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UNITED STATES ATOMIC ENERGY COMMISSION



IN THE MATTER OF:

TOLEDO EDISON COMPANY and
CLEVELAND ELECTRIC ILLUMINATING
COMPANY

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 - Monday, 16 September 1974

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ATOMIC ENERGY COMMISSION

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Postal Rate Commission
Room 500
2000 L Street, N. W.
Washington, D. C.

Monday, 16 September 1974

Prehearing conference in the above-entitled matter was
convened, pursuant to notice, at 9 a.m.

BEFORE:

JOHN FARMAKIDES, Chairman,
Atomic Safety and Licensing Board Panel

JOHN BREBBIA, Esq., Member

DOUGLAS RIGLER, Esq., Member

mp

1 APPEARANCES:

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

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

10 STEVEN M. CHARNO, Esq., and MELVIN G. BERGER, Esq.,
11 Antitrust Division, United States Department of
12 Justice, Washington, D. C. 20530; on behalf of
13 Department of Justice.

14 BENJAMIN H. VOGLER, Esq., Office of the General Counsel,
15 United States Atomic Energy Commission, Washington,
16 D. C. 20545; on behalf of the Regulatory Staff,
17 Atomic Energy Commission.

18 DONALD H. HAUSER, Esq., Cleveland Electric Illuminating
19 Company, Illuminating Building, Public Square,
20 Cleveland, Ohio 44113; on behalf of CEICO.
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P R O C E E D I N G S

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2 CHAIRMAN FARMAKIDES: Let's start, but let's
3 recess for about five minutes and we will wait for AMP-O.
4 They are not in the room so far as I know, so we will give
5 them a grace period of another five minutes. So we will
6 recess for five minutes.

7 (Recess.)

8 CHAIRMAN FARMAKIDES: Let's proceed.

9 First of all let me note for the record that by
10 our prehearing conference Order Number 2, we had set September
11 the 13th as the day scheduled for any objections to discovery
12 requests to be heard.

13 We subsequently, by telephone conference call,
14 called all the parties and we changed that date to September
15 16 and at the request of one of the parties we confirmed this
16 in writing.

17 We then set September the 16th as a date certain
18 for hearing the objections in view of some of the objections
19 filed by the parties, and sent it initially for the Landow
20 Building and found that that was previously scheduled for
21 another activity, so again by telephone conference call among
22 all the parties we rescheduled it for this room.

23 I am sorry for the inconvenience it may have caused,
24 but under the circumstance sometimes you have to be a little
25 flexible to find space in the Washington, D.C., area to conduct

1 a hearing.

2 The only party that we did not -- I will withdraw
3 that. I think all the parties were contacted either directly
4 or through their secretaries or fellow members of the firm.

5 The second point I would like to note for the
6 record is the fact that our Board member Dr. George Hall
7 has resigned from the Atomic Energy Commission to accept a
8 new position at the Department of Defense, Deputy Assistant
9 Secretary of Defense; and he is no longer therefore available
10 to serve on this Board, and we were very pleased that we
11 were able to have with us and to assume that responsibility
12 Mr. Douglas Rigler of the firm of Hollabaugh and Jacobs.

13 I am sure that you all know Mr. Rigler.

14 I can see by the nodding that this is true, and
15 so I won't introduce him any further.

16 I think this in no way will interfere with the
17 proceeding as we have scheduled it and as it will be
18 conducted.

19 Mr. Rigler has been with the panel for a number of
20 years and we are all able to work very well together.

21 I think that if Dr. Hall had to go, Mr. Rigler is
22 a beautiful replacement, not in terms of appearance but in
23 terms of effort and ability to do the work.

24 Let me also then move to the third point.

25 There have been a number of notices of appearances

1 and I would like to ask the parties to introduce themselves
2 so this would come up now on the record. ..

3 We will start with my left, Department of Justice.

4 Mr. Name is Melvin Berger. I am with the
5 Department of Justice.

6 CHAIRMAN FARMAKIDES: And Mr. Charno, I think
7 you are with them also.

8 MR. CHARNO: Steve Charno.

9 CHAIRMAN FARMAKIDES: Mr. Vogler.

10 MR. VOGLER: Ben Vogler of the Atomic Energy
11 Commission.

12 CHAIRMAN FARMAKIDES: Anyone else?

13 MR. VOGLER: Not of record.

14 I am assisted by technical experts.

15 CHAIRMAN FARMAKIDES: The applicant, Mr. Charnoff
16 and Mr. Reynolds.

17 Mr. Goldberg and Mr. Hjelmfelt representing the
18 City of Cleveland.

19 AMP-O is not present this morning.

20 Does anyone have any idea where Mr. Palm,
21 Baumann or Duncan might be?

22 (No response.)

23 I have heard nothing. They are one of the parties
24 that we did not directly talk to. Their secretary was
25 contacted, so I just don't know where they are.

1 Let's proceed, then, to the order of business
2 for today which is to consider the objections for the
3 requests for interrogatories and documents.

4 Anyone have any preference in the way we start?

5 MR. CHARNOFF: Sir, I think it might be well if
6 we began with the Department of Justice and AEC responses to
7 both our interrogatories and comments on the interrogatories
8 of the City of Cleveland.

9 I think they present specific types of questions
10 that could be considered very briefly, and then we might turn
11 to those of the objections of the City of Cleveland and the
12 Applicants that merit any discussion in the views of the
13 Board.

14 CHAIRMAN FARMAKIDES: Well, that is as good a
15 program as any other, I am sure.

16 Let's take it in that order, then. What we
17 will do -- any other preferences? It doesn't really matter.

18 (No response.)

19 Fine. Let's then take as the first package the
20 joint request of the AEC Regulatory Staff and the U.S.
21 Department of Justice for interrogatories and for production
22 of documents by Applicants.

23 This was filed August 23, 1974.

24 By objections filed September 9 the Applicant states
25 his objections to the interrogatories and document request.

1 Let's go over the objections. And the only way
2 I know how to proceed here is to take each of these objections
3 in turn.

4 Where they are duplicative, there is no need to
5 go further into any details with respect to that objection.

6 I will hear the objections.

7 First of all, in order to save some time, let me
8 ask Department of Justice and the AEC: do they agree with any
9 of the objections voiced by the Applicant?

10 Mr. Charno?

11 MR. CHARNO: No, we don't, your Honor.

12 CHAIRMAN FARMAKIDES: Mr. Vogler?

13 MR. VOGLER: I am going to have to also say no, but
14 I would like to say that I haven't had a chance to sit down
15 on an informal basis and discuss it with the Applicants and
16 I am sure, working both ways, that it is a matter of definition
17 and meeting of the minds as to what is meant by the document,
18 what is meant by scope, and perhaps that might be productive
19 in eliminating some of the disagreement.

20 If I am being asked to state at the outset, I have
21 to go along with Mr. Charno's answer, simply because I haven't
22 had a chance to speak to the Applicant.

23 CHAIRMAN FARMAKIDES: In other words, you are
24 talking only to the definition of scope and document.

25 MR. VOGLER: That is an example.

1 CHAIRMAN FARMAKIDES: Is there anything else
2 specifically, Mr. Vogler?

3 MR. VOGLER: No.

4 CHAIRMAN FARMAKIDES: Mr. Charnoff?

5 MR. CHARNOFF: Mr. Reynolds will discuss our
6 objections to the Staff and Justice Department interroga-
7 tories, sir.

8 I take it that given the time available that we
9 ought not to discuss each specific objection or each specific
10 interrogatory as we go through.

11 I think what we will do is try to highlight the
12 main points, if we can.

13 CHAIRMAN FARMAKIDES: What I would like is for you
14 to go through your objections, and we are going to be asking
15 you questions as we go through.

16 For example, on page 2 of your objections you
17 make the point that the scope of the definition of company
18 is too broad because it includes subsidiaries and affiliates;
19 isn't that correct?

20 CHAIRMAN FARMKAIDES: And you would prefer that it
21 be restricted to "predecessor companies and any entities
22 providing electric services at wholesale or retail, the
23 properties or assets of which have been acquired by the
24 named applicants"; isn't that correct?

25 MR. REYNOLDS: That's correct.

1 CHAIRMAN FARMAKIDES: That is the sum and substance
2 of your objection?

3 MR. REYNOLDS: Yes.

4 CHAIRMAN FARMAKIDES: Now, Mr. Charno and Mr.
5 Vogler, why not accept the definition proposed by the
6 Applicant?

7 MR. CHARNO: Well, there are two points, your
8 Honor.

9 First, control; the documents of subsidiaries and
10 affiliates of the Applicants are definitely within the legal
11 meaning of control of the Applicants.

12 Secondly -- well, to continue that point for a
13 second, under Rule 34 of the Civil Rules, in such a situation
14 the cases are decided that if a prima facie case controlled
15 over the documents is made out then the burden shifts to the
16 party who is the recipient of the document request to show
17 some undue burden.

18 No undue burden, I believe, has been shown here.

19 Secondly, there is a definite need for documents
20 which would indicate that a monopoly situation has been
21 created or perpetuated through the use of subsidiary
22 corporation.

23 The mere fact that they are subsidiaries doesn't
24 make them less effective tools. In fact, it could make them
25 more effective tools if they are out from under the umbrella

1 of regulation.

2 There are two specific subsidiaries that give
3 possible examples. I believe it is CEICO, which is
4 a subsidiary of the Cleveland Electric Illuminating Company,
5 which owns and services electric meters and has engaged in
6 certain land acquisitions.

7 Now, it would appear that the activities of that
8 subsidiary would have direct relevance to a number of the
9 allegations made by the City of Cleveland concerning the retail
10 accounts and practices, competitive accounts and practices
11 of CEI.

12 That would be an example of the type of corporation
13 that should not be accepted.

14 I think that summarizes our objections.

15 CHAIRMAN FARMAKIDES: Did you have anything else,
16 Mr. Vogler?

17 MR. VOGLER: No, sir.

18 CHAIRMAN FARMAKIDES: Mr. Reynolds, your response,
19 sir?

20 MR. REYNOLDS: Yes, the response to that is if we are
21 presented with a prima facie case, maybe we can then be in a
22 position to determine whether we have to answer as far as the
23 control -- whether it is in our control or whether there is a
24 good reason that this is outside the scope.

25 If we could have specified the subsidiaries

1 specifically, I think probably that we can get around this
2 problem.

3 I am not sure that CEICO fit with your definition?

4 MR. REYNOLDS: CEICO would be one that would be
5 outside the definition of company and as described by
6 Mr. Charno, I would suggest that there is nothing that is
7 relevant in CEICO's files that could bear on this?

8 CHAIRMAN FARMAKIDES: That is another question.

9 MR. REYNOLDS: But it would be a subsidiary that
10 would be outside the definition as redefined by us.

11 CHAIRMAN FARMAKIDES: All right. Did you have
12 anything?

13 (No response.)

14 All right. Can we go to your Objection Number 2?

15 Let's follow the same procedure, sir. Did you
16 care to state anything further with respect to your objection,
17 Mr. Reynolds?

18 MR. REYNOLDS: No. I think -- you mean as stated
19 on page 4 of our document?

20 That is comprehensive.

21 CHAIRMAN FARMAKIDES: Mr. Charno, Mr. Vogler,
22 either one.

23 MR. CHARNO: On behalf of the Department, I think
24 that we can perhaps limit this in a manner that would leave
25 some of the Applicants' apprehensions.

1 With respect to the language "propose to own
2 or control," if we substituted for that, or if we broadly
3 construed that language, proposing to own or control to reach
4 any entity whose consideration of or interest in entering
5 the electric power business has come to the company's
6 attention or is directly reflected on the face of the
7 document, I would think that would eliminate a great deal of
8 the uncertainty.

9 This is a compromise that we have entered when
10 we have used this language before -- not before the Atomic
11 Energy Commission, but in the Federal Courts, and it has been
12 something that has been acceptable to the utilities.

13 The definition of electric utility that has been
14 utilized in the Staff department discovery requests we think
15 is important to preserve as it stands.

16 For much the same reason that we gave with reference
17 to subsidiaries of the Applicants.

18 It is distinctly possible that dealings with an
19 electric utility outside the combined CAPCO service areas would
20 have a direct impact, competitive impact within those combined
21 service areas.

22 Any interchange of power with the corporation
23 outside or an electric utility outside the combined service
24 areas could have a substantial impact on the utilities inside
25 the combined service areas.

1 This would be true whether the transaction under
2 consideration were one between a CAPCO member and a third
3 party or between some small electric utility in the combined
4 service area and a third party.

5 They would have a competitive impact in opposite
6 directions, but still have a very definite competitive impact
7 either way.

8 I think that summarizes our position.

9 CHAIRMAN FARMAKIDES: Mr. Vogler, do you have
10 anything further?

11 MR. VOGLER: No. I would think that, as I
12 indicated previously, we might be able to work out a
13 reasonable definition. I am hearing the limitation from the
14 Department for the first time.

15 I have to really look at it in writing before I
16 can go along with it.

17 We went with these definitions earlier and we
18 are going to have to stand by it unless we can sit down
19 and figure out something else.

20 I understand the problem.

21 CHAIRMAN FARMAKIDES: Yes, and the problem was one
22 that was compounded by all the parties and the Board together,
23 I assume, in settling on this date to hear the objections.

24 Now, are you saying, sir, that it might be
25 visible to give everyone the opportunity of informally

1 resolving the objections voiced by each other before we
2 proceed into the formal session?

3 MR. VOGLER: It might, your Honor, be helpful,
4 and to come back to the Board with those that are insoluble.

5 CHAIRMAN FARMAKIDES: Mr. Charno, how do you
6 react to that, sir?

7 MR. CHARNO: The Department has made some attempt
8 to resolve some of these issues with the Applicants and we
9 have been unsuccessful.

10 CHAIRMAN FARMAKIDES: All right, sir.

11 MR. REYNOLDS: I don't believe, if you are asking
12 me to address myself to Mr. Vogler's comment --

13 CHAIRMAN FARMAKIDES: Suggestion, yes.

14 MR. REYNOLDS: I believe that the time is best
15 served by proceeding the way we are. I don't think it is
16 going to serve much purpose to go through an informal
17 discussion and then come back to the Board with the same
18 problem we had before.

19 CHAIRMAN FARMAKIDES: All right, sir.

20 Do you have something else?

21 MR. REYNOLDS: Do you want to hear any comments
22 on the electric utility definition?

23 MR. HJELMFELT: We have some disputes with the
24 Applicants that could probably be narrowed if we sat down and
25 talked with them, but I think we can make those proposals

1 here much more rapidly and most of our points, I think, can
2 just be made in going ahead today as we are and that is what
3 we propose rather than attempting to come back.

4 CHAIRMAN FARMAKIDES: All right, sir.

5 (The Board conferring.)

6 CHAIRMAN FARMAKIDES: I think, then, we are going
7 to -- I think we will proceed with the hope that perhaps
8 after discussion this morning on the record the parties will
9 get together during the luncheon recess today and talk to each
10 other and perhaps some of these problems might be resolved.

11 Anything further, then, Mr. Vogler, with respect
12 to the second item?

13 MR. VOGLER: No, your Honor.

14 CHAIRMAN FARMAKIDES: All right, Mr. Reynolds, you
15 may respond now, sir, to what Mr. Charno indicated.

16 MR. REYNOLDS: Well, it sounds to me as though this
17 is the same discussion and same argument we had some time ago
18 about this same definition and the Board subsequent to this in
19 both its order requesting clarification in June 28 and in
20 Prehearing Conference Order Number 2, July 25, incorporated
21 definitions of electric entity with its orders and our
22 position is basically we see no reason why those definitions
23 can't be followed for purposes of discovery and our suggestion
24 here is to essentially adopt the definition that the Board
25 has used on two different occasions and to limit the joint

1 request definition so that it is in essence to the same
2 effect as the Board's own definition in those two orders.

3 CHAIRMAN FARMAKIDES: Mr. Reynolds, why did you
4 say essentially to adopt?

5 Why not just adopt the Board's definition, sir?

6 MR. REYNOLDS: I am not prepared --

7 CHAIRMAN FARMAKIDES: Why couldn't we just adopt
8 the Board's definition?

9 MR. REYNOLDS: The reason I say essentially is
10 because it is formulated a little differently in those two
11 orders.

12 CHAIRMAN FARMAKIDES: Well, will you accept the
13 Board's definition?

14 MR. REYNOLDS: Yes, we will.

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1 CHAIRMAN FARMAKIDES: Mr. Charno, why don't you
2 adopt the Board's definition, sir?

3 MR. CHARNO: It is the Department's feeling that
4 while that definition is adequate with respect to those
5 entities that will be affected by the acts and practices of
6 the Applicants, that definition is not adequate to encompass
7 all the transactions between Applicants and electric utilities
8 which might have a competitive impact upon the electric
9 entities inside the combined CAPCO service areas.

10 We're talking about basically two different
11 things: One, we're talking about the entities who are
12 affected by the monopolization, those inside the market area.

13 On the other hand, we're talking about transactions
14 by the monopolists which have an effect upon the entities
15 inside the service area.

16 The transactions by Alcoa worldwide resulted in a
17 monopoly within the United States. We're not suggesting that
18 the geographic market area should be greater than the combined
19 CAPCO service areas or include the entities within the combined
20 CAPCO service areas.

21 We are suggesting that there are certain activities
22 in which the Applicants are alleged to have engaged that
23 took place outside the combined CAPCO service area and helped
24 establish and maintain their monopoly and should be dis-
25 coverable.

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1 MR. BREBBIA: Mr. Charno, you referred to line
2 of cases under Rule 134; did I hear you correctly?-

3 MR. CHARNO: Rule 34.

4 MR. BREBBIA: With regard to this definition.
5 What relation did that have?

6 MR. CHARNO: I'm sorry, that was the definition
7 of documents under the control of a party.

8 MR. BREBBIA: Oh.

9 CHAIRMAN FARMAKIDES: Mr. Vogler, did you want
10 to add anything to that, sir?

11 MR. VOGLER: No, sir. Several weeks ago Mr.
12 Charno and I discussed this when we drafted the document and
13 we are satisfied, too, that the definition previously
14 announced by the Board wouldn't cover what we want, so we
15 would prefer to stick with the definition of utilities found
16 in our document request.

17 CHAIRMAN FARMAKIDES: Anything further on this
18 point?

19 Let's go to objection number 3, the scope of
20 production.

21 Anything further, Mr. Reynolds, that you would
22 like to add?

23 MR. REYNOLDS: No, sir, not at the moment.

24 CHAIRMAN FARMAKIDES: Would you like to summarize
25 in any way that would further clarify what you stated, sir?

1 MR. REYNOLDS: The statement basically relates
2 to the time frame for discovery. Our position is that we see
3 no reason why discovery should back up earlier than January
4 1, 1967, which is the time when the Applicants became members
5 in CAPCO, and the planning for the Davis-Besse Unit commenced,
6 which was the earliest unit, and in looking into areas, document
7 searches, that type of thing on discovery, at an earlier time
8 period is not going to produce anything that is going to bear
9 on the issues here or advance the proceeding in any way, and
10 there's no point in burdening the Applicants with that
11 additional discovery that is called for in the joint request
12 that contemplates an earlier time period.

13 CHAIRMAN FARMAKIDES: All right, sir.

14 MR. REYNOLDS: The second part of that, B, basically
15 requests that as far as production is concerned, if the docu-
16 ments are a matter of public record and filed with the FPC
17 or Securities Exchange Commission, et cetera, that we not be
18 required to go through the duplicative effort of turning
19 over the same documents which are on file.

20 CHAIRMAN FARMAKIDES: Thank you.

21 Mr. Charno or Mr. Vogler?

22 MR. CHARNO: With respect to the scope of conten-
23 tions of the Applicant pertaining to the date of the demand,
24 they support that with the statement that this is not a
25 general antitrust case and to a certain extent, I must take

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1 exception to that.

2 We are exploring the existence of a situation in-
3 consistent with the antitrust laws.

4 Now, in certain particulars, especially scope of
5 discovery, that is very much akin to monopolization and
6 requires a broad and far-reaching discovery, over a reasonable
7 length of time.

8 We have taken a 10-year period, which is certainly
9 not unreasonable, and compared with any monopolization
10 action ever brought is a relatively short period of time.

11 Going with respect to Part B of their objection,
12 we looked at the case they cited in support of their objec-
13 tion, and we're willing to make slightly greater concessions
14 than were ordered in that case.

15 That is, that we would expect the Applicants to
16 identify any documents, the documents in the case they cited
17 were identified, that are responsive to the demand.

18 If they were filed with the Federal Power
19 Commission, Securities and Exchange Commission, or the Atomic
20 Energy Commission, they need not be produced. We will under-
21 take securing duplicates from those appropriate federal
22 regulatory agencies.

23 On the other hand, with respect to documents on
24 file with the Ohio Public Service Commission, the
25 Pennsylvania Public Service Commission, and what they

1 characterize as "any other state or federal regulatory body or office,"
2 we will not assume this rather substantial burden of
3 traveling around the country and trying to secure documents
4 that are in the files of the Applicants.

5 I think that summarizes our position on that.

6 CHAIRMAN FARMAKIDES: All right, Mr. Vogler;
7 anything further?

8 MR. VOGLER: Inasmuch as the Staff and the
9 Department formulated this joint discovery request together,
10 I am going to appear like a jack-in-the-box jumping up and
11 affirming what Mr. Charno had to say.

12 Basically, again, we agree. We have predicated
13 our case starting on January 1st, 1964 for a 10-year period,
14 and its monopoly, and that is the reason we have taken that
15 period.

16 Also we would like to say that if we are forced
17 to go to Columbus, Ohio, and Harrisburg, Pennsylvania, the
18 case may be delayed.

19 On the other hand, we can easily go down to Federal
20 Power Commission or other federal agencies and pick up the
21 documents, providing they are identified.

22 CHAIRMAN FARMAKIDES: All right, let me assume for
23 the remaining objections that Mr. Charno will be speaking
24 for both of you, and if you have anything else, I'll leave it
25 up to you to call my attention to it.

1 Mr. Reynolds, Mr. Charno has replied. Do you have
2 any further response, sir? ..

3 MR. REYNOLDS: Well, I do have some problem with
4 the idea that we're opening this up to a general antitrust
5 inquiry and exploring everything and anything that the
6 Justice Department decides to go after.

7 CHAIRMAN FARMAKIDES: I think, sir, that was
8 meant within the concept of the issues proposed by the Board.

9 MR. REYNOLDS: I wonder --

10 CHAIRMAN FARMAKIDES: Let's not wonder. Let's
11 be sure that all the parties recognize those issues are the
12 scope of discovery. I don't think there was any intent to
13 broaden them. How about to the point itself?

14 MR. REYNOLDS: To that point, we have two advice
15 letters in 1970 indicating there are no antitrust problems
16 with respect to the Applicants in the CAPCO area pertaining
17 to Davis-Besse and Beaver Valley. 1969 and '70.

18 And then we get a change in circumstance in the
19 Perry letter in 1973 which reaffirms as to all the other
20 applicants that there is no antitrust problem but for the
21 CEI-City of Cleveland situation.

22 And it seems to me that the idea of going back
23 now with respect -- certainly with respect to all the other
24 Applicants, and I think also with respect to Cleveland
25 Electric and looking for a period of 10 years, '64 all the way

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1 up to the present, and to anything that might constitute a
2 situation inconsistent with the antitrust laws is completely
3 and entirely inconsistent with the advice letters, and it is
4 not within the scope, if we're going to look at the pleadings
5 and rely on the pleadings here of the City of Cleveland,
6 Ohio, and advice letters from the Justice Department, all we
7 have in terms of pleadings of AEC and Justice, I think they
8 in themselves narrow the time frame of the inquiry, and I
9 think they should control and limit the amount of time that
10 the discovery can accomplish.

11 CHAIRMAN FARMAKIDES: How about the reply of
12 Mr. Charno to your B?

13 MR. REYNOLDS: I think on B, I can sympathize
14 with the trips to the Ohio Commission and Pennsylvania
15 Commission, but I think that a letter could probably accomplish
16 the same result, and I don't see that that would either be
17 time-consuming or overly expensive or unduly burdensome, so
18 we would stand on that.

19 CHAIRMAN FARMAKIDES: How about "any other state or
20 federal regulatory body or office"?

21 MR. REYNOLDS: We have no problem identifying
22 where the documents are filed as a matter of public record,
23 and I think that as to the other agencies or other public
24 bodies, that again a letter would certainly suffice to accomplish
25 the discovery they would desire, sir.

1753: Linda

CHAIRMAN FARMAKIDES: Let's open up 3-A to broader

3: #4 2 discussion because the question arises, this question of time,
3 date, how far back do we go and I think it would -- the thought
4 of the Board is we should have one date with respect to all
5 parties and all discovery. Anyone feel differently?

6 Again I'll start with my left, Justice.

7 MR. CHARNO: Well --

8 CHAIRMAN FARMAKIDES: Without stating what date we're
9 talking about, I'm just saying, let's have one date with respect
10 to all discovery.

11 MR. CHARNO: I think that that would entail additional
12 burden in terms of document search on the Department. We know
13 when our investigations began and we know that we have nothing
14 prior to that time.

15 CHAIRMAN FARMAKIDES: That causes no problem; just
16 say so.

17 MR. CHARNO: Then I would think one date would be
18 fine.

19 CHAIRMAN FARMAKIDES: Mr. Vogler.

20 MR. VOGLER: It would be fine.

21 MR. REYNOLDS: It would be fine, one date.

22 CHAIRMAN FARMAKIDES: Mr. Hjelmfelt.

23 MR. HJELMFELT: For most items one date would be
24 sufficient. However, there are certain items that we feel have
25 a bearing on our relationship with Cleveland electrically

MS: 2 1 where we feel it would be productive and important to go back
2 on a particular item to a certain date that may not fit in a
3 general date.

4 CHAIRMAN FARMAKIDES: How many such items, sir?

5 MR. HJELMFELT: As I recall there's five or six or
6 less than that that we would want to go back to a specific
7 time that would be earlier.

8 CHAIRMAN FARMAKIDES: Have you talked to the applicant
9 with respect to those five or six items?

10 MR. HJELMFELT: We haven't had an opportunity to
11 discuss this informally.

12 With respect to picking a particular date, since we're
13 I guess the only parties that haven't responded to that yet,
14 I'd like to point out first that for the most part we have
15 also used the date January 1, 1964, while in their requests to
16 us the applicants used as a general date 1960, so I don't think
17 1964 is out of line. In addition, we're looking at not only
18 what happens since CAPCO but certainly what led up to CAPCO,
19 the formation of CAPCO, the termination of membership of CAPCO,
20 all of which would go back to a date earlier than the date in
21 which the Memorandum of Agreement or Memorandum of Understanding
22 were set up and CAPCO was signed. In addition, the allegations
23 go beyond just the existence of CAPCO and we're looking to see
24 when a situation exists which would be maintained under the
25 activities under the license.

MS: 3 1 CHAIRMAN FARMAKIDES: Anything further on this ques-
2 tion of -- Mr. Hjelmfelt has just expanded it and we're now
3 talking about a date certain. I think we are going to have one
4 date for all discovery. We will consider further Mr. Hjelmfelt's
5 point. There are five or six exceptions to that. We'll talk
6 about that later on. Now to the date, how about 1964, January
7 1, which is the date recommended I guess by all of you in one
8 way or another.

9 MR. CHARNOFF: No, we have recommended now that it be
10 January 1, 1967, which coincides with the commencement of CAPCO
11 activities. It coincides with the beginning of planning for the
12 first nuclear unit of CAPCO Company's which happens to be the
13 first nuclear unit at issue in this case, namely Davis-Besse
14 No. 1. While it is true that some of our interrogatories did
15 go back beyond that because we did not reach any understanding,
16 about what the date ought to be, we were interested in certain
17 activities of the Municipal Electric Light & Power Company but
18 we do think after reviewing that it does make sense to have a
19 single date, and while I think we would have to forego certain
20 discoveries that we have requested of the Municipal Company
21 prior to that date in terms to real relevance, a situation that
22 has any relationship to the Perry and Davis-Besse situations,
23 January 1, 1967, would seem to be pertinent and relevant, and
24 anything beyond that in terms of past would only be history.

25 CHAIRMAN FARMAKIDES: All right, so you're now saying

MS: 4

1 all of your interrogatories and requests would be limited to a
2 date since January 1, 1967.

3 MR. CHARNOFF: Provided that would be true for every-
4 body else, sir.

5 CHAIRMAN FARMAKIDES: Yes. Mr. Charno, you indicated
6 January 1, 1964. The applicant desires starting January 1, 1967.
7 Would you accept that, sir?

8 MR. CHARNO: We would be loath to accept that for the
9 simple reason that oftentimes the most revealing information is
10 obtained in the year or two years prior to the formation of a
11 group activity.

12 And that material is often well-documented, and that
13 is the period in which policies are established that are carried
14 forward five and ten years in the future.

15 CHAIRMAN FARMAKIDES: That would date the date back
16 to 1965.

17 MR. CHARNO: It would take it back I think effectively
18 to January 1, 1964. That was one of the primary considerations
19 that the Staff and the Department looked at in attempting to
20 establish a date for discovery.

21 CHAIRMAN FARMAKIDES: Is there any need really to set
22 a ten-year limit which is effectively what you were doing?
23 You have just indicated what you would need is one or two years
24 prior to the formation, which would be '65 or '66. Why couldn't
25 we just take that as a parameter, rather than '64, save a year

MS: 5 1 of so.

2 MR. CHARNO: Speaking solely for the Department, if
3 we could be certain that we could come in and move to have that
4 limit expanded if we discovered any documents indicating activ-
5 ity prior to the cutoff date, then we would accept the 1965
6 January 1 date.

7 CHAIRMAN FARMAKIDES: Now, this is a key point; I'm
8 going to ask Mr. Vogler, specifically sir, did you have any
9 comment?

10 MR. VOGLER: Yes, sir, CAPCO was formed on January 1,
11 1967, and we're vitally interested in the planning documents
12 that led to the formation of CAPCO, and this is why, as Mr.
13 Charno mentioned, we selected the date we did. With the
14 same caveat that he gave you, if we can rest assured that if we
15 become aware of documents going beyond 1-1-'65, why we would be
16 willing to accept a short term. We're after the planning
17 document.

18 CHAIRMAN FARMAKIDES: All right, sir. Mr. Hjelmfelt.

19 MR. HJELMFELT: We would think that a three-year
20 period before the actual signing of the Memorandum is not
21 unreasonable. It is my understanding that a final agreement on
22 Memorandum of Understanding or Memorandum of Operations among
23 the CAPCO parties still hadn't been negotiated, and I think it
24 is not unreasonable to assume that the parties didn't formulate
25 the plans and arrive at an understanding on CAPCO in one or two

MS: 6

1 years, but it took a longer period than that. That's why we
2 would suggest that three years is maybe even a minimum period to
3 go back.

4 CHAIRMAN FARMAKIDES: All right. Mr. Charnoff.

5 MR. CHARNOFF: I would point out that CAPCO was formed
6 September 1, 1967, not January 1. And that's why we had
7 proposed January 1, 1967, so there would be the introductory
8 period leading up to the formation of CAPCO. We see no point
9 in going beyond that date.

10 CHAIRMAN FARMAKIDES: Anything further?

11 Let's take -- do you have any questions? Let's go to
12 the next point, item 4, appearing on your page 5, Mr. Reynolds,
13 anything further, sir?

14 MR. REYNOLDS: No.

15 CHAIRMAN FARMAKIDES: Would you care to summarize it
16 further for any clarification?

17 MR. REYNOLDS: Essentially, it's the request for all
18 documents which show or mention in effect upon business or
19 operations of company which, in our view, is totally unparticu-
20 larized and calls for the type of fishing expedition that the
21 regulations forbid.

22 I don't think that this, as written, it doesn't seem
23 that this is the type of request that really the applicants could
24 be responsive to even if they undertook the most conscientious
25 effort to search their files. I guess one of the most serious

MS: 7 1 problems that we're having with this type of request is that the
2 other -- the application other than Cleveland Electric, which
3 are not at any particular stage, are not even charged with any
4 kind of anticompetitive conduct and are in a remote service
5 area, remote from the city of Painesville, are swept within
6 these kind of broad requests for documents, calling for any
7 effect on their business and their operations within their
8 respective service areas and that doesn't seem to have any
9 bearing whatsoever on the issues that are in the present hearing
10 order number 2 and I don't see how it would further this case
11 to go through a burdensome discovery trying to respond to this
12 kind of a broad request.

13 CHAIRMAN FARMAKIDES: All right, sir. Mr. Charno.

14 MR. CHARNO: I'm afraid I have to take objection with
15 applicant's contention that CEI alone is charged with some kind
16 of anticompetitive conduct under the letters. They have been
17 making the assertion repeatedly that the issue is very, very
18 limited to a question of CEI, and the City of Cleveland, and a
19 review of the letters makes it clear at the very outset that
20 that is not true. We have discussed anticompetitive conduct by
21 virtually every other applicant in those three letters. In
22 some cases we said that standing alone it did not warrant
23 hearing. In some cases we said it appears as if this is likely
24 to be resolved, and in some cases it was not resolved.

25 For example, we have refusals to wheel, detailed in

MS: 8 1 the Beaver Valley letter. We are aware of and have not
2 included in the letters refusal to allow access to the CAPCO
3 pool, other than the one to the City of Cleveland. We do not
4 believe that the letter restricts us as to the introduction of
5 evidence or precludes us from entering into discovery to secure
6 evidence. We believe we are restricted solely by the statement
7 of issues placed in the record by the Board, and that the
8 Department of Justice's letters are not limiting, but even if
9 they were limiting, the contention that only CEI's activities
10 are under scrutiny is blatantly false on the basis of those
11 three letters.

