Before, Mr. Charnoff, we ask you to respond, sir,
21 since you have asked for that, let me ask the other parties.

22 Mr. Charno, did you have anything further to add
23 to Mr. Goldberg's statements just now?

24 MR. CHARNO: Only a single qualification.

25 CHAIRMAN FARMAKIDES: Yes, sir?

1 MR. CHARNO: That obviously the remedy, whatever
2 the remedy was as decided upon by the Board, would have to be
3 a remedy which would meet the situation inconsistent with
4 the antitrust laws that they found.

5 CHAIRMAN FARMAKIDES: All right.

6 Mr. Popper?

7 MR. POPPER: No, your Honor.

8 CHAIRMAN FARMAKIDES: Mr. Brown, do you have any-
9 thing else, sir?

10 MR. BROWN: No, sir.

11 CHAIRMAN FARMAKIDES: Mr. Charnoff?

12 MR. CHARNOFF: I think Mr. Charno's qualification
13 is very important. We started with Mr. Goldberg talking
14 about harassment at the retail level as being the situation
15 inconsistent with the antitrust laws.

16 I take it what Mr. Charno had in mind was that
17 perhaps there would have to be a remedy related to that.
18 Therefore, a condition to CEI, don't harass the City of
19 Cleveland at the retail level as distinguished from what Mr.
20 Goldberg wanted to do, was let's give them access to the plant.

21 Now I think it is very important that nowhere in
22 Mr. Goldberg's statement with respect to the inconsistent
23 or situations inconsistent with the antitrust law did he
24 even mention the question of limitation, which is whether
25 the activities under the license would contribute or maintain

1 or create or maintain a situation inconsistent with the anti-
2 trust laws.

3 Mr. Goldberg would really have this Board do a
4 total review, contrary to what Louisiana Power & Light
5 decision by the Commission directed, into the total anti-
6 competitive situation between CEI and the City of Cleveland
7 or perhaps other electric entities, whoever they may be, with-
8 out any regard right at the outset for the direction of
9 the Commission, namely that there has to be a nexus limita-
10 tion even at that point.

11 I would submit to you that the statement made
12 by Mr. Goldberg is so deficient in that regard that it
13 just vitiates any assertion that he made with regard to the
14 retail market situation.

15 CHAIRMAN FARMAKIDES: Thank you.

16 Let's go back now to the -- to 9, 10, 11 and 12.
17 And let me tell you what my concerns are here.

18 Ordinarily I would like to state an issue in such
19 a way that if answered, such answer would lead towards the
20 determination of whether or not we have a situation incon-
21 sistent with the antitrust laws.

22 That is the problem I have with 9, 10, 11 and 12.
23 They are not precise enough for us to grasp fully. If these
24 had been stated as questions, which if answered eventually
25 would lead towards determining whether or not a situation

1 inconsistent with the antitrust laws exist, they would
2 have been helpful and, perhaps, we could have -- we can
3 look at them with more favor.

4 Stated as they are, I think they are imprecise.
5 So I am asking now the parties, would you, would any one of
6 you restate 9, 10, 11 and 12 right now, or within a short
7 recess, if you really need it? I don't think you need it.
8 Would you restate them as the type of questions that we are
9 searching for here?

10 As you have stated them here, where you talk
11 about the relationship of activities, it is so broad and
12 ambiguous that we don't see the parameters.

13 Now I think it is a good time for a recess.
14 Let's recess until 3:40.

15 (Recess.)

(3:22 p.m. - 3:40 p.m.)

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1 CHAIRMAN FARMAKIDES: Let's go back on the record.
2 Could we have a response to that last question we
3 posed with respect to Broad Issue 2, matters in controversy
4 thereunder 9, 10, 11 and 12?

5 I guess, Mr. Popper, you are going to respond to
6 that, sir?

7 MR. POPPER: Yes, your Honor.

8 A suggested rephrasing of 9, 10 and 11 would
9 be: is there a relationship between the activities under
10 the proposed licenses as construed in the AEC Regulatory
11 Guide 9.1, and those allegations raised in Broad Issue 1
12 and the matters in controversy thereunder.

13 MR. BREBBIA: Is that a substitute for 9 through
14 12?

15 MR. POPPER: Nine through eleven.

16 CHAIRMAN FARMAKIDES: Could you restate that
17 again?

18 All right. The reporter.

19 (The reporter read from the record as requested.)

20 DR. HALL: Let me ask a couple questions, if I
21 may.

22 As I understood the original draft here, Broad
23 Issue 1 related to wholesale markets, Broad Issue 2 related
24 to retail markets; is that a fair characterization, Mr. Popper?

25 MR. POPPER: No, your Honor. I don't believe that

1 that is -- Broad Issue 2, the matters in controversy
2 under Broad Issue 2 were the nexus issues, as we saw them.

3 DR. HALL: In other words, Broad Issue 2 is
4 primarily a question of nexus?

5 MR. POPPER: Yes, your Honor.

6 DR. HALL: What is the relationship between the
7 plants and --

8 MR. POPPER: A very important distinction I
9 should make on the record at this point. It is not the
10 relationship between the plants and the situation alleged
11 to be inconsistent with the antitrust laws because the
12 plants are not the activities under license. That is why
13 I referred to the Regulatory Guide.

14 It is the relationship between, and I quote, the
15 activities under license defined thusly. Activities under
16 the license is not meaningful from an antitrust standpoint
17 if attention is focused solely on a nuclear facility.
18 Meaningful review requires the consideration of the
19 Applicant's activities to be licensed in the context of
20 the bulk power supply system within which it operates.
21 Those are the activities under the license. A situation
22 which occurs which is related to those activities, it is that
23 relationship that constitutes nexus. And it is that question
24 that this issue is directed to.

25 CHAIRMAN FARMAKIDES: Well, I have got to -- I

1 agree with Dr. Hall here. As I read Broad Issue 2,
2 "Whether Applicants have achieved dominance in the relevant
3 wholesale area retail markets so as to create."

