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UNITED STATES ATOMIC ENERGY COMMISSION

ANTITRUST

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.

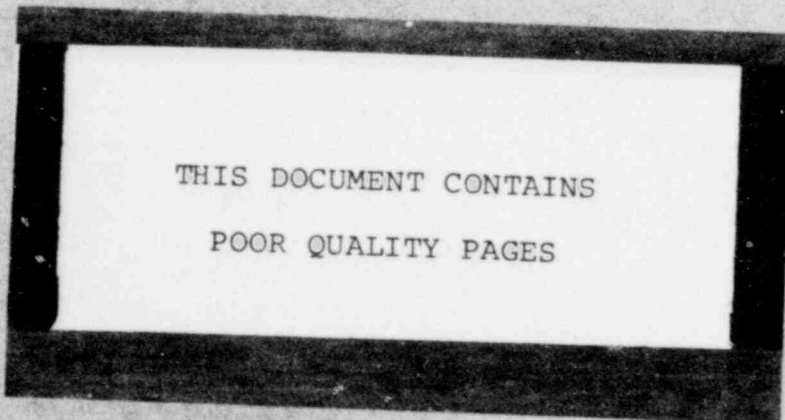
Docket Nos. 50-440A  
50-441A

(Perry Nuclear Generating Station,  
Units 1 and 2)

Place - Washington, D. C.

Date - Tuesday, 30 April 1974

Pages 303 - 339



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UNITED STATES OF AMERICA  
ATOMIC ENERGY COMMISSION

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In the matter of: :

TOLEDO EDISON COMPANY and : Docket Nos. 50-346A

CLEVELAND ELECTRIC ILLUMINATING : :

COMPANY : :

(Davis-Besse Nuclear Power : :

Station) : :

and : :

CLEVELAND ELECTRIC ILLUMINATING : Docket Nos. 50-440A

COMPANY, et al. : 50-441A

(Perry Nuclear Generating Station, : :

Units 1 and 2) : :

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ANTITRUST

U. S. Tax Court  
Courtroom No. 2  
1111 Constitution Avenue, N.W.  
Washington, D. C.

Tuesday, 30 April 1974

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

BEFORE:

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

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GERALD CHARNOFF, Esq. and W. BRADFORD REYNOLDS, Esq.,  
Shaw, Pittman, Potts & Trowbridge, 910 17th Street,  
N. W., Washington, D. C.; on behalf of Applicants.

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

CHRISTOPHER R. SCHRAFF, Assistant Attorney General,  
361 East Broad Street, 800 Seneca Towers, Columbus,  
Ohio 43215; on behalf of the State of Ohio.

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

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

BENJAMIN H. VOGLER, Esq., Office of the General Counsel,  
United States Atomic Energy Commission, Washington,  
D. C. 20545; and

ANDREW POPPER, Esq., 7920 Norfolk Avenue, Phillips  
Building, Bethesda, Maryland; on behalf of the  
Regulatory Staff, Atomic Energy Commission.

P R O C E E D I N G S

5165 A1

Reba 1

1  
2 CHAIRMAN FARMAKIDES: It is 9:30. This hearing will  
3 be in order. We will proceed. This is the first Prehearing  
4 Conference with respect to the consolidated proceeding involving  
5 the Davis-Besse Nuclear Power Station and the Perry Nuclear  
6 Power Station.

7 We have been discussing this proceeding in the  
8 past. I agree with the parties that we consolidate these  
9 proceedings correctly, and I would like to note for the record  
10 the docket number of these two proceedings. It will be each of  
11 the three numbers, 50-346A, 50-440A, and 50-441A. Those three  
12 numbers will be the docket number for this proceeding. That  
13 will eliminate duplication of copies and double transcripts  
14 and so forth.

15 We called this prehearing conference initially  
16 for April 25th, and then by a misunderstanding as to dates,  
17 by agreement to parties we postponed it to April 30th, today.  
18 We issued a notice dated 24 April, 1974, designating this  
19 location. In that notice, we indicated an agenda, and I would  
20 like to follow that agenda.

21 I would like to ask the parties one thing. I went  
22 over the transcripts both of the previous two hearings in-  
23 volving the first phase of the Board's effort, and that was the  
24 motions board phase, if you will allow me, and I truly believe  
25 that we can save tremendous time if we do not repeat the

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1 arguments once made. I notice several different points where  
2 counsel for the parties in fact were repeating the same  
3 arguments as before.

4 I did not control the programs as strictly as I  
5 should, but I wanted each person to say what he wanted to say  
6 on the record hoping that perhaps new and additional infor-  
7 mation would come out, but in fact it did not.

8 So today, I urge you please to limit yourselves  
9 to whatever point that you want to make, and make that point,  
10 and you don't have to repeat it. We don't need that type of  
11 reiteration. It is a waste of your time and our time.

12 Going back again to the agenda, the first item  
13 is contentions with respect to the Nexus. The State of Ohio  
14 is participating -- incidentally, under 2.751(c), the State of  
15 Ohio is participating, with additional commitments made by  
16 the Applicant and Staff.

17 They still have not come in. I think it would be  
18 proper to give them an additional period of time. Let's recess  
19 for five minutes, until 20 minutes to ten.

20 He is here now, so it will not be necessary to recess,  
21 so we will go off the record.

22 (Discussion off the record.)

23 CHAIRMAN FARMAKIDES: Let's proceed. All the  
24 counsel are in the room now. All parties are represented.  
25 State of Ohio, City of Cleveland, Applicants, Department of

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1 Justice, and AMP-O, so we can proceed.

2 On the first contention during a telephone conference  
3 call, Mr. Goldberg requested that he be given until today  
4 to advise the Board with respect to why he feels that the  
5 ruling of the Board requiring him to show a nexus should be  
6 deferred temporarily or perhaps permanently, and we would like  
7 to hear from Mr. Goldberg.