12 CHAIRMAN FARMAKIDES: Anything further, Mr. Reynolds?

13 MR. REYNOLDS: I think that our position is clear as
14 far as the letters are concerned. I think the one thing that
15 Mr. Charno didn't focus on and really should be focused on is
16 some definition. If we look to the request itself, all docu-
17 ments which show or mention the effect upon the business or
18 operations of company due to actual or possible coordination
19 or integration of electric power between origin, then our
20 objections to any CAPCO, which you see, I don't know what that
21 means, your request for any documents which show a request
22 upon business or operations. Is there anything not included
23 in that kind of a request? It is so broad and ill-defined that
24 if the interrogatories to stand our position is that we should
25 at least get some meaningful definition from the Department of

MS: 9

1 Justice, and the AEC as to what they have in mind when they want
2 some document with a mention of effect upon business.

3 I guess perhaps every document in the files could be
4 construed to mention an effect upon business or operations of
5 the company.

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1 CHAIRMAN FARMAKIDES: Could you clarify that,
2 Mr. Charno?

3 MR. CHARNO: Let me defer to Mr. Vogler on that.

4 MR. VOGLER: Perhaps we can in view of the last para-
5 graph on page 8 of the Applicant's document, it might be able to
6 be recast, at least to someone's satisfaction. I'm sure complete
7 satisfaction can't be obtained. We think that Request No. 23
8 is important. The Board in its prehearing order, Matters in
9 Controversy, mentioned it. That is the reason for the request.

10 Now if we can informally sit down we might be able to
11 do it and if we can't we'll come back to the Board this afternoon.

12 CHAIRMAN FARMAKIDES: You'll take that on at lunch?

13 MR. VOGLER: Yes.

14 CHAIRMAN FARMAKIDES: Let's go on then to item No. 5.
15 Mr. Reynolds?

16 MR. REYNOLDS: Item no. 5 objects to the request for
17 a definition by the Applicants of the geographic and product
18 markets and submarkets upon which the companies intend to rely as
19 the relevant markets in this procedure.

20 Our objection is that it is calling for a legal con-
21 tention and legal conclusions and I think that it is about as
22 clearly that as any interrogatory that can be framed. I don't
23 think there's any question here whether we're talking about half
24 fact or half law or whether we're talking about a factual conten-
25 tion. This is the type of thing that calls for a strict legal

jeri 2 1 conclusion and a legal contention and in essence what it is doing
2 is switching the burden to the Applicants to define the relevant
3 market which traditionally is on the charging party and it is
4 totally inappropriate as far as an interrogatory.

5 CHAIRMAN FARMAKIDES: All right, sir.

6 MR. BREBBIA: Excuse me. Let me ask Mr. Reynolds a
7 question: Is it your position, Mr. Reynolds, that it is up to
8 the government in this case to define the relevant market and
9 are you saying if they define the relevant market that your
10 position is that you will abide by their definition of the rele-
11 vant market?

12 MR. REYNOLDS: No, but I think that the initial burden
13 is on the government as far as establishing the relevant market.
14 We have obviously an opportunity once the government has present-
15 ed its position to then go forward and contest that particular
16 position, but it is not our burden to at the outset define the
17 relevant market in an antitrust case.

18 I think we do have a burden to go forward once they
19 admit their initial burden but certainly the initial burden is
20 on the government and the charging party.

21 CHAIRMAN FARMAKIDES: Mr. Charno.

22 MR. CHARNO: The Department does not believe that it
23 is attempting to shift the burden. We intend to define and prove
24 a relevant market. We are asking at this point whether the
25 Applicants have any contentions concerning relevant market and

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1 if so what those contentions are. We're not asking for the
2 legal arguments underlying it or even the factual bases for their
3 contentions. An interrogatory that is not otherwise objection-
4 able under Rule 33-B doesn't become objectionable simply because
5 it asks for the contentions of the party and we are not asking
6 for any formulation or creation or any work that's been done,
7 simply what the party's opinions are, if they have them, on this
8 particular subject.

9 MR. BREBBIA: Mr. Charno, can you cite me a case on
10 the -- contentions with regard to discovery questions? Your
11 ability to discover the contentions of the opposition if you
12 want to put it that way under the Rule?

13 MR. CHARNO: I can't at this point. Can I defer that
14 until after lunch?

15 MR. BREBBIA: Yes, thank you.

16 CHAIRMAN FARMAKIDES: Any further response, Mr. Rey-
17 nolds ?

18 MR. REYNOLDS: I believe I have stated our position.

19 CHAIRMAN FARMAKIDES: All right, let's go to Item 6,
20 page 10, Mr. Reynolds.

21 MR. REYNOLDS: Item 6 is a similar objection and it
22 goes to the interrogatories which call again for a contention,
23 the Applicant's contentions as to whether legal impediments were
24 municipally-owned electric utility to own a portion or participate
25 in a plant. Again I think that it is, on the basis of face of

jeri 4 1 this interrogatory, it is clear that it is calling for a legal
2 contention or a legal conclusion and I think that the cases
3 support the position that that is an objectionable interrogatory
4 which need not be answered by the parties.

5 MR. BREBBIA: Can I ask you a question, Mr. Reynolds.
6 What case are you relying upon for the nondiscoverability of con-
7 tentions?

8 MR. REYNOLDS: We cited this United States vs. Mary-
9 land and Virginia Milk Producers' decision in our case. I think
10 Glaxo group, U.S. vs Glaxo Group, Ltd. 318F.1 and it is at page
11 318. And if you give me five minutes I think I can give you
12 about three or four others.

13 CHAIRMAN FARMAKIDES: I'd like to have all of the
14 authorities you can cite because both sides it seems to me make
15 parallel contentions on the subject, both making the same argu-
16 ment. One, the reason why they should be allowed to discover
17 and one the reason why they shouldn't. So I'd like to solve
18 the conflict if there be one among the cases. Thank you. So
19 if you can produce any others before the hearing is over, I
20 would appreciate it.

21 CHAIRMAN FARMAKIDES: Mr. Charno.

22 MR. CHARNO: I would like to point out that the
23 Applicant's discovery requests 5, 6, 11, 12, 13, 14 and 17 all
24 call directly or indirectly for the Department's contentions and
2. the Department has not objected to their discovery request on

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1 this ground.

2 CHAIRMAN FARMAKIDES: I am aware of that; Mr. Charno,
3 but that doesn't answer the point. That certainly does highlight
4 the problem between you and we will try to resolve it but could
5 you respond to Mr. Reynolds' point just made with respect to
6 Item No. 6?

7 MR. CHARNO: Our response would parallel our response
8 with respect to Item No. 5.

9 CHAIRMAN FARMAKIDES: In other words you think that
10 what you're asking for are not their legal conclusions or their
11 legal work products. You're talking only with respect to what-
12 ever contentions they might have?

13 MR. CHARNO: That is correct.

14 CHAIRMAN FARMAKIDES: Anything else, Mr. Reynolds?

15 MR. REYNOLDS: I would just point out that in the
16 reference Mr. Charno made, we are seeking really to find out
17 what 2714 says you can find out, which is the basis for the con-
18 tentions or what are the contentions of the parties who are
19 initiating this proceeding or making contentions which call for
20 a hearing. And that is -- that is what the Commission's rules
21 contemplate, to state your contentions and tell us what is at
22 issue and what the hearing is to be about.

23 CHAIRMAN FARMAKIDES: And the basis for them.

24 MR. REYNOLDS: And the basis for those contentions
25 and that is what our interrogatories are addressed to and I think

jeri 6 1 that is perfectly appropriate interrogatories.

2 CHAIRMAN FARMAKIDES: Now you're responding to the
3 comment of Mr. Charno. What are your objections here however,
4 sir, getting back to Mr. Charno's response which is in effect
5 all he's doing is asking for your contentions and bases of your
6 contentions which is what you're asking of them.

7 MR. CHARNO: That is correct.

8 MR. REYNOLDS: That is correct. I don't believe the
9 Applicants make contentions. I think the whole part of the hear-
10 ing process is for the Intervenor to come in with their conten-
11 tions and the Applicants are to respond but it is not the Appli-
12 cant's duty to make contentions. I believe we had this discussion
13 with Mr. Brown regarding the matter of formulating contentions
14 and the Board recognized that it was not the Applicant's position
15 to be stating contentions or the basis for them but rather the
16 responsibility of the other parties.

17 CHAIRMAN FARMAKIDES: Didn't we cross that bridge,
18 however, when we formulated and issued the matters in contro-
19 versy here. Why are we going back this route. This is old
20 ground plowed over many times in the past.

21 MR. REYNOLDS: I guess we're going back over it be-
22 cause the issues as formulated by the Board contemplate that the
23 material we have asked for in our interrogatories is going to be
24 a matter of concern and consideration by the Board. That material
25 is material that -- the contentions, for example, are the

jeri 7

1 Department of Justice's contentions and we are entitled to the
 2 basis for those contentions. I think that the Board perhaps has
 3 moved them to some extent but it is relevant because they are
 4 within the ambit of the Board's order and they are the Justice
 5 Department and AEC's contentions and I think we're entitled to
 6 know the basis for them under the Commission's rules.

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1 CHAIRMAN FARMAKIDES: All right, perhaps you all
2 could talk to each other on this point over lunch, because
3 it may well be that you could change the contentions without
4 objecting to them. And that would be most helpful.

5 Let's go to 7. Mr. Reynolds.

6 MR. REYNOLDS: Unless you want me to summarize 7,
7 basically we are reserving any rights we may have with respect
8 to privileged material that may come to light in the course of
9 our documents, sir.

10 We don't intend by the general objection to waive
11 any of our objections to the basis of privilege.

12 CHAIRMAN FARMAKIDES: Anything on 7?

13 MR. CHARNO: No, we certainly accept that reser-
14 vation.

15 MR. RIGLER: How do you propose to handle your
16 privileged documents if you find any?

17 MR. REYNOLDS: In terms of identifying them?

18 MR. RIGLER: Yes.

19 MR. REYNOLDS: I believe that the procedure -- well,
20 I won't say that. I was going to say the agreed procedure,
21 but I believe the procedure would be to identify and state
22 the nature of the privilege that we are asserting as to why
23 we refuse to produce, and I believe that that is incorporated
24 in.

25 It may not be in -- I'm not sure which of the

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1 documents, but I think the other parties have addressed them-
2 selves to that point as a way they are going to handle privi-
3 leged material. I think it is not a matter of dispute here,
4 and we will identify certain privileged documents.

5 CHAIRMAN FARMAKIDES: How do the parties react to
6 this? There is undoubtedly going to be some dispute that will
7 have to be resolved by looking at details.

8 For example, this privileged material. Now, in the
9 past we used the master approach where we obtain a master and
10 we give him privileged materials. The parties work with the
11 master, and the master renders a decision.

12 Is this agreeable with the parties if we do the
13 same thing here? It works very well. Some of the parties
14 in the past have objected to the Board ruling on this material.
15 I don't see any problem of the Board ruling it, but it does
16 aid the disposition of the case to have a master involved and
17 examine only the documentation of the material and the question
18 of whether there is any relevance.

19 How do you react to that procedure?

20 MR. REYNOLDS: We have no problem.

21 MR. HJELMFELT: We have no objection.

22 MR. CHARNO: No objection.

23 MR. VOGLER: No objection.

24 CHAIRMAN FARMAKIDES: Now, the next question, of
25 course, is going to be who is going to pay for this kind of

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1 master if we need him, and we'll talk about that informally
2 off the record first before we go on the record with that
3 problem.

4 All right, that completes then the objections of
5 the applicant to the joint questions of Justice and AEC.

6 Let's proceed --

7 MR. CHARNO: I would suggest we proceed then to
8 the Department of Justice question for a protective order,
9 sir, and then to the AEC response.

10 CHAIRMAN FARMAKIDES: Well, since we started with
11 the applicant here this morning, I'd like to complete your
12 objections to the interrogatories and documents required of
13 CEI and the other applicants.

14 We will proceed along with your objections first.
15 Then we'll take the other parties' objections.

16 MR. CHARNOFF: What I would suggest at the outset
17 that I thought you had adopted, was that dealing with Justice
18 Department and AEC should be briefer than the other matter,
19 although the other matters could be handled briefly, too, if
20 we don't go through each and every question and objection.

21 CHAIRMAN FARMAKIDES: In the back of my mind I
22 misunderstood you. I thought we were talking about the appli-
23 cants' objections first.

24 Another reason why I would like to handle these
25 objections first is perhaps we can finish them before lunch

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1 time and you can all talk to this point.

2 After your objections I would like to take the
3 Environment's objections and then the Department of Justice
4 and the AEC staff merely for the convenience of you all having
5 an opportunity to talk to these over lunch.

6 Let's go to the applicant's document entitled,
7 "Objections to the Items of the Documents Required in the
8 Interrogatories of the City of Cleveland to the Toledo Edison
9 Company, Pennsylvania Power Company, Ohio Edison Company, and
10 Duquesne Light Company," dated September 9.

11 MR. HJELMFELT: Might I suggest that many of the
12 requests of CEI overlap and we can handle them together.

13 MR. CHARNOFF: I think virtually the questions
14 asked of all the applicants are also asked of CEI, and there
15 are many more addressed to CEI. And if we handle that document
16 we will probably handle the requests of some of the other ap-
17 plicants.

18 CHAIRMAN FARMAKIDES: Let's do it that way, then.
19 We'll take the document entitled "Cleveland Electric Illuminat-
20 ing Company's Reactions to the Interrogatories and Documents
21 Requested of the City of Cleveland," dated September 9.

22 All right, Item No. 1, Mr. Reynolds or Mr. Charnoff.

23 MR. REYNOLDS: Item, I believe, item No. 1, 2 and
24 3 are similar to what we have discussed earlier as to defini-
25 nitions.

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1 One is -- goes to the definition of the company
2 and again the same objection that we raised earlier as to sub-
3 sidiaries.

4 CHAIRMAN FARMAKIDES: All right. Mr. Hjelmfelt.

5 MR. HJELMFELT: We would adopt what Mr. Charno
6 has said with respect to the definition of company, and I
7 would just add one citation for the authority of including
8 affiliates and subsidiaries, and that is U.S. vs. Continental
9 Can Company, 22 FRD, 241.

10 With respect to the definition of electric utility,
11 we would just adopt what Mr. Charno offered in response to
12 the objection.

13 With respect to the objection to scope of dis-
14 covery, our scope of production, in addition to what is already
15 said about the date, we have the same problem with respect to
16 the documents which are on file with public bodies such as
17 the AEC or the FPC. Cleveland has not objected to producing
18 documents of that nature. The reason we would not object is
19 that we feel that it is more expeditious for the parties to
20 go ahead and produce such documents rather than sending
21 everyone scurrying around to try and get them from the various
22 agencies, which can sometimes be a very difficult task.

23 The only thing I would want to add to what has
24 been stated before is that if the parties are not required
25 to go ahead and produce these documents that are on public

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1 file that the same apply to all the parties and that Cleveland
2 also be relieved from the obligation to produce documents
3 which are on file elsewhere.

4 CHAIRMAN FARMAKIDES: Mr. Hjelmfelt, anything
5 further?

6 MR. HJELMFELT: I think that catches me up with
7 your objections up to date.

8 CHAIRMAN FARMAKIDES: Mr. Reynolds, do you have
9 any response to that?

10 MR. REYNOLDS: No, I think the City of Cleveland
11 did in fact make the similar objection, but I don't have
12 any --

13 CHAIRMAN FARMAKIDES: One point Cleveland is re-
14 iterating here is the same point made by Charno, which seems
15 reasonable, of saying, "Look, if they're in your files why
16 not make a copy of them?" It's very reasonable. They will
17 do the same with respect to yours, and I assume Justice will
18 do the same with respect to yours, too.

19 They're saying in effect, "Look, if you couldn't
20 give them this kind of discovery they're not going to be able
21 to give you this kind of discovery." It seems to me if it
22 is in your files and you have come across it, it is just as
23 easy to give it to them as to tell them where to find it. It
24 is a suggestion that makes reasonable sense to the Board. We
25 haven't ruled on this yet, but if you all could agree among

blt 7

1 yourselves as to that point it would certainly be helpful.

2 Anything else, then, on item No. 4? I think we
3 have finished 1, 2 and 3. How about 4?

4 MR. REYNOLDS: Excuse me, 3, I believe 3 is next.

5 CHAIRMAN FARMAKIDES: I beg your pardon, you're
6 right. It is 3.

7 MR. REYNOLDS: I think we have stated it in our
8 filing that the definition of competition is a new one to me,
9 and it is certainly extremely broad and doesn't really define
10 the term. It talks in terms of effects rather than in terms
11 of activities or process of competing or doesn't mention
12 anything about the competitors but talks about any other
13 electric utility company anywhere that -- in the world, I
14 guess.

15 CHAIRMAN FARMAKIDES: Mr. Reynolds, on this point
16 I agree with you. I, too, Mr. Hjelmfelt, thought it was
17 extremely broad. Why didn't you adopt the definition pro-
18 posed by the Board in its order? Is there a reason?

19 MR. HJELMFELT: Well, the definition here of com-
20 petition, speaking in terms of effects which, of course, is
21 what competition is all about, it seems to me that the defi-
22 nition that we are suggesting goes more to the essence of
23 what we are concerned with than a broader definition such
24 as you might find in a dictionary that talks about activity
25 or process of competing which really doesn't tell you all

blt 8 1 that much either; and I think ours is more precise and
2 really gets down to the essentials.

3 CHAIRMAN FARMAKIDES: Why did you not adopt the
4 definition proposed by the Board in its order, sir? It
5 would seem to me that if we had that one definition we
6 could apply across the board we would all be better off.

7 Now, the Department of Justice and AEC have indi-
8 cated in the past why they chose not to, and the Board has
9 not ruled on that yet. But why did you not choose to do
10 so here?

11 MR. HJELMFELT: Let me see if I can find the
12 Board's definition.

13 CHAIRMAN FARMAKIDES: Why don't you consider
14 this during lunch as well? I would appreciate that.

15 Let's go to 4, then.

16 MR. REYNOLDS: I believe 4 we have covered already,
17 the scope of production.

18 CHAIRMAN FARMAKIDES: That's right.

19 MR. REYNOLDS: And I also have response to 5, and
20 I'm not sure that, maybe Mr. Hjelmfelt has additional re-
21 marks, but 5 goes to the interrogatories which the city
22 adopted, the interrogatories of the Department of Justice and
23 the AEC staff which were adopted by the city and by refer-
24 ence.

25 CHAIRMAN FARMAKIDES: No, Mr. Hjelmfelt has

blt 9 1 not yet responded to those.

2 MR. HJELMFELT: I have nothing further to add than

End 6 3 what has already been stated.

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CHAIRMAN FARMAKIDES: How about item 6?

MR. REYNOLDS: Item 6 refers to the request for the 2-C, I guess, 1-C, 1-D, requests the occupations and addresses of all other businesses which the directors and the officers of the Applicant serve.

We don't see any relevancy of this whatsoever. How it could pertain to the -- to this proceeding or any issues in the proceeding, and don't think that the Applicant should be required to turn that information over without some showing of relevance.

CHAIRMAN FARMAKIDES: Mr. Hjelmfelt?

MR. HJELMFELT: Yes, I think this has relevance in several respects:

First, with respect to the competition at the retail level, it is quite possible, quite probable that directors of the Applicants also serve as directors or have business affiliations with other, with large industrial businesses or large real estate firms which would be doing business with either CEI or with the City of Cleveland or electric service.

If a director serves on both -- one of the Applicants and such an industry or commercial establishment, the likelihood is that that is removed -- removes that business from competition insofar as the possibility of service is concerned, and therefore it goes to the competition

1 at the retail level.

2 It is also important with respect to any ties that
3 CEI may have to the banking community, particularly within
4 the City of Cleveland.

5 As I pointed out in several of our subsequent
6 requests for documents, CEI, for example, has taken upon
7 itself, at least Cleveland has reason to believe that it has,
8 to contact trustees of the city's first mortgage bond
9 indenture and to suggest that perhaps the city is in default
10 to that bond indenture.

11 That, of course, goes directly to the city to
12 finance any additions or repairs or what-have-you to its
13 electric system.

14 In addition, when the city recently floated or
15 attempted to offer for sale, I think, \$9.8 million of bonds,
16 a Boston bank which was interested in bidding on those bonds
17 contacted the Cleveland bank and thereafter lost interest.

18 And we think it is reasonable for us to inquire
19 into whether CEI had a hand in that.

20 It is my understanding, for example, that Mr. Howley
21 owns or is part owner of a bank in the City of Cleveland.
22 Therefore, this isn't just a fishing with no reason for looking
23 at these items.

24 They're very directly related to the competition
25 and the city's ability to compete.

ar3

1 MR. BREBBIA: Let me ask you a question: You
2 particularized reasons why you think certain information
3 would be relevant under this D. Why is it, or do you feel
4 that it would be impossible for you to particularize this
5 request as you have done for us on the record today, rather
6 than leave the question as broad -- obviously it appears that
7 many of these occupations or connections of the directors
8 with other businesses would have no bearing on this hearing;
9 let's put it that way.

10 Do you feel that you could, if asked by the
11 Board, set forth the types of occupations that are of
12 interest to the City of Cleveland in this proceeding, or do
13 you feel that the only way you can get at it is to leave it
14 as broadly as it is stated here under small "d"?

15 MR. HJELMFELT: I think -- well, certainly with
16 respect -- we could make a specific request for the names
17 of any directors, for example, who are owners or directors
18 of banks in this sort of situation.

19 MR. BREBBIA: Or customers?

20 MR. HJELMFELT: Or potential customers, is it
21 you're suggesting?

22 MR. BREBBIA: Or customers.

23 MR. HJELMFELT: Customers.

24 MR. BREBBIA: I mean, are you looking at this
25 in a Clayton Act Section 8 context? Perhaps that is my question.

ar4

1 MR. HJELMFELT: Well, I think it is a broad -- it
2 goes broadly to the entire question of what -- what the
3 possible violations or inconsistencies that come up. It
4 seems to me it also goes to the Sherman Act questions, and
5 I'm loath to attempt to narrow it. I don't see that
6 the burden of obtaining this, of producing this documenta-
7 tion is all that great.

8 MR. BREBBIA: There's a question of relevance
9 also. The burden is only one objection. I'm just trying
10 to find out whether we could shorten this proceeding, not
11 this hearing today, but in terms of the amount of informa-
12 tion that all the parties will eventually be required to
13 produce in this hearing, and I'm just asking you whether
14 you feel that you could narrow this request down.

15 If you don't feel you can, that is your position.

16 MR. HJELMFELT: Our position is we would prefer
17 to stay with this request.

18 CHAIRMAN FARMAKIDES: All right, sir.

19 MR. CHARNOFF: May I speak to that?

20 Mr. Chairman, if we are going to engage into an
21 inquiry into the kinds of activities that Mr. Hjelmfelt alleges
22 I guess we, too, could inquire into the extent to which the
23 City of Cleveland has abused its power in terms of soliciting
24 or discouraging customers who might otherwise be customers
25 of the Cleveland Electric Illuminating Company.

1 We think that there's abundant information that
2 could be brought to the Board in that connection. . .

3 The City of Cleveland is not without power in
4 the City of Cleveland, and we think it's used it on many
5 occasions. We have refrained from getting into the retail
6 conduct question, partly for this reason, that I thought
7 it might be helpful to get at the AEC response to some of
8 the documents this morning, because I think that they pose
9 a question here in how far do we go in getting away from
10 the wholesale market.

11 We think we could be here a very long time
12 swapping charges as to how each of the principal companies
13 here have behaved or misbehaved and we think we could
14 probably muster a list as long as longer than the City of
15 Cleveland list, with as much indications of misconduct by
16 the City of Cleveland.

17 The issue is whether any of the discovery is
18 related to the issues that the Board has established and
19 we don't see how the context of the questions that are set
20 up by the Board in response, I might say, to the joint
21 stipulation of proposed issues, proposed by the City of
22 Cleveland together with AEC and the Department of Justice
23 would have this -- how this proceeding would get into that
24 kind of question.

25 Those questions go into whether the Applicants or

ar6

1 CEI have certain types of dominance with regard to genera-
2 tion and transmission capability and how has that been trans-
3 lated into certain markets.

4 In our judgment, there is very limited opportunity
5 under those particular issues and very limited opportunity
6 under the Board's introduction to it in its prehearing order
7 number 2 where it is interested in structure rather than
8 conduct to engage in the kinds of discovery requests that
9 are elsewhere set forth in the City of Cleveland's request
10 and in the specific allegations, unfounded ones, I must
11 say, that Mr. Hjelmfelt has just indicated he would like to
12 get into.

13 I think we have a fundamental question for the
14 Board to decide.

15 CHAIRMAN FAR AKIDES: All right, sir.

16 Let's go on to 7.

17 Anything further, Mr. Reynolds, on 7, which appears
18 on page 8 of your document?

19 MR. REYNOLDS: Nothing other than what is stated
20 there as being a request that is too broad and of questionable
21 relevance to this proceeding.

22 This doesn't identify any legislation, doesn't --
23 we don't know whether we're talking about legislation within
24 the City of Cleveland, legislation someplace else, consti-
25 tutional revisions, I don't know what constitutional

1 revisions anybody even has in mind.

2 It is so open-ended that it is really something
3 that is impossible to work with.

4 CHAIRMAN FARMAKIDES: Mr. Hjelmfelt?

5 MR. HJELMFELT: Incidentally, by my reading,
6 this objection also is an objection to 2-D of the request
7 to the other Applicants, I believe.

8 To a large extent, the powers of a municipa
9 system and the powers of the cooperative, for example, are
10 defined by the constitutions of their states or by legisla-
11 tion, statutes of the states.

12 CEI's activities with respect to such legislation
13 and the same would go for the other Applicants, in large
14 measure, goes directly to the heart of the existence and
15 the ability to compete with some of these other electric
16 entities which may be found and which are found within the
17 market areas.

18 Certainly the relevance of CEI's activities, for
19 example, before the Ohio State Legislature or before the
20 City Council of the City of Cleveland or the City Council
21 of Painesville would be of a close and obvious connection
22 of relevance that shouldn't require a great deal of discus-
23 sion.

24 At the same time, CEI's interest in legislation
25 or constitutional revisions regarding these subjects arising

ar8

1 wherever it is, may very well produce documents relating
2 to CEI or the other Applicant's intent either to attempt to
3 procure such legislation in their own spheres, to oppose
4 such legislation, and I think in this regard it goes to
5 their intent and to explaining their actions in either
6 creating a situation that is inconsistent or maintaining
7 one which then we must look to see what the effects of their
8 activities under the license will be.

9 MR. BREBBIA: Mr. Hjelmfelt, are you familiar with
10 the case of Parker v. Brown?

11 MR. HJELMFELT: Yes, sir.

12 MR. BREBBIA: Are you familiar with the Noerr case?

13 MR. HJELMFELT: Yes, sir.

14 MR. BREBBIA: Well, it seems to me that those
15 cases provide a pretty broad protection for people who pursue
16 legislative remedies, especially the Noerr case. There
17 couldn't be a more blatant example of an attempt to use political
18 influence to destroy a competitor, flatly stated. The
19 Supreme Court held that it was privileged.

20 Where do you think this privilege takes us with
21 requests of this nature?

22 MR. HJELMFELT: Well, I don't understand the Knorr
23 case, for example, as creating a privilege with respect to
24 discovery. As I understand that case, its holding is that
25 legislative activities of and in themselves are not

1 violations of the antitrust law.

2 I don't think that goes so far as to create a
3 privilege which would protect these matters from discovery.
4 I think there's another distinction in that here we're
5 dealing with a municipality acting in its proprietary
6 capacity. And I think there's a vast difference between
7 legislative efforts to influence the ability of a
8 municipality to operate an electric system in competition
9 with the Applicants, for example, that distinguishes it
10 from the Noerr dispute between the railroad companies
11 and the trucking companies.

12 MR. BREBBIA: Well, the Noerr case is not the
13 only case. There are now a number of cases on this subject.
14 I happen to be familiar with each and every one of them, and
15 those cases, if the activities are protected, if the
16 activities are protected by law, then how would you propose
17 to use these activities in discovery or otherwise?

18 MR. HJELMFELT: Well, the activities, although
19 themselves protected, may very well explain other activities
20 or they may give evidence which explains why the Applicants
21 take another action, or, for example, it may demonstrate a
22 course of conduct, for example, if they seek legislation
23 which hems the city in on two sides, and then they take
24 action that hems in the city on the other two sides.

25 And I think that it is relevant to showing that a

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situation exists.

MR. BREBBIA: Well, you may pursue it if you want to, but it seems to me that if the activities are exempt under the antitrust laws, that you're going to have a problem with the pursuit of discovery in this area.

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1 CHAIRMAN FARMAKIDES: Mr. Hjelmfelt, are you saying,
2 sir, that the applicant may not engage in those activities?

3 MR. HJELMFELT: No, sir, I'm not saying that they
4 may not engage in the activities. I'm not here arguing that
5 those activities are violations of the antitrust law.

6 CHAIRMAN FARMAKIDES: All you're saying, sir, is
7 that they may lead to additional -- that they're probative.

8 MR. HJELMFELT: They're probative; that is correct.

9 MR. GOLDBERG: If I may supplement Mr. Hjelmfelt's
10 statement, the contentions were made in response to discovery
11 questions by Alabama Power Company in the Farley case about
12 protection of the Noerr case, Parker v. Brown and I think
13 California Trucking.

14 The Board ruled in that case that those cases did
15 not preclude discovery questions in that area. And I submit
16 that that is a precedent supporting our position of this case.

17 CHAIRMAN FARMAKIDES: That same ruling was also in
18 the Oconee-McGuire case.

19 But here, you know, we have got a little difference
20 here; the question of relevance is always a factor, so the
21 issues that would permit or lead the Board to rule in these
22 cases aren't necessarily the same issues here, so the question
23 of relevance does play a very important part.

24 MR. GOLDBERG: I do think Mr. Hjelmfelt's statement
25 on the question of relevance, however, supports our position.

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1 I mean, we're not ignoring the question of relevance.

2 CHAIRMAN FARMAKIDES: All right, sir.

3 MR. CHARNOFF: I'd like to add on that, Mr. Chair-
4 man, again that it is difficult to understand how discovery
5 could be permitted on this matter within the context of the
6 idea in the Commission's regulations and indeed in the Board's
7 rulings that discovery is in some way related to and bounded
8 by the contentions.

9 Now, the contentions go to the dominance or alleged
10 dominance of the applicants in the fields of generation and
11 transmission and the consequences that flow from that.

12 So one has to draw a line between that type of
13 allegation and some relationship to legislation if this kind
14 of an issue is to be permitted as a relevant area of inquiry.

15 CHAIRMAN FARMAKIDES: Well, sir, I think the parties
16 are fully on notice that the Board has any number of times
17 indicated that it is going to examine issues of conduct and
18 discovery of conduct very strictly, very closely.

19 I think you all know that. We have said it time
20 and time again. So merely because other boards, because of the
21 facts in those cases have permitted discovery, doesn't mean
22 that this Board is going to do the same thing. We are going
23 to follow the rules as we see them in an impartial manner to
24 all the people, all the parties, in such a way that we do not
25 get bogged down in discovery. And we don't think that discovery

blt 3

1 is necessarily a right. We are certain it is not. It is a
2 privilege that the parties have, and it is going to be, the
3 parameters of that discovery, will be created by this Board.
4 Anything else, sir?

5 Let's go to the next item. Could you summarize
6 a little bit? Could you clarify it, Mr. Reynolds?

7 MR. REYNOLDS: I believe it follows from the dis-
8 cussion we just had which, this again calls for documents
9 related to municipal elections and I think that the Noerr-
10 Pennington decisions certainly are relevant here. Otter Tail,
11 also, is an attempt to gain discovery in the areas that are
12 immunized from antitrust attack and are not proper areas of
13 inquiry or relevant to this proceeding.

14 I don't really see how they could further the cause
15 of the proceeding at all.

16 CHAIRMAN FARMAKIDES: All right, Mr. Hjelmfelt.

17 MR. HJELMFELT: Well, without repeating what I have
18 said before, I would think that certainly these elections
19 and municipalities operating an electric distribution system
20 have a close bearing on the definition of the relevant market,
21 what potential new markets there's going to be for wholesale
22 power, what potential interest in the generation and trans-
23 mission business there may be, what ones are going to drop out,
24 what ones are going to change from generation to simply
25 purchasing electric power.

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1 So I think it is relevant to the situation and is
2 clear, and I suggest again that there is no privilege against
3 the discovery.

4 CHAIRMAN FARMAKIDES: All right, sir.

5 Anything further? Let's go to the next item.

6 Mr. Reynolds, we're talking now to item No. 9.

7 MR. REYNOLDS: Item No. 9, which is an objection
8 addressed to question No. 16-G by the city to Cleveland Elec-
9 tric; it asks for documents, for litigation documents pertain-
10 ing to litigation actual and considered before courts or
11 agencies in opposition to construction competing generation or
12 transmission facilities.

13 This -- I think that we have a very serious problem;
14 again, this is the California Motor Transport, which is the
15 follow to Noerr-Pennington in terms of getting into the whole
16 area of litigation.

17 A general question like this which does not specify
18 any particular piece of litigation which might be alleged to
19 be a sham lawsuit, for example, which is the exception to Noerr-
20 Pennington, is impermissible.

21 I think if they want to itemize certain lawsuits
22 or certain pieces of litigation in order to determine whether
23 that was a frivolous lawsuit or some sham lawsuit that that
24 may be permissible, but a broad open-ended question for liti-
25 gation documents which can invade all sorts of privileged

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1 matter and goes beyond anything that the exceptions in Cali-
2 fornia Motor Transport had in mind is not a permissible
3 interrogatory.

4 CHAIRMAN FARMAKIDES: Mr. Hjelmfelt.

5 MR. HJELMFELT: Well, the time comes as Applicants
6 or CEI would look at each particular document that would be
7 covered by this question, that would be the appropriate time
8 for them to assert a privilege and determine whether or not
9 that particular document is privileged.

10 With respect to listing particular items, in some
11 instances we have, in subsequent interrogatory questions for
12 documents, we have mentioned specific litigation. However,
13 all litigation may not have come to the attention of the City
14 of Cleveland.