4 But we are talking, as I understood you all,
5 you are talking about retail markets. And then you have
6 got another option, apparently, or another alternative,
7 or whether the activities under the proposed license will
8 create or maintain one or more of the situations described
9 in Broad Issue 2. Broad Issue 1. That is where you bring
10 in Broad Issue 1.

11 But it seems to us that you bring it in within
12 the framework, if you will, of retail markets.

13 MR. POPPER: Your Honor, may I make perhaps an
14 out of time comment on the phraseology of Broad Issue 2?
15 And that is I apologize for all the parties who are
16 signatories to this document. There is an "and" missing
17 between relevant wholesale area should be "and" and it
18 should be relative wholesale and retail markets.

19 CHAIRMAN FARMAKIDES: You know you people have
20 wated an awful lot of the Board's time. I wish when you
21 have something so substantive as that you would let us know.

22 This thing has been pending now since the 28th of
23 May, and we don't have any clarification until today. I
24 think that is inexcusable.

25 Really and truly, people, I almost feel that is --

1 I won't say anything more.

2 But we have been playing with this thing trying
3 to understand what you have said and, very frankly, we have
4 come to the point we were just going to knock it out.

5 All right. Let's go on.

6 So you are now saying that the word "and" follows
7 the word "area"?

8 MR. GOLDBERG: In lieu of.

9 MR. POPPER: In lieu of, that's correct.

10 CHAIRMAN FARMAKIDES: All right, in lieu of the
11 word "area."

12 With an asterisk after "and"?

13 MR. POPPER: After wholesale. We were defining
14 wholesale in the footnote, your Honor.

15 DR. HALL: The asterisk goes after wholesale and
16 before and?

17 MR. POPPER: That's correct.

18 CHAIRMAN FARMAKIDES: We will consider this, sir.
19 Anything else on this, Mr. Brown?

20 MR. BROWN: No, your Honor.

21 CHAIRMAN FARMAKIDES: Mr. Goldberg?

22 MR. GOLDBERG: No, sir.

23 CHAIRMAN FARMAKIDES: How about 12, Mr. Popper?

24 MR. POPPER: Okay. As I said, there were two
25 issues. The first was the one I read, matters in controversy

1 under Broad Issue 2 designated 12.

2 CHAIRMAN FARMAKIDES: I am sorry. Off the record.

3 (Discussion of the record.)

4 CHAIRMAN FARMAKIDES: Back on the record.

5 Mr. Popper?

6 MR. POPPER: Would read, phrased in question form:

7 Is there a relationship between the activities under the
8 proposed license as construed in the AEC Regulatory Guide
9 and the supply and cost of power in the relevant geographic
10 market, which defined before, meaning the CAPCO service area,
11 relevant geographic market.

12 CHAIRMAN FARMAKIDES: Mr. Knowles, would you read
13 that back?

14 (The reporter read from the record as requested.)

15 CHAIRMAN FARMAKIDES: All right.

16 Any comments on those revised statements?

17 Mr. Charnoff?

18 MR. CHARNOFF: Yes, sir. First I would like to
19 point out, sir, that we understood wholesale area retail
20 markets just as the Board did when we responded in our
21 document of June 7, 1974, and, as a matter of fact, we restated
22 those words exactly in Paragraph 21 where we had stipulated
23 that limiting that to CEI, we were prepared to stipulate to
24 the first part of Broad Issue 2. And find it illuminating that
25 in the joint reply no comment was made with respect to that

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1 particular restatement by us of their error in their joint
2 statement.

3 The second suggestion I would make in that regard,
4 sir, is that with respect to that first half of Broad Issue
5 2, as it was, or as it is now revised with that typographical
6 correction, it is clear that the joint statement poses no
7 detailed or specific subissues under that.

8 So we are talking about an extremely general
9 inquiry as set forth now by the correction in the first half
10 of that particular contention.

11 So general, in fact, that it is completely
12 inconsistent with the Commission's directions for a
13 particularization of contentions.

14 CHAIRMAN FARMAKIDES: How about 9, 10 and 11.

15 MR. CHARNOFF: I will get to that, sir.

16 May I have a moment, sir?

17 CHAIRMAN FARMAKIDES: Yes.

18 (Pause.)

19 MR. CHARNOFF: With respect to Items 9, 10 and 11,
20 and 12, as restated, and presumably they are only intended as
21 clarification under the second half of Broad Issue Number 2,
22 it is clear as we stated in our written submission that Broad
23 Issue Number 2 is no more than the conclusion that is
24 ultimately to be reached one way or the other in the case
25 and is clearly not a contention.

1 I would submit that 9, 10, 11 and 12 are really
2 not more than that either, except that they now say is there
3 a nexus between the activities of the license with respect
4 t transmission, with respect to coordinated operation, with
5 respect to coordinated development and with respect to the
6 supply and cost of power.

7 At this juncture, Mr. Chairman and members of the
8 Board, if none of the parties plaintiff to this case have
9 any idea as to what that nexus relationship is, I would
10 submit to you that they have defaulted in their proceeding.

11 They must have had some idea as to what it is that
12 they were contending in this particular area.

13 I would submit to you further that if these are
14 the guidelines for discovery, there are no boundaries that
15 are afforded by this, and that clearly is the intended
16 purpose.

17 That same thing applies, of course, to the City
18 of Cleveland and AMP-O.

19 These are presumably their contentions, though
20 again I don't know how this relates to anything AMP-O has
21 put into this paper, into any of the pleadings in this
22 particular case.

23 I would submit that with the clarification,
24 turning it around into a question form, there has been no
25 particularization.

1 I think, too, that when one talks about a defini-
2 tion in the Regulatory Guide and that definition is, as
3 Mr. Popper read it, activities under the license is not
4 meaningful from an antitrust standpoint if attention is
5 focused solely on the nuclear facility, and that defines
6 nothing for us.

7 The second sentence in that definition, meaning-
8 full review requires consideration of the Applicant's
9 activities to be licensed in the context of the bulk power
10 supply system within which it operates -- that, too, sir,
11 does not define activities under the license.