8 Mr. Goldberg?

9 MR. GOLDBERG: Mr. Chairman, and Members of the  
10 Board, I have in mind your admonition that you don't care to  
11 hear repetition of arguments previously made on this subject.

12 CHAIRMAN FARMAKIDES: Unless there is something new,  
13 sir, that you think can develop the record. That would be most  
14 helpful.

15 MR. GOLDBERG: Well, originally we requested the  
16 matter of a further statement with respect to nexus in these  
17 proceedings be deferred because of the application we were  
18 planning to file for reconsideration of the Board's ruling,  
19 and for certification either to the Appeals Board or to the  
20 Commission as appropriate.

21 I had understood that that request was granted.  
22 Now the Board subsequently ---

23 CHAIRMAN FARMAKIDES: Which request was that?

24 MR. GOLDBERG: That we not be required to meet the  
25 twenty-day specifications of the Board's original ruling.

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1 CHAIRMAN FARMAKIDES: You are correct. That is  
2 correct.

3 MR. GOLDBERG: Subsequently, we did file the request  
4 for reconsideration and request for certification, and both  
5 were denied. I would think that sometime today, as a matter  
6 of fact, I am sure that sometime today an appeal to the Appeals  
7 Board will be filed, and it is our feeling that any request  
8 for any clarification, any additional statements with respect  
9 to nexus, should be deferred until that decision has been  
10 rendered by the Appeals Board.

11 But in any case, it is our view that the allegations  
12 with respect to nexus that appear in the petitions and related  
13 pleadings in Davis-Besse, and in Perry, are as clear and  
14 adequate a statement as can possibly be made with respect to  
15 the matter of nexus, and I would say to the Board frankly that  
16 I am at a loss to understand why our allegations with respect  
17 to nexus were, in the view of the Board, only marginally  
18 adequate.

19 Now I started out by saying that I am mindful of  
20 the Board's admonition that it does not wish a repetition,  
21 and yet if I am going to argue that our allegations with  
22 respect to nexus are clear and adequate, and not only marginally  
23 adequate, I am simply going to have to go into the whole thing.

24 CHAIRMAN FARMAKIDES: Well, sir, let's understand  
25 one thing, Mr. Goldberg. I think all the parties should be

Reb 5

1 very clear. The Board considered really, that the motions,  
2 the petitions to intervene, and the ruling of the Board with  
3 respect to the petitions to intervene, was really a function  
4 of a motions board.

5 That was phase 1. We talked to the petitioners  
6 and resolved those issues. That was phase 1. Let me go to  
7 the next phase. That is the beginning of the formulation of  
8 the issues, if you will, to permit discovery. We are now  
9 in the next phase, Mr. Goldberg. We are at the point where we  
10 need to know what your contentions are with specificity so we  
11 can permit discovery and resolve issues in dispute on  
12 discovery.

13 The next phase is, then, the pleading phase, if  
14 you will, the brief-writing, and then we will go to the eviden-  
15 tiary session. This is a progression going to that. I am  
16 sure you have gone through this many, many times, perhaps more  
17 than I.

18 MR. GOLDBERG: I would submit respectfully that  
19 the Chairman is now really talking about number 2 on the  
20 agenda of the notice, which is a prerequisite, as I understand  
21 the Board, to discovery.

22 CHAIRMAN FARMAKIDES: Mr. Goldberg, I would accept  
23 that. It is perfectly all right with the Board to go to the  
24 two so long as we understand you to have said to us that your  
25 nexus, the nexus that you have articulated in the past, is the



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1 only nexus that you intend to pursue, which is the nexus  
2 that the Board identified in the final Memorandum and Order  
3 of the Board, with respect to Besse and with respect to Perry.

4 If that is the case, certainly I agree with you  
5 that we could very easily go to number 2, and begin to clarify  
6 and specify the issues.

7 Now I also understand you to say, Mr. Goldberg,  
8 that you would suggest the Board defer action with respect  
9 to any request you further specify on nexus until after the  
10 Appeals Board acts.

11 MR. GOLDBERG: Yes, I did say that.

12 CHAIRMAN FARMAKIDES: Is there anything else  
13 on 1, sir, before we go to 2?

14 MR. GOLDBERG: I would say if the Board desires  
15 a further statement on the matter of nexus that we be per-  
16 mitted at the appropriate time after the Appeals Board has  
17 acted to file a written supplemental statement of nexus.

18 CHAIRMAN FARMAKIDES: All right, sir. Let's go  
19 to 2. Forgive me. Forgive me. I beg your pardon. Does anyone  
20 else have anything on 1, agenda item number 1?

21 Mr. Charnoff?

22 MR. CHARNOFF: Very briefly, sir, it would be our  
23 position unequivocally that a deferral such as requested  
24 by Mr. Goldberg is unnecessary and irrelevant. The appeal that  
25 may be filed today has to do with the reactor named Beaver

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1 Valley Number 2. It has nothing to do with the Perry and  
2 the Davis-Besse proceedings, and it seems to us that if we  
3 are to get started at some time in this process, we ought to  
4 get started now in connection with those two facilities that  
5 are at issue in this proceeding, and hence we would very  
6 strongly oppose any deferral.

7           It is our view that the Board was quite correct  
8 in requiring a clear statement of the causal relationships  
9 between that facility that is at issue in the hearing, and  
10 any situations that are alleged to be inconsistent with the  
11 antitrust laws. That is what the Board had written in its March  
12 15th letter. We think that is required in order to confine and  
13 define subsequent events in this particular proceeding, and  
14 I would agree that if Mr. Goldberg is limiting himself to the  
15 one area of nexus found by the Board, we can move on.

16           If there is still an issue on that, then it seems  
17 to me the Board would have to rely on the record as it stands  
18 and identify the nexus issue as being the one it found.