15 If we are in a situation where we had several rounds
16 of discovery where we could go out with a round of interroga-
17 tories and say, "List the litigation you have been involved
18 in," and then we can come back with a subsequent document
19 question, that might be different. But here we are in a situ-
20 ation where we have got to make our question at one time.

21 It seems to me that it is limited to those in which
22 they have opposed construction of a competing generation and
23 transmission facility which limits it strictly to matters
24 at issue here.

25 Certainly we are talking about whether there's

blt 6 1 any competition in generation and transmission, whether there
2 can, what activities have been involved to prevent that, to
3 preclude it. Certainly it is very difficult to determine
4 whether there has been sham litigation prior to having dis-
5 covery to determine what the litigation was like, what exactly
6 the company did.

7 MR. BREBBIA: Can I ask you a question, Mr. Hjelm-
8 felt?

9 MR. HJELMFELT: Yes, sir.

10 MR. BREBBIA: Does the City of Cleveland have
11 information that any of the applicants in this case have en-
12 gaged in litigation in opposition to the construction of com-
13 peting generation facilities? I mean, do you have a basis
14 for this question, or is it simply that it may have occurred?

15 MR. HJELMFELT: We don't -- I don't know of any
16 particular litigation that the city has engaged in, I mean
17 that Cleveland has been engaged in.

18 MR. BREBBIA: CEI?

19 MR. HJELMFELT: CEI, excuse me. And I believe this
20 only goes to CEI. It wasn't asked of the other Applicants.

21 There has been litigation, for example, there's
22 litigation, there was a suit against Cleveland; again, this
23 goes to a subsequent, more specific document question, in oppo-
24 sition to the city's construction of a 138 KV transmission line.
25 We don't know whether CEI is involved in that.

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MR. BREBBIA: Well, you have, don't you have access to all of the papers that are a matter of public record in the case?

MR. HJELMFELT: Yes, we have access to all that are a matter of public record.

MR. BREBBIA: And has the litigation been completed?

MR. HJELMFELT: I don't believe it has. It is my understanding they're still processing it.

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(Recess.)

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CHAIRMAN FARMAKIDES: May we proceed.--

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I guess all counsel are here.

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Let's say this: we are going to continue, I think, until roughly 11:30. We are going to recess for two hours and that will give you plenty of opportunity to talk to each other and hopefully you might be able to resolve some of these matters between you.

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We will reconvene at 1:30.

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Now, the reason for this is so the parties can have some time to talk to each other.

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We are very disappointed that the parties have not talked to each other. They haven't picked up the phone except for one occasion that was mentioned before by Justice to seek to resolve some of these objections between them.

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I think when the Board resolves these objections you are going to find that all of you will be unhappy and that is invariably the case.

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If you can resolve the objections among yourselves, I think you perhaps will all be a little better off than if you allow the Board to resolve these for you and we will resolve these for you but as we said before, we are privy to whatever information you give us and we will resolve these on the basis of that information.

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Let's continue. I think we were just starting 10.

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1 MR. REYNOLDS: That's correct. 10 refers to 16I
2 of the City's interrogatories to CEI. It calls for documents
3 relating to labor union negotiations involving CEI and/or
4 MELP.

5 Again, our objection goes to the breadth of the
6 request and total relevancy of the documentation that it
7 requested as being outside the scope of anything that is at
8 issue in this hearing and so open-ended as to make it
9 incomprehensible exactly what it is that is being sought;
10 no particularization, as the Board requires.

11 CHAIRMAN FARMAKIDES: Mr. Hjelmfelt?

12 MR. HJELMFELT: This relates to the ability
13 to compete and the nature of the competition between CEI
14 and the Cleveland Municipal System.

15 The labor union negotiations are relevant in
16 that CEI may through its size and strength be able to obtain
17 labor terms which are unavailable to the City of Cleveland
18 and accordingly would put Cleveland at a disadvantage in
19 competing and that would be at a disadvantage in competing
20 in other not only if you are talking about directly at the
21 retail level but when you are talking about the generation and
22 possible transmission.

23 I say probable transmission because at the present
24 Cleveland doesn't have the facilities to compete.

25 MR. BREBBIA: Mr. Hjelmfelt, what is the relevance

1 of that to an antitrust proceeding?

2 MR. HJELMFELT: Well, it seems to me that an anti-
3 trust proceeding, particularly in this antitrust proceeding,
4 we are looking at the economic situation as it exists to
5 determine what competitive situation is and certainly the
6 ability to one party to operate its strength to obtain labor
7 terms not available to other parties directly relevant to
8 showing the competitive situation as it exists and the ability
9 of the parties to compete.

10 MR. BREBBIA: Mr. Hjelmfelt, I don't know whether
11 we are on the same wavelength, you and I, on this question.

12 It seems to me that this panel will concern
13 itself with illegal activities in terms of relative
14 competitive strength and there is a labor exemption to the
15 antitrust laws, for instance.

16 Is it your position that a situation inconsistent
17 with the antitrust laws can be created by unequal competition
18 because of the strength of CEI versus Cleveland as it affects
19 its ability to negotiate a labor contract?

20 MR. HJELMFELT: I would say that it is our
21 position that in order to ascertain what illegal situation
22 may exist, it is necessary to look broadly at the situation
23 that does exist, to determine whether in fact, for example --
24 determine whether there is in fact a monopoly power and
25 then whether that monopoly power has in fact been utilized

1 and what are the effects of that monopoly power.

2 Certainly certain activities which may be legal
3 standing alone can form the part of an illegal activity
4 when taken in conjunction with other activities.

5 CHAIRMAN FARMAKIDES: Anything else, Mr. Hjelmfelt?

6 MR. HJELMFELT: No, sir.

7 CHAIRMAN FARMAKIDES: Let's go to Item Number 11,
8 contracts.

9 Mr. Reynolds?

10 MR. REYNOLDS: Item 11 refers to 16J of the
11 interrogatory by the City calling for documents relating to
12 supply contracts involving coal fuel oil, nitric gas, et
13 cetera.

14 Our objection on this goes I think primarily to
15 the proprietary nature of the information that is requested.

16 I think that the quantity of coal, the plant
17 needs, et cetera, that information is all available in form,
18 Federal Power Commission Form 1 that is filed with the
19 Federal Power Commission, and we have no problem with
20 divulging and producing that information, but to call for the
21 supply contracts which gets into the proprietary privilege
22 and an awful lot of business confidences is inappropriate and
23 we object strongly to the effort to turn that material over.

24 CHAIRMAN FARMAKIDES: Mr. Hjelmfelt?

25 MR. HJELMFELT: Well, I would suggest, first, that

1 the fact that proprietary or business confidential information
2 which might be contained in the documents does not
3 again create a privilege. It may require that the Board
4 issue some sort of protection with respect to who has access
5 to the documents that are produced, something of this nature,
6 but I don't understand that to create a privilege precluding
7 discovery on those items.

8 Now, with respect to the relevancy and the need
9 for this information, again we are concerned with the
10 situation with respect to generation and transmission of
11 electric energy in the relevant market.

12 A portion of this generation, of course, is fossil
13 fuel of various sorts.

14 When we are looking to determine whether or not
15 Cleveland has utilized or CEI has utilized its dominance in
16 these fields in such a way as to hinder or preclude the City
17 of Cleveland from competing, the City of Painesville, for
18 example, from competing, one of the ways it may have used its
19 power is through negotiating contracts for the purchase of
20 fossil fuels which would either preclude the availability of
21 fuels from a supplier to the City of Cleveland or would be
22 obtainable because of CEI's dominance.

23 They would be obtainable by CEI in a matter or in
24 terms which would not be available to the City of Cleveland.
25 As a result, the City of Cleveland may be faced with the

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situation where its only real alternative is nuclear power in some situation, either in unit power or ownership, joint ownership of a plant of some nature.

I think one of the things that points out further the importance of this type of information is the plan of the CAPCO group. I believe they have a plan to guarantee the concerns of Quantro Mining Company, coal company, and therefore I think the whole relevance of the fossil fuel market to the generating capability of Cleveland and of other potential bulk power suppliers in the area is related to these contracts.

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1 CHAIRMAN FARMAKIDES: Mr. Reynolds, I have one
2 question, are you saying, sir, that all the documents that
3 you want to have in your possession with respect to this
4 Item 16J are business confidential.

5 MR. REYNOLDS: I think we're saying that the
6 supply contracts very definitely are.

7 CHAIRMAN FARMAKIDES: All of the supply contracts?

8 MR. REYNOLDS: Well, there are portions of the
9 supply contracts which contain proprietary matter, only, so
10 that all the -- the proprietary privilege relates to all
11 the supply contracts. I'm not sure if we're on --

12 CHAIRMAN FARMAKIDES: Yes, let's clarify this.

13 The interrogatory document request goes to supply
14 contracts involving coal, fuel and natural gas or possible
15 acquisition of coal and other hydrocarbon priorities. Now
16 are you saying that all of these supply contracts are
17 business confidential?

18 MR. REYNOLDS: My understanding is that they all
19 are. I don't think we have reviewed all of them but I
20 think the business confidential privilege would go to all
21 of them. For instance, there's a lot of pricing information
22 there, which certainly is not something that should be made
23 a matter of public record. You've got other antitrust pro-
24 blems on another level if you start making public this
25 kind of pricing information and all the vendors know the

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1 prices and so on of the supply -- the material that is being
2 supplied. So the business privilege would be asserted as to
3 supply contracts for coal, fuel oil, natural gas, possible
4 acquisitions of coal and other hydrocarbon priorities.

5 I have not reviewed them so I can't say unequiv-
6 ocaly that every supply contract in those respective
7 areas would be entitled to the privilege. But my under-
8 standing is that they just about all are if not all of them,
9 at least certainly portions of the contracts.

10 CHAIRMAN FARMAKIDES: Well, see, that was one
11 of Mr. Hjelmfelt's points and that is, look, how can you
12 object to this until after you have had a chance to go
13 through those files and some of them may and some may not
14 be privileged or business confidential or proprietary.

15 MR. REYNOLDS: I think that is right. The reason
16 that we raise that kind of objection here is that the cate-
17 gory in and of itself lends itself, I would say, certainly
18 as a general matter and almost completely to this kind of
19 objection. And if it turns out that we have a contract
20 that is not one that is entitled to that privilege, that,
21 I'm sure would not be a problem but I think that as a whole
22 that category does lend itself to that objection in its
23 entirety.

24 MR. BREBBIA: Mr. Reynolds, there are at least two,
25 maybe many more FTC actions taken in the area of supply

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1 contracts. One was a case, a litigated case against Luria
2 Brothers Steel Company and the other a more recent action
3 in which the complaint was issued against Great Lakes Carbon,
4 which, I think, was a case that was settled by consent
5 order. The issue of supply contracts, I'm sure you're aware,
6 is one which has involved many antitrust problems and im-
7 plications and if your objection is one to the treatment of
8 these documents as far as who gets to examine them with res-
9 pect to proprietary information, that is one thing. If
10 your objections goes further than that to the fact that supply
11 contracts are because you feel they are proprietary shouldn't
12 be in issue or discoverable in this proceeding, then I
13 have a lot of problems with the latter.

14 MR. REYNOLDS: Well, I think that the former
15 certainly is a problem when you're talking about a compet-
16 itor who is trying to obtain the information in the supply
17 contracts. One who is directly in competition with CEI,
18 so as to the first prong of your statement, that certainly
19 is a problem. As to relevance I hve a serious problem
20 especially in light of Mr. Hjelmfelt's comments, which
21 seem to go to such things as tying arrangements and that
22 kind of antitrust problems, seeing how on the basis of the
23 claims that the city has made or that has been made in this
24 proceeding, how that kind of a situation has any relevance
25 to what we're talking about in this case. I think that

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1 again we keep coming back to the point that this is not a
2 roving antitrust inquiry and any and all possible antitrust
3 or anti-competitive practices. I think you've got the
4 District Court and certainly the parties can go to the Dis-
5 trict Court if they feel there are certain areas of anti-
6 competitive activity but that is not the function here and
7 not the purpose of this proceeding and I don't think that the
8 inquiry sweeps that broadly so I don't have a problem as
9 to relevance in addition to the proprietary nature of the
10 documents.

11 CHAIRMAN FARMAKIDES: Let's go to Item 12.

12 MR. REYNOLDS: Before we leave the interrogatory
13 16, I have been advised and it was my oversight that the other
14 Applicants, other than CEI, did object to the litigation,
15 actual or considered before the courts or intended to and in-
16 advertently it was not in this separate document that they
17 filed. In other words, CEI objects to that interrogatory
18 and the other applicants similarly intended to raise that
19 objection.

20 CHAIRMAN FARMAKIDES: And they did not.

21 MR. REYNOLDS: It was not included.

22 CHAIRMAN FARMAKIDES: So, you're suggesting
23 then that your objections with respect to the other Applicants
24 include this same objection?

25 MR. REYNOLDS: That is right, it was my omission

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1 in terms of, I think, the other Applicants' paper, if you
2 track it with the CEI paper, is virtually identical in sub-
3 stance and it was one that was dropped in the --

4 CHAIRMAN FARMAKIDES: Well, let's mend it right
5 now because --

6 MR. REYNOLDS: It would be 2E, paragraph 2E is the
7 interrogatory that was addressed to the other Applicants.

8 CHAIRMAN FARMAKIDES: What page are we talking
9 about, sir? Where would you insert it. It is objections
10 to the interrogatories of document request of the Toledo
11 Edison Company, the Pennsylvania Power Company, Ohio Edison
12 Company and the Duquesne Light Company, September 9, 1974.

13 MR. REYNOLDS: And the objection would be the
14 same objection that appears in Item 9 in CEI's objections
15 to the City of Cleveland.

16 CHAIRMAN FARMAKIDES: State it, please, as
17 an amendment to your filing here.

18 MR. REYNOLDS: For the record, the amendment is to
19 the objections to the City of Cleveland's interrogatories
20 and document request of the Toledo Edison Company, Penn-
21 sylvania Power Company, Ohio Edison Company and Duquesne
22 Light Company. Added to those objections is an item 7A,
23 objecting to the city's interrogatory 2E --

24 CHAIRMAN FARMAKIDES: Which tracks your objection
25 on 16J.

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1 MR. REYNOLDS: That is correct. It is response to
2 document request 2E, not interrogatory 2E of the City of
3 Cleveland. And it tracks the objection of Cleveland Electric
4 Illuminating Company to document request number 16G by the
5 City of Cleveland.

6 CHAIRMAN FARMAKIDES: Let's proceed to Item 12 and
7 we're back to the objections of CEI.

8 MR. REYNOLDS: Correct.

9 Item 12 is in response to the city's document
10 request number 17A5.

11 CHAIRMAN FARMAKIDES: Well, I think your objections
12 is noted as being a very broad statement of the exhibit's
13 interrogatories, isn't that right, of document request.

14 MR. REYNOLDS: It goes to the broadness and the
15 relevance of the request.

16 CHAIRMAN FARMAKIDES: I wish, sir, if line with
17 your second paragraph that you would consider this with the
18 City of Cleveland during the lunch recess.

19 All right, Mr. Hjelmfelt, is that all right with
20 you, sir, that you people consider this Item number 12 at
21 lunch as one of your items for discussion?

22 MR. HJELMFELT: Yes, this corresponds with
23 document request 4A for the other Applicants, I believe.

24 MR. CHARNOFF: That is correct.

25 MR. HJELMFELT: I would be willing to discuss it.

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CHAIRMAN FARMAKIDES: Yes, let's have this on
one of your agendas for discussion. Let's go to Item 13.

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1 MR. REYNOLDS: Item 13 is objection of Document
2 Request 17-B of the City, the request is for documents per-
3 taining to retail electric franchise services. The objection
4 by CEI is that this is irrelevant to the proceeding. It is out-
5 side the scope as this Board defined in Prehearing Conference
6 Order No. 2, and is not a matter that is permissible for dis-
7 covery.

8 MR. HJELMFELT: Well, this discovery goes to the
9 identification of other potential generating and transmitting
10 electric utilities. Certainly, any municipality which current-
11 ly franchises CEI to serve within the City at retail at the
12 determination of that franchise has the option of purchasing
13 the CEI system or constructing its own system. In addition to
14 constructing a distribution system which would give competition
15 at retail the City might very well install its own generation
16 and if it installs its own generation it is available as a
17 possible partner for other municipalities or other electric
18 utility generating units for interconnection and to form
19 another pool, a competing pool or alternate power pool. It
20 would be available for such things as sharing construction,
21 coordination, and so I think that when we start to defining the
22 relevant market and looking at what kind of competition is
23 available, then I think knowing what these franchises are and
24 when they expire is directly relevant to what we're looking at.

25 CHAIRMAN FARMAKIDES: Mr. Reynolds, do you want to

jeri 2 1 reply to that, sir.

2 MR. REYNOLDS: I don't have anything further.

3 MR. BREBBIA: I have a question of Mr. Reynolds.

4 How many documents in your opinion in a ten-year period would you
5 be talking about under B?

6 MR. REYNOLDS: When you get to -- I don't know the
7 answer to that. We have not had an opportunity to do a file
8 search of any sort and I am not at this juncture --

9 MR. BREBBIA: Well, is this something that would be
10 very voluminous or is there any way that you can estimate what
11 we're talking about?

12 MR. REYNOLDS: We have a guess of somewhere in the
13 neighborhood of a four-drawer file since '67.

14 CHAIRMAN FARMAKIDES: Let's to to Item No. 14 then.
15 Anything further that you wish to add, Mr. Reynolds?

16 MR. REYNOLDS: Can you bear with me just a half a
17 second?

18 CHAIRMAN FARMAKIDES: Yes.

19 MR. REYNOLDS: Document Request 17, which is what
20 we were dealing with for Items 12 and 13 is the same in some re-
21 spects to Document Request 4 of the other Applicants. The
22 other Applicants have raised an objection to part C. It is 4-C
23 and it is 17-E. The objection is not raised by CEI but it was
24 raised by the other Applicants. It would logically fit in I
25 guess at this point unless you would rather do all of Cleveland
Electric.

1 CHAIRMAN FARMAKIDES: Yes, I would and just note that.
2 We'll get to that later.
3

3 MR. REYNOLDS: Fine.

4 CHAIRMAN FARMAKIDES: As we said earlier if we go
5 through this there will be very little to do on the others but
6 at least there will be one place in the record where we can refer
7 to it.

8 MR. REYNOLDS: Fine.

9 Back to the CEI objections to the City's interroga-
10 tories, Item 14 relates to Document Request No. 18 by the City
11 which calls for correspondence between CEI and Edison Electric
12 Institute or any committee thereof, the National Association of
13 Electric Companies and all electric utilities, referring to
14 system construction, wholesale power supply and coordination,
15 a number of items.

16 This again is an objection based on the relevancy of
17 a request calling for correspondence with Edison Electric Insti-
18 tute or National Association of Electric Companies. It is not
19 within any meaningful definitional framework. It is an extreme-
20 ly broad request for correspondence and doesn't deal with parties
21 in this action and in terms of volume, it is hard to see whether
22 there's any limit at all to this kind of request.

23 CHAIRMAN FARMAKIDES: Mr. Hjelmfelt.

24 MR. HJELMFELT: Well, the types of documents we have
25 requested here, the subject matter of course all goes to matters

jeri 11-4 1 which are at issue here were relating to the wholesale market,
2 coordination, interconnection, pooling arrangements, et cetera.
3 The organizations we have spoken of, for example, the Edison
4 Electric Institute have developed guidelines relating to certain
5 of these activities and maybe all of them such as coordination
6 between utilities. An example would be the Prime Mover Committee
7 Report with respect to generating facilities.

8 We would like to know to what extent these studies,
9 documents, have been available to CEI, and to what extent CEI
10 has utilized them. It may very well show the intent or motive
11 of certain activities of CEI and I think in that regard it is
12 relevant to what we're looking for here.

13 CHAIRMAN FARMAKIDES: The problem here, however, is
14 that the Applicant says he's got literally roomfuls of material
15 and to have him go through this voluminous amount of material
16 for seeking to obtain apparently the information you request
17 provides little if any information that you really need.

18 MR. HJELMFELT: We certainly don't want to be burden-
19 ed with going through roomfuls of material inasmuch as the
20 Applicant has repeatedly noted that they haven't had a chance to
21 determine their files to see how much is available. At this
22 point we're not willing to accept their statement as to how much
23 there is. This may well be the type of question that some guide-
24 lines on their response could be worked out informally between
25 the parties.

jeri 11-5 1 MR. BREBBIA: Would it, Mr. Hjelmfelt, would it be
2 possible for you to be more particular in your requests for
3 these documents, i.e., your requests here are very general as to
4 the kinds of information you seek. I presume if they are members
5 of these associations, I presume these are trade associations,
6 and if they're members they are entitled to whatever documents
7 the associations make available to any of their members.

8 I mean you start there but there may be a lot of
9 information here. Isn't it possible for you to ask more par-
10 ticular question, particularized questions in the context of
11 the issues of this case as to the type of material you need or
12 the effects which you think this material would have on this
13 hearing?

14 MR. HJELMFELT: It seems to me that we have narrowed
15 our request listing A through D, the subject matter of the
16 types of material. Certainly as a member I would assume CEI
17 would have a right to obtain copies of any studies, what-not,
18 that, for example, Edison Electric Institute might develop.
19 Whether in fact they have obtained copies or utilized copies,
20 I don't know any more than that the study exists.

21 Of course, it would depend on questions other than
22 their mere membership.

23 I would think that probably the best way to go about
24 reducing it, if there is in fact a voluminous amount of materials
25 to be developed would be through sitting down and discussing

jeri 6 1 this with the other party. At this stage I am not in a position
2 where I could draft a more particularized request. ..

3 CHAIRMAN FARMAKIDES: I had earlier made the comment
4 about rooms because on line 3 of the second paragraph the Appli-
5 cant says that many "rooms" of documents.

6 Mr. Reynolds, did you in fact examine this voluminous
7 amount?

8 MR. REYNOLDS: We have been assured of that and if I
9 could direct the Board's attention to Item 22 in our objections,
10 I think that we're getting an overlap here and there's an over-
11 lap in terms of many of the questions here on the type of infor-
12 mation that would be covered by the request, and we have done a,
13 by no means exhaustive, but a beginning list of the types of
14 things that would fall within this kind of interrogatory and
15 many of the other interrogatories that the City has asked which
16 fill up rooms. It is not an overexaggeration or I'm not just
17 using that as a generic room, it would be rooms full of materials
18 and the types of materials are categorized in that Item 22.

19 MR. RIGLER: What can you tell us about the procedures
20 that CEI uses to keep its file. Does each officer keep a file
21 within his area of responsibility? Is there a central common
22 legal file ? In other words, what is the arrangement of the files
23 within the company?

24 MR. HAUSER: For the record my name is Don Hauser,
25 I'm corporate solicitor for the Illuminating Company. We do

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1 have a central filing system, plus of course there are individual
2 department and section and unit files. In this particular
3 interrogatory which we are addressing ourselves, I can assure
4 the Board and the City there are rooms full of materials. There
5 are many committees and subcommittees under both of these
6 organizations and I would say that almost every section and
7 unit of the company would have some file materials involving
8 EEI or NAEC.

9 CHAIRMAN FARMAKIDES: Is the City a member of the
10 Edison Electric Institute?

11 MR. HJELMFELT: No, sir.

12 CHAIRMAN FARMAKIDES: A member of the National
13 Association of Electric Companies?

14 MR. HJELMFELT: No, sir.

15 CHAIRMAN FARMAKIDES: Let me go back now, Mr. Rey-
16 nolds, assuming that some of these discovery requests are to be
17 conducted by you, are you going to screen your materials or are
18 you going to simply give file drawers or roomfuls and make them
19 available to the City?

20 MR. REYNOLDS: I think we will have to screen our
21 files.

22 CHAIRMAN FARMAKIDES: Individually?

23 MR. REYNOLDS: Yes, sir.

24 MR. RIGLER: Don't they have labels or indexes on
25 the top of each filing cabinet or drawer?

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MR. REYNOLDS: I'm not sure they're indexed the same

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way the interrogatories are.

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1 MR. RIGLER: In any event how many of these files
2 will you be going through to satisfy yourself that you will
3 answer the interrogatories that are not objected to?

4 MR. HAUSER: I think we will have to go through
5 the files which I previously described which are literally
6 roomsful.

7 MR. RIGLER: And that will be to answer interroga-
8 tories to which the company has not objected?

9 MR. HAUSER: As broadly as this interrogatory
10 is presently constituted, my answer goes to that.

11 MR. RIGLER: No, I'm trying to find out how much
12 you are going to do in any event irrespective of whether we
13 sustain your objection to a particular interrogatory. You're
14 still going to have to go through a fairly large volume of
15 files, are you not?

16 MR. HAUSER: This is certainly correct, but unless
17 restricted, the scope of the burden of the job would be much
18 greater than --

19 MR. RIGLER: That's what I'm having a little
20 difficulty understanding. If, for example, you go to your
21 operations vice president, or you go to the solicitor, how
22 many files can be eliminated, if we take out particular
23 interrogatories? Won't you still have to go essentially
24 through your entire files?

25 MR. HAUSER: No, I don't believe so.

1 MR. BREGGIA: If this question were eliminated,
2 would you have to review these rooms filled with files that
3 you have just talked about in answer to any or all of the
4 questions to which you have not objected?

5 MR. HAUSER: I don't believe so.

6 CHAIRMAN FARMAKIDES: Mr. Goldberg.

7 MR. GOLDBERG: One of our difficulties, of course,
8 is we don't know whether they maintain an index of their
9 files as I know some companies do and even law firms.

10 MR. CHARNOFF: We have indicated we will provide
11 that index.

12 MR. GOLDBERG: That might provide some assistance
13 in trying to narrow it. For example, it may very well be
14 they maintain separate files for materials they receive from
15 these associations, in which event I would think that they
16 would have a very narrow number of files to look at and not a
17 roomful.

18 CHAIRMAN FARMAKIDES: When was the index made avail-
19 able, Mr. Charnoff?

20 MR. CHARNOFF: It was asked in this and we have
21 indicated we will make that available.

22 CHAIRMAN FARMAKIDES: It has not yet been made
23 available?

24 MR. CHARNOFF: We just got the request, sir, in the
25 last ten days.

1 CHAIRMAN FARMAKIDES: I just wonder about the two
2 of you getting together on that index.

3 MR. CHARNOFF: Maybe we can do that at lunch.

4 CHAIRMAN FARMAKIDES: I think we have enough
5 information. Let's go to Item 15. Let's complete this one
6 and then we'll break for a recess, and you all can talk to
7 each other.

8 Mr. Reynolds, do you have anything further to
9 clarify on this point, sir? This is Item 15, appearing on
10 your page 16 of the objections to the interrogatories of the
11 city. You're saying in effect that Document Request No. 20-E
12 is stated so broadly that you can't respond to it.

13 MR. REYNOLDS: I think that is what we're stating.
14 I was just trying to locate the document request. That is our
15 basic objection. It asks for any communications with officials
16 or members of board directors of wholesale customers and also
17 with managers and persons and elected appointive officers who
18 are or were responsible for operations of each municipal whole-
19 sale customer.

20 I don't think -- there is again no particularization
21 at all.

22 CHAIRMAN FARMAKIDES: We're talking now to a period
23 of time. We haven't settled yet on '64, '65 or '67, but it's
24 a period of time. Where are all these files kept, sir? Are
25 they kept in your headquarters in downtown Cleveland or out
in the fields?

1 MR. HAUSER: A number of them would be in downtown
2 Cleveland, but then we also do have -- well, one we have in an
3 eastern district office, but we have a number of service centers
4 where some of this material would also be kept.

5 CHAIRMAN FARMAKIDES: Sir, in your index, do you have
6 a category that would be limited to wholesale customers?

7 MR. HAUSER: I don't believe so, and again I'm
8 relying on a very hasty and faulty recollection. For example,
9 there might be a label interconnection which would involve
10 wholesale customers.

11 CHAIRMAN FARMAKIDES: All right.

12 MR. GOLDBERG: Your Honor, I have made in other
13 cases this kind of an offer to help resolve the alleged burden
14 of review of files, and we're perfectly willing to have the
15 access to files -- give us access to the files, and we'll look
16 through them, and we're willing to look through them supervised.

17 MR. BREBBIA: Your position, Mr. Goldberg, I take
18 it, is that if they open the door to all the files to you for
19 which you have made a request for access, you're willing to
20 provide the manpower within a certain time frame to examine
21 these files?

22 MR. GOLDBERG: Absolutely. Under their careful
23 and guarded --

24 MR. BREBBIA: You would relieve the applicants of
25 the burden of examining them first?

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1 MR. GOLDBERG: Absolutely. They can examine what
2 we would like to have copies of.

3 MR. CHARNOFF: Let me say that we have read the
4 interrogatories and the document requests as being a request
5 for a fishing expedition, and I think what Mr. Goldberg is
6 suggesting might end up being just that.

7 CHAIRMAN FARMAKIDES: I don't think, Mr. Charnoff,
8 that that is necessarily what Mr. Goldberg had in mind by
9 his statement. I think there is no doubt that looking
10 through masses of material is a real problem. It's a real
11 and one of the reasons we're examining this is we
12 may well deny this interrogatory on the basis of burden.

13 What Mr. Goldberg has suggested is, he is offering
14 to obviate that problem by he and his people looking through them.
15 Now that causes other problems. And we understand
16 that. For example, getting back to the interrogatory with
17 Edison Electric Institute and National Association of Electric
18 Companies: Would you have a similar problem in having Mr.
19 Goldberg going through that file? I don't see anything in
20 there -- I don't know, but we're talking about roomfuls of
21 material, talking about Edison Electric Institute and National
22 Association of materials.

23 MR. REYNOLDS: I think it says "and any other
24 electric companies."

25 MR. CHARNOFF: I think the real issue is, beyond

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1 this proceeding there are a great many areas of confrontation
2 between these particular parties. Without imputing any motives
3 to any kinds of specific requests, I think it would be a very
4 difficult solution to suggest that the City of Cleveland was
5 going to be given a key to our files or vice versa. Given that
6 fact, if this were the only issue between the two parties,
7 perhaps that would make some sense. Given the historic nature
8 of that relationship, I suspect that that's not a very workable
9 idea.

10 CHAIRMAN FARMAKIDES: Anything further on 15? Mr.
11 Hjelmfelt, did you have any more on 15?

12 MR. HJELMFELT: It's my understanding that CEI doesn't
13 have a great many wholesale customers, and I here use the term
14 "wholesale" not referring to sales to large industries, large
15 industrial users, but sales for resale, and that I think would
16 point up that there's not going to be all that much material.

17 CHAIRMAN FARMAKIDES: So when you use the word
18 "wholesale" you're talking about a sale for resale purposes?

19 MR. HJELMFELT: Yes, sir.

20 CHAIRMAN FARMAKIDES: Mr. Reynolds, does that in any
21 way change your position, sir?

22 MR. REYNOLDS: Well, I think that again I believe
23 that's helpful. The problem is when you ask for correspondence
24 and leave it at documents and don't identify what the areas
25 of inquiry are, or the areas of the subject matter involved,

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1 that conclusion, I guess, includes personal correspondence for
2 that matter, if we want to go to that extreme. There's got
3 to be some definition in the request so we know what they're
4 talking about when they say correspondence, not just any and
5 all correspondence that might relate to. That's where we have
6 a very difficult problem with this interrogatory and a number
7 of other ones. They ask for documents mentioning, and corres-
8 pondence between, and I think that it gets into a number of
9 these file drawers which otherwise nobody would have any cause
10 to look into, and nobody really has any business looking into
11 them in the context of this proceeding.

12 It's just so open-ended to -- There's no way
13 to get a grip on what's being sought.

14 CHAIRMAN FARMAKIDES: We're going to break --

15 MR. CHARNOFF: Before we do, sir, may I make an
16 observation? I'm going to discuss with Mr. Reynolds at
17 lunch, and perhaps the other parties could do so too, and
18 perhaps the other parties could consider that at the rate
19 we're going, item by item, this may be a very extended one-day
20 conference. I would like to suggest to all that by and large
21 the positions of the parties have been taken, that what we
22 might address at lunch are those particular objections that we
23 wish to express or the Board wishes to hear some specific
24 argument on.

25 CHAIRMAN FARMAKIDES: Well, that's a thought that

1 you all can exchange during the informal discussion that you
2 will be having when we recess.

3 Now, look, I would like for all of the parties to
4 stay in the room. It's only 11:45 or thereabouts. We'll recess
5 for two hours until 1:45, and I hope too, Mr. Charnoff, that
6 you will stay and discuss your protective order as well, with
7 the parties and Mr. Vogler, your objections so that you're
8 able to sit down for at least a half-hour, forty-five minutes
9 before lunch and talk to each other and then take your luncheon
10 break, and perhaps you can take lunch together, but this is
11 an opportunity for you all to see if you can't resolve some
12 of these objections and perhaps a suggestion voiced by Mr.
13 Charnoff can be discussed, and that is there are some objections
14 that you people have special problems with, and you want to
15 pinpoint on those. And there are some that the Board has
16 special problems with. So let's recess. We'll reconvene
17 at 1:45, and I hope that you all can resolve some of these
18 issues, especially those that relate to ambiguity.

19 (Whereupon, at 11:45 a. m., the hearing was
20 recessed, to reconvene at 1:45 p. m., this same day.)

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AFTERNOON SESSION

(1:45 p.m.)

CHAIRMAN FARMAKIDES: May we proceed.

At the outset of this afternoon's session, let me note for the record that as the parties were previously advised by telephone, the Motion for Summary Disposition filed by the Applicant will be acted upon by the Board as quickly as possible.

Now, the parties were advised that they have until October 10, 1974, within which to respond to Applicant's motion. Thus, all responses to the Motion for Summary Disposition should be filed on or before October 10, 1974.

Thereafter, the Applicant will be given 10 days within which to file any additional reply. And after that period -- well, let's state for the record then that means that the Applicant's reply will be due on or before October 20, and the Board will act as quickly as possible thereafter.

