

NUCLEAR REGULATORY COMMISSION



IN THE MATTER OF:

TOLEDO EDISON COMPANY and
CLEVELAND ELECTRIC ILLUMINATING CO.
(Davis-Besse Nuclear Power Station,
Units 1, 2 and 3)

Docket Nos.
50-346A
50-500A
50-501A

and
CLEVELAND ELECTRIC ILLUMINATING CO.,
et al.
(Perry Nuclear Power Plant, Units 1
and 2)

50-440A
50-441A

Place - Bethesda, Maryland

Date - Friday, 31 October 1975

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1 APPEARANCES: (continued)

2 ROY P. LESSY, JR., BENJAMIN H. VOGLER and JACK GOLDBERG,
3 Esqs., Nuclear Regulatory Commission, Office of the
4 Executive Legal Director, Washington, D. C.; on behalf
5 of the Nuclear Regulatory Staff.

6 GERALD CHARNOFF, BRADFORD REYNOLDS, Esqs., Shaw,
7 Pittman, Potts & Trowbridge, 910 Seventeenth Street,
8 N. W., Washington, D. C.; and
9 TERRENCE H. BENBOW, Esq., Winthrop, Stimson, Putnam
10 & Roberts, 40 Wall Street, New York, New York 10005;
11 on behalf of the Applicants.

12 DAVID HJELMFELT, Esq., Suite 550, 1700 Pennsylvania
13 Avenue, N. W., Washington, D. C.; on behalf of the
14 City of Cleveland, Ohio.

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CHAIRMAN RIGLER: This will be our 7th prehearing conference the Board is convening to consider pending evidentiary matters and procedural matters so we can meet our schedule of commencing hearings on November 20. Mr. Frysiak will not be able to be with us this morning.

I believe that the first item on the agenda will be the request by the Department of Justice for leave to amend its interrogatory answers.

The Board has read your pleadings. We do want a little brief argument to put it in focus.

Mr. Charno, we want you to address yourself to the question of good cause as to why this amendment is necessary at this date.

For the Ohio Edison, the question we will want answered is what prejudice, if any, would there be in permitting the Department to amend.

That is a general guideline of some of the questions the Board is considering at this time.

Mr. Charno.

MR. CHARNO: Mr. Chairman, let me first believe apologize for an error, misstatement in our original paper. As Applicant's counsel pointed out, there is only one document that we had requested by separate letter that was within the time frame allowed and which related to the requested

1 amendment. There are other documents prior to the cut off
2 date that we had also discovered and we would attempt to place
3 into evidence through witnesses other than the Applicant's
4 which relates to the amendment.

5 Basically, our statement of good cause is simply
6 that the Department has for some time been playing catch up
7 ball in this proceeding. The digesting of documents was not
8 completed until very recently. As soon as we discovered the
9 existence of the documentary materials which support the new
10 allegation, we brought them to the attention of the Applicants
11 by filing this amendment to our allegations and interrogatory
12 answers.

13 We discovered in the course of preparing expert
14 testimony -- we had no occasion prior to that time -- that the
15 documents were in existence or that the allegation could be
16 made.

17 CHAIRMAN RIGLER: Were these documents that you
18 had pulled from the depository during the course of your re-
19 view there?

20 MR. CHARNO: No, they were not. They were obtained
21 from an outside source. They were not obtained through dis-
22 covery in this proceeding.

23 We had no reason to go to the outside source until
24 we were in the process of preparing expert testimony. We were
25 looking for something entirely different. We felt the

1 documents should have been presented to us during discovery
2 and others fell outside the cut off date and should not have
3 been produced during discovery.

4 CHAIRMAN RIGLER: Were any of the documents relat-
5 ing to the alleged territorial agreement produced during the
6 discovery period?

7 MR. CHARNO: No, sir. What our position is is that
8 we were unaware of these matters and if this would constitute
9 prejudice to amending our pleading at this point, then we
10 obviously continue to do so.

11 Applicants have had complete discovery of every
12 document we are going to use. We see no prejudice in this
13 action. There have been very few documents we have come
14 across since September 5.

15 We would be happy to turn over additional documents
16 at the time the document listing is filed or prior thereto.
17 We are not attempting to surprise the Applicants. As a matter
18 of preparation, the preparation has been a burden on the
19 Department and apparently the Applicants, also.

20 CHAIRMAN RIGLER: If we were to permit this
21 amendment, how many additional documents would you add to the
22 list you presently propose to turn over?