19           CHAIRMAN FARMAKIDES: Thank you. Mr. Brown?

20           MR. BROWN: Nothing.

21           CHAIRMAN FARMAKIDES: Mr. Charno?

22           MR. CHARNO: Nothing.

23           CHAIRMAN FARMAKIDES: Mr. Popper?

24           MR. POPPER: Yes, Mr. Chairman. Three very brief  
25 points: First of all, the Staff's position on the question of

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1 nexus regarding the Davis-Besse and Perry facility is similar  
2 to that stated by Mr. Goldberg. We feel there is no further  
3 reason for additional pleadings regarding the point nexus at  
4 this point in the proceeding, that the issue of nexus has been  
5 sufficiently plead.

6 CHAIRMAN FARMAKIDES: You are saying in effect that  
7 all that is needed is to allege sufficient nexus to get into  
8 the case. From then on, you don't need further nexus?

9 MR. POPPER: That is correct, your Honor, and I  
10 further feel there is a second point that any pleading with  
11 greater factual particularity on the issue of nexus at this  
12 point would be an unnecessary exercise, that we will get in  
13 pretrial briefs sufficient factual determinations of what nexus  
14 is, and that will be best done after discovery, and not prior  
15 to.

16 Nexus is in the most part a factual issue.

17 CHAIRMAN FARMAKIDES: So you think you can properly  
18 go into phase 2 by looking at item 2 on the agenda?

19 MR. POPPER: Yes.

20 CHAIRMAN FARMAKIDES: Mr. Schraff?

21 MR. SCHRAFF: Nothing.

22 MR. CHARNOFF: I would like to raise a point. Maybe  
23 it is better number 2 than number 1. I was puzzled by Mr.

24 Brown's position on item 1, which as I understood it was only

25 with respect to Mr. Goldberg's request for a deferral. However,

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1 the Board did with respect to AMP-O, in its Order require  
2 it would require further clarification from AMP-O, before we  
3 get into discovery, and I don't know whether the Board proposes  
4 to handle that as an introductory matter insofar as AMP-O is  
5 concerned, or as part of item 1.

6 CHAIRMAN FARMAKIDES: I think in view of the  
7 development here this morning, it seems we can get into the  
8 issues on item 2, and that is really what we are getting at.  
9 We want to get to the point where you fellows join issues.  
10 The Board would be delighted if you would sit down together  
11 and come up with a joint statement of issues.

12 That would be the very best way, a joint statement  
13 of issues really for discovery. You don't have to finalize  
14 your issues. You can have a joint issue for discovery purposes,  
15 and after you have had discovery, a lot of those issues will  
16 dissolve, and some will be amended.

17 I hope that would be the best procedure for you and  
18 for us. I would be most happy to accept that kind of effort  
19 if you people will put a deadline on yourselves. Mr. Popper?

20 MR. POPPER: Mr. Chairman, the parties did meet on  
21 the 25th of this month, all the parties to this proceeding  
22 with the exception of the State of Ohio. On the 29th the  
23 Staff and the Department of Justice met, and pursuant to those  
24 meetings we have come up with a joint statement of the Staff  
25 and the Justice Department.

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1 I would add that on the first day we discussed in  
2 great detail many of the issues that could be considered as  
3 being subject matter for a joint statement of issues and  
4 matters in controversy in this proceeding. Now, the Staff,  
5 the Regulatory Staff ---

6 CHAIRMAN FARMAKIDES: I beg your pardon. You  
7 did this with the Department of Justice?

8 MR. POPPER: Yes.

9 CHAIRMAN FARMAKIDES: Did you talk to the other  
10 parties?

11 MR. POPPER: Yes, your Honor, I did. All the  
12 parties met on the 25th.

13 CHAIRMAN FARMAKIDES: But this is a joint statement  
14 only of two of the parties?

15 MR. POPPER: That is correct. The initial work  
16 product that went into this was of all five parties. However,  
17 we were only able to get through about half of the material  
18 that we felt should be covered.

19 MR. CHARNOFF: The initial work product was not  
20 the work product of all five parties.

21 MR. POPPER: I am sorry. That which occurred on the  
22 25th of April was a meeting of all five parties, a meeting  
23 of counsel, and at that time we discussed matters in con-  
24 troversy. Some points were obviously in disagreement, and on  
25 some point we were able to agree.

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1 Let me complete my statement, please.

2 CHAIRMAN FARMAKIDES: Mr. Charnoff, please from now  
3 on, no gratuitous comments. Let's continue, Mr. Popper.

4 MR. POPPER: What had resulted from the meeting of  
5 the 29th is a joint statement of issues by the Department and  
6 by the Staff. These have gone out in a formal mailing, and  
7 they went out this morning, I think. I have copies of that  
8 statement for the parties, for all the parties and the Board  
9 this morning.

10 CHAIRMAN FARMAKIDES: I don't know if the Board  
11 would like to have those at this time. I think it would be  
12 far more useful if you would get back together and meet with  
13 all the parties and see if you can't come up with a final  
14 statement. I don't want the Board to be part of your nego-  
15 tiations, and I don't see that it would be useful for the Board  
16 to have this, which is a statement between two parties.

17 Look. How much time do the parties need to talk  
18 to each other again? I am very encouraged that you in fact  
19 have been meeting like this. How much additional time do you  
20 need to get together to come up with a joint statement of the  
21 issues to which all parties agree now? There may be areas  
22 in which you disagree. Then as to those areas, simply articulate  
23 those areas of disagreement. How much time, Mr. Popper?

24 MR. POPPER: Your Honor, that is very difficult  
25 to say.

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1 CHAIRMAN FARMAKIDES: How about 20 days? Would that  
2 be convenient with you?