We also discussed earlier this morning the question of the possible need of a master. I think we'll hold off any further discussion on this issue for the moment.

As time approaches and it appears as though we would need a master, why, I'll contact the parties further, but I think everyone agreed pretty well, as I saw the people nodding their heads, that a master would be advisable.

Let's proceed. We gave the parties roughly two

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1 hours during the luncheon recess to talk to each other,
2 hopefully to see if they can't resolve some of these issues
3 that we discussed this morning, and perhaps additional
4 issues.

5 Could someone give us a status report? Mr. Charno
6 or Mr. Vogler or Mr. Charnoff? It doesn't matter.

7 MR. CHARNOFF: There was a discussion, sir, on a
8 number of different matters. There was a discussion between
9 the Staff and ourselves and Justice and ourselves with
10 regard to their responses or their objections to our
11 interrogatories where I think we have made a lot of progress.

12 There were discussions with Mr. Hjelmfelt where I
13 think we have agreed on a couple of questions and we had
14 disagreement on some others.

15 I'll be glad to take a try at summarizing where
16 we're at.

17 CHAIRMAN FARMAKIDES: Can we clarify any of those
18 items that we discussed this morning in terms of agreement
19 among the parties or agreement among two of the parties, I
20 should say?

21 MR. CHARNOFF: We're all operating without notes.

22 MR. CHARNO: Mr. Brebbia, this morning, asked a
23 question and we have some authority in response to his
24 question. We were unable to resolve the point, but we'd
25 like to insert the authorities into the record at this point.

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1 Prior to 1970, there were a conflict of cases
2 among the different courts concerning whether it was
3 proper for an interrogatory to call for contentions and the
4 application of law to factual contentions.

5 In 1970, this conflict was resolved by the amend-
6 ment of Rule 33 of the Federal Rules of Civil Procedure,
7 33B at present states in pertinent part:

8 An interrogatory otherwise proper is not
9 necessarily objectionable merely because an answer to the
10 interrogatory involves an opinion or contention that relates
11 to fact or the application of law to fact.

12 The legislative history as indicated in USCA
13 makes it clear that this was designed to resolve the prior
14 conflicting cases. All of the cases that Applicants have
15 cited in support of their position are prior to 1970.

16 Two post-1970 cites that interpret and apply
17 the new Rule 33B are Sargent-Welch Scientific Company,
18 versus Ventron Corporation, 59 FRD 500 (Northern District
19 of Illinois, 1973). And Ballard versus Allegheny Airlines,
20 54 FRD 67 (Eastern District of Pennsylvania, 1972).

21 We haven't had a chance to fully research this, and
22 if briefs are thought advisable, we will be happy to submit
23 one.

24 MR. BREBBIA: If you tell me, as you tell me, that
25 it is discretionary on the part of the Board. As I hear it,

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1 you're telling me that the Rule 33B was imposed in an
2 attempt to eliminate -- well, I don't know about eliminate,
3 but at any rate, making it the rule now that it wouldn't
4 necessarily preclude discovery.

5 If it were a question of the -- whoever the party
6 is in contention, you're asking for his opinion on his
7 position in the matter. Whereas before, perhaps, it could
8 be considered to having called for a legal conclusion, it
9 would then be non-discoverable.

10 MR. CHARNO: Well, there was a conflict prior to
11 '70, yes.

12 MR. BREBBIA: Well, the conflict would have been
13 adverse. In some of the circuits, at least, contentions
14 would not be discoverable.

15 MR. CHARNO: That's correct, prior to 1970.

16 MR. BREBBIA: Right. And now it reads or it is
17 understood to mean that simply because it is a contention,
18 it does not mean that it is not discoverable, which I read
19 to mean it is within the discretion of this Board as to
20 whether it wants to permit discovery on a contention.

21 MR. CHARNO: I don't think I would go so far as --
22 obviously it is within the discretion of the Board. The
23 Board's discretion should be guided by the general purposes
24 of discovery, as to whether it is going to throw light upon
25 the issues to the proceeding. I think that is the factor

1 that should be guiding the course of discretion rather than
2 the factor of whether or not it calls for a contention or
3 application of law to a contention of fact.

4 CHAIRMAN FARMAKIDES: Anything else, Mr. Charno?

5 MR. CHARNO: I could briefly summarize if it is
6 agreeable with counsel for Applicant what we did agree to
7 over the recess.

8 CHAIRMAN FARMAKIDES: Fine. With respect to your-
9 selves, to each other?

10 MR. CHARNOFF: Yes.

11 MR. CHARNO: With respect to the Department's
12 Motion for a Protective Order, if I can make reference, if
13 you all have it handy, if I can make reference to the roman
14 numeral headings in that order.

15 We could perhaps go faster if I indicate those we
16 agreed, and then call upon Applicants to indicate where we
17 still have a disagreement.

18 MR. CHARNOFF: Why don't we do them one at a time?

19 CHAIRMAN FARMAKIDES: Yes, let's take Section 1,
20 Motion by the Department of Justice for a Protective Order,
21 right?

22 MR. CHARNO: Right. Roman numeral Section 1,
23 the Applicants, as I understand it, have no objection to
24 what we have requested in Section 1.

25 CHAIRMAN FARMAKIDES: All right, fine.

1 Is that correct, Mr. Charnoff?

2 MR. CHARNOFF: That's correct.

3 MR. RIGLER: Do you need a protective order on
4 that, or just an understanding of the parties?

5 MR. CHARNOFF: On this one, I think an understand-
6 ing on the record is sufficient.

7 CHAIRMAN FARMAKIDES: Mr. Charno, correct with
8 you?

9 MR. CHARNO: That is fine.

10 CHAIRMAN FARMAKIDES: All right, two.

11 MR. CHARNO: This apparently is going to be mooted
12 by the Board's determination of the day for all discovery.

13 CHAIRMAN FARMAKIDES: All right.

14 MR. CHARNO: With respect to roman numeral 3, I
15 believe --

16 MR. CHARNOFF: Excuse me. There was one qualifica-
17 tion, if I may.

18 As I understand it, what we're mooting is the
19 proposal that this be all filings as of January 1, 1971, but
20 there was the reservation with regard to the August 26, 1974
21 date.

22 While we understand that there isn't going to be
23 continuing search of files, we did understand that the
24 documents that we produced herein would be current.

25 CHAIRMAN FARMAKIDES: Is that correct?

1 MR. CHARNO: They would be current as of the date
2 of our file search, and we will supplement them as
3 additional documents come to our attention.

4 MR. CHARNOFF: And that is satisfactory to us.

5 CHAIRMAN FARMAKIDES: All right, fine.

6 At this point in time, let me interrupt, did
7 you-all talk with respect to a date as suggested by the
8 Board?

9 MR. CHARNO: We did.

10 MR. CHARNOFF: We talked, but I don't think we
11 reached any agreement.

12 CHAIRMAN FARMAKIDES: Item 3?

13 MR. CHARNO: It is my understanding the Applicants
14 will agree to what we have requested in item 3.

15 CHAIRMAN FARMAKIDES: Mr. Charnoff?

16 MR. CHARNOFF: Let me just check my notes.

17 Yes, I think we did want it clarified either in
18 the record or by way of an order that in fact Justice
19 Department will give us what it has by October 31, 1974,
20 and then as indicated on January 10, 1975, it will have
21 modified or supplemented that initial response.

22 CHAIRMAN FARMAKIDES: Justice has so indicated
23 that they would do so. I assume you're going to honor that
24 commitment, Mr. Charno?

25 MR. CHARNO: Certainly.

1 CHAIRMAN FARMAKIDES: 4?

2 MR. CHARNO: We still have a disagreement with
3 respect to item 4. The Applicants have asked us to make
4 the initial submission we have agreed to make on October 31
5 and then to modify or supplement that initial response on
6 January 10th.

7 The Department does not feel that we will be in a
8 position prior to the formulation of expert testimony and
9 complete analysis of the materials obtained through discovery
10 by experts to make a detailed statement of position. And
11 that is why we specify January 20, the date on which expert
12 testimony is due --

13 MR. CHARNOFF: February 20.

14 MR. CHARNO: I'm sorry. February 20 -- as the
15 date on which it would be appropriate to supplement that
16 response.

17 MR. CHARNOFF: Our feeling is that by January 10th,
18 the Department is supposed to come forward with the issues
19 that it sees appropriate as a result of the discovery that
20 will have been completed before then, and we do believe that
21 subject always to subsequent modification that when and if
22 the Department of Justice determines that it can specify
23 what the issues ought to be, it ought also to be able to
24 provide an update of the information at that time of their
25 views as preliminarily given to us on October 31.

1 I would point out, Mr. Chairman, that one of the
2 difficulties we have with the Department of Justice position
3 in all of this is that these investigations have gone on now,
4 or at least have been available to them to have been conducted
5 for quite some time. In Davis-Besse for a number of years,
6 and in Perry for about a year at this point.

7 And apparently the Department of Justice reads
8 its obligation in Section 105C to come up to the recommenda-
9 tion to the AEC, but the only recommendation is to whether
10 there ought to be a hearing or not, but that is not what the
11 statute says.

12 It says they're supposed to come up with a
13 recommendation or advice in which there's a situation in-
14 consistent with the antitrust law.

15 It seems to me it is not becoming for the Depart-
16 ment of Justice to say, well, we did some cursory review and
17 now we want to have a hearing.

18 What we're asking for is their position on a
19 matter that is very significant in here, and if they felt
20 well enough along to recommend a hearing, presumably they had
21 some problems in mind, and particularly some positions that
22 ought to be taken.

23 I would think that if they're going to be able to
24 formulate issues on January 10th, they ought to be able to
25 respond to item 5 at a point as well, with some definiteness.

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It is item 5 which is the subject of roman 4 --
 I'm sorry, item 6, which is the subject of roman 4.

CHAIRMAN FARMAKIDES: Actually it does relate
 to both items 5 and 6. You're right, Mr. Charnoff.

Anything else, Mr. Charno?

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MR. CHARNO: I would like to make two very brief
2 points: First, as everyone is aware this is the first opportunity
3 the department has had for discovery to learn what documents,
4 what materials, what evidence lays in the possession of the
5 Applicants. Previous to this in answer to certain brief ques-
6 tions, and we have requested some additional evidence but we
7 have not had any compulsive device for obtaining evidentiary
8 material from them and this is our first opportunity to do so,
9 to conduct a full-scale investigation on every application prior
10 to rendering our advice is impossible, number one by virtue of
11 the 180 statutory limitation on the Attorney General in render-
12 ing advice and number two would unnecessarily and unduly delay
13 the issuing of an advisory letter and the consequent licensing
14 of each and every Applicant's nuclear generating facility.

CHAIRMAN FARMAKIDES: All right, let's go to the next
15 item, five. Roman number v, Mr. Charnoff, appearing on your
16 page 6 of the Motion for Protective Order.

MR. CHARNO: We discussed this at some length,
18 Mr. Chairman, and I think we came to the conclusion that since
19 the Department has not yet formulated and does not intend to
20 formulate conditions we do not need and are to seek protection
21 originally requested in this item and we'll withdraw our request.
22

CHAIRMAN FARMAKIDES: So you'll withdraw. How about
23 roman number VI.
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MR. CHARNOFF: I'm sorry.
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1 CHAIRMAN FARMAKIDES: Did you have anything else?

2 MR. CHARNOFF: Yes, I'm not sure I heard that
3 correctly. He's not withdrawing anything that I heard.

4 MR. CHARNO: That is what I said.

5 MR. CHARNOFF: Withdrawing the request for the pro-
6 tective order.

7 CHAIRMAN FARMAKIDES: As to roman numeral V. Let's go
8 to roman numeral VI.

9 MR. RIGLER: Did I understand you to say that you
10 were not going to request relief?

11 MR. CHARNOFF: Does that mean that you're going to
12 answer item 10?

13 MR. CHARNO: That is correct.

14 MR. RIGLER: Suppose there is a hearing and the
15 evidence shows there is a situation inconsistent with the anti-
16 trust laws, the Department still does not intend to request re-
17 lief?

18 MR. CHARNO. I'm sorry, no, at a point certainly we
19 would attempt to formulate conditions. After the factual record
20 was clear and we knew exactly what needed to be remedied, we
21 would submit conditions at that time.

22 CHAIRMAN FARMAKIDES: All you're going really is with-
23 drawing your objection to item ten?

24 MR. CHARNO: That is correct.

25 CHAIRMAN FARMAKIDES: Six.

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1 MR. CHARNO: With respect to roman numeral VI. we had
2 the identical difficulty that we did on roman number IV. The
3 Applicants would like a date of January 10. The Department feels
4 a date of February 20 is more appropriate in order to give it a
5 chance to completely evaluate all aspects of the nexus question
6 through the use of expert witnesses.

7 MR. CHARNOFF: Our position, sir, is that the sentences
8 referred to in the interrogatories, were relied upon by the
9 Department, at least in part, they quoted them and referred to
10 them, in their letter of advice. The Department contrary to
11 what Mr. Charno has said is authorized under AEC rules to re-
12 quest any information that it wishes from the Applicant. If they
13 sat on their rights I don't see why the Applicants should have
14 to defer getting information from them at this particular point
15 in time.

16 The Commission Rules clearly authorize interrogatories
17 by Justice and the AEC pursuant to these investigations. Indeed
18 every question has been answered. Never has there been a situ-
19 ation that I know of where we did not answer a question. So the
20 availability or unavailability to the Department of Justice of
21 compulsive process is almost -- in the form of discovery is
22 almost irrelevant because they have had the authority to ask
23 questions.

24 The fact is they relied upon these assertions. They
25 have indicated they made a determination that the assertions are

jeri 14-4 1 serious and not frivolous and now we're told that they just can't
2 seem to provide any indication what their position is with re-
3 gard to these matters and furthermore they can't do it until
4 their testimony is written.

5 It seems to me this is dilatory by the Department of
6 Justice and we're entitled to more than what Mr. Charno is
7 prepared to give us.

8 CHAIRMAN FARMAKIDES: Look, gentlemen, practically
9 speaking from the point of view of common sense, if the Depart-
10 ment of Justice comes in and gives its answers, whether you
11 identify them as tentative answers or "answers at that time" they
12 are whatever answers they are as of October 10, 1974. If some-
13 thing else is developed during the course of discovery that
14 changes those the Department has a right to come back in and
15 correct its answers.

16 MR. CHARNOFF: I think the fundamental issue is whe-
17 ther we're entitled to these at the time the Board has for con-
18 sidering issues on January 10.

19 CHAIRMAN FARMAKIDES: The request as I understand it
20 in roman VI is they want a provision in the protective order that
21 they ask for allowing them to make "tentative answers" to inter-
22 rogatories on October 31.

23 MR. CHARNOFF: That is right but go on and there they
24 say they would like to supplement those as late as the time when
25 they develop their testimony on February 20. We're suggesting

jeri 14-5 1 at the time they formulate the issues on January 10 they really
2 ought to have answers available to us.

3 CHAIRMAN FARMAKIDES: It is the latter date?

4 MR. CHARNOFF: Yes.

5 CHAIRMAN FARMAKIDES: Sorry.

6 MR. CHARNOFF: I assume their initial tentative
7 answers on October 31 is whatever they will have in their
8 possession.

9 CHAIRMAN FARMAKIDES: It is really the latter date.

10 MR. CHARNOFF: Yes, sir.

11 CHAIRMAN FARMAKIDES: I beg your pardon. Anything
12 else on 6. How about roman numeral VII?

13 MR. CHARNO: We have the same conflict with respect
14 to roman number VII.

15 CHAIRMAN FARMAKIDES: In other words the conflict is
16 the February 20 date?

17 MR. BREBBIA: January 10 and February 20?

18 MR. CHARNOFF: That is right.

19 CHAIRMAN FARMAKIDES: Okay. How about 8?

20 MR. CHARNO: Before we go on, let me make clear that
21 with respect to any factual matters that we're submitting in
22 our statement of issues on January 10, we're offering to supple-
23 ment the interrogatories on January 10. With respect to ques-
24 tions of nexus between those factual matters and activities
25 under the license, we're -- we would like to wait until

jeri 14-6 1 February 20 when we will have our expert testimony completed.

2 CHAIRMAN FARMAKIDES: Do I understand you now,
3 Mr. Charno, to say that you will update everything as to all of
4 your answers except nexus by January 10?

5 MR. CHARNO: That is correct.

6 CHAIRMAN FARMAKIDES: And the only thing that you want
7 to -- you want permission to update on February 20 is the nexus?

8 MR. CHARNO: That is correct.

9 CHAIRMAN FARMAKIDES: Did you understand that,
10 Mr. Charnoff?

11 MR. CHARNOFF: I understand that.

12 CHAIRMAN FARMAKIDES: All right. Let's go to roman
13 numeral VIII.

14 MR. CHARNO: With respect to roman numeral VIII we
15 would still like to incorporate the reasons originally given
16 in response to item 10, although we have withdrawn the objection
17 to item 10.

18 This interrogatory asks us to go out and formulate
19 a set of conditions or at least a specific condition providing
20 for access to the subject units.

21 We have not yet done so and we do not feel we will
22 be in a position to do so until further determination on the
23 factual record in the case.

24 CHAIRMAN FARMAKIDES: Mr. Charnoff.

25 MR. CHARNOFF: Our position on that, sir, is that at

jeri 7 1 the time they have concluded their discovery as distinguished
2 from waiting for a determination on the issue of situation which
3 is the first phase of the hearing that the Board has ordered that
4 at an earlier stage when they are proposing issues in January
5 that we ought to be able to understand what it is that the
6 Department does feel is anticompetitive and what the rectifica-
end 14 7 tion of that will be.

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1 CHAIRMAN FARMAKIDES: All right, sir. Nine.

2 MR. CHARNO: The applicants are willing to concede
3 what we requested in IX.

4 CHAIRMAN FARMAKIDES: Mr. Charnoff.

5 MR. CHARNOFF: That's correct, sir.

6 I think it might be well, sir, having taken the
7 Justice Department answer to move over to the AEC response.
8 Mr. Vogler, do you want to present that?

9 MR. VOGLER: No, it is very brief, go ahead.
10 It doesn't matter. We have basically reached agreement.

11 CHAIRMAN FARMAKIDES: All right. Who is going
12 to give the status, Mr. Charnoff?

13 MR. CHARNOFF: As I understand it, while the docu-
14 ment at least in Section A, B and C in reply to I, namely their
15 objections to the Applicants' interrogatories, while those
16 sections suggest that AEC would not now provide answers to
17 our interrogatories, I do understand that that is somewhat
18 ambiguously written at least and that the AEC does intend
19 on schedule to provide us with what they have in reply to
20 the interrogatories we asked of them with possibly one
21 reservation dealing with internal --

22 MR. VOGLER: Handwritten memoranda.

23 MR. CHARNOFF: Handwritten memoranda of persons
24 within the agency.

25 I would point out that we -- while we're getting

ge2 1 the information and this relates also to II of this paper,
2 it is our view that the case cited on page 3, that's the
3 Utah Pie Company case, which would suggest that it is quoted
4 in support of excluding the questions relating to profitability
5 of the competitors, and therefore, issues such as costs,
6 tax advantages, interest rates, etc. are not relevant, that
7 we feel that the Utah Pie Company case does not stand for
8 that proposition at all and that indeed insofar as we're
9 interested in determining the viability of City of Cleveland,
10 that the issue of costs as well as reliability of their
11 service are indeed relevant.

12 But as I understand the staff's position, they're
13 going to again provide us with the answers to the extent
14 they have them and not rely upon this as reason for declining
15 to answer.

16 Similarly, it is our position that the second para-
17 graph of page 3 which suggests that because state and local
18 laws may be changed at any time, that there's no reason to
19 answer any interrogatories dealing with local laws is
20 a proposition that we would disagree with.

21 We think the Parker v. Brown case fully disposes
22 of that particular matter.

23 I think that takes care of I, Mr. Vogler, does it?

24 CHAIRMAN FARRAKIDES: Before you go to II, I
25 understand then that what has happened is essentially that

ge3 1 the staff no longer has objections to Applicants' interroga-
2 tories.

3 MR. VOGLER: I'm sorry, sir, could you repeat that?

4 CHAIRMAN FARMAKIDES: Oh, with respect to I of
5 the staff's objections to Applicants' interrogatories and
6 document request of the interrogatory staff, I take it from
7 the response just made by Mr. Charnoff into the record that
8 the agreement is that there are no objections to the Appli-
9 cants' interrogatories and request for documents?

10 MR. VOGLER: And the reason for that and it should
11 be very clear, is commission policy and not law. It is the
12 policy of the Atomic Energy Commission if the information is
13 available and in the files of the Atomic Energy Commission, it
14 will be made available to the other side, with the exception
15 of legal memoranda from the office of the general counsel
16 or handwritten notes as Mr. Charnoff previously explained
17 from the professional staff.

18 CHAIRMAN FARMAKIDES: All right, sir.

19 MR. BREBBIA: So your objection is withdrawn?

20 MR. VOGLER: Other than what I have just stated,
21 yes. If we have the information that he is asking for, we
22 will give it to him.

23 CHAIRMAN FARMAKIDES: All right, II.

24 MR. CHARNOFF: As to II, which is addressed not
25 to the staff but seems to be addressed to the discovery

ge4 1 requests and interrogatories addressed by the staff to the
2 City of Cleveland and by the City of Cleveland to the Appli-
3 cant.

4 There are a number of requests made that seems
5 to me very cogent.

6 For one thing, it is our view that under Section
7 A, costs and rates of return, we do believe that insofar as
8 the viability of the City of Cleveland, light companies in
9 issue here and we do believe it is, that costs and reliability
10 of that particular organization serviced is pertinent and
11 is relevant and would justify inquiry by ourselves and by
12 this particular Board.

13 As to capital B, dates before January 1, 1964,
14 I think we have explored that. I think we do feel that seven
15 years is enough, that January 1, 1967 would be a satisfactory
16 starting point for discovery for everybody.

17 CHAIRMAN FARMAKIDES: Let me ask again at this
18 point, I want to get a focus on this. Is there any material
19 difference between January 1, 1964, and September 1, 1965?
20 And the latter date goes back to the two year period of time
21 prior to the January 1, 1967 formation of CAPCO, but I under-
22 stand later that the formation of CAPCO was September 1,
23 1967.

24 Two years prior to that then to encompass all of
25 the planning would be September 1, 1965. My question then,

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1 is there a material significance between January 1, '64, and
2 September 1, '65?

3 I would, of course, like to see the parties settle
4 on September 1, 1965, or the Board submit some rule if there
5 is no material significance between those two dates.

6 MR. VOGLER: I thought that an agreement had been
7 reached earlier this morning where we would go along with
8 the two years prior to the actual formation of CAPCO with
9 the right that if we found something going back beyond that,
10 the Applicant, as I understand it, maintains that we will
11 not, that we thought that was material, we would have the
12 privilege of coming to the Board and asking for that particu-
13 lar evidence.

14 CHAIRMAN FARMAKIDES: There was no agreement but
15 the Board is very much inclined to go that way. But there
16 was no agreement that was effected insofar as I know.

17 MR. VOGLER: We would not object to that procedure.

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1 CHAIRMAN FARMAKIDES: In other words, September 1,
2 1965, would be the date.

3 Mr. Charnoff and then Mr. Hjelmfelt.

4 MR. CHARNOFF: Our position is that it is an
5 approximately precise compromise between January 1, '64, and
6 the date we were proposing.

7 We do think it adds another year and a half to the
8 burdensomeness of looking at documents.

9 I am not saying that the discovery will take another
10 year and a half, but it adds a year and a half to the documents
11 we have to look at.

12 Nothing to our knowledge occurred at a particular
13 time that is particularly relevant.

14 We would much prefer January 1, 1967. If the Board
15 orders September 1, 1965, obviously that is a split between
16 the two periods of time.

17 MR. HJELMFELT: We would still prefer to have
18 the earlier date simply for the reason we are doubtful that
19 the CAPCO organization got put together in that period of
20 time.

21 CHAIRMAN FARMAKIDES: Well, sir, the proviso that
22 Mr. Vogler expressed was in case something is developed you
23 would have the opportunity then on some showing of reasonable
24 good cause to go back.

25 MR. HJELMFELT: Yes, sir, I understand that and,

1 of course, it is predicated on our stumbling across some-
2 thing that indicates there was something before that.

3 In other words, there might be documents before
4 that that we would never have an opportunity to look for.

5 MR. BREBBIA: Well, Mr. Hjelmfelt, in every piece
6 of litigation one might say that one could go back to the
7 beginning of mankind and maybe find more or something else
8 that you wouldn't find if you picked a later date.

9 MR. HJELMFELT: Yes, sir, but I think here there
10 is "a reasonable" -- it seems to be to be logical to go back
11 a period of time and I don't think the two years is a
12 sufficient time to go back because, for example, they say
13 that CAPCO has been in operation or been functioning since
14 September 1st, 1967, and yet we are also told that as of yet
15 they are still working under a memorandum of understanding,
16 there is no CAPCO agreement.

17 Well, if we have gone seven years and still haven't
18 got an agreement, how did we get to a memorandum of under-
19 standing in two years?

20 CHAIRMAN FARMAKIDES: We talk about September 1,
21 1965. We are talking roughly ten years. At least it is nine
22 years. So it is not an inconsequential period of time.

23 I think, sir, we have heard your arguments this
24 morning.

25 I wanted to know if there was any agreement that

1 that you have entered into and I assume you have not.

2 MR. HJELMFELT: No, sir, and it was my under-
3 standing there was no agreement.

4 CHAIRMAN FARMAKIDES: Well, there was some
5 agreement between the Staff, the Department of Justice and
6 the Applicant, but not as to yours.

7 MR. HJELMFELT: Yes, sir.

8 CHAIRMAN FARMAKIDES: Anything else on Item B?

9 MR. CHARNOFF: No, sir.

10 CHAIRMAN FARMAKIDES: Item C?

11 MR. CHARNOFF: On Item C, sir, the Staff makes
12 an observation that we substantially agree with -- that
13 is that discovery and interrogatories should be essentially
14 limited to the wholesale market.

15 We view this as being consistent with the Board's
16 statement spoken I think at the prehearing conference, preceding
17 the second prehearing conference order, and that is how we
18 understand essentially the thrust of the prehearing conference
19 order.

20 We believe that that observation made by the
21 Staff substantially is valid and should be used to exclude
22 a whole variety of interrogatories addressed to us by the City
23 of Cleveland with respect to conduct at the retail market level.

24 That is that somebody do something to the City's
25 customers at any one time.

1 There are a whole slew of those that the City
2 of Cleveland would like to make, as I indicated earlier.

3 We have refrained from going into similar types
4 of activities by the City of Cleveland because we do under-
5 stand the Board to have included conduct at the retail level.

6 On the other hand, we do think that while the
7 wholesale market is the key to this case, as the Board under-
8 stands it, we do think that the question of viability in terms
9 of cost and in terms of reliability of the City of Cleveland's
10 organization here which directly relates to the structure
11 question that the Board was looking at are issues that do
12 require us to examine and that is why we have asked questions
13 with regard to the cost of generation and the reliability of
14 generation provided for sale at the retail level by
15 Cleveland Municipal Electric Light and Power Company.

16 In our view the Board is clearly right that
17 there is no possibility of nexus to any conduct at the retail
18 level to that which the Board has jurisdiction to look into.

19 So with that qualification we do essentially
20 support what the Staff has written in retail competition and
21 I think we may get to that as we look into other interrogatories
22 of MELP later this afternoon.

23 I think that qualification is important because
24 of the Board's issue and ours in the determination of structure
25 we ought to be able to examine MELP at the retail level.

1 CHAIRMAN FARMAKIDES: Mr. Vogler?

2 MR. VOGLER: A brief comment or two.

3 Mr. Charnoff has basically related our
4 agreement reached during the noon hour.

5 With regard to Part 2, due to the policy of the
6 Atomic Energy Commission in responding to the documents that
7 are in our files as I previously described, it is sort of
8 beating a dead horse to sit here and say that we haven't
9 reached an agreement on cost and rate of return and dates
10 before January 1, 1964, and so forth.

11 This is a discovery request and we are going to
12 respond to it.

13 By that, we shouldn't be construed -- the Staff
14 should not be construed as agreeing with the Applicant that
15 costs and rate of return and dates before January 1, 1964,
16 are not proper or improper as we maintain them.

17 When the proper time comes we are going to object
18 to it because we don't think it is part of this proceeding.
19 And I don't want to have anyone misled that because we are
20 turning discovery documents over due to a very broad
21 Commission directive that we are agreeing that rates of
22 return and costs are part and parcel of this case.

23 CHAIRMAN FARMAKIDES: All right, sir.

24 MR. VOGLER: With regard to retail competition,
25 it cuts both ways. It cuts against the Applicant as well as

1 it does the City of Cleveland and we can't go along with a
2 statement that Cleveland has no right to ask for accounts in
3 conduct and that the Applicant does.

4 Our objection goes to both sides for the reasons
5 stated.

6 CHAIRMAN FARMAKIDES: Now, let's be clear, both of
7 you, that the Board has not excluded conduct, and let me quote
8 page 7 of our Prehearing Order Number 2, and line 3 of the
9 bottom.

10 "The Board has determined not to limit discovery
11 to the subject of dominance alone. However, if parties
12 should be mindful that the Board considers the contentions
13 to relate primarily to structure and only incidentally to
14 conduct. Accordingly, any discovery directed to conduct
15 should be limited and clearly designed to develop whatever
16 evidence of conduct is needed beyond structure to demonstrate
17 the situation referred to herein."

18 So let's be very clear about that. We did this
19 after a lot of thought and I think -- I don't want to get
20 into a discussion of that order now, but what I am pointing
21 out is that conduct can be part of the discovery process,
22 although we are looking very carefully at whatever conduct
23 discovery is being asked for.

24 MR. CHARNOFF: Sir, I was not saying that the
25 Board said no conduct. I said the Board excluded conduct

1 at the retail level. And this, it seems to me -- I think
2 the Board has not disallowed conduct at the wholesale level,
3 for example, how activities are carried out between inter-
4 connections that we may have.

5 For example, the City has alleged that we have
6 affected their acquisition of wholesale power from us in some
7 way.

8 I am not suggesting that the Board has at all said
9 that the conduct of the wholesale issue is out.

10 CHAIRMAN FARMAKIDES: Where have we said that conduct
11 at the retail level is out?

12 MR. CHARNOFF: Sir, as I read these contentions,
13 they are essentially addressed to the question of how we
14 have used our so-called dominance.

15 CHAIRMAN FARMAKIDES: You mean the issues that we
16 stated?

17 MR. CHARNOFF: Yes, sir.

18 CHAIRMAN FARMAKIDES: But there are one or two
19 issues in there that incorporate retail.

20 MR. CHARNOFF: Yes, sir, they refer to retail power
21 transactions but it seems to me that one has to read that in
22 the conduct of the Commission's directive of nexus and I hope
23 the Board is not suggesting that it is not going to allow the
24 concept of nexus to intrude at all on the discovery process.

25 It seems to me that any discovery request with

1 regard to retail power transaction conduct has to be demon-
2 strated to have some concept of nexus to the activities
3 under this license.

4 Now, I must say that I do recall Mr. Brebbia
5 raising this question at the last prehearing conference and
6 getting a non-answer from anybody to it, indicating how
7 could there be any nexus in that area and I must say that we
8 have tried to exercise our imagination to determine that
9 nexus and I think that the Commission under the Waterford
10 ruling is obliged, sir, to apply nexus to discovery as well
11 as to the evidentiary proceeding that will come a year from
12 now.

13 CHAIRMAN FARMAKIDES: Well, part of the answer that
14 you seek, of course, is in the decision of the Board to take
15 up the motion for summary disposition at this time.

16 MR. CHARNOFF: I am sorry.

17 CHAIRMAN FARMAKIDES: Part of the answer to the
18 issue that you have just posed really comes from the
19 action of this Board deciding to take up the motion for
20 summary disposition at this time rather than in '75 as
21 proposed by AMP-O. That is part of it.

22 In other words, we are concerned with nexus.
23 Secondly, sir, we did consider the issue very seriously in
24 evolving the issues that we finally posed.

25 However, we do have issues that we think are

1 properly issues of discovery. As, for example, on page 11
2 of our order, that going to retail power transactions.

3 Now, gentlemen, I don't care at this point in time
4 to get involved in this subject which I think now is beyond
5 the scope of this particular conference, so I don't care to
6 go into it any further.

7 I just want to be sure that we are alert to
8 what I have just mentioned and what has been mentioned
9 earlier with respect to nexus and also the question of
10 retail conduct.

11 Now, let me then state, we can proceed to go
12 back to the Applicant's objections to the request of the City
13 of Cleveland and also to discuss what they talked about at
14 lunch.

15 I think now we have completed with the
16 protective order, motion for protective order for the
17 Department of Justice, and the objections of the Staff.

18 Am I correct, Mr. Charroff?

19 MR. CHARNOFF: Yes.

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CHAIRMAN FARMAKIDES: Mr. Vogler.

MR. VOGLER: Yes.

3 CHAIRMAN FARMAKIDES: So all we have left, then,
4 are the interrogatories between applicant and the City of
5 Cleveland.

6 Oh, let's also clarify one more thing. Applicant's
7 initial interrogatories to AMP-O, the Board has received no
8 objections. Is this the status insofar as any party here is
9 concerned?

10 MR. CHARNOFF: That is correct.

11 CHAIRMAN FARMAKIDES: At luncheon or during the
12 noon recess, Mr. Charnoff, Mr. Hjelmfelt, could one of the
13 two of you clarify what took place?

14 MR. HJELMFELT: Yes, I think I can clarify, with
15 respect to our request No. 17-A, we have reached an agreement
16 on a document request which we will restate.

17 CHAIRMAN FARMAKIDES: Excuse me, sir, hold on just
18 a minute. Let me find that.

19 Off the record.

20 (Discussion off the record.)