12 So that if in fact the references to these two
13 sentences is as a definition of activities under the license,
14 that is a mischaracterization of what those two sentences
15 are all about.

16 We really have nothing in front of us in the
17 form of Broad Issue Number 2, either in the second half of
18 that contention or in 9, 10, 11 and 12.

19 (The Board conferring.)
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lml 1 CHAIRMAN FARMAKIDES: All right, sir. Anything
2 further on the statement made by Mr. Charnoff? Mr. Charno.

3 MR. CHARNO: No.

4 CHAIRMAN FARMAKIDES: Mr. Popper?

5 MR. POPPER: No.

6 CHAIRMAN FARMAKIDES: Mr. Brown?

7 MR. BROWN: No.

8 CHAIRMAN FARMAKIDES: Mr. Goldberg?

9 MR. GOLDBERG: I was just going to say that having
10 been connected with the Louisiana Power and Light Waterford
11 case, I think that the statements of 9, 10, 11, and 12, as
12 they appeared in the matters in controversy under broad Issue
13 2 in this document that we have before us pretty much track
14 almost verbatim the issues as framed by the Waterford
15 Board.

16 CHAIRMAN FARMAKIDES: This is a different Board here,
17 sir.

18 MR. GOLDBERG: I realize that.

19 CHAIRMAN FARMAKIDES: And secondly, what you are
20 doing here under broad Issue 2 as clarified now is seeking
21 discovery as to those issues in order to prove your nexus.
22 I assume. Mr. Goldberg, isn't that correct?

23 MR. GOLDBERG: What do you need under broad Issue 2
24 that you are not going to get under broad Issue 1 with respect
25 to, quote, proving your nexus, end quote?

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1 MR. GOLDBERG: I suppose broad Issue 1 develops
2 certain activities with respect to the Applicants, whereas
3 broad Issue 2 applies the nexus test to them. That is the way
4 I would view it. I think Mr. Popper wants to say something on
5 this point.

6 CHAIRMAN FARMAKIDES: Mr. Popper, you have got the
7 ball, sir.

8 MR. POPPER: I hate to fall out of the good graces
9 of the Board on my last hearing. Broad Issue 2 is essential in
10 the matters in controversy as amended are essential as they
11 relate to broad Issue 1. Broad Issue 1 lays out in isolation
12 potential inconsistencies with the law. Under the Waterford
13 decision and under our guide, everything we have talked about,
14 we know that those have to be connected up to the activities
15 under the license. Those situations have to be factually
16 connected. Nexus is a question of fact. You have to draw
17 that factual inference. It is not a legal question. In other
18 cases, for example, in the consumers case, the Board tried
19 to resolve the question of nexus with a brief prior to the
20 case. It then decided after the briefs were received that it
21 was only after a showing of the facts and the record was clearly
22 established that they could determine whether or not a nexus
23 in fact existed between the inconsistency and the activities.
24 And they let the matter drop there. And that Board has not
25 resolved the question up until now. The broad issue is

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1 essential at this point because if it is not there, we won't
2 have the factual prerogative to introduce evidence to prove nexus
3 up.

4 CHAIRMAN FARMAKIDES: All right, sir. Anything else
5 on this?

6 MR. CHARNOFF: Sir, I would just like to make two
7 brief observations. I think that reference to Louisiana Power
8 and Light is very instructive. It was made also in a joint
9 response by the government agencies, the Intervenors in this
10 case. I think that it demonstrates the lack of particularity.
11 This is a different case. I think that we have not yet
12 developed a ticketed admission, if you will, to discovery in
13 all antitrust cases so one can copy one from the other. I
14 think it illustrates that there has been no particularization
15 in this matter.

16 MR. GOLDBERG: Let me respond to that.

17 CHAIRMAN FARMAKIDES: You may, sir.

18 MR. GOLDBERG: Obviously, in framing issues in the
19 case, one looks to other precedents. And because one looks to
20 other precedents that doesn't mean that one isn't making a judg-
21 ment about whether these other precedents are applicable to the
22 particular facts of this case. It was our judgment that they
23 were applicable and they were appropriate to be stated here in
24 light of the facts of this case. I think one problem that I keep
25 having with Mr. Charnoff's argument, not only today but all

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1 throughout, Mr. Charnoff seems to be saying that when you are
2 framing statements of issues, in effect, you have to be parti-
3 cular about specific facts. When you are framing statements of
4 issues, particularly for purposes of discovery, you are simply
5 framing areas in which the discovery will proceed. The discovery
6 will develop the facts, some of which we may be aware of today,
7 but most of which we are not.

8 CHAIRMAN FARMAKIDES: All right, sir. We will let
9 Mr. Charnoff respond if he wishes. There is no need to do so
10 unless you wish.

11 MR. CHARNOFF: I would remind Mr. Goldberg and the
12 Board that the Louisiana decision said the parties have to
13 plead and prove nexus, statements stating that they wish to
14 inquire into whether there is nexus is not a pleading of nexus.

15 CHAIRMAN FARMAKIDES: Is there anything else? Okay.
16 Now we are up to broad Issue 3. And I would like to state
17 for the Board that the Board does not intend to discuss remedies
18 and broad Issue 3 until after we resolved the matters of whether
19 or not there is a situation inconsistent with the antitrust
20 laws. In other words, we don't quite see how you can get to
21 remedy until you first decide whether or not there is a situation
22 inconsistent with the antitrust laws. However, we want the
23 parties to comment on that. And we would like to defer our
24 ruling until after we have had your comments. Who would like
25 to go first? Mr. Popper?

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1 MR. POPPER: Very brief comment, your Honor. That
2 is that we included the remedies issue as my interpretation of
3 the inclusion of this issue in the formulation of the joint state-
4 ment was that we had an eye in the formulation of this state-
5 ment towards the scope of the issues for discovery and also
6 towards materiality and relevancy as the proceeding itself
7 evolved. We felt that if we did not put in issues regarding
8 relief, that we may potentially be barred on a factual standpoint
9 from introducing facts into the record during the proceeding
10 regarding remedy. That was the reason behind this. I
11 think it's also served the dual and perhaps unintended purpose
12 of assisting negotiations, letting the other parties know at
13 least in very vague form what we believe to be that which would
14 remedy the situation that is developing in this case.