23 MR. CHARNO: Approximately 10.

24 I have nothing to add on that point.

25 MR. REYNOLDS: We both will respond.

1 Mr. Benbow is the proper person to address the
2 major points that we want to make, I think. Since I filed the
3 paper, I will just say a few things.

4 Let me respond to Mr. Charno, specifically and
5 then Mr. Benbow can answer the question that the Board posed
6 more directly.

7 Mr. Charno says the Department has been playing
8 catch up ball which is surprising since this is the Depart-
9 ment's case. I'm not sure how they can be playing catch up
10 ball when they were the ones that started the proceeding at
11 the outset.

12 From everything I understand, they have been
13 holding in the wings an allegation which was not discovered
14 during discovery on the basis of any of the information -- it
15 is not based on any documents within the permissible scope of
16 the discovery period.

17 Then they are hinging that on a single document
18 they come in with at this late date and say that that is good
19 cause. We attached that single document to the filing we sub-
20 mitted to the Board and I think if you take a look at that
21 document, it is pretty clear that it is not even remotely
22 basis for any kind of good cause to support this kind of
23 allegation.

24 I think that the record ought to show that the
25 fact that no documents in this area were produced by

1 Applicants had nothing to do with noncompliance by the
2 Applicants with respect to discovery and I didn't get the
3 impression that Mr. Charno was saying that.

4 I want to make it clear that there is no implica-
5 tion to that effect at all. I guess that it seems to me in
6 our filing we make a couple of points that should be addressed
7 by this Board and I think that the Department should be re-
8 quired to answer.

9 One of them is why at this stage the Department
10 should be permitted to come in with an allegation without
11 support, without specificity, without satisfying any of this
12 Commission's rules of pleading, and be permitted to interject
13 following what it seemed to me was a lengthy discovery period
14 and very clear pronouncement by the Board that we would have
15 a specific set of allegations on September 5 and then we
16 would not expand them after the hearings on September 5.

17 Mr. Lessy was allowed to make an amendment, but
18 there was no indication by the Department that they would
19 make an amendment. Why we should come in and without compli-
20 ance with the Commission rules be considering another allega-
21 tion by the Department, it seems to me a serious question to
22 be answered.

23 CHAIRMAN RIGLER: Which rule?

24 MR. REYNOLDS: 2.714(a). It states there for
25 contentions made, there must be a basis and there must be a

1 showing that there is a nexus between the allegation and
2 activities under the license as Waterford has applied
3 2.714(a).

4 CHAIRMAN RIGLER: 2.714(a) says there must be
5 allegation and nexus shown.

6 MR. REYNOLDS: In Waterford the Commission said
7 in applying 2.714(a) pleadings in an antitrust contention,
8 one of the pleading requirements under that provision is
9 that there must be pleaded by the party who is trying to assert
10 the contention, a nexus between the matter he is trying to
11 allege and the activities under the license. That is the
12 Waterford Commission pronouncement applying and interpreting
13 Section 2.714(a) which was your question.

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1 CHAIRMAN RIGLER: My question related to 2.714
2 and the specific language you were using, but go ahead.

3 MR. REYNOLDS: I'm referring to 714 and the
4 Commission reading of 714. If the Board would like me to
5 submit a paper on it I will spell out the language. Very
6 specifically we are talking to that pleading requirement and
7 the Waterford -- and the nexus standard in a pleading
8 context, as it should be applied under that rule. The
9 Appeal Board in the Kansas decision came down -- in 279
10 reaffirmed that in explicit terms as a pleading requirement
11 as part of 2.714 A. It is required.

12 There has been no effort to satisfy these require-
13 ments. That is the threshold question for the Board to reach
14 before we start talking about good cause and these other
15 considerations.

16 I also question in terms of procedures why we are
17 discussing new allegations after the opportunity has been
18 given time and again for the department and all of the other
19 parties to state specifically their case and they seem to
20 each time duck that obligation and then come in at the last
21 minute after the Board said we are closing the door and ask
22 that the door be reopened again.

23 I will turn to Mr. Benbow and let him directly
24 respond to the other question of the Board, which is how the
25 Ohio Edison Company is prejudiced. I think it is considerably

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1 and I will let him speak to that.