3 MR. POPPER: Could we take two minutes and discuss  
4 this morning ourselves?

5 CHAIRMAN FARMAKIDES: We are off the record. We  
6 are in recess for five minutes.

7 (Recess)

8 CHAIRMAN FARMAKIDES: Back on the record. Mr. Popper?

9 MR. POPPER: Your Honor, it appears that it is  
10 going to be rather difficult to come up with a joint statement  
11 of issues in this proceeding, and perhaps it would be the  
12 position of the Staff at this time that the parties submit  
13 issues to the Board and that we have argument on the issues.

14 There seems to be complete disagreement among the  
15 parties as to what the scope of the issues are, and as the  
16 Board is well aware there are still legal disputes on the  
17 jurisdictional reach of these proceedings. Perhaps we can  
18 agree to a certain extent on some of the issues, but I have  
19 a feeling that coming up with a joint statement of all the  
20 issues will be an impossibility.

21 MR. GOLDBERG: May I say ---

22 CHAIRMAN FARMAKIDES: Hold off a minute. Mr.  
23 Popper?

24 MR. POPPER: If we could set a time limit for  
25 delivery of issues to the Board by the parties, we can argue

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1 the issues before the Board and as has been done in other  
2 cases, the Board can evaluate this and determine what the issues  
3 are in these proceedings.

4 That appears to be the only way we can proceed at  
5 this time.

6 CHAIRMAN FARMAKIDES: I am sorry to hear that,  
7 Mr. Popper. If that is the only way, of course, that is the  
8 only way. Mr. Goldberg?

9 MR. GOLDBERG: I was simply going to say that I  
10 did not want the record to have any misconceptions about our  
11 position on this. We met on the 25th with the representatives  
12 of Justice and the AEC, and we met with the intention of seeing  
13 if we could work out a joint statement of issues, and we ran  
14 out of time that day and that is why today you find only a  
15 joint statement by two parties to the proceeding, because they  
16 met alone on the 29th.

17 I could not meet with them on the 29th, and it is  
18 my recollection that Mr. Reynolds was unable to meet on the  
19 29th, either. But I went with that meeting, with the idea of  
20 trying to work out a joint statement. I feel -- my feeling  
21 was that to the extent we could agree, fine. To the extent we  
22 fell short, we would present to the Board our additions that  
23 we would like to see on the Board would make its decision.

24 We still feel that way about that. I wanted it  
25 clear today that we are willing to try to work out a joint



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1 statement, and if we can persuade them to include some items  
2 that we think ought to be included, we would then submit it  
3 at a specified time to the Board.

4 CHAIRMAN FARMAKIDES: That is the right procedure,  
5 Mr. Goldberg. That is the procedure I think should be followed  
6 if at all possible. If we end early today, and it appears there  
7 is a good chance we will end early, I don't see why counsel  
8 can't use the rest of the day to come up with, hopefully, a  
9 further discussion of joint statement.

10 If you cannot reach agreement, then you think what  
11 Mr. Goldberg says is the posture of this Board as well, and  
12 that is on those issues on which you agree, fine, or articulate  
13 those issues in a joint statement, and then file your separate  
14 issues on which you disagree.

15 We want both. The Board will then evaluate and  
16 come up with a final statement of the issues for purposes of  
17 discovery. Mr. Charnoff?

18 MR. CHARNOFF: I would like to make a proposal, sir,  
19 and first, I think that it is perfectly clear that to the  
20 extent we can sit down and negotiate an agreed-upon contention  
21 that would be acceptable procedure to us.

22 I think, however, that much time has gone by, and  
23 we do need to get started. We have, or had hoped, and we read  
24 into the rulings of the Licensing Board, that there would be  
25 two prerequisites to this process that would give us an ability

Reb 15 1 to then understand contentions, if you will, and incidently,  
2 we have not seen proposed contentions by AMP-O or the City  
3 of Cleveland.

4 We wanted to see what it was that Justice and AEC  
5 were proposing. As we understand it, the Board has ruled both  
6 in Davis-Besse and in Perry that there ought to be a clear  
7 statement of nexus. The Board has ruled with respect to AMP-O  
8 that there ought to be a clarification of the technical, economic  
9 and marketing relationships that underlie the AMP-O assertions,  
10 and I would assume that we ought to have from the Department  
11 of Justice and the AEC Staff, either together or separate,  
12 allegations that, at least insofar as the Department of Justice  
13 is concerned, would relate somehow or other to the letter of  
14 advice that was written by the Department of Justice to the AEC  
15 in December, I guess.

16 We recognize that they wrote a different letter  
17 in the Davis-Besse proceeding. Based upon those documents,  
18 we are perfectly prepared to sit down and talk contentions.  
19 To shorten things up, what I would propose is the following,  
20 Mr. Chairman: That the Department of Justice and AEC separately  
21 or together, the City of Cleveland and AMP-O, in, say, 10  
22 days from today, file their proposed specific contentions  
23 together with the statement of nexus that supports those  
24 particular allegations that they wish to make.

25 That would apply as well to my judgment to AEC

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1 and Justice as it does to the other parties, and insofar as  
2 AMP-O is concerned, let AMP-O file the kind of statement  
3 that was requested on -- by the Board on page 5 of the April  
4 16, 1974 letter in support of its contentions.

5           During this period of time, we will be available to  
6 meet with one or all of the other parties, and perhaps we can  
7 agree upon a joint statement with one or all of those parties,  
8 and perhaps we will not. But in any event, we ought to have  
9 a deadline of, say, ten days for that filing.

10           Following that, we ought to have ten days to respond  
11 to that filing. After all, they are the contentions of the  
12 other parties, that we are supposed to respond to, and we don't  
13 have to develop contentions and make allegations against  
14 ourselves, but we are prepared and anxious to cooperate in terms  
15 of shortening this up.

16           In any event, I would propose that a schedule  
17 be established now, ten days following for the contentions  
18 on nexus by all the three other parties, ten days for us to  
19 reply to that, and shortly thereafter, the Board rules on the  
20 papers that are presented before it as to what those principal  
21 matters in controversy are that define discovery, and then we  
22 can set a discovery schedule of perhaps two or three or four  
23 months and we can get going on this process.