15 CHAIRMAN FARMAKIDES: All right. Thank you.

16 (The Board conferring.)
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1 CHAIRMAN FARMAKIDES: All right.

2 Mr. Charno?

3 MR. CHARNO: I have nothing to add to Mr. Popper's
4 statement.

5 CHAIRMAN FARMAKIDES: Mr. Charnoff?

6 MR. CHARNOFF: The only question I have, sir, is
7 with regard to timing. I think it would be unfortunate,
8 given the hoped-for scheduling of licensing of the plant,
9 if what we did was go through a lengthy discovery process
10 and then a lengthy hearing, and then a lengthy period for
11 decision, and then start all over again, if you will, for
12 remedying it.

13 I don't know whether that is what the Board has
14 in mind in terms of bifurcating this schedule.

15 CHAIRMAN FARMAKIDES: If, for example, Mr. Charnoff,
16 this Board were to find a situation inconsistent with the
17 antitrust laws, we would naturally go to remedy.

18 If the Board were to find no situation incon-
19 sistent with the antitrust laws, the remedy aspects drop out.

20 What you are doing here at this point in time is
21 taking a calculated risk. That risk is as I have outlined
22 it, and the hope here is that we would, perhaps, at this
23 point in time save time, by not going to remedy.

24 Now the other point is this: You can better go
25 to remedy, especially discovery as to remedy, if you know

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1 what the decision of the Board is with respect to the first
2 level, and that is the question of whether or not there is a
3 situation inconsistent with the antitrust laws.

4 I daresay it is the latter reason that has far
5 more validity.

6 MR. CHARNOFF: I don't disagree with that at all.
7 I guess, given the fact that one might be eliminating these
8 issues from No. 3 at this time, and I am not sure discovery
9 is even necessary in terms of remedy; I think, however, that
10 I would hope that we would be able to move rather promptly,
11 more promptly than is proposed in the Staff and Justice
12 Department proposed hearing schedule to that first hearing.

13 Otherwise, we are setting up a situation that is
14 substantially prejudicial, if you will, to at least the planned
15 construction permit issuance for the Perry Plant. We had
16 hoped and still hope to be able to complete the safety review
17 and safety hearing this fall and get a decision on that certainly
18 by the end of the fall or early winte , but by the end of this
19 year.

20 And the only fear I have is through the bifurca-
21 tion which makes sense for all the reasons you have stated,
22 is that if we have a lengthy period until we get to the first
23 hearing and first decision, and then start again, we may
24 thereby ultimately make it a longer schedule.

25 CHAIRMAN FARMAKIDES: Let me also clarify one more

1 thing, Mr. Charnoff. An antitrust hearing is considerably
2 different from a licensing and construction or operating
3 hearing in the sense that you are going to have far more
4 discovery, you are going to get involved in a greater detail
5 on discovery.

6 So I don't think you are talking timewise the same
7 ball game for an antitrust hearing as for a construction or
8 operating license hearing.

9 MR. CHARNOFF: The only difference is that we are
10 getting started rather late in the antitrust hearing. I am
11 not stating that is the fault of the Board. I am simply
12 stating that as things now stand, the bifurcation approach
13 might add substantially to the end date for necessary decision-
14 making.

15 CHAIRMAN FARMAKIDES: What is your preference,
16 then, sir? You don't want a split hearing?

17 MR. CHARNOFF: I think at this point I would be
18 opposed to it, and I would state only two things on it,
19 sir:

20 One is that I welcome Mr. Popper's characterization
21 of these alleged contentions as being stated in very vague
22 form. That is precisely what is wrong with the entire docu-
23 ment and that is why we think most of it ought to go out.

24 At the same time we do think that it is entirely
25 appropriate for you to consider whether there is any real

1 issue in the nine forms of relief that are being talked
2 about when the Applicant is prepared to at least meet eight
3 of them.

4 CHAIRMAN FARMAKIDES: Wait a minute, sir.

5 Look, let's ask you one thing here, and please, if
6 you can give me a yes or no, I would appreciate it.

7 You have made several statements with respect to
8 meeting those remedies outlined in the joint statement.

9 MR. CHARNOFF: Yes, sir.

10 CHAIRMAN FARMAKIDES: Will you stipulate to all
11 nine of them, sir, as they presently exist?

12 MR. CHARNOFF: We have --

13 CHAIRMAN FARMAKIDES: Will you stipulate to all
14 nine of them as they presently exist?

15 MR. CHARNOFF: Not to No. 3.

16 CHAIRMAN FARMAKIDES: Will you stipulate to all
17 the rest, sir?

18 MR. CHARNOFF: As to the City of Cleveland?

19 CHAIRMAN FARMAKIDES: No.

20 MR. CHARNOFF: If that is -- if we are talking
21 about all entities and all Applicants --

22 CHAIRMAN FARMAKIDES: I am talking about all the
23 Applicants.

24 MR. CHARNOFF: All the Applicants have concurred
25 in the license conditions we have proposed, sir.

1 CHAIRMAN FARMAKIDES: With respect --

2 MR. CHARNOFF: That means that all the Applicants,
3 for example, have agreed as to No. 1 that ownership and
4 the appropriate portion of the license unit or unit power
5 therefrom can be granted to the City of Cleveland. We have all
6 agreed to that.

7 CHAIRMAN FARMAKIDES: So you are opposing the
8 split hearing?

9 MR. CHARNOFF: Yes, sir, on the assumption that --

10 CHAIRMAN FARMAKIDES: Go ahead.

11 MR. CHARNOFF: Yes, sir, on the assumption that
12 I think that splitting the hearing has within it the potential
13 for gravely extending the schedule.

14 Now if, in fact, the Board were to see fit, as we
15 hope it would, to narrowly limit the issues in broad issues
16 1 and 2 for the reasons that we have already articulated,
17 that would enable, it seems to me, to have a shorter
18 discovery period and to go to hearing sooner. And if the
19 Board sees fit to an early schedule for hearing on the
20 first question of conduct or behavior, then I would be
21 agreeable to doing it in a bifurcated way.