21 CHAIRMAN FARMAKIDES: Back on the record. We're
22 talking of the interrogatories of the City of Cleveland to
23 the Cleveland Electric Illuminating Company, dated August 26,
24 1974, Mr. Hjelmfelt.

25 MR. HJELMFELT: Yes.

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1 CHAIRMAN FARMAKIDES: All right, proceed.

2 MR. HJELMFELT: With respect to that document re-
3 quest No. 17-A and the corresponding document request No. 4-A
4 directed to the other applicants, to be of the same date, we
5 have reached an agreement with respect to the matters which
6 will be covered and the City of Cleveland will, subsequent to
7 today's proceeding, will restate the document request along
8 the lines that have been agreed to with the applicants.

9 CHAIRMAN FARMAKIDES: In other words, then, you are
10 -- I am sorry, the City of Cleveland, then, is withdrawing its
11 item No. 12?

12 MR. HJELMFELT: It is our document request 17-A.

13 CHAIRMAN FARMAKIDES: That is right, but you see,
14 it is the applicant's objection No. 12 which occurs on page 13.

15 MR. HJELMFELT: Yes.

16 CHAIRMAN FARMAKIDES: Now, are you saying that
17 they are withdrawing that in view of the fact that you are
18 restating it in accordance with your agreement?

19 MR. CHARNOFF: I think, sir, we are leaving the
20 objection in to 17-A as it is stated in the request, but I
21 think that we have reached an agreement that what the City is
22 looking for are the applicants' demand forecasts and any
23 economic projections we have, and if stated that way we have
24 indicated that we would be prepared to provide that type of
25 information even though there's a question of relevance. But

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1 we said we would provide that. I think the only way to leave
2 the record is that the objection to 17-A could be withdrawn
3 if at this point the City of Cleveland withdraws 17-A and
4 4-A, and then we have a greed that when 17-A and 4-A is
5 reformulated along the lines of what I have just indicated,
6 we have indicated we would have no objection to it.

7 CHAIRMAN FARMAKIDES: That would appear to be
8 satisfactory.

9 MR. HJELMFELT: That is satisfactory.

10 CHAIRMAN FARMAKIDES: In other words, the City of
11 Cleveland is withdrawing 17-A.

12 MR. CHARNOFF: And 4-A.

13 CHAIRMAN FARMAKIDES: And 4-A, and the Cleveland
14 Electric Illuminating Company has agreed to make certain in-
15 formation available if that interrogatory is restated in accord-
16 ance with your agreement?

17 MR. CHARNOFF: That is correct, sir.

18 CHAIRMAN FARMAKIDES: Anything else?

19 MR. HJELMFELT: Yes, I believe we agreed on a re-
20 wording of our inquiry No. 28 to the Cleveland Electric Illumi-
21 nating Company, which is document inquiry No. 12 to the other
22 applicants.

23 MR. CHARNOFF: That is item 22, sir, in our response.
24 In the CEI response.

25 CHAIRMAN FARMAKIDES: All right.

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1 MR. HJELMFELT: Our restatement of that inquiry
2 would simply strike the words "documents including" so that
3 the inquiry begins with the words "minutes of meetings of
4 the Board of Directors and the Executive Committee of the
5 company and documents prepared in advance of meetings."
6 And those items contained in the parentheses in that inquiry
7 would be the only documents prepared in advance of meetings
8 of which we are requesting copies of.

9 MR. CHARNOFF: We have agreed to that, sir.

10 CHAIRMAN FARMAKIDES: In other words, then, let's
11 be clear, Mr. Charnoff, you withdraw your objection to item
12 No. 22 in view of the change in the wording of the interroga-
13 tory 2-B?

14 MR. CHARNOFF: And 12.

15 CHAIRMAN FARMAKIDES: And 12.

16 MR. CHARNOFF: That is right, sir.

17 CHAIRMAN FARMAKIDES: 12 of the --

18 MR. CHARNOFF: 12 addressed to the other applicants.

19 CHAIRMAN FARMAKIDES: All right, 28 plus 12.

20 MR. CHARNOFF: That is not without prejudice,
21 however, to our general objection to the definition of elec-
22 tric utilities, sir, that appears in our first objection,
23 I believe, that Mr. Reynolds mentioned this morning.

24 But the general thrust -- I'm sorry.

25 CHAIRMAN FARMAKIDES: Hold on just a minute,

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1 please.

2 MR. CHARNOFF: Yes, sir.

3 CHAIRMAN FARMAKIDES: Proceed, sir.

4 MR. CHARNOFF: I was just indicating that the
5 term electric utilities is used in 28 as addressed to CEI and
6 12 as addressed to the other applicants, and we do maintain
7 our objection to the broad scope of that definition.

8 If MELP would agree to limit that to the electric
9 utilities within the service area of each of the companies,
10 we would have no objection.

11 MR. HJELMFELT: No, sir. We're asking among other
12 things for discussions of interconnection plans, proposals
13 or agreements with other electric utilities, and certainly
14 with respect to the regional power exchange market, that
15 would include electric utilities which are outside of the
16 service area of CAPCO.

17 CHAIRMAN FARMAKIDES: All right, sir.

18 Anything further?

19 MR. HJELMFELT: Yes. Our document request No. 31
20 to CEI is withdrawn. It duplicates our document request No.
21 26.

22 CHAIRMAN FARMAKIDES: And that is item 23, Mr.
23 Charnoff, of your objections? CEI's objections?

24 MR. CHARNOFF: Yes, sir.

25 CHAIRMAN FARMAKIDES: What is it of the other

blt 6 1 applicants; do you know?

2 MR. REYNOLDS: It was not answered yet.

3 MR. HJELMFELT: That is the extent of, I believe,
4 of the agreements that we were able to reach over the noon
5 hour. We're prepared now to continue through them.

6 CHAIRMAN FARMAKIDES: All right.

7 Were you able -- did you discuss, I mean, the
8 proposal of Mr. Charnoff that perhaps the parties could
9 focus in only on those on which they had special problems?
10 Was that discussed?

11 MR. HJELMFELT: Yes, we did. I think that we will
12 be able to group some of our responses; in other words, there
13 might be a series of questions to which their objection is
14 the same to each question and our response is the same, and
15 we can cover those in a group.

16 Other than that, I think we would prefer to re-
17 spond individually.

18 CHAIRMAN FARMAKIDES: Yes, all right, let's pro-
19 ceed.

20 We're -- we're discussing item 15 of the objec-
21 tions of CEI, and we concluded that, as I recall, and we're
22 now at item 16 of the CEI objections; is that correct,
23 gentlemen?

24 MR. REYNOLDS: That is correct.

25 CHAIRMAN FARMAKIDES: Mr. Reynolds, would you

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1 proceed, sir?

2 MR. REYNOLDS: We have, as a preliminary, let
3 me maybe in order to expedite this, we have gone through
4 on our objections and given a rather lengthy dissertation
5 in writing of our position, and unless the Board feels there
6 is a need for reiteration, it might speed things to stand
7 on what we have written.

8 CHAIRMAN FARMAKIDES: All right, sir.

9 MR. REYNOLDS: To the extent possible; I will
10 elaborate to the extent it is necessary, but it may speed
11 things along if we can rely on the written submission, and
12 then respond where necessary to the City.

13 CHAIRMAN FARMAKIDES: All right, let's follow
14 that procedure.

15 Mr. Hjelmfelt, if you wish, sir, if you wish to
16 respond to some and not to others, you may do that, or if
17 you want to lump them, you may do that.

18 MR. HJELMFELT: Yes, sir. Okay, with response
19 to document request, their objection to document request
20 No. 21-C --

21 CHAIRMAN FARMAKIDES: How, are we talking now
22 from the applicant's objections? Are they requesting that
23 document?

24 MR. HJELMFELT: I'm referring to my document
25 request No. 21-C and the corresponding document request 7-C

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1 which relates to the other applicants.

2 CHAIRMAN FARMAKIDES: All right, sir.

3 MR. CHARNOFF: That's item 16 in our objections,
4 sir.

5 CHAIRMAN FARMAKIDES: Yes.

6 If you could -- I assume unless they have filed
7 an objection, that the applicant is going to answer, so if
8 you would kindly take the objections filed by the applicant
9 and comment with respect to their objections, we could go
10 faster.

11 MR. HJELMFELT: That is what I'm doing, except
12 I have got my notes set up under my headings; but I will
13 attempt to switch over.

14 CHAIRMAN FARMAKIDES: Fine, just cross-reference
15 there so we can get on with it.

16 MR. HJELMFELT: This is with response, then, to
17 their item 16 in which they're objecting to our request for
18 documents relating to the Northeast Electric Reliability
19 Council, NERC, ECAR, NAPSIC.

20 Assuming the things that are relevant here are,
21 for example, qualifications for membership in such organiza-
22 tions which may exclude an entity such as the City of
23 Cleveland. Another indication of the relevance of this
24 material is that, for example, in the FPC proceedings be-
25 tween CEI and the City, relating to the interconnection that

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presently exists between the two, CEI relied heavily on the incorporating principles as constituting the principles which should govern interconnections between utilities and, inasmuch as in this proceeding we're dealing with interconnections or possible interconnections, it would seem to me that it is relevant for us to inquiry into the principles that are going to govern these interconnections.

End 17

So what sort of interconnections are available and to what parties?

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1 CHAIRMAN FARMAKIDES: Mr. Reynolds?

2 MR. REYNOLDS: Well, I think that if ..

3 Mr. Hjelmfelt can specify, as he has, on the record here
4 with a little more particularlity exactly what kind of
5 documents they are talking about, perhaps we can come to an
6 agreement on this.

7 I don't believe there is any problem as to
8 qualifications for membership, but the question, as phrased,
9 the interrogatory as phrased goes to these regional organiza-
10 tions and their formation activities and the company's
11 participation therein.

12 It is completely open-ended with a "including, but
13 not limited to" and then specifying a couple of specific
14 items.

15 If we could get a definitive question as to the
16 nature of the documents that would fall into this area that
17 the City is looking for, again, I don't see that there
18 would be a problem coming to some agreement and accommodation
19 on that.

20 But at the present time we have no way of indicating
21 from what we have read here even what we have been told this
22 morning to the documents in mind.

23 CHAIRMAN FARMAKIDES: Mr. Hjelmfelt?

24 MR. HJELMFELT: Well, it seems to me we have
25 specified the types of documents we are looking for, the

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1 documents relating to the formation of these entities,
2 documents going to the qualifications for membership, docu-
3 ments relating to CEI's participation in those organizations,
4 which may exclude other municipalities from membership.

5 And if these organizations are going to set the
6 standards that a party must meet in order to join in these
7 interconnections, then the ability to obtain membership to
8 participate in these organizations is relevant as is
9 Cleveland's participation in playing a hand in setting the
10 rules by which interconnected parties are going to have to
11 live.

12 CHARIMAN FARMAKIDES: Is there any chance that
13 perhaps in view of the statement made by the Applicant that
14 you people could talk to each other on this particular
15 Contention 21C?

16 MR. HJELMFELT: We would certainly be willing to
17 talk to them, your Honor, of course.

18 By now I don't have any ideas on how we could make
19 it more limited.

20 CHAIRMAN FARMAKIDES: Well, the Board has a little
21 difficulty in seeing relevance here, sir, and you might talk
22 to them.

23 Now, I would appreciate it if perhaps at the
24 conclusion of this session today you would all talk to each
25 other and then advise the Board by tomorrow in a telephone

1 conference call.

2 Just let us know. We can place it if you
3 wish. With respect to your document request 21C and their
4 Objection 16.

5 Let's go to 17.

6 MR. GOLDBERG: I don't know whether there is going
7 to be time between when we conclude today and tomorrow.
8 I have some doubt about it.

9 CHAIRMAN FARMAKIDES: Call me then tomorrow. We
10 will hold up making a decision until I hear from you.

11 MR. GOLDBERG: Mr. Hjelmfelt will call you
12 tomorrow.

13 CHAIRMAN FARMAKIDES: All right.

14 Oh, I am sorry. Look, call me Wednesday. We will
15 hold off.

16 MR. GOLDBERG: I couldn't call you before Thursday,
17 but Mr. Hjelmfelt will be talking to you.

18 MR. CHARNOFF: I really think, sir, that if we
19 are to get into formation and activities of these other groups
20 we are probably not going to be able to break.

21 If we are going to talk about qualification for
22 membership, I am sure we could turn that over.

23 CHAIRMAN FARMAKIDES: Well, the relevance is
24 something that the Board itself has raised on the record.
25 We mentioned it to you.

1 Now, I thought that is hint enough to you people
2 to get together, if you can.

3 I am going to give you the opportunity of talking
4 to each other.

5 Let's go on to Document Request Number 22, Item 17.

6 MR. HJELMFELT: Yes, sir. The objection here
7 goes to agreements and modifications which are still under
8 consideration or are proposed.

9 Unexecuted agreements are relevant in that they
10 can show the matters of intent, the matters of expected
11 changes in structure.

12 They can show -- they can actually reveal evidence
13 of anticompetitive activity.

14 For example, if one of the CAPCO members has
15 proposed that the City of Cleveland should be admitted to
16 membership and the proposal may have brought elicited
17 responses by others saying no, for various reasons, the
18 City of Cleveland should not be admitted.

19 In that regard, proposals that are under
20 consideration are relevant.

21 CHAIRMAN FARMAKIDES: Sir, do you have any
22 information that such is the case, that proposals under
23 consideration or unexecuted agreements have the information
24 that you have just suggested?

25 MR. HJELMFELT: No, I certainly don't know that

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1 any of the applicants have suggested that the City -- in
2 fact, the indications -- well, such indications that we have
3 had have all been negative, that the City should not be a
4 member of CAPCO.

5 I merely state that as an example.

6 CHAIRMAN FARMAKIDES: All right, sir.

7 Anything else?

8 MR. HJELMFELT: Incidentally, that one, the
9 corresponding objection goes to Document Request Number 9
10 for the other applicants.

11 CHAIRMAN FARMAKIDES: All right.

12 If the applicant has anything further to add to
13 clarify this or especially if there is any means of resolving
14 the issue, why, speak up, sir.

15 MR. REYNOLDS: On this, we will stand on our
16 written submission. I think when you get into asking for
17 drafts and agreements that are under consideration which
18 may be partially drafted or -- that that is totally outside
19 the scope of permissible discovery.

20 We are perfectly willing to hand over the
21 executed agreements and supplements and modifications thereto.

22 CHAIRMAN FARMAKIDES: All right, sir.

23 Mr. Hjelmfelt?

24 MR. HJELMFELT: Okay. That brings us to Item 18
25 which is our Document Request Number 23 and corresponding

1 Document Request Number 13 of the other applicants.

2 I take it that the objection here goes to
3 relevance.

4 These materials relate to the structure and the
5 operations of CAPCO and thereby the structure and operation to
6 a large extent of the wholesale and regional power markets.

7 It seems to me that that is just one of the gut
8 issues in this proceeding.

9 MR. REYNOLDS: I think that Applicant's basic
10 problem with this interrogatory is that it is not limited to
11 CAPCO, that it branches off into minutes and reports of
12 committees that may have nothing whatsoever to do with CAPCO
13 and subcommittees and task forces thereof.

14 I think that that is where we get into a serious
15 difficulty with the kind of --

16 CHAIRMAN FARMAKIDES: Mr. Hjelmfelt, would you limit
17 it to CAPCO?

18 MR. HJELMFELT: No. What we are looking for here
19 is information about pooling and coordination agreements
20 to which the company is a party and while CAPCO is certainly
21 the predominant one in this proceeding because the CAPCO
22 parties are the ones who are building the nuclear facility
23 and they are the applicants, they don't constitute the entire
24 wholesale market. They don't constitute the entire regional
25 power exchange market. And, therefore, the company's

1 relationship with other parties who would engage in power
2 pooling and coordination is relevant. --

3 MR. BREBBIA: Mr. Hjelmfelt, the entire wholesale
4 market, what is the entire wholesale market in terms of the
5 statement that you have just made that these do not --
6 CAPCO members do not constitute the entire wholesale market?

7 MR. HJELMFELT: I think the wholesale market, in
8 terms of available bulk power suppliers would be the bulk
9 power suppliers in an area which economically can reach into
10 the CAPCO area and sell bulk power, bulk power suppliers that,
11 if transmission was available, could service, for example,
12 the City of Cleveland. And that may be parties in Ohio other
13 than CAPCO parties.

14 MR. BREBBIA: Are you talking about a geographical
15 market now as being within the CAPCO geographical area or without
16 it or --

17 MR. HJELMFELT: I would say that it includes --
18 that the wholesale market would certainly encompass the CAPCO
19 area and I would think it might very well be larger.

20 MR. BREBBIA: How much larger?

21 MR. HJELMFELT: Well --

22 MR. BREBBIA: Are you talking about the whole
23 United States?

24 MR. HJELMFELT: No. I think that the ultimate
25 determination of where the boundaries of the wholesale market

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1 is might well be an engineering technical problem that I
2 certainly can't answer at this point. ..

3 But, for example, PASNY is a potential bulk power
4 supplier in the wholesale market which includes Cleveland.

5 MR. BREBBIA: You say you don't know what the
6 boundaries of the wholesale market are. You simply know they
7 are not bounded by the CAPCO membership. Is that what you
8 mean to say?

9 You don't have any idea what it is?

10 MR. HJELMFELT: I could say in all probability it
11 excludes the West Coast and to lop off other areas, but
12 I don't have at this time the technical information to say
13 at what point bulk power supply is no longer feasible to
14 consider part of that market.

15 I think that is something to be developed, but the
16 discovery and other part of the testimony --

17 MR. RIGLER: Do you know of other pools to which
18 the company is a party?

19 MR. HJELMFELT: I know the company is inter-
20 connections with other groups, for example the PJM group, and
21 I believe there are others, but I am not aware of them right
22 now.

23 CHAIRMAN FARMAKIDES: Do we have any idea of how
24 many committees there are here, Mr. Reynolds?

25 MR. REYNOLDS: Are you talking about outside of

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1 CAPCO now?

2 MR. RIGLER: Yes.

3 MR. CHARNOFF: CEI, for example, is interconnected
4 with PJM and the American Electric Power System. They are
5 members of ECAR which has members which are interconnected
6 with other systems and by virtue of the various regional inter-
7 connection systems there is in effect a countrywide inter-
8 connection system, so it is very difficult to answer the
9 question in the way in which it is posed.

10 MR. RIGLER: Well, how many major groups like
11 PJM and ECAR?

12 MR. CHARNOFF: I am not sure. There are nine
13 reliability councils and I don't know how many subcommittees
14 there are in each of those.

15 There are groups like ECAR and Maine and I
16 forget the group that is immediately northwest of Maine, where
17 Northern States, Minnesota is connected.

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Tape # 19

1 CHAIRMAN FARMAKIDES: I'm not clear, Mr. Charnoff.
2 How many pooling or coordination agreements is CEI a party to?

3 MR. CHARNOFF: CEI is a member of CAPCO. We are
4 interconnected with companies who are part of our regional
5 groups such as PJM, Maine, and so on, and then companies within
6 those groups are interconnected so that theirs flow.

7 MR. RIGLER: But how many direct contracts does
8 the company have, to which the company has directly assumed
9 obligations under?

10 MR. CHARNOFF: CEI, part of CAPCO is contracted with
(?) 11 Pennil Lack which is part of PJM an Ohio power company which
12 is part of American Electric Power system.. Ohio Edison..

13 MR. KAYUHA: In addition to our CAPCO indexes, we're
14 interconnected with Monongahela Power which is a division
15 of West Penn, Dayton Power and Light, Ohio Power and Columbus
16 and Southern.

17 CHAIRMAN FARMAKIDES: So that is five. There is
18 a committee established under each of these?

19 MR. CHARNOFF: It is our understanding that committees
20 are established.

21 MR. RIGLER: How often do these committees meet?

22 MR. CHARNOFF: We have no idea. We can find out.

23 Let me ask what the situation is with Duquesne Light Company.-

24 MR. OLDS: Our response to that would be that
25 we are in one pool which is CAPCO. We are in common with all

elw-2

1 the other companies in our general traffic area, part of the
2 ECAR group which is a coordinating arrangement for reliability.
3 In effect, mandated by the federal government, beyond which, its
4 sponsorship is exactly official in that respect and we have inter-
5 connections but we would not construe interconnections to fall
6 within the ambit of this question.

7 CHAIRMAN FARMAKIDES: I think at least from the
8 point of myself, I agree with you, neither would I.

9 MR. CHARNOFF: Mr. Henry of Toledo Edison is not
10 here.

11 MR. OLDS: I can speak to some extent for Mr.
12 Henry. I don't believe they are in any other pool, but they
13 do have interconnections to the north and to whatever pool
14 encompasses Michigan and also to the west, I believe, to
15 whatever pool encompasses Indiana. I don't know more than that.

16 CHAIRMAN FARMAKIDES: I think we have enough
17 information on this one. We can proceed to the next one,
18 please.

19 MR. HJELMFELT: Our document request number 25 and
20 document request number eight to the other applicants. This
21 again goes to the applicant's structure of the market and
22 what might exist in the wholesale market.

23 For example, if some or all of the CAPCC members
24 were joined together in a holding company, such limited possi-
25 bilities for competition as might exist in the wholesale market
or the regional power exchange market which are presently

elw-3

1 existing would disappear.

2 Documents that would be produced might very well
3 discuss the effects of this argument on the market. And
4 whether or not a holding company is desirable for those effects.

5 MR. REYNOLDS: I don't really think that I can
6 expand on what I have already said and written unless there's
7 a question that you have.

8 MR. CHARNOFF: The point to be made is that there
9 is no holding company in existence.

10 MR. REYNOLDS: We know of no holding company and
11 unless they have something in mind, it is more like part of
12 a fishing expedition rather than constructive discovery.

13 MR. GOLDBERG: The request doesn't say there is
14 one in existence. It says referring or relating to the for-
15 mation.

16 MR. HJELMFELT: We understand that there was a
17 study at least with respect to the formation of a holding
18 company.

19 Of course, if there are no documents, there are no
20 documents and that takes care of their response to it.

21 If there are documents and we believe that there
22 was some conversation looking towards the formation of such
23 holding company, then there might be documents in which case
24 a response would be called for.

25 MR. CHARNOFF: There was a public announcement made

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1 by some of these companies to the effect that they were going
2 to examine the possibility of forming a holding company.
3 No dispute about that. The holding company was and has not been
4 informed.

5 The question of relevance of this kind of request
6 into an inquiry that some of the companies were making is some-
7 thing that certainly remains to be established in terms of the
8 province of the Atomic Energy Commission in this particular
9 hearing.

10 If there is going to be a holding company, it will
11 be reviewed and considered by the Securities Exchange Commission.

12 MR. BREBBIA: Well, nevertheless, that doesn't answer
13 the question and it is conceivable to me that there could be
14 relevance to such documents were they in existence, I'm not
15 saying there is relevance, I'm saying it is conceivable to me
16 that there could be relevance to the intentions and desires
17 of the members of CAPCO to create a holding company for some
18 reason.

19 MR. CHARNOFF: I must say that the City of Cleveland
20 articulate such relevance in terms of any of the issues that
21 are in this hearing.

22 If we allow this kind of question, the whole concept
23 of contentions as being debated as something that defines the
24 parameters of discovery, it would be a very loose concept.

25 MR. BREBBIA: Well, whatever, certainly if there are

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1 documents in existence, this Board does not have a problem with
2 it and it would be an awfully lot easier for this Board to
3 decide on a lot of these matters of discovery if it knew when
4 there were any documents in existence.

5 It is pretty obvious if the Board knew that there
6 were not any documents in existence that it would pass the ques-
7 tion on.

8 MR. CHARNOFF: I'm certain there must be some documents
9 in existence. We have not said there are no documents. If the
10 companies announced that they were requiring into that possibil-
11 ity several years back knowing how you title work, I'm sure
12 there are documents.

13 MR. REYNOLDS: To interject a quick point, I'm not
14 sure that the presence or absence of documents at this particu-
15 lar stage is determinative of the propriety of the question
16 or the admissibility of the interrogatory.

17 MR. BREBBIA: The Board has not decided upon the
18 relevance as yet. The Board simply said only if it knew there
19 were no documents in existence it wouldn't have to waste time
20 debating as to whether or not they are relevant.

21 MR. CHARNOFF: I think we can put your mind at rest,
22 there are documents.

23 MR. BREBBIA: Thank you.

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1 MR. HJELMFELT: May I comment that if the proposal
2 has been abandoned, the reasons for abandonment might also be
3 relevant with respect to this proceeding. We're ready to go
4 on.

5 CHAIRMAN FARMAKIDES: Yes, I am too. All right,
6 Mr. Hjelmfelt.

7 MR. HJELMFELT: This is our document, Document
8 Request No. 26 which raises an objection only, I understand
9 the objection only goes to power pooling arrangements under
10 consideration and much of what I have stated again about
11 documents which are in preparation or under consideration is
12 relevant hereto. They can demonstrate company objectives
13 and indicate matters that -- some things that the company thinks
14 it's important and wants to have or should have an agreement,
15 and it also can indicate matters that the company refuses to
16 agree to. For example, refusal to wheel power for the City
17 of Cleveland, whether similar refusals would be made elsewhere,
18 whether a refusal to pool power with one party would also --
19 a similar refusal would be made in other situations.

20 CHAIRMAN FARMAKIDES: Mr. Brebbia.

21 MR. BREBBIA: Mr. Reynolds, do I take it from your
22 objection that you do not object to producing the documents,
23 the contracts?

24 MR. REYNOLDS: That's correct. We have no objection
25 to that.

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1 MR. BREBBIA: You're only talking about, as your
2 objection states, the power pooling arrangements? ..

3 MR. CHARNOFF: Under consideration.

4 MR. REYNOLDS: Under consideration.

5 MR. BREBBIA: Well, then those power pooling
6 arrangements, wherein you have contracts, you are willing to
7 produce?

8 MR. REYNOLDS: That's correct.

9 MR. CHARNOFF: Yes, sir.

10 CHAIRMAN FARMAKIDES: 27, or rather Document
11 Request Number 27, Item 21.

12 MR. HJELMFELT: I think we're ready, -- we'll
13 stand on our request, and we'll go up to there, Item 24, which
14 is our Document Request 32.

15 CHAIRMAN FARMAKIDES: I beg your pardon. I didn't
16 understand that. We are now at Applicant's Item 21.

17 MR. HJELMFELT: Yes, sir, I'm waiving any further
18 argument until I get up to Item 24. In other words, we will
19 just stand on the record as it's on those intervening objections.

20 CHAIRMAN FARMAKIDES: Hold on, then.

21 I think the Board might have a couple questions.

22 MR. RIGLER: Mr. Reynolds, are you saying in your
23 objection, Number 21, that you don't understand what the
24 interconnection systems group is?

25 MR. REYNOLDS: That's correct.

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1 MR. RIGLER: In other words, that doesn't mean
2 anything to you?

3 MR. REYNOLDS: It doesn't mean anything.

4 MR. BREBBIA: Is the reporter hearing all of these
5 answers?

6 MR. HJELMFELT: The Applicants are objecting because
7 they don't know what the interconnections systems group is.
8 It seems to me if they're participants, and Cleveland believes
9 they are, they know what it is.

10 If they are not participants in the interconnections
11 systems group, they will have no documents, and there will be
12 nothing to respond to. So I don't think -- the City is not
13 familiar with the activities of the interconnection systems
14 group and all its members.

15 CHAIRMAN FARMAKIDES: Would that be a sufficient
16 answer, then, sir, insofar as you are concerned?

17 MR. HJELMFELT: If they don't know what it is,
18 that's a sufficient answer because I assume they have no
19 documents. They would know what it was if they had documents.

20 CHAIRMAN FARMAKIDES: Mr. Charnoff, are you prepared
21 to state you don't know what the interconnections group is,
22 or Mr. Reynolds?

23 MR. CHARNOFF: That's correct.

24 CHAIRMAN FARMAKIDES: All right. That's the answer
25 then to that particular interrogatory. 20 has been withdrawn.

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1 MR. RIGLER: Right, there's an agreement on it.

2 MR. CHARNO: Mr. Chairman, could it be possible that
3 there was a misspelling on that -- in that last one relating
4 to the ISG that might be the source of a confusion?

5 MR. BREBBIA: Are we sparring around here? What is
6 the group, what is the interconnection systems group?

7 MR. HJELMFELT: It's our understanding that Cleveland
8 was a member of a group, the interconnection systems group,
9 which we assume has some relationship to interconnected utilities,
10 as its name would suggest. We would like to find out what that
11 group is and how it relates, if at all, to the wholesale and
12 power exchange market.

13 CHAIRMAN FARMAKIDES: All right, look, the applicant
14 reflects, insofar as I am concerned, the applicants know of
15 no interconnections systems group.

16 Mr. Charno, do you have something else?

17 MR. CHARNO: I believe the correct name is
18 interconnected systems group.

19 MR. GOLDBERG: Interconnected.

20 CHAIRMAN FARMAKIDES: Mr. Reynolds, I hope there's
21 no confusion.

22 MR. CHARNOFF: We don't know what that is. We still
23 stand.

24 CHAIRMAN FARMAKIDES: All right, let's proceed,
25 gentlemen. Document 28 has been withdrawn. We are now at --

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MR. HJELMFELT: No, we have reached an agreement on a modification on our Document Request 29. Their Item 23, our Document Request 31 was withdrawn, which would bring us to Item 24.

CHAIRMAN FARMAKIDES: Wait a moment.

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1 (Discussion off the record.)

2 CHAIRMAN FARMAKIDES: On the record. --

3 Let's go back and clarify.

4 MR. HJELMFELT: Yes, sir, document request 27,
5 there is no corresponding document request to the other
6 Applicants.

7 CHAIRMAN FARMAKIDES: All right.

8 MR. HJELMFELT: Document request No. 28, the
9 corresponding request is document request number 12.

10 Document request number 31, which is withdrawn,
11 there is no corresponding document request.

12 CHAIRMAN FARMAKIDES: All right.

13 MR. HJELMFELT: I believe that brings us to CEI's
14 item number 24. Our document request to CEI number 32 and
15 the corresponding document request number 26.

16 This document request is relevant to demonstrating
17 the impact of nuclear facilities' additions to the Applicants'
18 bulk power supply resources and to showing the resulting
19 effects on the competitive situation.

20 CHAIRMAN FARMAKIDES: Sir, I think one of the
21 objections, as I read the objections here, is that the
22 Applicant is saying that the cost studies themselves might
23 not be so objectionable, but all the documents relating to
24 the cost studies is a tremendous burden.

25 Mr. Reynolds, is that essentially your position?

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1 MR. REYNOLDS: Essentially, and it contains a
2 lot of highly confidential material. --

3 CHAIRMAN FARMAKIDES: Could you respond, Mr.
4 Hjelmfelt?

5 MR. HJELMFELT: With respect to the fuel supply
6 and the highly confidential information talked about there,
7 I think we discussed that earlier with respect to, I believe,
8 16-J, with respect to our request for fuel supply contracts.

9 What we're interested in here are the cost
10 studies --

11 CHAIRMAN FARMAKIDES: -- themselves.

12 MR. HJELMFELT: -- themselves, not necessarily
13 in all the backup materials which again I'm not certain
14 what they might be referring to as to all the voluminous
15 amount of material lying behind the studies.

16 CHAIRMAN FARMAKIDES: Mr. Reynolds, could you
17 make "the cost studies themselves" available?

18 MR. CHARNOFF: Yes, we indicated in that objection
19 we would, sir.

20 CHAIRMAN FARMAKIDES: Would that be sufficient?

21 MR. HJELMFELT: I think if we had the cost studies,
22 we could determine then if it was necessary for us to seek
23 anything behind them so at least for the immediate time we
24 would be satisfied with cost studies.

25 CHAIRMAN FARMAKIDES: All right.

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Let's proceed.

MR. HJELMFELT: I believe this brings us to item 25. Is our document request number 35, and I believe there is no corresponding request.

Again this objection goes, as I recall, to the proposed and draft statements and documents, and I really think the objection really goes more to the weight such documents are entitled to as evidence rather than whether they're discoverable, and I have already discussed on a couple of occasions why we would like to propose in draft type documents so I won't burden the record further with that.

CHAIRMAN FARMAKIDES: Mr. Reynolds, anything further?

MR. REYNOLDS: Nothing further than is stated.

CHAIRMAN FARMAKIDES: All right, next one.

MR. HJELMFELT: Yes, that brings us to item number 26, document request 37, and the corresponding document request 14. I believe the objections are to each and every part. Number 37-A goes to the existence of competition and to CEI's reaction to competitive pressures. That is, the cost analysis or estimates of other Ohio electric utilities systems operations comparison of cost, et cetera.

From this, we would determine whether CEI's activities are related to competitive pressures from other electric

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1 utilities and whether such competitive pressures actually
2 exist. ..

3 With respect to 37-B, where we're asking for
4 studies of joint ownership or other participation considered
5 proposed or agreed upon by the company with other electric
6 utilities, again these would show the terms of various
7 hour exchange agreements, they might show again what
8 competitive pressures exist, they would show what type of
9 terms had been offered to other parties for comparison to
10 the types of terms, for example, that have been offered to
11 the city and certainly studies of joint ownership might
12 very well have discussions of the competitive results of a
13 joint ownership, for example, of a generating facility or a
14 transmission line as opposed to separately constructing the
15 same.

16 Again with respect to 37-C, we're asking for
17 present and future planned interconnections. When we're
18 looking at the wholesale market and particularly the
19 regional hour exchange market and the availability of
20 transmission facilities to other parties, I think inter-
21 connections with other electric utilities which CEI has and
22 their proposed capacities, both those planned, present and
23 future, are readily relevant.

24 With respect to 37-D, requesting information
25 relating to the company's line extension policy, including

1 modifications or interpretations thereof, the kind of
2 information we're looking for here is documents relating to
3 the policy. Electric utilities frequently have a policy as
4 to when they will extend the line.