24           As I said, we are willing to meet with these folks  
25 anytime in the next ten days to do this, but I think we need

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1 to hear or understand either the informal discussions or if we  
 2 can't get it there in the formal submittal those elements that  
 3 define the propriety, if you will, of the inquiry they wish  
 4 to make in the context of an AEC licensing procedure.

5 CHAIRMAN FARMAKIDES: Mr. Charnoff, there must be  
 6 a couple of perhaps semantic problems here, perhaps more sub-  
 7 stantive, but I for one, and I am not speaking for the board now.  
 8 I for one feel that nexus is shown through contentions. Nexus  
 9 is not something additional to contentions. 2.714 as clarified  
 10 by Waterford really is still two point 714, which requires  
 11 contentions.

12 There is no doubt about it. In that sense you  
 13 are right, sir. At least, I would expect the parties to come  
 14 up with contentions, and I think that is what we are going to  
 15 have, either as a joint statement or as individual statements.  
 16 No doubt about that.

17 We are going to have contentions. But I don't  
 18 follow your thought that there should be an additional  
 19 pleading of nexus along with the contentions. That, to me,  
 20 is unnecessary.

21 In fact, I don't see the logic of it. Point two,  
 22 it would seem to me that perhaps one of the things that the  
 23 Board could do later this morning is to articulate in greater  
 24 detail on the record its concerns with respect to the con-  
 25 tentions, if you will, or the nexus shown by AMP-0, as well

Reb 19

1 as whatever additional concerns we think might now state on  
2 the record for Mr. Goldberg, hoping we can help you all to  
3 better formulate and articulate your contentions.

4 We will do that, but I don't think we should get  
5 nexus and contentions as two separate items. Perhaps the  
6 other members of the Board may want to discuss opinions on  
7 this, too.

8 George, have you given that thought?

9 DR. HALL: Well, I think the only thought I would  
10 express is that contentions are usually phrased in terms of  
11 the question, whether something has happened, what is whatever  
12 and so on.

13 The nexus question, or it isn't even nexus, but I  
14 will call it nexus, or you can call it anything else, is  
15 essentially the articulation of the causal relationships  
16 which are involved in the factual situation which gives rise  
17 to the nexus.

18 That is, the plant is going to come on line at  
19 such-and-such a time, something is going to happen and something  
20 else is going to happen, and this is the reason that it is  
21 going to happen, and such-and-such. Now it seems to me this  
22 in order to understand contentions or deal with contentions,  
23 one has to have some kind of picture of the broader framework  
24 which is involved in the functional or causal relationships  
25 inherent in the market with which we are dealing, and that

20

1 is my general frame of reference with which I approach the  
2 questions that we are discussing, and so I would associate  
3 myself with Chairman Farmakides' views on this.

4 CHAIRMAN FARMAKIDES: Mr. Brebbia, did you have  
5 anything further you would like to add?

6 MR. BREBBIA: No.

7 CHAIRMAN FARMAKIDES: Mr. Charnoff?

8 MR. CHARNOFF: I don't necessarily say the statement  
9 on nexus has been separate from the contentions. They could  
10 be inherent in the contentions, but it is perfectly clear  
11 to me that the antitrust inquiry authorized by Section 105(c)  
12 is not a broad inquiry into how utilities generally do business.

13 It is related in some way to the activities of  
14 the -- under the license -- and the alleged anticompetitive  
15 activities. It is perfectly plausible for me to believe that  
16 a contention could be written that demonstrates the nexus con-  
17 cept in it, but I do believe after looking at what I have  
18 received, and I don't propose to debate it, what I have  
19 received from the Staff the last thing last night, and the first  
20 thing this morning reflecting the meeting last week, that  
21 those are general, broad, far-reaching points that go beyond  
22 the nexus as beyond the letter.

23 I want to move this process along. We want to  
24 get going, and certainly we are looking at an end of year  
25 type of decision date, we hope, in this case.

Reb 21

1                   What we are anxious to do is get to that contentions  
2 phase. We are also anxious, however, not to neglect that  
3 important jurisdictional limit inherent in the concept of  
4 nexus, which the Board itself recognized when it suggested  
5 or directed in effect this showing of nexus in some clarification  
6 by the City of Cleveland as a limitation to defining con-  
7 tentions and discovery.

8                   I don't care whether it comes first or together,  
9 but it has to be inherent in that, or we are going to be  
10 debating the process for a very long time, and don't want  
11 to do this.

12                   My own suggestion is that we set a schedule of the  
13 sort I have talked to, but I am going to say that the nexus  
14 concept has to be inherent in what is alleged.

15                   CHAIRMAN FARMAKIDES: Dr. Hall had something else.

16                   DR. HALL: Well, I think that it is certainly true,  
17 as the Commission instructed in the Waterford decisions, that  
18 the question of nexus is an ongoing one, and it operates now  
19 throughout the proceedings simply in the sense that, as you  
20 said, any contentions which are raised and anything which  
21 happens has something to do with the plants, but on the other  
22 hand, I think it is also true, as we have tried to express  
23 this morning, I believe, that the job is to get to contentions,  
24 as you get to defining the structure of these proceedings,  
25 and that is simply what needs to be done, and the Board's

Reb 22

1 concern is that in the process that we have a little bit, or  
2 that we don't forget the structure within which the legal  
3 questions, or to which the legal questions pertain.

4 MR. CHARNOFF: I don't think we disagree, sir.  
5 I think we are saying from our standpoint that the contentions  
6 cannot be so far-reaching that they ignore the question of  
7 nexus, even at the outset, and that there has to be some  
8 showing, allegation of some sort, with regard to the activities  
9 under the license to support the general inquiry that might  
10 otherwise be made, or else the general inquiry is too broad.