22 But if we are talking about a lengthy schedule
23 until the first hearing, and then followed by the question
24 of schedule for the remedy notwithstanding the logic of
25 that bifurcation, I think we would oppose it, sir.

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1 CHAIRMAN FARMAKIDES: All right.

2 Now you are duly aware that frequently your
3 discovery on remedies will consume far more time than your
4 discovery on the factual matters.

5 MR. CHARNOFF: That is why I make the observation

6 CHAIRMAN FARMAKIDES: If you are going to combine
7 those two into one, you may well be dragging this thing out
8 far longer than taking it in two bites.

9 MR. CHARNOFF: May I have a moment?

10 (Pause.)

11 I would like to essentially leave it the way it
12 is. That is, that bifurcation makes sense in our judgment
13 for the logic that you have articulated.

14 We are interested in getting the quickest possible
15 ultimate conclusion.

16 I would say to you that, if the Board determines,
17 after it decides what the appropriate issues are, that we
18 have got a very lengthy schedule anyway, then I would want
19 to add discovery -- remedies to that.

20 If, however, the Board determines after determin-
21 ing what the issues are that maybe we have a chance of
22 narrowing the issues and going to hearing on the first phase,
23 I would say I would rather leave that to the discretion of
24 the Board.

25 I assume we are all collectively interested in

1 moving the ultimate end date to the soonest possible time.
2 I don't think there is any conflict there.

3 So I would -- in effect I am saying I would leave
4 that to the discretion of the Board.

5 CHAIRMAN FARMAKIDES: All right, sir. Thank you.
6 Mr. Goldberg?

7 MR. GOLDBERG: Waiting for Mr. Charnoff to be in
8 his seat so that he wouldn't fall down, since I am about to
9 agree generally with what he has said.

10 (Laughter.)

11 MR. CHARNOFF: I am a very steady fellow.

12 CHAIRMAN FARMAKIDES: In other words, you are
13 leaving it to the discretion of the Board, Mr. Goldberg?

14 MR. GOLDBERG: No, not -- it is going to end up in
15 the discretion of the Board, obviously. In the Farley Case,
16 as you know, and independently, I don't mention that case,
17 nor did I mention the Waterford Case, without recognition that
18 this is a different Board and this Board has the right to
19 determine what it deems appropriate for this proceeding.

20 But in the Farley Case there was a motion by
21 Alabama Power Company to bifurcate the hearing.

22 CHAIRMAN FARMAKIDES: By the Applicant in that
23 case?

24 MR. GOLDBERG: By the Applicant, yes.

25 On the eve of filing of testimony in that case,

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1 after discovery was already out of the way.

2 And we opposed the bifurcation.

3 The Board has granted the motion, but by
4 telegram advised that it did so with qualifications, and
5 they would be spelled out in its order.

6 Its order has not been issued yet, so we really
7 don't know what kind of bifurcation has been granted. And,
8 frankly, it posed some problems for us in preparing and
9 filing our testimony.

10 CHAIRMAN FARMAKIDES: What stage are you in there,
11 sir?

12 MR. GOLDBERG: The prepared testimony by the
13 Intervenors, the -- by all the Intervenors, yes, by every-
14 body other than the Applicants have just been filed.

15 Applicants will be filing their testimony, then
16 there will be rebuttal testimony and the case will probably
17 come on for hearing in late fall.

18 I would hope that the question of bifurcation
19 would not be decided here until we have an opportunity to
20 see that decision by the Board in that case.

21 I am very much interested in knowing how its
22 qualifications really affect the granting of the motion for
23 bifurcation.

24 CHAIRMAN FARMAKIDES: Could I ask you a question,
25 sir, at this point?

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1 MR. GOLDBERG: Yes.

2 CHAIRMAN FARMAKIDES: How would you feel if we
3 delayed discussing this and reaching a judgment on it
4 until we have gone through the first round discovery, and
5 after the first round we re-examine this issue of split hearing?

6 MR. GOLDBERG: I would be in favor of that.

7 My own personal feeling is that bifurcation, which
8 has an appeal of simplification and looks to speeding up the
9 case, could actually have the opposite result.

10 This was my concern in the Farley Case.

11 CHAIRMAN FARMAKIDES: Except that, you see, once
12 the proposed findings are issued by the Board on the
13 first decision, then your discovery goes as to those
14 findings. You are limited from then on to those findings.

15 MR. GOLDBERG: One of the questions that arose in
16 the argument to the motion on the Farley Case was whether
17 the second phase, the remedy phase, was going to mark time,
18 or was it going to move right ahead after the Board's
19 decision was issued even though there were appeals to the
20 Commission and appeals to the court.

21 We feel that the Board is going to deal with that
22 in its order and will probably insist that as soon as its
23 decision is issued, the remedies phase, if it is appropriate
24 to be considered, moves right ahead.

25 I would hope that would be its conclusion.

1 My own feeling is on the matters of discovery,
2 that discovery on remedies really doesn't add much to the
3 discovery of problems or the length of discovery.

4 CHAIRMAN FARMAKIDES: You mean after the initial
5 decision or now?

6 MR. GOLDBERG: Even now.

7 CHAIRMAN FARMAKIDES: Even now?

8 MR. GOLDBERG: Even now.

9 But that is my own feeling.

10 CHAIRMAN FARMAKIDES: All right, sir.

11 Mr. Brown?

12 MR. BROWN: Nothing to add, your Honor, except
13 that I concur strongly and would urge the Board to consider
14 not making a decision on bifurcation until after the first
15 round of discovery.

16 MR. CHARNOFF: May I make one observation with
17 regard to the Farley Case?

18 I think it should be remembered, a fundamental
19 difference between that case and this case is that that
20 is a granddaddy case. The plant is being constructed.
21 Therefore, whether the schedule is a few months longer or
22 shorter is of no immediate consequence to anybody.