5 For example, it might be that if a new industry
6 is constructing a facility, say, four-tenths of a mile
7 away from an existing subtransmission line of the company,
8 the company's policy may be that if the proposed revenues
9 from that customer will pay back the cost of the line exten-
10 sion within two years or the revenues -- two years' revenues
11 equal the cost of the line extension, the company will make
12 the line extension.

13 Otherwise, the cost of the line extension will have
14 to be borne by the customer. I don't know whether that's
15 CEI's particular policy.

16 MR. RIGLER: Suppose it were; what would be the
17 relevance?

18 MR. HJELMFELT: Well, we'd like to know what that
19 policy is because the policy can be changed and altered in
20 order to forestall other parties from constructing lines.

21 For example, if a large electric -- suppose a
22 large industry which has some of its own generation or is
23 going to install some large generation, and it also wants
24 to purchase power from CEI, now, it might be that under
25 the normal line extension policy, CEI would say to the

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1 company, well you're going to have to pay to construct this
2 transmission or subtransmission line two miles to get out to
3 reach us.

4 However, CEI doesn't want somebody else owning
5 some transmission line in their area because perhaps that
6 transmission line would then create a situation where the
7 City of Cleveland could also interconnect and perhaps
8 share reserves or something with this industry which has
9 some generation and therefore CEI changes its line extension
10 policy to prevent or forestall the construction of transmis-
11 sion lines by this other party, and that is the sort of thing
12 that we're interested in looking at here.

13 MR. BREBBIA: Do you have any information to the
14 effect that there are cases of this type that have occurred
15 to the knowledge of your client?

16 MR. HJELMFELT: Not with respect to CEI capital
17 parties, we have no specific instances in mind.

18 With respect to F&G, which are basically asking
19 for reliability information, partly this information is
20 needed to determine the reliability on the CEI system prior
21 to the advent of nuclear power or to measure the effect of
22 nuclear power on the reliability of the system.

23 I think it's been brought out on several occasions
24 in previous prehearing conferences that reliability on the
25 two systems is an important factor in retail competition

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between the city and CEI, and accordingly the reliability of the CEI system is in issue as a comparison to what the reliability that the city can offer, as if, of course, any changes in that reliability which would occur as a result of the advent of nuclear capacity in the CEI system.

With respect to Number 37-H, requesting outage time, here we don't want any backup data. We simply would like the outage time in 1973 per customer per year, and again this goes to comparative purposes of reliability.

As to just what is the reliability situation as far as competition in the retail market exists goes.

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CHAIRMAN FARMAKIDES: Let's proceed.

Mr. Hjelmfelt?

3 MR. HJELMFELT: We're up to our objection item 34
4 which goes to our document request number 37-I. We're with-
5 drawing our document request 37-I.

6 MR. OLDS: Is there a cross reference?

7 MR. REYNOLDS: 14.

8 MR. HJELMFELT: I have no cross reference. I don't
9 believe there is one.

10 MR. GOLDBERG: You get no benefit out of that one.

11 MR. REYNOLDS: Excuse me, I believe 37-I is 14-H, is
12 it not. I believe there is a cross reference.

13 CHAIRMAN FARMAKIDES: 37-I, and you --

14 MR. REYNOLDS: I believe it is 14-H.

15 CHAIRMAN FARMAKIDES: All right, let's check 14-H.

16 MR. REYNOLDS: I would hope that they are going to
17 withdraw 14-H.

18 MR. OLDS: Yes, it seems to be the same.

19 CHAIRMAN FARMAKIDES: It looks similar but we'll leave
20 that to Mr. Hjelmfelt.

21 MR. HJELMFELT: Yes, 14-H is a cross reference and
22 we will withdraw 14-H as well.

23 CHAIRMAN FARMAKIDES: Is there anything else, sir?

24 MR. HJELMFELT: I have nothing else on 37.

25 CHAIRMAN FARMAKIDES: All right, could you respond

jeri 22-2 1 to 37, Mr. Reynolds?

2 MR. REYNOLDS: Let me state that generally I will
3 stand on the response that has been submitted to the Board in
4 writing where we have addressed ourselves to each of the
5 separate lettered paragraphs in 37 and the corresponding inter-
6 rogatory 14.

7 CHAIRMAN FARMAKIDES: All right, sir.

8 MR. REYNOLDS: I would like to make an additional
9 point or perhaps emphasize a point that is in the written
10 material and that is that as to the Applicants other than
11 Cleveland Electric Illuminating Company, it seems that there is
12 no basis and I have not heard Mr. Hjelmfelt in his comments
13 this afternoon indicate any basis why any of this material is
14 relevant to this proceeding insofar as we are talking about the
15 Applicants whose service areas are remote from the City of
16 Cleveland and are not engaged in any direct competition whatso-
17 ever with the City of Cleveland.

18 Their extension line policies, their plans, their
19 reliability data, outage time, future planning has no relevance
20 at all to any of the matters that the City of Cleveland is
21 raising in its petition or sought to discuss or argue about in
22 this proceeding and it, I think, goes well beyond the permiss-
23 ible bounds of discovery to start asking these types of ques-
24 tions to the other Applicants and that is over and above the
25 general objection that CEI and the other Applicants have to the

jeri 22-3 1 nature of the requests and the broad terminology in which they
2 are phrased where there's no way to, I think, no reasonable way
3 to determine in most cases whether we have complied or not com-
4 plied even after a conscientious file search and that is one
5 of the basic difficulties with this kind of interrogatory.

6 I think that insofar as CEI is concerned, I can
7 state that where we, if we are talking on paragraph 37-E, the
8 company's line extension policy, if that is limited simply to
9 the policy of the distribution lines of CEI, there is no diffi-
10 culty with providing that information, and similarly if the --

11 CHAIRMAN FARMAKIDES: Hold on on this one. Would
12 that be sufficient, Mr. Hjelmfelt?

13 MR. HJELMFELT: I would think we would want subtrans-
14 mission as well. I believe that some large and particularly the
15 types -- the types of customers who are apt to maybe construct
16 some competing type transmission would, I believe, be likely to
17 also be served off of a subtransmission system rather than a dis-
18 tribution system so I wouldn't want to limit it to a distribution
19 system.

20 MR. REYNOLDS: We would agree to that.

21 CHAIRMAN FARMAKIDES: All right, fine. That is 37-E.

22 MR. REYNOLDS: And with reference to 37-H, I believe,
23 Mr. Hjelmfelt stated that they were interested not in the back-
24 up material but just in the outage reports for 1973 per customer
25 per year and, again, only as to CEI, there would be no problem

jeri 4 1 with producing that material as limited.

2 CHAIRMAN FARMAKIDES: Mr. Hjelmfelt, would that be
3 satisfactory, sir?

4 MR. HJELMFELT: Yes, we didn't want the backup
5 material on that. We just want kind of the end result of it.

6 CHAIRMAN FARMAKIDES: In other words, then the com-
7 pliance of the Applicant as he has stated it just now with re-
8 spect to H is sufficient?

9 MR. REYNOLDS: Again I emphasize that with reference
10 to CEI, that the other Applicants find that these paragraphs are
11 totally irrelevant and have no bearing.

12 CHAIRMAN FARMAKIDES: We'll get down to the other
13 Applicant. I think we're going to handle those separately.

14 MR. REYNOLDS: I understand but they do overlap.

15 MR. RIGLER: With respect to number 28 which focuses
16 on document request 37-C, do any of you have any proposals for
17 limiting the number of documents? The objection in some part
18 went to burden.

19 MR. REYNOLDS: We would be receptive to any sugges-
20 tions on limitations. Our feeling is certainly as to future
21 planned interconnections and proposed capacity and status that
22 that is a remote area that does not bear on what the situation
23 is or in terms of the generation transmission of the Perry
24 facilities, it is not relevant.

25 MR. HJELMFELT: With respect to 37-C, present and

jeri 22-5 1 future planned interconnection with other electric utilities
2 and proposed capacity and status, we're not interested in these
3 matters that the CEI has suggested they respond with, like right
4 of way, clearance, right of way inspection, replacement and
5 modification, relay settings and -- what we are looking for
6 here again is -- are documents relating to the types of inter-
7 connections that are planned, the future interconnections, who
8 is going to be interconnected with who and on what kind of terms.

9 MR. RIGLER: Would you be able to rephrase that so
10 that if we decided to overrule the objection as to relevance '
11 we would still have some limitation on documents and could you
12 report in that phone call to the Chairman on Thursday with respect
13 to whether you could work out a limitation on the number of
14 documents?

15 MR. HJELMFELT: We'll undertake to -- we can limit
16 our request, I'm sure to exclude a lot of matters that they
17 paraded but whether we can reach an agreement, I don't know, of
18 course.

19 CHAIRMAN FARIAKIDES: We'll add then 37-C to 21-C
20 as items of discussion in our telephone call and rather than
21 Thursday I would prefer to have it earlier if at all possible
22 so we can issue our order earlier. If we can't have it earlier
23 than Thursday, Thursday would be all right. As a matter of fact,
24 if you people talk about 37 generally and reach any other
25 agreements in terms of limiting discovery or more precisely

jeri 22-6 1 clarifying what you had in mind let me know at that time too.

2 Okay, let's go to document request no. 38.

3 MR. HJELMFELT: With respect to this document request,
4 which I believe the corresponding document request is no. 15,
5 we would limit that to those responsible for, in charge of the
6 work involved in a study of generation or transmission service
7 or construction as set out there rather than each and every
8 engineer. We just want the ones in charge.

9 CHAIRMAN FARMAKIDES: Of Davis-Besse and Perry?

10 MR. HJELMFELT: No, it is not limited to Davis-Besse
11 and Perry. Again, I think the matters we've got to concern our-
12 selves with go to all the generation and transmission that makes
13 up the marketplace in which this nuclear power is going to be
14 infused.

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1 CHAIRMAN FARMAKIDES: I assume the time frame that
2 you're talking about is whatever time frame the Board finally
3 sets.

4 MR. HJELMFELT: Yes, sir. Where we want noted
5 a particular time frame we include a catchall at the start
6 of our request from January 1, 1964, and if that's changed,
7 it would apply similarly.

8 MR. BREBBIA: Mr. Hjelmfelt, you're saying that
9 you want supervisory types, is that what you said?

10 MR. HJELMFELT: Yes, sir, we're interested
11 in the names of the persons that would be looked to as being
12 the man in charge.

13 MR. BREBBIA: The man in charge is vague.

14 MR. HJELMFELT: Supervisor, your term.

15 MR. CHARNOFF: Even that's not a particularly
16 helpful definition in any large organization. There are
17 people in charge.

18 MR. BREBBIA: What kind of engineers could you
19 have in this organization ?

20 MR. CHARNOFF: Good ones, sir.

21 MR. BREBBIA: I'm sure of that. What kinds of
22 title categories do you have for them?

23 MR. CHARNOFF: We have a vice president of engineer-
24 ing.

25 MR. BREBBIA: He's your head engineer?

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1 CHAIRMAN FARMAKIDES: How many people report to
2 him, sir?

3 MR. HAUSER: About, I think, six department heads.

4 MR. BREBBIA: Engineers all?

5 MR. HAUSER: Yes, systems planning engineers,
6 transmission and distribution engineers, civil and mechanical
7 engineering, plant and substation engineering, contract
8 construction.

9 CHAIRMAN FARMAKIDES: Are those the people you have
10 in mind, Mr. Hjelmfelt? That first tier under the vice
11 president?

12 MR. HJELMFELT: Yes, sir. Your Honor, I think
13 we have asked for personnel charts and rosters of their
14 organizational makeup and if these people would be indicated
15 on those then we wouldn't need the material here, so maybe
16 that's the answer.

17 MR. HAUSER: The department heads would appear on
18 the organizational chart.

19 CHAIRMAN FARMAKIDES: By the department heads, you
20 mean that first tier under the vice president?

21 MR. HAUSER: That is correct.

22 CHAIRMAN FARMAKIDES: And they would appear on the
23 organization chart?

24 MR. HAUSER: Yes.

25 CHAIRMAN FARMAKIDES: Would that meet your needs

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1 then, sir?

2 MR. HJELMFELT: The only thing it wouldn't include,
3 I believe, would be outside consultants who would be retained
4 and if there are any of those, we would like their names.

5 MR. REYNOLDS: For what purpose?

6 MR. HJELMFELT: For generation transmission
7 service, design studies.

8 MR. CHARNOFF: There are any number of consultants
9 for example that are retained in connection with the design
10 and construction of a nuclear power plant. Do you want the
11 people who get intimately involved with the design of the
12 plant whether for safety reasons or other reasons? Is that
13 what you're looking for?

14 MR. HJELMFELT: We're not really interested in the
15 safety aspects. What we want to know is the people who
16 would be knowledgeable to the generation and transmission
17 services for the purpose of taking depositions if we feel
18 that we need depositions in these areas.

19 MR. CHARNOFF: I know why you're asking. I guess
20 I'm trying to follow up the question of -- we understand, I
21 think what you were aiming at in terms of the supervisory
22 level and we'll give you that.

23 When it comes to consultants, however, we have no
24 such definition from what you have just stated.

25 CHAIRMAN FARMAKIDES: Look. let's proceed here.

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1 The Board has this thought in mind and clarify it if it
2 is not correct and that is that we're talking about experts
3 in the area of generation and transmission services. The
4 rest of that sentence means very little to me, if anything,
5 so we're talking about supervisory people of the tier
6 immediately below the vice president having generation and
7 transmission expertise and we're also talking, as I understand
8 it, Mr. Hjelmfelt, about consultants or others retained for
9 that same type of service, generation and transmission
10 service. Mr. Hjelmfelt, is this correct, sir?

11 MR. HJELMFELT: Yes, sir.

12 MR. HAUSER: Maybe I could help, for the most part,
13 my understanding is that this would be covered by the vice
14 president of engineering and the first tier below him. To
15 the extent any consultants had been retained in this area, it
16 would be work done for one of these people, either the vice-
17 president of engineering or the tier below them so that if
18 you would take their depositions, they would be knowledgeable
19 of what had gone into a system, the work that was done
20 primarily internally.

21 CHAIRMAN FARMAKIDES: Mr. Hjelmfelt, would that
22 be sufficient, sir?

23 MR. HJELMFELT: I'm not sure --

24 CHAIRMAN FARMAKIDES: It appears to me a very
25 helpful suggestion.

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1 MR. HJELMFELT: Is he suggesting that they don't
2 furnish the name of the consultant?

3 CHAIRMAN FARMAKIDES: Essentially that's what he's
4 saying. He's saying that those six people, the first tier
5 under the vice president, would be the only ones that are
6 really knowledgeable in this area and that you in the pursuit
7 of the information that you seek would be able to obtain any
8 further information regarding consultants from one of these
9 six or all of them.

10 MR. HJELMFELT: That's acceptable to us.

11 CHAIRMAN FARMAKIDES: All right, fine. Let's
12 proceed.

13 We'll consider then that 38 is formulated accord-
14 ing to our discussion and that the commitments of the appli-
15 cant as stated in the record will suffice.

16 Let's proceed, sir.

17 MR. HJELMFELT: Sir, I believe that takes us to
18 item 36, our document request number 39. I believe the
19 corresponding document request is number 19.

20 The information we are asking here, we would
21 agree to limit our request to those studies referred to by
22 the applicants in their motion for summary disposition in the
23 attached affidavit, which I think makes a very specific
24 request.

25 CHAIRMAN FARMAKIDES: I don't have that motion

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1 here with me.

2 MR. REYNOLDS: We have no problems with that.

3 CHAIRMAN FARMAKIDES: What studies are you talking
4 to, sir?

5 MR. HJELMFELT: I don't have that motion with me
6 either. They're set out in the motion and in the affidavit,
7 a series of studies that were made by experts with respect
8 to the low flow and the company system and on CAPCO system,
9 I believe, and those are the studies we're asking for copies
10 of.

11 MR. REYNOLDS: Those are the studies that --
12 we accept that. That is acceptable.

13 CHAIRMAN FARMAKIDES: In other words, in view of
14 that clarification of Mr. Hjelmfelt with respect to his
15 request 39, you will withdraw your objection, item 36?

16 MR. REYNOLDS: That's right. I assume that that
17 will be satisfactory both as to Cleveland Illuminating Company
18 and as to the other applicants.

19 MR. HJELMFELT: That is correct.

20 CHAIRMAN FARMAKIDES: All right, fine. Let's
21 go then to item -- document request number 40.

22 MR. HJELMFELT: Yes, sir, and the corresponding
23 request is document number 21. We're ready to limit that
24 to matters which already been made public to press releases
25 and such data as that.

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1 CHAIRMAN FARMAKIDES: Mr. Reynolds, that would
2 seem as though that would be agreeable. If it has already
3 been released to the public, why, I think the only thing,
4 then, that you're asked to do under that request is to bring
5 that together.

6 Mr. Hjelmfelt, is that correct, sir?

7 MR. HJELMFELT: Yes.

8 CHAIRMAN FARMAKIDES: Mr. Reynolds?

9 MR. REYNOLDS: I guess there's the general ob-
10 jection that it is available to them if it is in a press
11 release. It certainly is available to them through another
12 source.

13 If their request is to search through our files
14 for all press releases or articles relating to this, that
15 to me is a burdensome request. Certainly, to the extent it
16 eliminates the additional documentation described, we would
17 accept it.

18 CHAIRMAN FARMAKIDES: What did you mean, sir, when
19 you said that the documents related here consist of thousands
20 of separate pieces of paper?

21 Could you give me a handle, sir?

22 MR. REYNOLDS: I don't think that is an over-
23 statement. I think that pertains essentially to the internal
24 documents. My problem with the limitation is that I'm not
25 sure that it reduces the search that is contemplated by

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1 this interrogatory to now say that we will go through and
2 pick out press releases.

3 MR. RIGLER: Don't you have a public relations
4 department?

5 MR. REYNOLDS: Yes.

6 CHAIRMAN FARMAKIDES: And don't they keep a
7 chronological file of the press releases?

8 MR. HAUSER: Yes.

9 CHAIRMAN FARMAKIDES: So what is the burden?

10 MR. REYNOLDS: All right, I'm told that we can
11 find the press releases.

12 CHAIRMAN FARMAKIDES: All right, especially in
13 view of the fact that I understand you have indexes.

14 MR. REYNOLDS: That is correct.

15 CHAIRMAN FARMAKIDES: All right, fine.

16 MR. REYNOLDS: This is, then, modified to pertain
17 only to press releases?

18 CHAIRMAN FARMAKIDES: This is modified to public
19 disclosures.

20 All right, let's go to your request 41.

21 MR. HJELMFELT: Our request No. 41 and the cor-
22 responding document request No. 24; what we're looking for
23 here is information which will, one, permit us to make
24 any studies we might make for comparison to be based on the
25 same factors that the company uses in order to have a valid

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1 comparison. In addition, we are interested in determining
2 whether the advent of nuclear power is going to change any
3 of the existing factors on the company's system.

4 Again, we are not interested in all the big bulk
5 of backup documents.

6 CHAIRMAN FARMAKIDES: Mr. Reynolds, does this
7 change your position, sir, in any way?

8 MR. REYNOLDS: No, I don't see how this has any
9 relevance at all.

10 I guess maybe Mr. Hjelmfelt can help me, but
11 this is totally, as near as I can determine, totally irrele-
12 vant. I see that it is certainly tremendously burdensome
13 and it is involving a lot of cost element information which
14 is confidential which our competitor is now trying to
15 delve into and search through, and there's no indication
16 from my reading of it that it has any bearing at all on the
17 issues in this proceeding.

18 CHAIRMAN FARMAKIDES: Mr. Hjelmfelt, could you
19 clarify that further, sir?

20 MR. HJELMFELT: Yes. For example, if the City of
21 Cleveland determined that in presenting its case it should
22 present a study showing the relative costs, for example, of
23 generation, for example, costs to the city of generating
24 as an independent isolated entity as compared to the costs
25 of generation incurred by the CAPCO group or by CEI by

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1 virtue of its interconnections and its ability to share
2 reserves and take the advantage of other things that accrue
3 from power pooling and coordination, coordinated development
4 and staggered construction and what-have-you, all of which
5 are denied to the City of Cleveland.

6 Certainly we wouldn't want to make such a study
7 only to come in and say, "Yes, but none of those factors
8 which you used in your study are relevant there. They're
9 incorrect factors. We used these factors."

10 I think it is obvious that we should have those
11 factors now to be able to make a study that has some valid
12 comparative purpose. In that way we will be able, should
13 we decide to make such a study, to determine whether the
14 exclusion of the city from these power pooling and coordina-
15 tion and what-have-you, whether that really hurts the city
16 and perhaps even arrive at some sort of quantification of
17 what that is, and how adding coordination would eliminate
18 this disparity.

19 CHAIRMAN FARMAKIDES: Do you intend now at this
20 time, sir, to undertake such a study and to present it?

21 MR. HJELMFELT: We're thinking about making such
22 a study. Such a study, for example, has been made and
23 presented in the Farley case; and certainly we're not in
24 a position where we're putting our evidence together yet,
25 but we're considering what we're going to need to show to

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1 prove our case.

2 MR. BREBBIA: What value is this information if
3 you don't make the study?

4 MR. HJELMFELT: Well, aside from a study, the
5 information combined with the other information that was re-
6 quested can show whether nuclear generation on the cost-
7 system is going to alter these factors and in what way.

8 And in this regard it could also indicate the
9 result of the nuclear facilities as to how they're going to
10 change the competitive situation by changing the cost fac-
11 tors of the parties.

12 Aside from these two areas, really, I don't
13 know what we would do with the material other than that.

14 CHAIRMAN FARMAKIDES: Did you have anything else,
15 Mr. Reynolds?

16 MR. REYNOLDS: I guess I would just suggest --
17 well, probably now is not the time to do it, but looking
18 down "A" through "F" in light of what Mr. Hjelmfelt suggested
19 was his study, I think that the question that is propounded
20 is far broader than anything that need be asked to accomplish
21 even that kind of study, assuming he's going to use it.

22 I would prefer if they had a study in mind to
23 focus on what study they're going to do and then ask us the
24 questions that would be relevant to the study so they get
25 that kind of information.

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But even in terms of what he said, this is so broad-based not to give any indication as to have any relevance to the study.

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1 MR. BREBBIA: Do you consider this information
2 as being proprietary in nature?

3 MR. REYNOLDS: I think there is a good part of it
4 that is proprietary in nature. Certainly the escalation
5 factors for fossil fuel, nuclear fuel, and other expenses,
6 that is definitely in the area of proprietary nature.

7 MR. BREBBIA: Do you consider that the granting of
8 this request, in view of the information asked would cause you
9 competitive harm or is it merely proprietary? I mean does
10 proprietary relate to competitive problems you might have?

11 MR. REYNOLDS: I think that it could relate to
12 competitive problems and that certainly is an element of the
13 objection on that ground. Certainly in terms of complying as
14 broadly as it is written, I think there would be some serious
15 problems from a competitive standpoint.

16 CHAIRMAN FARMAKIDES: Aren't you also saying, sir,
17 that the costs for example of undertaking the response
18 to this interrogatory isn't worth the benefit the Intervenor
19 could get out of it?

20 MR. REYNOLDS: That is a part of it.

21 CHAIRMAN FARMAKIDES: And that is something that
22 is bothering me, Mr. Hjelmfelt; the effort, the burden of
23 answering this interrogatory in view of your intent to use
24 it as a study or to perform a study, as we understand it,
25 goes really to the benefits of being a large organization in

1 CEI -- in the CAPCO area. Or the benefits of pooling. Isn't
2 that essentially what you're asking?

3 MR. HJELMFELT: Yes, sir. Well, I think it goes
4 to the benefits of pooling, yes, which seems to me to be very
5 much at issue in that if there are no competitive benefits
6 from pooling, then there could scarcely be anti-competitive
7 problems in excluding someone from the pool.

8 MR. RIGLER: They must have seen benefits or
9 they wouldn't have entered into the agreement or at least
10 be operating pursuant to a memorandum of understanding.
11 I think they would stipulate that in their company's view
12 they see benefits from pooling and if that is the bottom line
13 of your study, then as the Chairman said, that is a great
14 deal of work to go through to produce an obvious result.

15 MR. HJELMFELT: Well, sir, I'm not all that
16 certain that we're going to get that sort of a stipulation
17 out of them. For example, we're left in the Farley case with
18 repeated statements that although the power company is
19 building nuclear plants and plans to build more nuclear
20 plants, that building nuclear plants isn't necessarily
21 beneficial.

22 So the company might engage in activities which
23 it is later not going to agree are beneficial from it in a
24 competitive position. So, we will be put to the proof on
25 that subject.

1 MR. BREBBIA: Mr. Hjelmfelt, if we were to decide
2 that we felt you were entitled to this information, would the
3 study be made by people within the City of Cleveland, within
4 MELP, or is there a way we could protect this information
5 from, the proprietary or confidential aspects of it from use
6 by your client on an initial examination of the materials.

7 MR. HJELMFELT: Yes, sir, the materials that we
8 obtained from this would not be utilized for any such
9 studies from in-house people from MELP. It would be
10 utilized by consultants and in that way would be protected.

11 MR. GOLDBERG: I was simply going to say that I
12 don't think there are any significant costs associated with
13 supplying this information. I would venture to say that this
14 is the kind of information that is at hand within the
15 company right now.

16 CHAIRMAN FARMAKIDES: Mr. Goldberg, as I read it,
17 documents containing or pertaining -- that is a pretty broad
18 statement, sir. You're asking for all of those documents,
19 whatever documents from the data that we'll see relating to
20 transmission facilities and all the way on down through F.
21 And also pertaining to capital operation and maintenance.

22 MR. GOLDBERG: Yes, those are the kind of factors
23 I would expect that they have at hand.

24 CHAIRMAN FARMAKIDES: And the problem this Board
25 has, then, is is the benefit worth the cost and the cost is

1 the total effort of getting this together not only insofar
2 as the Applicant is concerned, but insofar as you people are
3 concerned. You have a cost here, too.

4 Now, the benefit is, as I understood it earlier,
5 you want to show that there's a benefit in pooling.

6 MR. GOLDBERG: I don't think Mr. Hjelmfelt's
7 statement was limited to that at all.

8 There is a question here of making studies to
9 determine the value of the resource we're talking about as
10 against not having that resource available to the city in
11 connection with supplying its resources.

12 Now, if we're going to make such a study, it
13 involves the utilization of cost factors. It seems to us
14 that we would be eliminating the areas of controversy with
15 respect to such studies if we utilized the same cost
16 factors that the company utilizes into making its studies.

17 We had precisely that same kind of situation
18 presented to us in the Farley case. In the Farley case
19 there are outside consultants for the Department of Justice
20 making studies, Burns and MacDonald, and they wished to
21 utilize escalation factors, for example, that the company
22 was using in its studies to eliminate that area of
23 controversy.

24 I think it would be valuable to eliminate that
25 area of controversy by coming up with studies when they're

1 made that are utilizing similar factors as those used by the
2 company in making such studies.

3 CHAIRMAN FARMAKIDES: All right, sir. Anything
4 further?

5 MR. CHARNOFF: I would like to simply point out
6 that the question does not ask for the costs of the nuclear
7 plants at issue, but the question is addressed to each of
8 the transmission facilities and each of the generating
9 facilities of the Applicant.

10 MR. GOLDBERG: That is right. That gets involved
11 in the whole picture.

12 CHAIRMAN FARMAKIDES: All right, let's proceed to
13 43.

14 MR. HJELMFELT: Yes, sir, our document request
15 No. 43 to CEI and the corresponding document request is
16 No. 27.

17 Again we're asking for various cost information.
18 This information again goes to the benefits of interconnected
19 operations and it goes to assessing whether nuclear projects
20 on the CEI system and the CAPCO will improve the competitive
21 situation of the parties.

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1 MR. REYNOLDS: The applicants and CEI have
2 addressed themselves to this, both objecting but formulating
3 their objections a little differently, basically because
4 the Cleveland Electric Illuminating Company is in direct com-
5 petition with the City and the type of cost information,
6 rate type information, called for here is precisely the type
7 of material that is protected from disclosure from one to
8 another competitor. And that is basically, so far as Cleve-
9 land Electric Illuminating Company is concerned, this falls
10 into that kind of category where we're seeking the kind of
11 cost information that is not particularly relevant and is
12 only going to give its competitor an advantage that I'm
13 sure it would love to have but is not necessary in this pro-
14 ceeding but inappropriate as far as the course of discovery.

15 MR. RIGLER: Suppose we entered a protective
16 order preventing Mr. Goldberg and Mr. Hjelmfelt from passing
17 on any of this information to their client and to the extent
18 they wanted analysis to require them to farm that project
19 out to an independent consultant.

20 MR. OLDS: Well, would the protective order also
21 provide that the independent consultant would not be able at
22 any time in the future to advise the City of Cleveland in
23 any rate case?

24 MR. RIGLER: Perhaps; yes, I see your point.

25 MR. CHARNOFF: And in any direct negotiations for

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1 purchase of wholesale power as between CEI and the city.
2 This information is precisely the kind of information a
3 customer would love to have from a would-be vendor of power.

4 MR. RIGLER: I understand, but it seems to me
5 that the solution is simple.

6 MR. CHARNOFF: It seems to me that the con-
7 sultant would have to be immunized forever on that and so would
8 counsel, and it seems to me that to the extent that Mr. Gold-
9 berg might participate in any of those negotiations his ac-
10 cess to this knowledge would be very difficult for us.

11 But the important thing, sir, is we really have a
12 great deal of difficulty in relating it to the issues in
13 this case, and it is in that area as well as the burdensome
14 necessity that it seems to me we ought to be very careful of
15 how much information we turn over in terms of this informa-
16 tion which has that peculiar sensitivity to which Mr. Goldberg
17 has alluded.

18 MR. RIGLER: I don't see where you raised the
19 objection to relevance here.

20 MR. OLDS: We did.

21 MR. REYNOLDS: What document are you looking at?

22 CHAIRMAN FARMAKIDES: We are looking at your objec-
23 tions, sir, page 36.

24 MR. REYNOLDS: I guess page 38, the final paragraph
25 which refers back to an earlier document request and objects

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1 thereto, has been discussion in terms of the burdensome neces-
2 sity in light of what relevance may be obtained by virtue of
3 requiring a file search in this area.

4 The applicants, which as I indicated responded at --
5 the other applicants who responded a bit differently, essen-
6 tially made the point that as far as the cost information as
7 to each of the other applicants, it is their position that
8 there is no relevance at all in terms of what the City of
9 Cleveland is alleging in this proceeding and the issues that
10 it is concerned with.

11 CHAIRMAN FARMAKIDES: Mr. Goldberg.

12 MR. GOLDBERG: I am concerned about the suggestion
13 of a protective order that would preclude the City of Cleveland,
14 for example, in a rate proceeding which we might very well have
15 involving Cleveland Electric Illuminating Company's service to
16 the city before the Federal Power Commission from being avail-
17 able to the city as a rate consultant in the event this informa-
18 tion in paragraph 43 were made available.

19 I don't think we could accept such a protective
20 order, because I think that it would deny to the City of Cleve-
21 land a very expert rate consultant, but I would point out beyond
22 that that the kind of information requested in our request No.
23 43 could not possibly be denied in a rate case, for example,
24 on the grounds that it was proprietary information.

25 In a rate case, and I can conceive of one coming up

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1 with respect to the service. Right now we are being billed
2 for the utilization of the 69 KV interconnection by Cleve-
3 land Electric Illuminating Company at a certain level,
4 which is exceeding 4 cents per kilowatt hour, if you want
5 to believe that, but that is exactly what it is. And it is
6 obvious that that is apparently based upon incremental cost
7 of running all their cats and dogs on their system.

8 Now, it is going to be germane in any proceeding
9 relating to that rate, what is the incremental cost of your
10 units.

11 MR. BREBBIA: Well, what would prevent you from
12 exposing the information in the rate case under the protective
13 order of ours? The protective order, assuming we have made
14 no decision in this matter, but if we decided we wanted a
15 protective order, the order would protect CEI from the use
16 of this information gathered in this proceeding. If you ex-
17 pose it independently in a rate case and issue an exposure
18 under the rules and regulations of the Federal Power Commission
19 and they grant it, what effect would it have on this proceed-
20 ing?

21 MR. GOLDBERG: I would have to look to your pro-
22 tective order to determine that, but I'm suggesting beyond
23 that that there's no occasion for that kind of a protective
24 order with respect to this information. And perhaps we ought
25 to ask Cleveland Electric Illuminating Company, are they

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1 suggesting that this kind of information is not available
2 to their partners in CAPCO?

3 CHAIRMAN FARMAKIDES: Before we do that, sir, I
4 am also interested in your request for this information from
5 the point of relevance. Where does this type of information
6 relate to the issues that we have admitted?

7 MR. GOLDBERG: It relates to the issue of compe-
8 tition, to the issue of excluding the City of Cleveland
9 from participation. The importance of the resource, the
10 importance of that resource to the Cleveland Electric Illumi-
11 nating Company, is very much an important determination in
12 this case.

13 MR. BREBBIA: Are you referring in this situation,
14 Mr. Goldberg, to the nuclear plants under construction or
15 any plants?

16 MR. GOLDBERG: I'm talking about the nuclear plants.
17 And nuclear plants, you know, fit into their entire system.

18 CHAIRMAN FARMAKIDES: Well, you don't limit it,
19 sir.

20 MR. BREBBIA: The subject matter of this proceed-
21 ing is nuclear plants basically.

22 MR. CHARNOFF: The question is not even addressed
23 to nuclear plants.

24 CHAIRMAN FARMAKIDES: Excuse me, Mr. Charnoff,
25 hold off.

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1 MR. GOLDBERG: I'm saying the nuclear plants fit
2 into the entire system, and you can't evaluate them as part
3 of the system without having the information regarding the
4 other facilities.

5 CHAIRMAN FARMAKIDES: In other words, you're saying
6 that you want documents with respect to that entire list of
7 subissues or subcategories with respect to each existing gener-
8 rating unit, as you state?