11 CHAIRMAN FARMAKIDES: Mr. Goldberg?

12 MR. GOLDBERG: Mr. Chairman, the Board has indicated  
13 that it is going to provide some clarification for the  
14 benefit of the City of Cleveland and AMP-O. I would hope that  
15 Mr. Charnoff right now can try to articulate how he would  
16 try to revise, for example, one of these issues to meet the  
17 objections he seems to be raising.

18 I am left with the feeling that even before  
19 discovery, he is looking for contentions that are particular  
20 and specific. I really don't think you can have that before  
21 discovery. I would be loath to permit myself to be put in  
22 that kind of a corner.

23 CHAIRMAN FARMAKIDES: Well, you don't think there  
24 is any need for that at this point in time. Look, let's pro-  
25 ceed a little bit. Let's note one thing, Mr. Charnoff. We



Reb 23

1 have completed item 1 on the agenda, and both the City of  
2 Cleveland and AMP-O have nothing further to say with respect  
3 to their nexus contentions which they have raised earlier.

4           However, that is their nexus. We had some contentions  
5 and some questions. For example, we felt, our understanding  
6 of what AMP-O had suggested in their petition to intervene was  
7 that related to the impact of the Perry facility on CEI's  
8 transmission system and the ability to provide the City of  
9 Cleveland with an alternative source of bulk electric power,  
10 from, I assume, PASNY.

11           As we have said also earlier, we are not at all  
12 certain what this means in terms of the economic relationships  
13 of the relevant market, and we would like AMP-O today to  
14 clarify that. We will request, as you said, clarification.  
15 Now, we thought we would do it under Item 2, and now is the  
16 time, for example, to do that.

17           All right. If we can get that clarification on the  
18 record for the purpose of the Board's information, incidentally,  
19 in evaluating what will be the final issues, we are also  
20 going to ask Mr. Goldberg to clarify in terms of where the  
21 Board might ask specific questions, contentions that we  
22 think he in fact is suggesting, but we are not sure that he  
23 is.

24           We want to be sure that we understand where you  
25 people have joined issue. It is as simple as that. I don't

Feb 24

1 understand the problem. And certainly it is your responsibility  
2 as counsel here to help this Board understand what the issues  
3 are, and to join those issues.

4           If you don't join the issues, we are whistling.  
5 All right. Now perhaps I think Dr. Hall has comments here, too,  
6 and perhaps he can express those, and perhaps, Mr. Brebbia,  
7 you might do the same.

8           DR. HALL: My problem was this: The Perry plant  
9 is going to go online in what, 1976?

10           MR. CHARNOFF: In 1979, sir.

11           DR. HALL: 1979. Okay. When this goes online, how  
12 is the AMP-O going to be damaged? You have said that AMP-O  
13 would be hurt, would be hurt because of what? The hurt, as  
14 I understand it, has something to do with the capacity of the  
15 transmission systems. What we would like to have is a little  
16 clearer understanding of exactly how this comes about, a  
17 primer if you like, which tells us about, or which goes from  
18 the engineering relationships involved to some of the marketing  
19 relationships involved and some of the economic relationships  
20 involved, in your opinion.

21           We understand, of course, that this is a matter of  
22 contention, and that you are simply expressing your resurgence  
23 with respect to this.

24           CHAIRMAN FARMAKIDES: I would like to add one more  
25 thought to that. We would like to be completely clear what

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1 your position is, sir, either on the record today or, if  
2 you wish an additional period of five days to file your  
3 contentions, we would welcome it -- either on the record today  
4 or in a very short period of time.

5 We want to know what your contentions are.

6 MR. BROWN: If I might respond to that, I think  
7 part of this is apart from nexus, which has already been deter-  
8 mined and which is a matter of pleading and not a matter of  
9 proof. I certainly want to make that clear for the record.

10 Second, we were somewhat confused, frankly, by  
11 virtue of the Board's earlier memorandum and final order as  
12 to when and what would be required with respect to the marketing  
13 and economic relationships and so forth.

14 We were under the assumption that this prehearing  
15 conference would naturally be the time at which, not that those  
16 would all be clarified, but the time at which a schedule of  
17 dates would be set for all parties to submit contentions to the  
18 Board for purposes of determining precisely what the issues  
19 are. We would certainly feel somewhat, you might say, under  
20 the gun to be put in a position of within five days of the  
21 present time we develop precisely all of the issues which AMP-O  
22 is contending.

23 Certainly that would be true if the other parties  
24 don't have to do the same thing. We think that would be sometime  
25 precipitate.

Reb 26

1 CHAIRMAN FARMAKIDES: How much time do you need?  
2 I threw out five days, and I was hoping you would throw something  
3 back.

4 MR. BROWN: I think we need precisely the amount  
5 of time either parties have to submit their contentions.

6 CHAIRMAN FARMAKIDES: How about twenty days, sir?

7 MR. BROWN: I think within twenty days we could  
8 submit our contentions and in that regard it would be my suggesti  
9 just as in a judicial proceeding, that not only what amounts  
10 to the plaintiffs in the proceeding, but also the applicants be  
11 r required to submit their contentions so that the Board can  
12 have a complete overview -- not their contentions vis-a-vis  
13 their contentions, against the parties, but a statement of what  
14 their conceptions of the issues are.

15 It does not seem to me beyond ---

16 CHAIRMAN FARMAKIDES: You are the ones, you and  
17 the Department of Justice and the AEC, Staff, and the State of  
18 Ohio, and the City of Cleveland; you are the people who are  
19 raising the issues.

20 MR. BROWN: My only point is that if we use the  
21 analogy of the judicial proceeding, both the Defendant and the  
22 Plaintiff are required to submit a statement of contentions.  
23 This, it seems to me, would give the Board a more complete  
24 overview of what all the parties' contentions are, and  
25 issues.

Reb 27

1 MR. BREBBIA: Speaking as one Board Member, I don't  
2 think that the Board is required to sit and watch people spar  
3 as far as the issues are concerned. Those who contend that  
4 there may be a situation inconsistent with the antitrust laws  
5 are required to articulate their position.