23 CHAIRMAN FARMAKIDES: How do you react,
24 Mr. Charnoff, to the question posed to Mr. Goldberg; and
25 that is to delay decision on this matter until after first

1 round discovery?

2 MR. CHARNOFF: Does that carry with it no
3 discovery on these issues during the first round?

4 CHAIRMAN FARMAKIDES: Excuse me, no discovery on
5 the issues on 3.

6 MR. CHARNOFF: Yes. Provided the first round of
7 discovery is reasonably short, I think that is an excellent
8 suggestion, sir.

9 CHAIRMAN FARMAKIDES: Mr. Charno?

10 MR. CHARNO: We have no objection at all.

11 CHAIRMAN FARMAKIDES: Mr. Popper?

12 MR. POPPER: We have no immediate objection.

13 (The Board conferring.)

14 CHAIRMAN FARMAKIDES: All right. That then
15 brings us to the other item of business here. That is what
16 we consider to be the schedule for all the dates remaining
17 in the proceeding.

18 MR. CHARNOFF: Mr. Chairman, excuse me. I
19 don't believe we are finished with contentions and discovery.
20 As I indicated, at least the record now stands that prior
21 to any discovery at least by AMP-O, the Board was going to
22 obtain from AMP-O certain data as set forth in its April 15
23 order.

24 Now, it seems to me that unless the Board finds
25 that that joint statement provides that information, which

1 I respectfully submit it doesn't even come close to providing,
2 then it seems to me we ought to hear from Mr. Brown today, the
3 response --

4 CHAIRMAN FARMAKIDES: Mr. Charnoff, yes, you
5 earlier stated that. I agree with you. That is a point
6 that I will ask Mr. Brown to respond to.

7 MR. BROWN: Yes, Mr. Chairman; Mr. Charnoff is
8 conveniently forgetting one subsequent order which has been
9 issued by the Board subsequent to the April 15 order. That,
10 of course, is the Prehearing Order Number 1 of the Board
11 dated May 6, 1974 in which the Board indicated, and I
12 quote: "The Department of Justice and the Atomic Energy
13 Commission Regulatory Staff have agreed to a joint statement
14 of issues in this proceeding which they are currently
15 discussing with the other parties. Each of the other
16 parties may decide to participate and agree to this joint
17 statement as presently constituted or as it may be amended."

18 Consequently in our determination and consultation
19 with the Regulatory Staff, the Department of Justice and the
20 City of Cleveland subsequent to that time, we worked on an
21 amended joint statement and all of us were able to reach
22 agreement on that joint statement.

23 So, therefore, pursuant precisely to the directions
24 of the Board, that each of the other parties may decide to
25 participate and agree to this joint statement as presently

1 constituted or as it may be amended, we decided, as was
2 indicated in that order, to participate in the joint state-
3 ment as amended.

4 I might also make reference to Mr. Charnoff's
5 own pleading, Paragraph 26 of that pleading at page 21,
6 which is dated June 7, 1974, in which he indicates, himself,
7 that, and I quote: "The issue has been joined." That is
8 between CEI and AMP-O. And I quote again. "This alone
9 remains an area where, within the confines of AMP-O's
10 pleadings and the Perry advice letter, it makes sense to
11 proceed with discovery."

12 We certainly agree with Mr. Charnoff that it
13 makes sense to proceed with discovery without any further
14 necessity for anything which would further burden the record
15 in these proceedings.

16 MR. CHARNOFF: Sir, we have no authority to
17 waive requirements of the Board, and I would submit to you
18 that the Board's direction and requirement of AMP-O was
19 certainly not met by that filing and was not modified by
20 Prehearing Order Number 1 in any respect.

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1 CHAIRMAN FARMAKIDES: We will address this issue.
2 If we think that anything more has to be done, we will resolve
3 it in the prehearing conference order. I personally had looked
4 at that prior to coming here today. We discussed it a little
5 bit and we will address it in the prehearing conference order.
6 Let's go to the proposed hearing schedule, that proposed by
7 Mr. Charno and by Mr. Popper.

8 MR. GOLDBERG: Your Honor, before we deal with dates
9 on that, could we set it up to include some of the items that
10 are not provided for in that schedule such as the date for filing
11 prepared testimony.

12 CHAIRMAN FARMAKIDES: Yes, I have that. I am
13 going to do that right now. I would like to suggest the
14 following list of activities. You have identified them
15 as milestones or events. These are procedural dates. Final
16 dates for the following: One, discovery begins. Two, prehear-
17 ing conference number 3. Three, written testimony. Four,
18 motions for summary dispositions. Five, responses. Six,
19 pretrial briefs. Seven, prehearing conference number four.
20 Six, hearing commences.

21 MR. CHARNOFF: May I comment on that, sir.

22 CHAIRMAN FARMAKIDES: Yes.

23 Now, I have purposefully left out the dates. I was
24 hoping you people could take the first crack at putting dates
25 in there and coming back to the Board with suggested dates from

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1 the parties. In that context, I would say this.

2 (The Board conferring.)

3 CHAIRMAN FARMAKIDES: The Board considers that the
4 dates suggested by Mr. Charno and Mr. Popper are reasonable.
5 We would like to throw in the additional actions, events,
6 milestones, whatever you want to call them, and ask that you
7 all come up with an integrated series of dates that would be
8 hopefully acceptable to you all. If not, of course, we will
9 resolve the differences.

10 Mr. Charnoff?

11 MR. CHARNOFF: Mr. Chairman, a couple of items. One
12 is I would urge that we come up with a shorter end of first
13 round of discovery, if you will. But I would like to urge
14 three matters be included in the agenda.

15 CHAIRMAN FARMAKIDES: All right, sir.

16 MR. CHARNOFF: One is that there be an end of discov-
17 ery date, as well as a beginning of discovery date. Two would
18 be --

19 CHAIRMAN FARMAKIDES: All right, let's break that down
20 into two, and those activities will be the last day of
21 discovery requests.

22 MR. CHARNOFF: Right.

23 CHAIRMAN FARMAKIDES: And then the last day for
24 responses --

25 MR. CHARNOFF: Right.

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1 CHAIRMAN FARMAKIDES: -- to those discovery, all
2 right?