9 MR. GOLDBERG: That's what it says. That's what
10 we want.

11 MR. BREBBIA: Each unit and each one, also those under
12 construction and planning, both, all?

13 MR. GOLDBERG: That is right.

14 CHAIRMAN FARMAKIDES: And you say you need this
15 in order for you to be able to evaluate or to present a case
16 on competition?

17 MR. GOLDBERG: To consider the case we want to pre-
18 sent on competition, yes.

19 MR. RIGLER: Mr. Goldberg, are these figures tra-
20 ditionally kept in this matter? For example, item C, start-up
21 cost in volumes, 4 hours, and 24-hour shutdown periods.

22 MR. GOLDBERG: I couldn't answer that for the City
23 of Cleveland, nor will I attempt to answer it as an industry
24 custom, but I do know they have start-up costs.

25 MR. RIGLER: You're not asking them to go out and

blt 7 1 calculate this information for you? You're asking if they
2 have those documents?

3 MR. GOLDBERG: No, in any of our requests we're
4 not asking them to generate data that doesn't exist; and
5 in our approach to the requests put to us, if the information
6 doesn't exist, we expect to respond that it doesn't exist.
7 We do not believe that the burden can be put upon us nor can
8 we put a burden upon them to make a study for us, to gene-
9 rate the information.

10 CHAIRMAN FARMAKIDES: So you're really saying,
11 then, that if this information exists, you would like to have
12 it?

13 MR. GOLDBERG: Right, right.

14 MR. RIGLER: If they have a cost file for each
15 generating unit, that is what you want?

16 MR. GOLDBERG: That is right. If they have this
17 information, if it exists, we want it.

18 CHAIRMAN FARMAKIDES: Do you know, Mr. Reynolds;
19 Mr. Charnoff, do you have a cost file for each generating
20 unit?

21 MR. CHARNOFF: We have a cost for each unit. We
22 don't know whether it is provided in any breakdown such as
23 this.

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1 CHAIRMAN FARMAKIDES: I would ask you to add
2 this as the third item for you to discuss and report back to
3 me. This would be 43. We have 21(c), 37(c), and all of 43.

4 You two should discuss this more together to see
5 if there is some possibility of reaching a compromise, if
6 you will.

7 Let's go to the next document, request number 44,
8 which is the subject of, of course, item 40.

9 MR. GOLDBERG: May I just say this? I hope I
10 have made it clear that what I said about we're not asking
11 them to generate information applies to each of the requests
12 we have made.

13 CHAIRMAN FARMAKIDES: You have made it clear now,
14 sir.

15 MR. GOLDBERG: I'm glad it came up then.

16 CHAIRMAN FARMAKIDES: All right.

17 MR. HJELMFELT: With respect to document request
18 number 44 we'll limit our request to apply only to wholesale
19 sales or wholesale transactions. Again, by wholesale we
20 mean sales for resell type.

21 MR. OLDS: Is there a cross reference?

22 MR. HJELMFELT: There's a cost reference to 28.

23 MR. REYNOLDS: 28?

24 MR. HJELMFELT: We believe this is relevant to
25 showing the scope and the nature of the wholesale market as

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1 well as CEI and the other parties' position in this market.

2 CHAIRMAN FARMAKIDES: Mr. Reynolds, do you have a
3 change in position in view of the limitation or do you want
4 to add this also to the items to consider?

5 MR. REYNOLDS: I think we've got some difficulty
6 with the fact that they still are seeking proposed power
7 purchases and sales. We have, as far as all actual is
8 limited to wholesale, we have no problem at all.

9 It is the prepared that we have some problem with.
10 The other companies, I think, other than Cleveland Electric
11 Illuminating Company, still question the relevance of the
12 inquiry into that in its entirety.

13 CHAIRMAN FARMAKIDES: Mr. Hjelmfelt.

14 MR. HJELMFELT: Well, our question there is going,
15 of course, to the actual transactions that are occurring
16 and to a large extent in the regional power exchange market.
17 It seems to me that that's very relevant to the issues that
18 have been framed in this case.

19 CHAIRMAN FARMAKIDES: I still am not clear to your
20 response with respect to the objection voiced by Mr. Reynolds
21 and that is that if you had withdrawn the proposed power
22 purchase request, you would go along with your discovery as
23 you have limited it.

24 MR. HJELMFELT: Well, I think we discussed why we
25 want proposed documents and sales and stuff on other document

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1 requests and I don't really have anything to add to what I
2 have said with respect to those.

3 CHAIRMAN FARMAKIDES: All right, 51.

4 MR. HJELMFELT: Document request number 51 calls
5 for documents relating to the proposed Yankee-Dixie generation
6 of transmission system which I understand Yankee-Dixie
7 proposed with the construction at various times either four
8 or six very large fossil fuel generating plants typically
9 in eastern Kentucky and possibly in southern Illinois, along
10 with a large grid of high voltage or extra high voltage
11 transmission lines covering something like 17 eastern states
12 including the state of Ohio.

13 Yankee-Dixie, which is proposed not only by
14 municipal electric utilities and REA coops also invited
15 investor-owned utilities to join in the plan.

16 Obviously, Yankee-Dixie, if it ever got off the
17 ground, would be another bulk power supplier available in
18 the wholesale market to sell bulk power. It would also
19 because of its transmission grid, offer alternatives for the
20 transmission of electric energy.

21 Inasmuch as what we're looking at here is compe-
22 tition in the wholesale market, we're looking at transmission
23 availability, we're looking at the regional power exchange
24 market. It seems to me that this promise for a potential
25 competitor to CEI and the other CAPCO members is relevant and

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1 for that reason we are --

2 CHAIRMAN FARMAKIDES: Let me ask Mr. Charno
3 whether he sees any relevance to this proceeding of documents
4 involving this Yankee-Dixie generation in transmission system,
5 assuming there is one.

6 MR. CHARNO: Okay, the Department does not to the
7 best of my knowledge have any present knowledge relating to
8 any activities on CEI's part relative to Yankee-Dixie.
9 However, if there had been activities on CEI's part to limit
10 the competition from Yankee-Dixie, that would certainly be
11 a relevant element in a situation inconsistent with the
12 antitrust laws.

13 MR. BREBBIA: Now, Mr. Charnoff, would you like
14 to respond to that or Mr. Reynolds?

15 MR. REYNOLDS: I was just asking whether we have
16 any documents which would skirt perhaps part of the problem.
17 I'm not sure that we can answer that. I think that if this
18 proceeding is to proceed along the lines of a bifurcated
19 review, looking first to whether there exists a situation
20 and then the nexus question and whether you would have a
21 relationship to the Perry and Davis-Besse plants, I have a
22 difficult time seeing where the Yankee-Dixie situation, what-
23 ever we're talking about, let's say as described by Mr.
24 Hjelmfelt, where it would fit into that formulation.

25 I don't think that promise of that sort goes to

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1 situation inconsistent with the antitrust laws in terms of any
2 kind of relevant market that anybody has spoken of, thus far
3 and it doesn't bear on the nexus question once you get
4 beyond the situation where someone finds there does create a
5 situation inconsistent with the antitrust laws.

6 I am having a difficult time saying how that
7 exercise or that negotiation or that promise fits in on
8 either side of the equation so far as relevance to the particu-
9 lar issues that this Board is concerned with. I just don't
10 see the relevance of that.

11 CHAIRMAN FARMAKIDES: Anything else, sir?

12 MR. HJELMFELT: No, I don't think I have anything
13 to add to that. I'm ready to proceed.

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CHAIRMAN FARMAKIDES: All right.

MR. HJELMFELT: I'm ready for document request no.
3 54 which is their item 42. I have no corresponding number. I
4 don't think there is one.

5 MR. REYNOLDS: There is none.

6 MR. HJELMFELT: Where we're asking for wholesale and
7 retail rate design studies and comparative studies of wholesale
8 and retail rates and documents relating to the decision on file
9 for new rates.

10 Among the things studies like this would show would
11 be whether the rate design put into effect by CEI is determined
12 on a cost basis, on a cost of service basis or whether it is
13 designed to meet competition or to forestall competition and
14 whether the pricing policies comport with a competitive market
15 or whether they reflect the policies one would expect a monopoly
16 to impose.

17 CHAIRMAN FARMAKIDES: Any questions on that?

18 MR. RIGLER: One of the objections is that the re-
19 quest is too broad. Can you address yourself to that?

20 MR. HJELMFELT: I really fail to see that it is too
21 broad. I think certainly the rate design studies and the com-
22 parative rate studies are about as specific as you could get in
23 requesting those. Documents relating to decisions to file for
24 new rates, I suppose again we could limit it by saying we're
25 not interested necessarily in all the backup data that might

jeri 28-2 1 have been used in making a study to determine whether new rates
2 are needed but for example a recommendation contained in a
3 memorandum or something that a particular rate needs to be
4 lowered to meet a competitive situation or that no competitive
5 situation exists and therefore we don't need to lower the rate
6 would be something we would want to see, and that would be some-
7 thing going into a decision to file for a new rate or to propose
8 a new rate design.

9 MR. RIGLER: How about the suggestion that the rate
10 studies be limited to those relevant to MELP's activities
11 within the city limits.

12 MR. HJELMFELT: Well, to a large extent at the pre-
13 sent time that would take care of the City of Cleveland's prob-
14 lems. The City of Painesville is also mentioned as a competi-
15 tor. And I would think that their situation would also be
16 relevant to our analysis, as well. I can see a potential
17 problem in that rates can be utilized to forestall a municipal-
18 ity which presently is a CEI franchise rate design changes or
19 a new reduced rate or holding off on filing a rate can be used
20 to forestall a city from undertaking to generate on its own.

21 CHAIRMAN FARMAKIDES: Anything else?

22 Let's go to the next one.

23 MR. HJELMFELT: I believe that takes us to document
24 request number 55, corresponding document request number 29 and
25 I think the response I really want to make here is the response

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1 to the idea that wheeling is an issue and placed in issue only
2 in a very limited sense and that only by AMP-O. I don't think
3 that is the case at all. I think wheeling is an issue in this
4 case that's been put in and it's been asserted as an issue, I
5 would suggest, by the Staff and the Department and they can
6 certainly correct me if I'm wrong on that and certainly by the
7 City of Cleveland.

8 In that regard I suggest that our Perry petition,
9 paragraph 16, I believe it is, specifically refers to the AMP-O
10 situation, if it has any power and puts that in issue and thus
11 wheeling is an issue as far as the City of Cleveland is con-
12 cerned. Our Perry petition's paragraph 19 and 17 put in issue
13 wheeling with respect to our discussion of access to transmission
14 facilities.

15 I believe that wheeling has certainly made an issue
16 in the formulation of the matters in controversy that we
17 struggled sometime to arrive at and it seems to me, really seems
18 to me unnecessary to go back beyond that to the Perry petition
19 but to the extent it is I think we have raised the wheeling
20 issue and it is at issue here.

21 CHAIRMAN FARMAKIDES: Mr. Reynolds, did you have any
22 thing to add?

23 MR. REYNOLDS: I think our position is articulated
24 clearly in writing. I take issue that wheeling is interjected
25 as opposed to isolating power has been interjected in this case

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1 by any of the parties or any of the pleadings. I think it is
2 something that is outside of the scope of this proceeding.

3 MR. RIGLER: Mr. Charno, do you have a response?

4 MR. CHARNO: I would take definite objection to that.
5 I think it is a mischaracterization of the Department's advice
6 letters and I think wheeling generally is going to be in this
7 proceeding, if only as an issue of remedy, but the Department
8 specifically noted that Toledo Edison had engaged in a refusal
9 to wheel, specifically noted that CEI had engaged in a refusal
10 to wheel and we said that these were representative specimens
11 of conduct and were not intended to be all-inclusive so we think
12 wheeling is very much in issue with respect to the Applicants
13 to CEI.

14 MR. CHARNOFF: Based on the Toledo refusal to wheel,
15 the Department recommended no hearing.

16 CHAIRMAN FARMAKIDES: Let's hold off on that. This
17 is completely out of order at the moment. We're going to go
18 on. From my point of view I think wheeling is a matter in
19 controversy.

20 Now, let's go ahead, by order I mean order no 2 of
21 the Board. Let's go ahead to the next one, Mr. Hjelmfelt.

22 MR. HJELMFELT: Yes, sir, I would undertake now to
23 apply both objections to document request no. 56 through 62.
24 There is no corresponding request to the other parties. These
25 requests basically go to advertising and public relations

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1 activities of CEI with respect to their relationship to Cleve-
2 land system and to competition at retail including expenditures
3 for promotions, the use of, with respect to that, for example
4 we believe that money has been used from the public relations
5 budget to induce customers to take service from CEI rather than
6 MELP. It is my understanding, for example, certain facilities
7 that might ordinarily not be paid for by the company but would
8 be paid for by the customer have been paid for by the company.

9 In fact the money from those funds came from the
10 public relations budget. All of this matter is relevant to the
11 retail market and I think goes to show both the intent and the
12 nature and the existence of competition at the retail level.

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1 CHAIRMAN FARMAKIDES: How does this relate to
2 structure, sir?

3 MR. HJELMFELT: Well, I think it relates to the
4 situation that exists in the retail market, and the structure
5 of the retail market, who's got which customers and how they
6 obtained them and how the competition exists. The competition
7 at retail is, to a considerable extent, of course, a question
8 of reliability. And I think we have spelled out on previous
9 occasions how reliability is tied in with what happens at
10 wholesale or at least the bulk power supply situation and the
11 availability of interconnections.

12 I might also point out when we are talking about
13 competing for new customers, the only sense in which it
14 makes for the parties to compete is that they are going to
15 have supplies of electric power and energy to serve these
16 customers. For example, CEI has stated that the City of
17 Cleveland is a short supply power area and therefore needs
18 new bulk power sources pumping into it. That is very good.
19 We know that there's 30 megawatts of PASNY power that could
20 be made available if there was wheeling and bring this power
21 into the City of Cleveland.

22 The only reason I can see for CEI to refuse to
23 wheel that 30 megawatts in and let the City of Cleveland
24 satisfy this demand for electric power and energy is that
25 CEI thinks it has an opportunity to satisfy the demands

1 itself and the reason it believes that is because it is
2 constructing new generation. For example, the Davis-Besse
3 plant which is due to go operational shortly; the Beaver
4 Valley plant, the Perry plant; and, therefore, the advent of
5 nuclear energy into this system directly reflects the
6 activities that CEI is going to undertake on the retail
7 level.

8 CHAIRMAN FARMAKIDES: Mr. Reynolds?

9 MR. REYNOLDS: Well, I think you have asked the
10 question that's in my mind. This relates to promotional
11 activities, these questions, and I don't think the discussion
12 that Mr. Hjelmfelt just launched on really was addressed
13 to that particular aspect or these particular questions. It
14 does go to conduct and I don't see how that conduct at
15 least as these questions are framed bears on market structure
16 and I question if we can't get a more specific interrogatory.
17 I question whether it is even appropriate under any circum-
18 stances to look at the promotional or advertising activity
19 of CEI. That is a legitimate way to do business. There is
20 no indication here of specific bad conduct or specific types
21 of conduct which would reflect on the question of market
22 structure in any way and I just don't see how getting into
23 that is going to be very productive to anybody.

24 CHAIRMAN FARMAKIDES: Let's go to the next, Item
25 45, document requests as to 70, 72, 74, 76, 83 through 88.

1 MR. HJELMFELT: Okay.

2 Document Request No. 70, where we have a situation
3 of CEI -- and this is an example of a type of situation where
4 no matter what sort of a cutoff date might generally be
5 applicable we would feel that there is a situation here, a
6 specific time frame that is outside of that that is relevant
7 to go back to.

8 Now here is a situation where the city has money
9 in its proposed budget to construct a 75,000 mw capacity
10 and 5 million for an interconnection between the City of
11 Cleveland and the City of Painesville and also the City of
12 Orville and we have the competitor CEI stepping right into
13 the situation and arguing that that should be taken out of
14 the budget of the city for these activities and these
15 activities are directly related to the existence of trans-
16 mission facilities and bulk power supply in the relevant
17 market.

18 MR. BREBBIA: Let's say under -- or any of the
19 other cases and there are more than California Transport and
20 Parker V. Brown that we have discussed today -- let's say
21 under that case, CEI were to state yes, we did our very best
22 to get the city council. We petitioned them in an open
23 manner and asked the city council to please not appropriate
24 this money because we feel that CEI can do a better job and
25 in the long run it will do it cheaper for the city and anyway,

1 we don't like the competition from the municipal system and
2 we are entitled to go to the legislature and we are here
3 asking you not to do it. So what?

4 MR. HJELMFELT: Okay, I think this while by itself
5 is perhaps not a violation of the antitrust laws, it certainly
6 is evidence of intent to keep the city from being in a
7 position where it can compete. I think in that regard it
8 explains other activities that CEI is engaged in and again
9 while it, by itself, may not constitute illegal activities,
10 taken in the context of the whole, forming the part of a
11 scheme to arrive at an anti-competitive end result, I think
12 it is relevant and I would suggest that it be admissible.

13 CHAIRMAN FARMAKIDES: Anything else?

14 MR. REYNOLDS: Just one brief comment which is that
15 I think it is immunized because of political activity but
16 the extent to which Mr. Hjelmfelt suggest that we use it or
17 that the city use it again is far removed from structure.
18 In there he is not looking at conduct in any way to further
19 advance this Board's inquiry into structure which is, as
20 I understand, the Board's prehearing Order No. 2 was the
21 only area that it would permit discovery into conduct, so
22 again I question its relevance even apart from the Noerr-
23 Pennington.

24 CHAIRMAN FARMAKIDES: Next one, Document Request
25 No. 71.

1 MR. HJELMFELT: Okay, I would just suggest that
2 that very much goes to structure, what exists, the structure
3 of the market. 71, again this information is relevant to
4 an understanding of the market and competition that exists
5 in the market.

6 MR. BREBBIA: Can we go off the record?

End #29

7 (Discussion off the record.)
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CHAIRMAN FARMAKIDES: Back on the record.

All right, we'll go to the next one, 72.

MR. HJELMFELT: Okay. 72 is, again, this deals with the ability of the City of Cleveland electric system to finance its system.

The city in this regard has reason to believe that CEI participated in making suggestions and amendments, suggesting amendments to the bond ordinance, corresponded with bond counsel for the City of Cleveland and members of the City Council, and again this is a direct interference with the basic activities of the electric system, interfering with its ability to raise money.

I think maybe I can respond to 74 also.

MR. BREBBIA: Let me ask you a question on 72 before you do that, and this relates to 70 also.

Does not the City Council represent the city? I mean, what do you see is the relationship between the City Council and the municipal system? Isn't the municipal system owned by the city and the city governed by the City Council and the mayor?

MR. HJELMFELT: Yes, sir.

MR. BREBBIA: Don't you think the City Council has the right to do whatever it wants to do with regard to appropriations? What does the antitrust problem service in the workings of the City Council?

1 MR. HJELMFELT: The antitrust problem becomes
2 involved in here, you have what in effect is the governing
3 body of the municipality, the board of directors will have
4 the electric system and you have the competing party entering
5 right into the boardroom and undertaking to influence the
6 manner in which the entity is going to be able to raise
7 money.

8 MR. PREBBIA: Mr. Hjelmfelt, the use of the term
9 "board of directors" would be to my mind completely in-
10 appropriate here. This is a public body, the City Council.
11 The city is a public body. It is not like going into the
12 boardroom of a corporation which is a private body.

13 That is what in effect so much of this litigation
14 in the cases that have been mentioned today is about. They're
15 not analogous in my mind, at least.

16 MR. HJELMFELT: Well, the analogy I was drawing
17 is that it is governing the controlling body. Certainly I
18 would agree with you that there's a difference between a
19 private corporation and a municipality. But I think the
20 interference with the direct business activities is the
21 same and I again suggest that this sort of activity not only
22 demonstrates intent, but also coupled with other activities
23 can in fact be evidence of antitrust violations when the
24 activities are taken as a whole.

25 CHAIRMAN FARMAKIDES: Anything further on this,

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1 Mr. Reynolds?

2 MR. REYNOLDS: I think it is controlled by Noerr-
3 Pennington.

4 CHAIRMAN FARMAKIDES: All right, 74.

5 MR. HJELMFELT: 74, I would make the same response
6 except here we also have, we're asking if there's any
7 correspondence with bond counsel for the city of Cleveland
8 which I think certainly goes beyond any Noerr problems, takes
9 it out of the legislative realm.

10 CHAIRMAN FARMAKIDES: Mr. Reynolds?

11 MR. REYNOLDS: I guess that to the extent it does
12 take it out, and I question that, but I don't know how it
13 makes it any more relevant to what we're talking about.

14 MR. BREBBIA: I'd like to ask just one question:
15 Wouldn't this correspondence or -- does the
16 municipal system through the city solicitor, or whoever
17 represents it on the city level, not have access to discussions
18 with bond counsel?

19 MR. HJELMFELT: Well, yes, the city of Cleveland
20 has access to its conversation with bond counsel, but if its
21 bond counsel also had correspondence regarding a city bond
22 issue that it was working on with CEI and this firm, Squire,
23 Saunders and Dempsey has for some time, as I understand it,
24 acted as counsel for CEI in many respects, the city would not
25 have access to that correspondence.

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1 MR. BREBBIA: Are you suggesting there's a
2 conflict of interest perhaps in the representation-- this
3 to me is not a joking matter. Are you suggesting in
4 limiting it to discovery here that there would be a conflict
5 of interest which prevents the city from having access to
6 discussions with the city's bond counsel that would affect
7 the municipal system?

8 MR. HJELMFELT: Yes, that is what we're saying,
9 that there might be a situation that exists that prevents
10 the city of Cleveland from having full access to its own
11 corporate bond counsel without interference from others.

12 MR. BREBBIA: Has the city or MELP ever made a
13 request for such information, to your knowledge?

14 MR. HJELMFELT: To my understanding, they have not.

15 MR. CHARNOFF: I understand this gentleman is
16 still bond counsel to the city, sir.

17 CHAIRMAN FARMAKIDES: Let me understand again,
18 what is the purpose here, what is the relevance?

19 MR. HJELMFELT: Well, as I pointed out in an earlier
20 response to an earlier request, it is our understanding
21 and we have reason to believe that CEI has actively undertaken
22 to influence the type of bond ordinances that were passed.

23 In addition, we note that the law firm that
24 represents CEI on many activities is also bond counsel
25 for the City of Cleveland. We're suggesting that the connection

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is such that the City of Cleveland has not at all times had
 access to bond counsel unhampered by the influence of CEI.

Certainly if that turns out to be the case, I
 should think it would be very relevant to whether or not
 there's been anticompetitive conduct.

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1 CHAIRMAN FARMAKIDES: You say you have reason to
2 believe. What do you mean by that, sir?

3 MR. HJELMFELT: WE have reason to believe, for
4 example, we understand, for example, that during passage of a
5 bond issue ordinance, I'm not sure whether bond counsel was
6 present. I understand counsel for the City was present and
7 made suggestions, suggested amendments off the record to the --
8 counsel for CEI -- proposed amendments off the record, of course,
9 to this city council committee which were incorporated into
10 the bond ordinance and subsequently made it very difficult to
11 sell any bonds passed under that ordinance.

12 We know that the CEI has undertaken, I think I
13 referred to this earlier, CEI has undertaken as a volunteer
14 to contact the trustees under the first mortgage bond indenture
15 and suggest that Cleveland was in default on those bonds.

16 In other words, we've got what appears to be a course
17 of conduct of CEI to interfere with the City's ability to
18 finance its system.

19 CHAIRMAN FARMAKIDES: And you relate this to
20 structure the same way as you did before, sir?

21 MR. HJELMFELT: Certainly, when we're talking about
22 the City's ability to finish its system, we're talking about
23 its ability to construct generation, its ability to construct
24 transmission and this, of course, goes directly to whether
25 its ability to compete, either in the wholesale market,

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1 whether it's able to participate, for example, if at the early
2 stage it had obtained the bond money to construct interconnection
3 with Orville and Painesville and the City of Cleveland, by
4 reaching down to Orville it would be within striking distance
5 of reaching outside the CAPCO ring and it could obtain power
6 from other sources.

7 MR. BREBBIA: And the counsel you're referring to
8 who was representing CEI at the time was from the firm Squire,
9 Saunders and Dempsey?

10 MR. HJELMFELT: No, as I understand it, at this
11 particular board meeting, Squire, Saunders and Dempsey counsel,
12 I'm not sure whether counsel from the law firm was present at
13 that meeting.

14 MR. BREBBIA: When you said CEI's counsel, you were
15 referring to whom?

16 MR. HJELMFELT: House counsel.

17 CHAIRMAN FARMAKIDES: Anything else? Let's go on to
18 76.

19 MR. CHARNOFF: I would like to make an observation,
20 sir, that I think ought to be made briefly.

21 There are a number of allegations that are always
22 being made against the Cleveland Electric Illuminating Company,
23 and I'm sure that the Municipal Electric Power and Light Company
24 is entitled to make all the allegations it wants. I think it
25 should be stated from everything I understand, for example,

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1 CEI did not approach industries that were involved in this
2 particular instance. And I'm not standing up and denying every
3 charge simply because I don't want to take the time from the
4 Board, but I think it's important for the public record of the
5 fact that we deny those allegations being made against CEI. If
6 the City is not able to finance itself, it's not always the
7 fault of Cleveland Electric Illuminating Company.

8 MR. GOLDBERG: I'm glad you said not always.

9 MR. HJELMFELT: We're ready for our Document
10 Request Number 76. I really think we have fully discussed the
11 issues that are involved in that. Again I would only point out
12 that that's another instance where we think we will have to go
13 back beyond any cutoff date.

14 MR. BREBBIA: Mr. Hjelmfelt, you're suggesting in
15 this one that we go back to 1930. Did I read this correctly?

16 MR. HJELMFELT: Yes, again because this \$40,000,000
17 bond issue goes back to the structure of who's got what by way
18 of generation in the market.

19 CHAIRMAN FARMAKIDES: 83 through 88, sir.

20 MR. HJELMFELT: We've got objections to 75. There
21 Item 47.

22 MR. BREBBIA: Could you take us through 83 to 88?
23 Their objections are all stated together.

24 MR. HJELMFELT: Okay. 83 through 88. Well, again,
25 with 83 and 84, I understand from people in the City government

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1 that there is a possibility that CRI was influential in pro-
2 curing the appointments of these individuals to the stated
3 positions, dealing with the public utilities system, and thereby
4 MELP in the City of Cleveland. Again that's a direct inter-
5 ference in the business affairs of the competitor, and I think it's
6 of obvious relevance.

7 MR. BREBBIA: Who appoints the director of public
8 utilities?

9 MR. HJELMFELT: They are appointed by the mayor.

10 MR. BREBBIA: By the mayor?

11 MR. HJELMFELT: As I understand it.

12 The remainder of these, 83 through 88, again go to the
13 peculiar political susceptibility of a municipal-type operation
14 in a competitive situation.

15 Are we proposed to continue?

16 CHAIRMAN FARMAKIDES: I think perhaps we'll give
17 the young lady time to rest. Let's take a very short recess.
18 Let's reconvene at 10 after 5. It's 5 after now.

19 (Recess.)

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25 Acc. eral Reporters, Inc.

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1 CHAIRMAN FARMAKIDES: Let's proceed.

2 MR. HJELMFELT: Yes, sir, I think we are ready
3 for Documents Requests 77, 79, 80 and 81.

4 MR. BREBBIA: Wait a minute, 71. Don't we have to
5 go back? We are tracking theirs.

6 CHAIRMAN FARMAKIDES: We are tracking the objections.

7 MR. HJELMFELT: Yes, sir, I understand.

8 MR. RIGLER: You are on their No. 46 which is your
9 No. 71.

10 MR. HJELMFELT: I think the relevance and everything
11 I have to say that would bear on 71 I have said on others.

12 MR. BREBBIA: Is there a corresponding number?

13 MR. HJELMFELT: Yes, that corresponds to Request
14 11.

15 CHAIRMAN FARMAKIDES: All right.

16 MR. BREBBIA: Well, if you could just give us in
17 any of these where you don't have anything more to say if
18 there is a corresponding number and you can provide it, that
19 would be helpful.

20 How about 70, 72, 74, 76, 83 through 88?

21 MR. HJELMFELT: Yes, sir, no corresponding numbers.

22 CHAIRMAN FARMAKIDES: Mr. Reynolds, did you have
23 anything further on your 46?

24 MR. REYNOLDS: No, sir.

25 CHAIRMAN FARMAKIDES: Mr. Hjelmfelt, the next one.

1 MR. HJELMFELT: Okay, I believe we are ready for
2 Document Request No. 75. I don't think I have anything
3 additional to state on that. Again, there are no corresponding
4 numbers.

5 MR. BREBBIA: How about 78?

6 MR. HJELMFELT: 78, there is no corresponding number.
7 This suit goes to the financing of the city system and in
8 that regard is relevant. I don't think we really have anything
9 that would require discussion.

10 Document requests, we are ready for 77. I have
11 discussed that one with respect to other items.

12 MR. BREBBIA: No number?

13 MR. HJELMFELT: No corresponding number.

14 MR. BREBBIA: Where we have -- I don't mean to
15 interrupt, but wher we have multiple ones, if you could give
16 us the corresponding numbers of all of them at the same
17 time.

18 MR. HJELMFELT: From here on out, I believe there
19 are no corresponding numbers.

20 CHAIRMAN FARMAKIDES: All right, fine.

21 MR. HJELMFELT: Okay, I am ready for Request No. 79.
22 We will limit that to attorneys in Greater Cleveland Area.
23 Request to --

24 MR. REYNOLDS: If I may comment, we still have a
25 problem even as so limited to the extent that the interrogatory

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1 asks for a description of the basis for retainers. We have
2 no problem furnishing a list of names and addresses of
3 attorneys in the City of Cleveland but we still do continue
4 to object to any description on the basis of retainers.

5 CHAIRMAN FARMAKIDES: What is meant by the basis
6 of retainers, Mr. Hjemfelt?

7 MR. HJELMFELT: In this regard we are not looking
8 for the payment type basis. We are looking for the purpose
9 for which they are retained.

10 MR. BREBBIA: Don't you have a lawyer-client
11 privilege there or don't you see a problem with it?

12 MR. HJELMFELT: I see a problem with it which I
13 would think would be appropriate for them to assert in
14 individual instances where we find that problem.

15 MR. REYNOLDS: I think we would assert it generally
16 which is why we raised it now.

17 MR. HJELMFELT: Request No. 80, I might point out
18 that typical of the reports we are asking for there, that is
19 where we understand that the Bridges memorandum which is
20 referred to in our petition is typical of the type of documents
21 we would seek there.

22 Document 81 we would suggest would go to the
23 relationship of the CEI to the City of Cleveland.

24 The next one --

25 CHAIRMAN FARMAKIDES: Let me understand that.

1 The relationship of CEI to the City of Cleveland?

2 MR. HJELMFELT: Yes, sir, the weekly reports sub-
3 mitted to Mr. Howley by the Government Affairs Department
4 of the company, the City of Cleveland being a governmental
5 body, we would anticipate that there would be information
6 there bearing upon the relationship between CEI and the
7 electric system of the City of Cleveland.

8 MR. REYNOLDS: I would assume that would be in the
9 city's possession.

10 CHAIRMAN FARMAKIDES: I understand Mr. Hjelmfelt
11 is saying here that whoever prepares these reports, it is
12 their opinion, their interpretation, their concept of the
13 city government's action.

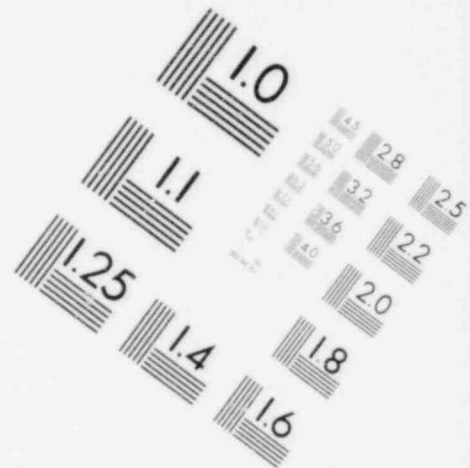
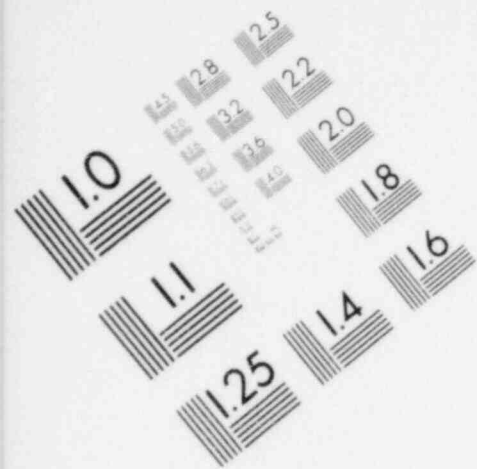
14 Mr. Hjelmfelt, is that correct?

15 MR. HJELMFELT: The Government Affairs Department
16 is a department within CEI and these are materials, weekly
17 reports, that they prepare and submit to Mr. Howley, at
18 least that is our understanding of what happens. We believe
19 this would have information relevant to CEI's activities and
20 responses and understanding of the situation that exists.

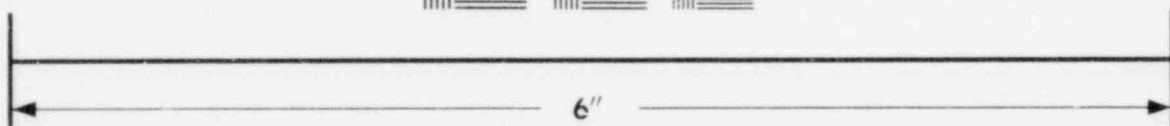
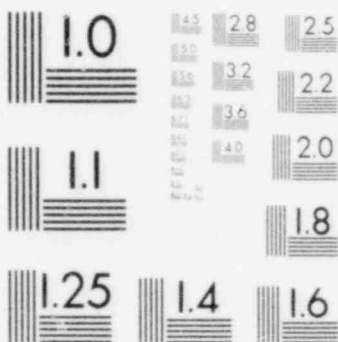
21 CHAIRMAN FARMAKIDES: All right.