6 They are to articulate the position without the  
7 benefit of discovery, of course, and all of us are familiar  
8 with the fact that in discovery, facts may be disgorged which  
9 may even expand the issues, but it is certainly proper for  
10 this Board to require that to the extent, the best extent of  
11 your knowledge, that you, AMP-O, articulate what you think are  
12 the problems with this application in that it might provoke  
13 a situation inconsistent with the antitrust laws. We don't  
14 have to sit here and have three or four more prehearing con-  
15 ferences while these issues fly back and forth between the  
16 parties.

17 We are entitled within a reasonable time for you  
18 to set forth what you think is going to happen with regard  
19 to this application if it is granted on the basis of the know-  
20 ledge that you now have.

21 Naturally, after discovery, we will then frame our  
22 discovery, then, in terms of those contentions, if you want  
23 to use the broad based contentions, and in terms of the  
24 extent of your present knowledge.

25 I don't think the Board is precluded, if discovery

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1 produces issues, expanded issues, is precluded from expanding  
2 the scope of discovery or of the issues as they are now framed.

3 But we want to frame the issues here, and get  
4 started.

5 CHAIRMAN FARMAKIDES: You feel 20 days might be  
6 sufficient?

7 MR. BROWN: I think it would be sufficient for our  
8 purposes. If I have misstated myself or was misinterpreted,  
9 I didn't mean to imply that we did not feel a statement of  
10 the issues was necessary. We simply felt it would be helpful  
11 perhaps for the Board as well as the parties if the Applicants  
12 were required to frame the issues as well.

13 CHAIRMAN FARMAKIDES: The Board will consider that  
14 and rule on that. Your suggestion has been made, sir, for the  
15 record. Mr. Charno, now, so far as I understand it, the  
16 Department of Justice has met with the AEC and you people have  
17 in fact articulated a joint statement of contentions.

18 Is that correct, sir?

19 MR. CHARNO: That is correct, Mr. Chairman.

20 CHAIRMAN FARMAKIDES: And those would be the sum  
21 total of your positions?

22 MR. CHARNO: Yes.

23 CHAIRMAN FARMAKIDES: Mr. Popper, the same could be  
24 said of yourself, that you have articulated the sum total of  
25 contentions in the agreement with the Department of Justice?

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1 MR. POPPER: That is correct.

2 CHAIRMAN FARMAKIDES: And you might get 1 or 2 or  
3 perhaps all of the parties to join you in that rendition or  
4 some other rendition?

5 I was thinking of issues.

6 MR. POPPER: I would say that is possible.

7 CHAIRMAN FARMAKIDES: But not probable?

8 MR. POPPER: I would not want to comment on how  
9 probable that is. I would say in regard to the contentions  
10 we have submitted, there are other parties who in viewing them  
11 have commented that they indicate that they don't have the  
12 factual particularity that the parties would desire.

13 I think in the next twenty days the Commission could  
14 perhaps in the form of explanation give greater particularity  
15 to these contentions.

16 CHAIRMAN FARMAKIDES: You mean the Regulatory Staff  
17 would do that?

18 MR. POPPER: That is correct. We would take it  
19 upon the Staff to clarify these in some detail. But I want  
20 to make it very clear that I don't feel this is the time  
21 for a pretrial brief. I don't feel this is the time for factual  
22 delineations of all the issues.

23 The Applicant would just believe that the ultimate  
24 questions in the case are supposed to be decided before dis-  
25 covery begins, and I want to make it very clear on the record

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1 that the Staff does not feel that is the purpose of a pretrial  
2 conference like this.

3 CHAIRMAN FARMAKIDES: Mr. Popper, certainly you are  
4 entitled to be heard, and the Applicant is entitled to be  
5 heard. You are expressing your positions.

6 Mr. Goldberg, is twenty days sufficient for you?

7 MR. GOLDBERG: Yes. I would anticipate from the  
8 meeting on the 25th that there is a high degree of probability  
9 that we will be able to agree with at least some of the  
10 statements of contentions in the joint statement of the Depart-  
11 ment of Justice and the AEC Staff.

12 We may want to see it expanded and may suggest  
13 expansion within that time.

14 CHAIRMAN FARMAKIDES: All right. Mr. Charnoff?  
15 I beg your pardon. I would like to make another note for the  
16 record. Mr. Schraff, you don't have to participate. You do  
17 have the right to cross-examine and discover. I would  
18 appreciate it if you would participate in the creation of  
19 these issues.

20 Since you do have rights of discovery, you might  
21 want to be involved in the drafting of the issues.

22 MR. SCHRAFF: I understand, Mr. Chairman.

23 CHAIRMAN FARMAKIDES: So twenty days would be  
24 sufficient for you?

25 MR. SCHRAFF: Yes.



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1 CHAIRMAN FARMAKIDES: Mr. Charnoff?

2 MR. CHARNOFF: I was hoping the two-day period  
3 could be shorter. But if you allow twenty days, could you  
4 allow the Applicants 15 days to respond to the submittals  
5 that are put in 20 days, with our comments either indicating  
6 agreement or disagreement and why with some of those con-  
7 tentions?

8 CHAIRMAN FARMAKIDES: A lot of time would be saved,  
9 Mr. Charnoff, if you could sit down with the other parties  
10 and come up with a joint statement.

11 MR. CHARNOFF: Mr. Chairman, it was at my suggestion  
12 that the Staff called such a meeting. I am perfectly willing  
13 to do that. I think until we get some of those background  
14 materials or clarification that you say you are going to get  
15 from AMP-O and the City of Cleveland and that we are hoping  
16 to get from the staff, we are not going to make much progress.  
17 The shoe is on their feet.