3 MR. CHARNOFF: Correct, yes, that would be helpful.

4 CHAIRMAN FARMAKIDES: That would follow, then, after
5 item 1. Item 1-A would be the last day for completing dis-
6 covery, and 1-B would be the last day for responses to discovery
7 requests.

8 MR. CHARNOFF: Correct.

9 CHAIRMAN FARMAKIDES: All right.

10 MR. CHARNOFF: Secondly, I think that at some reason-
11 able time thereafter, the parties plaintiffs in this case,
12 namely the government agencies and the intervenors, ought to
13 submit their definition of the matters in issue with that
14 ultimate precision that they claim they can't make at this time.
15 They have always indicated that they need discovery and it
16 seems to me we need to know what the issues are.

17 CHAIRMAN FARMAKIDES: As to that point, the Board
18 will take care of the contentions in its prehearing -- in its
19 next prehearing conference order. We will pass on them and
20 formulate them as we understand them to be. And then with
21 respect to the final contentions or matters in controversy for
22 litigation, those would follow, I am relatively certain, in the
23 prehearing conference order to prehearing conference number three.

24 MR. CHARNOFF: I am not sure of the location in there,
25 but clearly at some point there has to be a proposed statement

4mil 1 of what really is at issue.

2 CHAIRMAN FARMAKIDES: Well, in fact when you talk
3 pretrial briefs, at least Mr. Charno and Mr. Popper, I take
4 that to be a statement of those issues. Mr. Charno and Mr.
5 Popper, isn't that correct?

6 MR. CHARNO: That is our understanding, your Honor.

7 MR. CHARNOFF: Not to follow the filing of the writ-
8 ten testimony. We have to know what it is they are alleging
9 as the matters in issue so we can prepare testimony on those
10 matters. So we do need that definition. I would submit that
11 that comes before the pretrial brief. I can't write a pretrial
12 brief not knowing the issues.

13 Finally, when one talks about filing of testimony,
14 I think it would be entirely appropriate for there to be a
15 sequence for filing of testimony, with direct testimony filed
16 first by the government agencies and the Intervenors, followed
17 by some interval of time for filing of testimony by the
18 Applicants. That has been the case in every other antitrust
19 case before the AEC.

20 CHAIRMAN FARMAKIDES: Any further comments, Mr.
21 Charno?

22 MR. CHARNO: No comments.

23 CHAIRMAN FARMAKIDES: Mr. Popper?

24 MR. POPPER: No, your Honor.

25 CHAIRMAN FARMAKIDES: Mr. Brown?

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MR. BROWN: No, your Honor.

CHAIRMAN FARMAKIDES: Mr. Goldberg?

MR. GOLDBERG: I don't think I have any problem with the introduction of these additional elements into the listing. I do have a problem with the suggestion of shortening the prehearing conference. Part of it is a personal problem.

CHAIRMAN FARMAKIDES: Shortening the prehearing conference?

MR. GOLDBERG: I am sorry, shortening the discovery. The initial round of discovery. My own personal feeling was that based upon the experience we have had in other proceedings, particularly the Farley proceeding, that when you consider discovery is also going to involve the taking of depositions, that the time that was proposed, I think it was three months, here, is going to turn out to be much too short. But I have a personal desire apart from that for some slippage in the discovery time to get out of the office, out of which office I haven't been for a very considerable number of years. And I am hopeful that the parties in working up a schedule will permit themselves, as well as me, some opportunity for vacation.

MR. BREBBIA: And the Board. Don't forget the Board.

MR. GOLDBERG: And the Board.

CHAIRMAN FARMAKIDES: Well, Mr. Goldberg, your first

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1 point is a very valid one. Every one of these proceedings
2 in which discovery is permitted takes a long period of time
3 beyond two or three weeks or two or three months. Now, our
4 hope here today was that we were going to resolve hopefully
5 some of these contentions by stipulation to the point where
6 discovery would become reduced considerably. We have failed
7 principally, we have succeeded in a couple of instances. That
8 has, I hope, will narrow discovery. And I think I am not
9 yet certain, I would feel that once the Board has acted on the
10 contentions and has articulated them insofar as we understand
11 them and you all have the opportunity then of looking at them,
12 we can better gauge how much time we will need for discovery.
13 We just can't do it right now.

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1 MR. GOLDBERG: No, I don't want to keep harping
2 on the Farley case, but there were very large numbers of
3 depositions that had to be taken about in the space of one
4 month, wasn't it? It was other material -- it was a night-
5 mare.

6 CHAIRMAN FARMAKIDES: I understand. We have the
7 same problems in Oconee, McGuire. It is just a question of
8 scheduling witnesses. It is a question of getting people
9 together and it takes time.

10 MR. GOLDBERG: And getting the transcripts out
11 of the reporter.

12 (Discussion off the record.)

13 MR. GOLDBER I was not talking about the type
14 of reporters we have in the city of Washington, emphasis.

15 (Laughter.)

16 CHAIRMAN FARMAKIDES: Is there anything else then
17 with respect to this schedule of actions? All right. The
18 Board will then ask you -- Well, let's resolve this right
19 now. I think we can. I think there is agreement from every-
20 one as to Mr. Charnoff's first comment, and that is to break
21 out the item of discovery with two additional sub-items.
22 We all agree to that. I see you all nodding, so I will
23 accept that.

24 Now, how about the second request with respect
25 to written testimony; I'm sorry, his second request went

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1 really to a statement of the final issues for litigation. We
2 will address that in our prehearing conference order, which we
3 will issue hopefully as quickly as possible. The third
4 point he raised had to do with written testimony. And his
5 point was that the Staff, Department of Justice and Inter-
6 venors should file first. Then, within a period of time
7 thereafter the Applicant should file. I think that is a
8 reasonable request.

9 MR. CHARNOFF: I would point out that has been
10 agreed to by all the parties in the document we filed,
11 statement on consolidation procedures dated March 29.