22 Anything at all on any of these, 77, 79, 80, or
23 81, Mr. Reynolds, other than what you have said in your
24 objection?

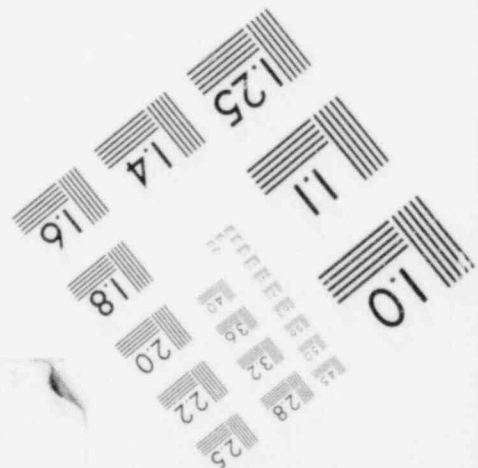
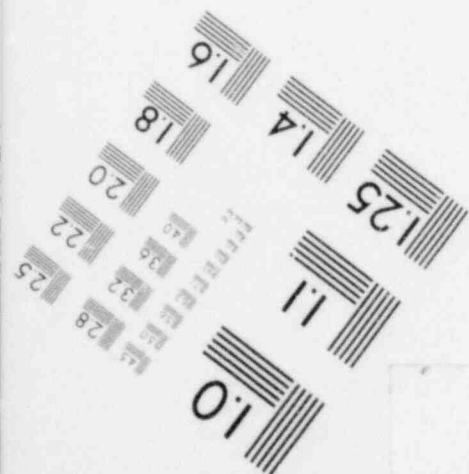
25 MR. REYNOLDS: It is as stated in the objection.

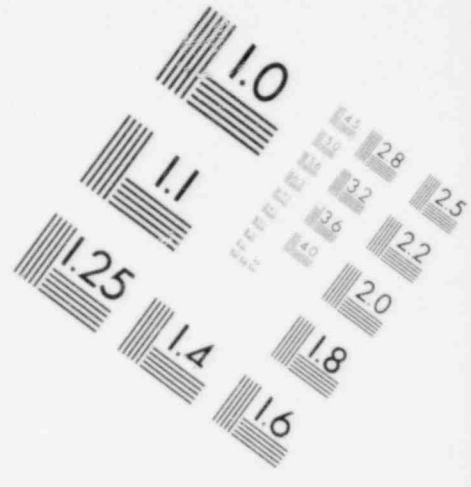
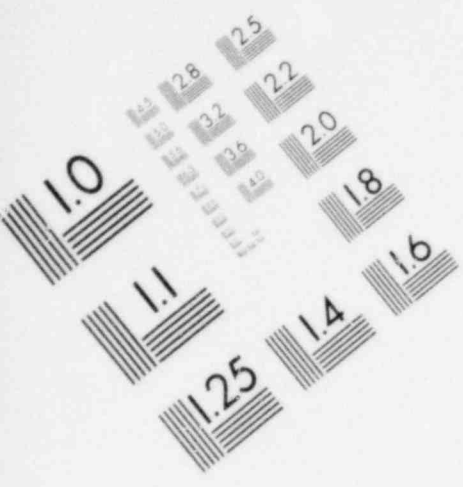


**IMAGE EVALUATION
TEST TARGET (MT-3)**

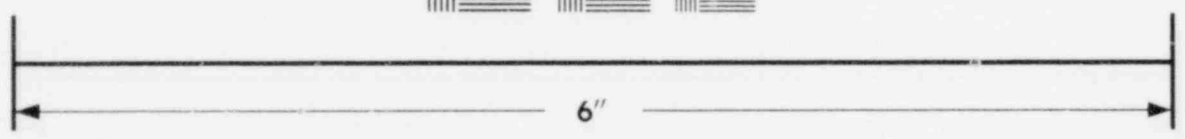
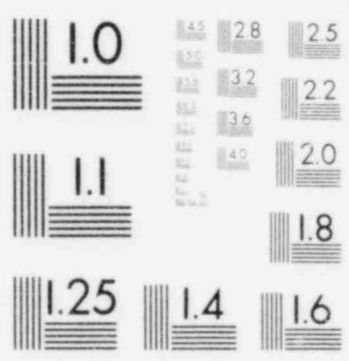


MICROCOPY RESOLUTION TEST CHART

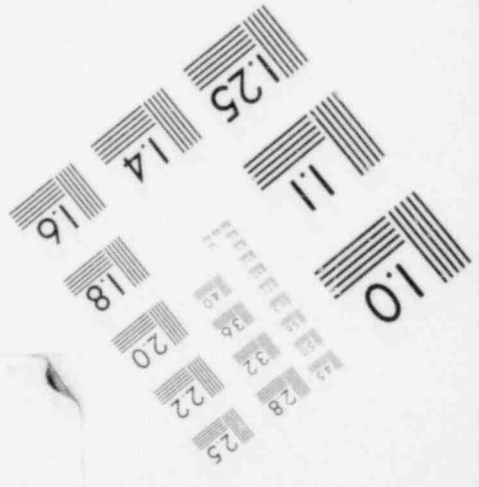
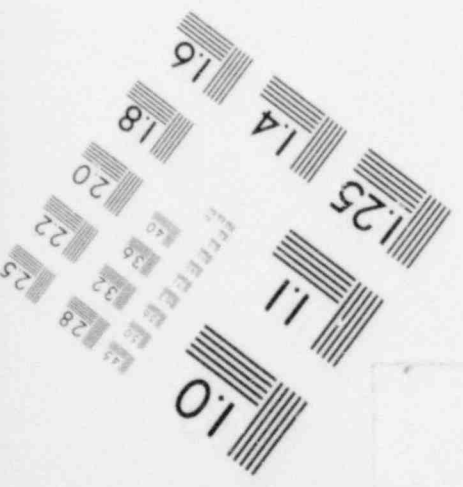




**IMAGE EVALUATION
TEST TARGET (MT-3)**



MICROCOPY RESOLUTION TEST CHART



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CHAIRMAN FARMAKIDES: Next one, 89.

2

MR. HJELMFELT: I think the reason we asked that is probably pretty relevant -- I mean pretty obvious and I don't know that I have anything else to add.

5

Their next request or objection is to our Document Request No. 9. I believe -- it is my understanding that they are really intending to object to our Document Request No. 91.

9

MR. REYNOLDS: That is correct.

10

CHAIRMAN FARMAKIDES: That is a typo then.

11

That should be 91 rather than 90.

12

MR. REYNOLDS: That is correct.

13

CHAIRMAN FARMAKIDES: Your Item 50 then appearing on page 45 of your objections relates to Document Request No. 91.

16

Proceed.

17

MR. HJELMFELT: Okay, in response thereto, we would suggest that with respect to what we have already mentioned about what we consider to be the possibility of CEI influencing MELP's ability to obtain financing, we believe that this is relevant in that connection.

22

Document Request 93 through 112 --

23

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1 CHAIRMAN FARMAKIDES: I have problems with 91
2 especially. Tell me again the relevance of 91 to the issues
3 before us.

4 MR. HJELMFELT: Yes, sir, the thing that particular-
5 ly led us to this line of inquiry is the fact that when the
6 City offered for bid, recently offered for bid, 9.8 million
7 dollars worth of bonds, a Boston bank was interested in bidding
8 thereon --

9 CHAIRMAN FARMAKIDES: In other words it is that same
10 example you have given me.

11 MR. HJELMFELT: It is that same matter then and
12 certainly a depositor who deposits the kind of funds that CAPCO
13 and CEI could deposit in banks could exert considerable influ-
14 ence. We also have another banking situation that some banks,
15 we're informed, I believe Cleveland Trust is one, refuses to
16 lend mortgage money to somebody who has a house unless the
17 house is served by CEI and again if CEI influences that situ-
18 ation, that directly gets to CEI.

19 CHAIRMAN FARMAKIDES: How would that information
20 come about through your question?

21 MR. HJELMFELT: That is not necessarily going to
22 result from this particular request. In fact I think we have
23 asked for some specific requests directed to that particular
24 situation. I'm merely using that to illustrate among the type
25 of situations where a large depositor can wield influence on

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1 the bank's policies.

2 CHAIRMAN FARMAKIDES: All right, sir.

3 MR. HJELMFELT: In fact I guess 92, the following
4 one gets right to that.

5 Okay, I'm ready to discuss document request 93
6 through 112, all of which relate to very specifically pointed
7 out items of competition between the City, CEI and the City of
8 Cleveland -- excuse me, yes, through 112, many of which are
9 contained -- referred to in our Petition to Intervene and the
10 accompanying affidavit, directly representative of some of the
11 items that occur in the retail market. And we suggest are
12 relevant to some of the statutes that this Board is charged
13 with ascertaining whether or not a situation inconsistent with
14 those statutes exists.

15 I'm ready to go on to document request no. 113.

16 MR. RIGLER: I'd like to hear a little bit more
17 about that. I'm new on the Board and that broad brush treat-
18 ment doesn't really educate me very well.

19 MR. HJELMFELT: Yes, sir. Well, we have alleged that
20 in various situations, housing or advertising allowance, for
21 example, was given to an apartment builder. I think it is
22 relevant whether or not such a similar allowance is given to
23 people who are not in an area where there's competition between
24 CEI and MELP. There's situations where we have a problem where
25 it appears that CEI has wiring inspectors who will come into a

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1 home and allege that the wiring, or maybe discover wiring de-
2 fects, which they then report. And, of course, the owner of
3 the building is required to make appropriate repairs to the
4 wiring. It turns out that say \$500 is going to be the cost to
5 make the repair and the current service is provided by MELP and
6 then CEI steps in and offers to, if they'll take service from
7 CEI, CEI will make the repairs.

8 This is the sort of competitive situation that we're
9 inquiring into here.

10 MR. RIGLER: They're trying to steal your retail
11 customers?

12 MR. HJELMFELT: Yes, sir.

13 MR. RIGLER: Now how does that relate to the appli-
14 cation to build a nuclear plant?

15 MR. HJELMFELT: Well, again as I pointed out at some
16 length before, the nuclear power is going to be marketed in a
17 retail market and if you don't have the power there's no point
18 in stealing customers and, of course, they're stealing customers
19 to serve them power that is going to come from the nuclear situ-
20 ation. If you steal all Cleveland's customers, Cleveland has
21 no need to go into the wholesale market, no reason to seek
22 access to nuclear capacity.

23 Are there further questions or shall I proceed?

24 MR. BREBBIA: No.

25 MR. HJELMFELT: Document request 113, we're willing

jeri 4 1 to reduce the period that we're asking for to a period back five
2 years. I would suggest that the material to be produced would
3 not be particularly voluminous and would certainly be, if it is
4 still retained and available, would probably be very easily
5 retrievable without any big massive file search.

6 CHAIRMAN FARMAKIDES: You're asking, sir, for the
7 daily diaries and logs and appointment calendars of all the
8 offices and all the directors of CEI in this case?

9 MR. HJELMFELT: Yes, sir.

10 CHAIRMAN FARMAKIDES: Could you give me, do you have
11 any basis for that particular request?

12 MR. HJELMFELT: Typically of the type of situation
13 that we want to inquire into here is the situation which was
14 raised earlier by -- very early in this proceeding when the
15 Applicants moved to take the depositions of, I think they
16 wanted to depose director Cadukas and they wanted to subpoena
17 the transcripts of certain hearings that occurred before the
18 City Council.

19 Among other things, we would be interested in knowing
20 whether CEI, for example, had meetings with city council members
21 prior to that meeting. We also think -- would be looking for
22 materials that could lead us to persons that we would be
23 interested in deposing. It would also be relevant to matters,
24 it might very well be relevant to such matters as contacts with
25 banks. For example, the contact with the trustee of the First

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1 Mortgage Bond Indenture, of First Mortgage Bonds.

2 MR. BREBBIA: Mr. Hjelmfelt, I want you to know as a
3 member of this panel that I find that I would never accede to
4 a request of that type unless you were willing to specify the
5 areas or the types of information from these logs or diaries
6 that you wanted. I don't believe the typical and true fishing
7 expedition in my opinion is one where a party to a proceeding
8 simply states that he wants for any period of time, all of a
9 certain category of documents, period.

10 You have to show some relevance to the proceeding in
11 my opinion before you would be entitled to access to documents
12 of that nature, and I'm not saying, you know, how I would vote
13 in the event you stated relevance but I say as that is framed,
14 to me that is the typical fishing expedition request and when
15 I say typical, of all the kinds of requests that you have in
16 discovery proceedings, that is the one that I have found in my
17 experience to be most subject to attack as framed.

18 MR. HJELMFELT: I agree that it is framed broadly.
19 I would merely -- it appears to me that it certainly simplifies
20 the burden on the responding party in this sort of situation.

21 MR. BREBBIA: Burdensomeness is not the only con-
22 sideration in whether we grant or deny a discovery request.
23 I mean, I have stated what I feel is objectionable about it.

24 MR. HJELMFELT: Yes, sir, I recognize that.

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1 CHAIRMAN FARMAKIDES: All right, anything further
2 on these?

3 I think we completed, then, that particular pack-
4 age. Let's go to the interrogatories in document request
5 propounded to the other applicants. And, again, I would like
6 to refer -- off the record.

7 (Discussion off the record.)

8 CHAIRMAN FARMAKIDES: Back on the record.

9 We will now take up the "Objections to the Inter-
10 rogatories of Document Request of the Toledo Edison Company,
11 Pennsylvania Power Company, Ohio Edison Company, and Duquesne
12 Light Company," dated September 9, 1974.

13 We have, of course, item 1 is definition 1; defi-
14 nition No. 3 is item 2. Item 3 is definition No. 5. Item
15 No. 4 is scope of production.

16 Is there anything further that needs to be said
17 with respect to those subjects?

18 MR. HJELMFELT: Sir, in regard to this discovery
19 request to the other applicants, I believe that probably other
20 than our document request 4-C, which is their item 9, every-
21 thing has probably been talked to death already.

22 CHAIRMAN FARMAKIDES: All right, your 4-C.

23 MR. HJELMFELT: Our 4-C, their item 9.

24 CHAIRMAN FARMAKIDES: That's on page 10 of the
25 objections? Is that correct, Mr. Reynolds? Can we go ahead?

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1 MR. REYNOLDS: That is correct.

2 CHAIRMAN FARMAKIDES: Let's go to item 9, then, and
3 let's discuss it.

4 Mr. Hjelmfelt.

5 MR. HJELMFELT: Yes, sir, this request is for
6 documents that go to the possibility -- it is information re-
7 lated to potential competition. We're looking for items
8 referring to possible acquisition of electric power facilities
9 of municipalities or electric cooperatives -- excuse me, not
10 potential competition but ending competition or taking over,
11 for example, from your municipal -- if there was a munici-
12 pality that was present that had its own generation and one
13 of the CAPCO, one of the other applicants to whom this is
14 addressed sought to take over that system, sought to purchase
15 it, offered to serve it wholesale. That is the sort of in-
16 formation we're looking for, and I would suggest that it is
17 certainly relevant to what we are looking into here as to
18 who is available to deal with in the market.

19 CHAIRMAN FARMAKIDES: All right, sir. Mr. Olds
20 or Mr. Reynolds.

21 MR. OLDS: I seem to have been promoted by Mr.
22 Charnoff's departure to the status of a speaker. Speaking
23 particularly on behalf of Duquesne but also generally on behalf
24 of the other applicants, other than CEI, we would certainly
25 urge that there has not been any serious suggestion that there

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1 is an antitrust problem in this area. It is burdensome to
2 ask us to go back for years and review our files and produce
3 information about this. We really urge that there is no
4 need to bring forth this kind of information.

5 Further, we don't understand that it properly
6 falls from the lips of the city to raise this question.
7 This is not an issue raised by the city, nor has the Depart-
8 ment of Justice raised this issue, which you might consider
9 would be the agency that would have a broader perspective
10 in the matter, and we therefore feel that this sort of an
11 interrogatory is really harassment, trying to generate some-
12 thing where nothing at the present time is indicated to
13 exist.

14 I don't like to hark back to the letters of ad-
15 vice issued by the Department, but I think they should bear
16 some importance in the mind of the Board, and they certainly
17 do not suggest to us any problem and they do suggest that
18 the Department has looked into the matter.

19 CHAIRMAN FARMAKIDES: All right, sir. Thank you.

20 I take it, then, that was the only item that --
21 that was being discussed.

22 MR. HJELMFELT: I believe it is the only item that
23 didn't have a corresponding discussion. Unless Mr. Reynolds
24 has one.

25 MR. REYNOLDS: Item 16 -- I'm sorry, 26?

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1 CHAIRMAN FARMAKIDES: Item 26, which appears on
2 page --

3 MR. REYNOLDS: Bear with me for a second. Is
4 it interrogatory No. 26?

5 CHAIRMAN FARMAKIDES: Wait a minute, let's use
6 the very same system that we used in the earlier, if you will.

7 MR. REYNOLDS: Item 24, which is document request
8 26 to the other applicants, other than Cleveland Electric
9 and it's document request 32 as to the --

10 CHAIRMAN FARMAKIDES: There's something wrong.
11 My item 24 on the objections to the interrogatories and
12 document requests, et cetera, relates to document request No.
13 14-G.

14 MR. REYNOLDS: I'm confused on the documents. If
15 we can strike from the record my last reference.

16 CHAIRMAN FARMAKIDES: We're not going to strike
17 the record, sir. Let's just continue. Let's get it correct.

18 MR. REYNOLDS: It's item 30, 31 and 32 and 33.

19 CHAIRMAN FARMAKIDES: All right, sir.

20 MR. REYNOLDS: Which has reference to document
21 request 26, A, B, C, and D.

22 The applicants alone are objecting to document
23 request 26-B, -C, and -D. There was no objection raised by
24 CEI to the comparable document request in the document we
25 first went through.

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1 CHAIRMAN FARMAKIDES: All right.

2 MR. REYNOLDS: I believe that as to -B, -C, and
3 -D, the filing with the Board addresses itself fully to the
4 objections that the other applicants have. The city has
5 not responded to those objections yet because they were not
6 raised by CEI on the earlier review.

7 CHAIRMAN FARMAKIDES: All right, sir. All of the
8 applicants have objected to 26-A.

9 MR. REYNOLDS: That is correct.

10 CHAIRMAN FARMAKIDES: But only -- but CEI has not
11 objected to 26-B, -C, or -D?

12 MR. REYNOLDS: That is correct.

13 CHAIRMAN FARMAKIDES: Mr. Hjelmfelt, did you wish
14 to clarify this or add to 26-B, -C, or -D, sir?

15 MR. HJELMFELT: I don't think it requires a whole
16 lot of comment. I think we're looking to joint planning
17 studies, which, of course, we're looking here at joint ac-
18 tivities in construction of generation and transmission and
19 that sort of thing, coordination, coordinated development
20 which is an issue, transmission load flow which is used in
21 planning transmission and discussions regarding allocations
22 responsibility for the location and timing of transmission
23 construction which generally is a joint activity from which
24 the city has been excluded and which has a great deal to do
25 with interconnection and the ability to function in the
wholesale market.

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1 CHAIRMAN FARMAKIDES: All right, sir.

2 MR. OLDS: Mr. Farmakides, may I speak to that?

3 I'd like to make the point that other requests
4 of the city have gone to all of the CAPCO papers, and that
5 is the place where the matters would arise that Mr. Hjelmfelt
6 is talking about.

7 Our objection is that this requires us to make a
8 study of our files and produce information about, in effect,
9 the non-CAPCO matters. We're not raising an objection to
10 the requests that deal with the issue of CAPCO and CAPCO
11 studies and planning, but we're talking about all the
12 rest. What is the relevance of that? There's never been a
13 contention of anticompetitive result in planning studies.

14 I would analogize about the point that was made
15 of producing all of the information which is of a rate nature.
16 If a study could be made, perhaps we could understand it, but
17 what possible studies are involved in this?

18 CHAIRMAN FARMAKIDES: Mr. Hjelmfelt?

19 MR. HJELMFELT: I would only say when we're looking
20 at what kind of a situation there is that is being maintained,
21 whether an anticompetitive situation exists, that it is certainly
22 relevant to look beyond just the CAPCO members when we're
23 talking about bulk power supply sources that are potential.

24 If we have all sorts of bulk power supply sources
25 that we can grab with no problem, then denying a submission

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1 to CAPCO would not be an anticompetitive activity, so I
2 think it is relevant to know what is there.

3 CHAIRMAN FARMAKIDES: I believe then that
4 concludes our treatment of the objections to the inter-
5 rogatories in document requests of the Toledo Edison
6 Company, Pennsylvania Power Company, Ohio Edison Company,
7 and Duquesne Light Company.

8 Let's go then to the last objection filed with us.
9 It is entitled "Objections to the City of Cleveland to
10 Applicants' Initial Interrogatories and Requests for Docu-
11 ments," and I understood earlier Mr. Charnoff to say that
12 apparently you-all had discussed this during the recess
13 and you have certain categories of further comment to make.

14 Mr. Hjelmfelt?

15 MR. HJELMFELT: Yes, sir. I'd like to commence
16 with a reference to interrogatory number 87, which is found
17 on my page 7 of our objection.

18 Lest anyone be misled, the case of SEF versus
19 General Outdoor Advertising Company is there cited for a
20 proposition for which it does not stand and that should be
21 stricken.

22 CHAIRMAN FARMAKIDES: All right.

23 MR. HJELMFELT: Our objections fall into a few
24 categories that can be discussed. For example, most of our
25 objections to the interrogatories are based on the idea that

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1 when we are asked to furnish a document, we don't think it
2 is appropriate for us to be required to abstract the same
3 testimony and respond to an interrogatory and to the extent
4 that we're furnishing information in documents in response
5 to the document request as indicated, we feel we should be
6 relieved from duplicating that information with interrogatories.

7 Another area to which --

8 CHAIRMAN FARMAKIDES: Hold on in that area. Let'
9 talk to that area first.

10 MR. RIGLER: Suppose that the document is not
11 fully responsive to the request for information. In other
12 words, suppose the company officials or city officials
13 have some further knowledge that would amplify the answer or
14 even change the answer.

15 MR. HJELMFELT: Yes, sir. In that situation it
16 would be appropriate for us to furnish that information
17 to the interrogatory. Certainly to the extent that it is,
18 for example, available in our Form 12, for example, filed
19 with the FPC, I see no reason why we should have to copy it
20 out.

21 CHAIRMAN FARMAKIDES: Mr. Reynolds or Mr. Olds,
22 did you have a comment with respect to that point?

23 MR. REYNOLDS: I believe in terms of that whole
24 matter, and it runs throughout the objections, I believe, we
25 have no problem to the extent that the document request over-

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1 laps and duplicates the interrogatories to have the
2 information furnished in the document.

3 I would agree that to the extent the document goes
4 much further into other areas that the obligation of extract-
5 ing the relevant information should fall on the party that is
6 requested to furnish the information, and I would add in
7 addition that to the extent the interrogatory goes further
8 than the document request and the document is not fully
9 responsive, we would anticipate that the interrogatory
10 would be answered to the extent that it is not already
11 answered by the material furnished under the document request.

12 CHAIRMAN FARMAKIDES: Do you agree to that, Mr.
13 Hjelmfelt?

14 MR. HJELMFELT: As far as I understand it, I agree
15 that where we furnish a document and ask the same information,
16 we shouldn't be required to abstract.

17 Where the interrogatory is broader than the
18 document we're furnishing later on, any relevant information
19 we have should be furnished. I agree with that. I don't
20 think I understand the other -- what I understood him to say
21 was that where the document was broader than the interrogatory
22 and we're requested to provide the document, then we should
23 have to abstract to answer a more narrow interrogatory, and
24 I would object to that.

25 CHAIRMAN FARMAKIDES: That was my understanding, too,

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1 Mr. Reynolds. Did you intend to say that, sir? Where
2 the document is being furnished, the information is in the
3 document. However, if the interrogatory is more narrow
4 than the document, then you feel the burden is upon the party
5 who furnishes the document to abstract it and furnish the
6 information?

7 MR. REYNOLDS: Yes. For example, FPC Form 1 is
8 a voluminous document that has a wealth of information in
9 it, some of which has no relevance to this proceeding, and
10 to turn over FPC 1 as a response to some of these questions
11 is not very helpful to anybody in this proceeding.

12 I think that portion of the documents turned over
13 should relate to the request made.

14 MR. OLDS: May I suggest that it would be simplicity
15 itself for Mr. Hjelmfelt in that case to indicate what
16 portion of the document speaks to the question asked in the
17 interrogatory and save himself trouble and greatly aid us?

18 CHAIRMAN FARMAKIDES: Look, this is a point of
19 administration which is quite relevant, don't misunderstand
20 me.

21 I would like to add this to the items that you
22 people discuss among yourselves and come back to me on.
23 You've got three items, 21-C, 37-C and 43. Let's add this
24 category. We'll call it category 1 to that list, and I
25 would like to have you-all talk to each other, because this

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1 cuts two ways, no doubt about it. It is going to make your
2 jobs much more difficult or much easier if you can agree on
3 something.

4 As a matter of fact, this very same agreement
5 should also apply with respect to Justice and the AEC Staff,
6 because they're going to have the same problem.

7 So you talk about it and give me the benefit of
8 your thoughts.

9 MR. HJELMFELT: The second category is the question
10 of requests, which we suggest require us to do legal research,
11 and I don't think that requires any extended discussion.
12 Our point is made in here.

LN #36
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1 CHAIRMAN FARMAKIDES: Right.

2 Did you have any comment, Mr. Reynolds?

3 MR. REYNOLDS: I think that it is a characterization
4 problem. We have asked for them to describe the municipal
5 ordinances and statutes, to list them, to furnish citations.
6 I don't think that Muny is governed by the city and these are
7 analogous I guess to the bylaws and all we are asking for is
8 a list of the pertinent provisions.

9 MR. BREBBIA: Mr. Reynolds, your client operates
10 in the City of Cleveland, doesn't it?

11 MR. REYNOLDS: That is correct.

12 MR. BREBBIA: Does your client have house counsel?

13 MR. REYNOLDS: Yes.

14 MR. BREBBIA: You mean to tell me you don't have
15 these pertinent regulations? I can't believe it and I will
16 put that on the record. I mean how do they operate?

17 MR. REYNOLDS: Well, Mr. Brebbia, I am not sure
18 that we have -- I guess the answer is we don't know whether
19 we have all of the regulations that respond to the particular
20 interrogatories. I am sure that we have the municipal
21 ordinances and statutes. The listing that we are asking for
22 goes for provisions to expansion or contraction of the
23 municipal system.

24 MR. BREBBIA: Isn't that available to you in
25 Cleveland? Can't the company get it in Cleveland?

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1 MR. REYNOLDS: I am sure that if it were furnished
2 to us that we could get it.

3 MR. BREBBIA: Okay.

4 MR. HJEMFELT: We have objected to a couple of
5 questions on the grounds that we understand them to be
6 actually going in the subject of remedies and it was our
7 understanding that this was not the appropriate stage to
8 conduct discovery in the issue of remedies.

9 (Board conference.)

10 CHAIRMAN FARMAKIDES: Anything further?

11 MR. REYNOLDS: I would like to respond to that, if
12 I might.

13 CHAIRMAN FARMAKIDES: Yes.

14 MR. REYNOLDS: I think the interrogatories we are
15 talking about are No. 71, No. 82-C, No. 96 and then the
16 Document Requests 49-A, B, and C and Document Request 50
17 which essentially relate to the matter of MELP's plans to
18 finance its proposed participation in the nuclear units.
19 And this, I don't think, goes to remedy at all.

20 The reason we are in this case and the reason we
21 are having a hearing is an allegation that there is a denial
22 of access by CEI to the city.

23 Now it seems that it is extremely relevant to that
24 question of denial whether the city is in any position to
25 finance ownership or finance any participation in these plants.

1 That is a bedrock issue that goes to the very anti-competitive
2 behavior that has been alleged in this case, as to the
3 question of a denial of access and I think that we have been
4 advised by the city in the first prehearing conference before
5 this Board that they would furnish that information to us
6 promptly and there have been repeated promises and their
7 information as to their ability or capability to give that
8 information is not forthcoming. It goes directly to the
9 question of whether there has been a denial of access of anti-
10 competitive nature by CEI in this case.

11 MR. RIGLER: Is their offer of access contingent
12 upon financing?

13 MR. REYNOLDS: There has been very definitely an
14 offer.

15 MR. RIGLER: Contingent be upon financing.

16 MR. REYNOLDS: That is correct.

17 MR. HJEMFELT: I would like to respond to that, if
18 I might. I don't recall any of the offers for what they
19 consider to be access to have been couched in any phrase or
20 in any way stated as being contingent upon financing. His
21 earlier reference to financing, it is my recollection that
22 those discussions were all involved with negotiations and
23 what might be relevant for discussion and negotiations is
24 not necessarily relevant for discovery purposes and I don't
25 think it is relevant for discussion on the record. I think

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1 this clearly goes directly towards the matter of remedies.

2 It doesn't have anything to do that I can see with
3 the anti-competitive situation if one exists or an inquiry
4 into whether there is an anti-competitive situation. It is
5 solely related to a remedy situation, that is, access. How
6 do we go about taking advantage of access if it is granted
7 and that to me is remedies.

8 CHAIRMAN FARMAKIDES: All right, sir. Your next
9 category.

10 MR. HJEMFELT: Yes, sir, our next category is
11 one dealing with what we consider to be a request for us to
12 state our contentions, our legal conclusions and our legal
13 opinions and state opinions. It seems to me that we have
14 gone through a long procedure of stating matters in contro-
15 versy and contentions and as I understand it when we complete
16 discovery we are going to go through another attempt to narrow
17 these more, focus more sharply on them if we can and it
18 seems to me at this point to be referring back again behind
19 what we have finally embodied in a statement of contentions
20 is not helpful in any way to getting us any closer to a
21 conclusion and is only a matter of delay, as well as I don't
22 think it is an appropriate matter for discovery.

End #36

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1 MR. REYNOLDS: This is objection 83 which is, I
2 repeatedly referred to throughout. I'm sorry, interrogatory
3 83. And it's raised in connection with the question by CEI as
4 to the basis for specific statements made in the City of Cleve-
5 land's petition to intervene. It recalls -- it requests the
6 factual backup for those statements, what was the basis for those
7 particular statements made in their pleadings. It calls for facts.
8 It doesn't call for law. It doesn't ask for a legal opinion.
9 It doesn't ask for legal conclusions. It's asking for the
10 factual backup or the specific allegations and statements made
11 in the petition to intervene. And I think that is the heart
12 of what discovery is addressed to and goes to the very nature
13 of your information that you can obtain on discovery.

14 You can't perhaps get to the way that they're going
15 to formulate the legal conclusions, but they make statements
16 in their petition and their pleadings, and I think we're en-
17 titled to know the factual basis for those statements and the
18 cases that they cite, I don't think support the proposition
19 that they're cited for.

20 CHAIRMAN FARMAKIDES: All right. Mr. Hjelmfelt.
21 Anything further?

22 Your next category.

23 MR. HJELMFELT: That exhausts my categories, and
24 I believe that with respect to the rest of our objections, they're
25 pretty self-explanatory and I don't need to burden the record

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1 with any further statement.

2 MR. REYNOLDS: Just two matters in connection with the
3 City's objections, one is Interrogatory Number 31, the City
4 objected to that interrogatory as not being able to understand
5 it, and I think that that objection is understandable.

6 MR. BREBBIA: Is that your statement?

7 (Laughter.)

8 MR. REYNOLDS: I would like to suggest that it
9 be revised so that it will be more understandable, and we dis-
10 cussed this at the luncheon break. The interrogatory would
11 now read "State whether MELP has now or had at any time during
12 the period from 1950 to date a policy or practice of establishing
13 a fixed or target rate of payments or services to the City
14 in lieu of local taxes." And then the second sentence would
15 remain the same.

16 CHAIRMAN FARMAKIDES: All right.

17 MR. HJELMFELT: Now, I might state that at this
18 point we're not in a position to say whether that puts it in
19 language that would permit a meaningful response by the City.
20 We would have to see what's available.

21 MR. REYNOLDS: And if I could make one further
22 point --

23 CHAIRMAN FARMAKIDES: Before we finish, can we also
24 be advised during the phone call as to that, Mr. Hjelmfelt?

25 MR. HJELMFELT: We'll make an effort. I'll include

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1 that on my list.

2 MR. REYNOLDS: Interrogatory Number 21 which was
3 objected to by the City as too broad and burdensome for the
4 reason that it would require Cleveland to supply the name of
5 each city council member. We would be prepared to limit
6 that interrogatory to persons within MELP's employ.

7 CHAIRMAN FARMAKIDES: Mr. Hjelmfelt.

8 MR. HJELMFELT: I would assume that when asking
9 for the person responsible, they're willing to rely on the
10 City's identification of who's responsible without -- we would
11 not object on that basis.

12 CHAIRMAN FARMAKIDES: All right, fine.

13 MR. HJELMFELT: Again, I would assume whatever
14 time limit is set would apply?

15 CHAIRMAN FARMAKIDES: Yes, yes, the time limit that
16 we're going to set, I think, will apply to all of these unless
17 a party makes a very good showing of good cause why it should
18 not. As to an individual interrogatory or document request.
19 The probability would be that the Board would deny it. On the
20 other hand, there may well be some exceptional situation where
21 the time that the Board sets is not appropriate with respect
22 to an individual interrogatory or individual document request.
23 I can't foresee any, but there is that possibility. In that
24 situation the Board would entertain a special pleading from that
25

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1 party to lengthen the time.

2 Anything further, Gentlemen? Fine. We will now
3 adjourn and I will hope to hear from you all, Mr. REynolds and
4 Mr. Hjelmfelt, either Wednesday or Thursday.

5 Thank you very much, gentlemen.

6 (Whereupon, at 6:00 p. m., the prehearing
7 conference in the above-entitled matter was adjourned.)
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