18 We are prepared to sit down and cooperate as much  
19 as possible during the next few weeks to see if we can reach  
20 agreement, but we are not going to initiate any contentions.  
21 That ought to be very clear.

22 MR. GOLDBERG: May I understand what the request  
23 is?

24 MR. CHARNOFF: I have asked for 15 days following  
25 the 20-day period if that is the period set for reply by the

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1 Applicants to the submittals put in.

2 MR. GOLDBERG: The Applicant is not going to submit  
3 anything in those twenty days?

4 MR. CHARNOFF: Unless the Applicant reaches an  
5 agreement with the other parties we would not submit contentions  
6 of our own in the twenty days.

7 MR. GOLDBERG: If the parties are submitting separate  
8 papers, I think each party should have an opportunity to respond  
9 to whatever else is filed.

10 MR. CHARNOFF: We are responding, but not putting  
11 anything forward.

12 MR. GOLDBERG: We might want to rebut what they are  
13 saying. I think there should be an opportunity to respond  
14 to that.

15 CHAIRMAN FARMAKIDES: I might say this, look, as  
16 to that, we are going to adhere to the rules strictly, very  
17 strictly. You can file any papers you want outside the rules  
18 and they will come in, and they will sit on my desk. If they  
19 are filed under the rules, I will look at them.

20 Incidentally, when you file a motion for leave to  
21 file with your document appended to it, I am not sure that that  
22 meets the merits of the rules. If you want to file a motion  
23 for leave to file, file separately, and then file your document,  
24 and certainly you may take a little bit more time, but I think  
25 it would be more fair to all parties.

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1 I would like again to state something that I think  
2 is apparent. The Board feels strongly that the best way to get  
3 a case moving and get it tried is where counsel cooperate with  
4 each other. That is the very best way. You can save so  
5 terribly much time. So while we are taking more time initially,  
6 I think if you can get counsel to work together, and they have  
7 been, I must say, and I would like to see that continue more --  
8 why, we are home free.

9 Excuse me just a minute. All right, we will take  
10 this under consideration, and we will issue our prehearing  
11 conference order on this very quickly. All right. Number 3,  
12 then, we really can't address that this morning. I think the  
13 Board has been encouraged that the parties are part of the  
14 way home toward formulating the issues.

15 We are going to delay item 3 a little longer. I  
16 noted one thing this morning, which I think all of you picked  
17 up, the docket number for the consolidated case, and also I  
18 want to be sure that the parties have in fact discussed among  
19 themselves how they would like to propose to the Board cross-  
20 examination should be conducted.

21 What party or parties shall cross? Are the parties  
22 limited, for example, to the issues which they have alleged  
23 in the case, or may they cross on other parties' issues? It  
24 is an important factor that you ought to look at. Now if you  
25 come back to us with the proposed schedule of actions to be

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1 taken, procedure leading up to the evidentiary hearing, we would  
2 be happy to have that.

3           If you don't we will set it. Number two, if you  
4 can come up with an agreement on the conduct, we will appreciate  
5 it. I think it is important that you know the rules of the  
6 ballgame initially. It helps you in your discovery process.

7           MR. GOLDBERG: Mr. Chairman, I missed your reference  
8 after the word "conduct" when you started out. I missed that.  
9 Did you say conduct of the proceeding?

10           CHAIRMAN FARMAKIDES: Conduct of the proceeding.  
11 I am not sure that there is anything else.

12           MR. GOLDBERG: All right.

13           CHAIRMAN FARMAKIDES: Also, this question of briefs,  
14 how many briefs shall be filed, by whom, and when? It would  
15 seem to me the proper course here, and the Board will rule on  
16 this, but we would like to have your thoughts again, whatever  
17 thoughts you can agree to would be helpful to the Board.

18           I keep stressing we would like to have that. So while  
19 I received your joint memorandum on consolidation procedures,  
20 I was not really quite happy. It did not go into the detail that  
21 you might have articulated.

22           I think you understand that those procedures are  
23 intended to conduct -- sorry. Those procedures are intended to  
24 bind each party during the course of the hearing. We are allowing  
25 you the opportunity of coming up with rules that you feel are

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1 fair. Now we have moved a lot faster than we thought because  
2 of the obvious efforts to come up with either a joint statement  
3 of issues by two parties or three parties, and I think we are  
4 prepared now to take whatever else any party would like to state  
5 at this time for the record.

6 Do you have anything further?

7 MR. CHARNOFF: I thought you had indicated that you  
8 were going to inquire of Mr. Goldberg or make observations  
9 with regard to the nexus problems.

10 CHAIRMAN FARMAKIDES: I think the Board discussed  
11 them, Mr. Charnoff, and we feel it is proper to wait until we  
12 get the contentions from the parties.

13 I think it is going to be those contentions, and  
14 hopefully it is a joint stipulation of all the parties, and  
15 I keep going back to this, and if it is, that will help all of  
16 us. That is what we decided to do during our latter recess.

17 Is there anything else? Mr. Brown?

18 MR. BROWN: No, sir.

19 CHAIRMAN FARMAKIDES: Mr. Charno?

20 MR. CHARNO: No, Mr. Chairman.

21 CHAIRMAN FARMAKIDES: Mr. Charnoff?

22 MR. CHARNOFF: No.

23 CHAIRMAN FARMAKIDES: Mr. Popper?

24 MR. POPPER: No.

25 CHAIRMAN FARMAKIDES: Mr. Goldberg?

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MR. GOLDBERG: No. Mr. Schraff?

MR. SCHRAFF: No.

CHAIRMAN FARMAKIDES: Thank you very much, gentlemen.  
We are going to issue a prehearing order, and we hope to have it  
out tomorrow or the day after.

Off the record.

(Discussion off the record.)

CHAIRMAN FARMAKIDES: On the record. Thank you very  
much. This prehearing confernece is over.

(Whereupon, at 10:35 a.m., the Prehearing Conference  
in the above-entitled matter was concluded.)

end 36

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