12 CHAIRMAN FARMAKIDES: That's right, my only
13 problem --

14 MR. CHARNOFF: There was such an agreement.

15 CHAIRMAN FARMAKIDES: -- is how much time. I
16 am asking now. How about 15 days, Mr. Charnoff or the other
17 members, the other parties here? Is that sufficient time, 20
18 days?

19 MR. CHARNOFF: I guess I lean, I want to keep it
20 as short as possible, but I lean toward enough time so that
21 we will have read their testimony. And that will depend, of
22 course on how many issues there are.

23 CHAIRMAN FARMAKIDES: Do you want 30 days, sir?

24 MR. CHARNOFF: I would rather aim toward 20, sir,
25 because I want to keep the schedule tight.

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1 CHAIRMAN FARMAKIDES: All right, so let's break
2 that out then. Written testimony, sub-A, would be filing
3 of all parties except the Applicant on a given date. Sub-B,
4 filing of the Applicant, which would be 20 days thereafter.

5 MR. CHARNOFF: This assumes that sometime prior
6 to that we will have been told by the parties and the Board
7 what the ultimate issues in controversy are.

8 CHAIRMAN FARMAKIDES: We have a question there,
9 Mr. Charnoff. And we will address that in our prehearing
10 conference order.

11 MR. GOLDBERG: I think we need to provide in the
12 sequence of testimony for rebuttal.

13 CHAIRMAN FARMAKIDES: I don't know that we have to
14 be as fine as that. If a party feels that he's got to
15 file rebuttal testimony, let him then ask the Board. Let's
16 not address that unless we need to, unless the parties now
17 see a reason for that and would like to put that into the
18 schedule.

19 All right. Let's hold that off. Anything fur-
20 ther?

21 MR. BROWN: Mr. Chairman, does the Board anti-
22 cipate reply briefs or potentially cross-answering briefs if
23 there is a division on issues other than between the
24 Applicants and Intervenors?

25 CHAIRMAN FARMAKIDES: Well, I will tell you what.

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1 If you people want to do that, I feel that that is not a
2 bad idea. And you are talking about sometime after the pre-
3 trial briefs are filed?

4 MR. BROWN: Yes, your Honor.

5 CHAIRMAN FARMAKIDES: You would file cross-
6 briefs.

7 MR. BROWN: Cross-briefs or reply briefs.

8 CHAIRMAN FARMAKIDES: I have no problem with that.

9 MR. CHARNOFF: Mr. Chairman, I would like to
10 object to that at the moment.

11 CHAIRMAN FARMAKIDES: Excuse me, sir. That may
12 well be very helpful, Mr. Brown, but let's see what the
13 other parties say. Mr. Goldber, what is your response, sir?

14 MR. GOLDBERG: My own experience is that I have
15 not run into this business of cross or reply briefs in
16 connection with pretrial briefs. The only time I have
17 run into cross or answering briefs is after hearing when
18 you are dealing with the final merits of the case.

19 MR. CHARNOFF: We would agree with that, sir,
20 I think it poses a threat to the overall schedule.

21 CHAIRMAN FARMAKIDES: No, it would not. It
22 would not affect the beginning of the hearing.

23 MR. CHARNOFFF: Well, if it wouldn't affect the
24 beginning of the hearing, I guess I have no objection to
25 it, sir.

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1 CHAIRMAN FARMAKIDES: From my point of view it
2 should not affect the beginning of the hearing.

3 MR. CHARNOFF: I think we really -- I think what
4 you are saying to us is after we get the contentions from the
5 Board this week or early next week or whenever you rule on
6 it, we, the parties, ought to get together on this schedule
7 and see if we can fit all these dates in.

8 CHAIRMAN FARMAKIDES: That's right.

9 MR. CHARNOFF: I would suggest that we see what that
10 schedule shapes up like before we commit ourselves.

11 CHAIRMAN FARMAKIDES: Mr. Charno.

12 MR. CHARNO: The Department doesn't desire cross-
13 briefs but we will be happy to submit them. No objection.

14 CHAIRMAN FARMAKIDES: Mr. Popper?

15 MR. POPPER: The Staff feels it is unnecessary to
16 have a reply to a pretrial brief but we will --

17 CHAIRMAN FARMAKIDES: Look, you all, as we said
18 before, I think it is best that you people have the first
19 crack at generating such a proposed schedule. I must say,
20 Mr. Charon and Mr. Popper, yours is one very good step
21 toward that final schedule. All we would do then is to
22 recommend that it be further refined with the additional
23 items that we proposed. If you want to crank in cross-briefs,
24 it is all right with me. Is there anything else? I think
25 we have --

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1 MR. GOLDBERG: Just one question. You are look-
2 ing to the parties to try to get together on a schedule.

3 CHAIRMAN FARMAKIDES: Yes.

4 M.R GOLDBERG: Are we to submit it by a certain
5 date to the Board?

6 CHAIRMAN FARMAKIDES: I was thinking of a rea-
7 sonable time.

8 MR. GOLDBERG: Withink the next 10 days, would that
9 be all right?

10 CHAIRMAN FARMAKIDES: We will set the time with
11 respect to the beginning of discovery. You need not worry
12 about that date. The beginning of discovery, okay? We
13 will set that in our prehearing conference order. Let's say
14 10 days would be a good time.

15 MR. CHARNOFF: Mr. Chairman, that would be a
16 little difficult for me because I am going to be away at
17 another hearing next week. Can we say two weeks after your
18 order comes out we will all submit either an agreed upon
19 or separate schedule?

20 CHAIRMAN FARMAKIDES: This is such a small mat-
21 ter I would like to leave it to you people. I don't con-
22 sider it to be at all a problem. Let's say by July 15,
23 we will have an order from you. Wait a minute, excuse me.

24 (Board confers.)

25 CHAIRMAN FARMAKIDES: July 15 is fine.

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MR. CHARNOFF: That is for our submission of
schedule?

CHAIRMAN FARMAKIDES: For you people to submit
to the Board a schedule. Anything else?

Thank you very much.

(Whereupon, at 4:26 p.m., the hearing was ad-
end 28 7) journed.)