2 MR. BENBOW: Mr. Chairman, Mr. Smith, I think
3 your questions, gentlemen, indicate that your focussing
4 on some of the things that we think are involved in the
5 consideration of the Department's proposed amendment. I'm
6 not sure that, as Mr. Reynolds, I'm satisfied it evokes the
7 full context that the Board must consider with respect to
8 this matter as it affects Ohio Edison and Pennsylvania
9 Power Company. I would like to help the Board, if I can think
10 through what I see to be some of the relevant aspects that
11 it ought to take into mind in considering this matter.
12 There is a deceptive simplicity in the Department on October
13 14, 1975 dropping a paragraph and a page and a half document
14 that it looks like in the context of this mammoth case
15 isn't much more than we have had to face up to and more or
16 less why not let them do it unless Ohio Edison and Pennsyl-
17 vania Power can show severe prejudice. I think in the
18 context of the years that have preceded you gentlemen on
19 this Board and certainly preceded me since September 18 I
20 guess it was, in your presence when my first real involvement
21 came, that the unfairness of the Department's approach be-
22 comes readily apparent.

23 Ohio Edison and Pennsylvania Power have been re-
24 assured over the years in a series of proceedings beginning
25 with Davis-Besse 1 and with respect to Beaver Valley and with

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1 respect to Perry 1 and 2 that we really hadn't done anything
2 except perhaps we were guilty of being a member of a CAPCO
3 group that structurally in July of 1974, I guess, it was
4 that the Department first decided they didn't like. No
5 specific allegations at all with respect to Ohio Edison.

6 CHAIRMAN RIGLER: Who gave you this reassurance
7 to which you are referring?

8 MR. BENBOW: The Department did repeatedly. In
9 its filings and advice letters it said we have problems with
10 CEI apparently. We have problems with some other aspects.
11 There are some practices we question with respect to them.

12 As to Ohio Edison and Pennsylvania Power they are
13 only here because they technically happen to be applicants
14 with respect to some of these plants.

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1 CHAIRMAN RIGLER: This was an affirmative
2 statement of the Department?

3 MR. BENBOW: Yes, sir. In a series of advice
4 letters on which our clients thought it appropriate to
5 rely and which accounts for my late appearance, I think.
6 I apologize for that.

7 Our clients felt we were here as a technical
8 matter. We happen to be a part of the CAPCO group. Even
9 though Justice's position has evolved as to other parties,
10 it has not evolved as to us, except to mention we are
11 a member of the CAPCO group.

12 Excuse my unfamiliarity with these matters,
13 Mr. Chairman. There is a Perry letter dated September 17,
14 1973, where it is stated on page 3 under a Roman heading
15 III, "Competitive Considerations," the end of the first
16 paragraph states "The competitive situation outlined in
17 the Department's advice letter dated April 20, 1973, on the
18 Beaver Valley facility appears to be unchanged with respect
19 to all but one of the Applicants, CEI. Therefore, we will
20 not reiterate the conclusions concerning the activities
21 of the other Applicants which we have set forth in our prior
22 correspondence.

23 We weren't content to rest on these assurances,
24 Mr. Chairman, because we know the way these things happen.
25 We pressed continuously, together with the other Applicants

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1 and through the good offices of Mr. Charnoff and
2 Mr. Reynolds for a specification of the charges by the Justice
3 Department, the NRC staff and the City of Cleveland, as well
4 as the other then potential Intervenor. We received nothing.
5 The ironic thing is that the procedure that the Department
6 now attempts to avail itself of to treat this, as if it
7 were amending a matter of discovery, is a procedure which,
8 as I understand it, was really suggested by them. This
9 is back in the early part of this year. I believe the
10 Chairman and perhaps Mr. Smith have lived at least in part
11 through that process and may remember it.

12 The Department suggested the procedure and said
13 as long as we are filing these papers anyway, and as long as
14 we are continuing and completing our discovery, let us at
15 the tail end of that discovery proceeding, and as a part
16 of it, put in what our allegations are going to be. We
17 needed it. We should have had it then, so we could have pursued
18 proper discovery ourselves. The way this discovery process
19 has worked, is that discovery has been conducted against
20 us. Our ability, particularly, on this charge which has
21 not emerged until October 14, is nonexistent.

22 I think the facts speak to prejudice directly,
23 and my remarks to prejudice directly. It must be apparent
24 to the Board that for the Department to be playing catch-up
25 ball and saying they only found out about the charge on

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1 on October 14 ignores what Ohio Edison and Pennsylvania
2 Power position should be in the face of that. Ten days
3 from now I have to answer that charge they have only
4 discovered two weeks ago.

5 Less than three weeks from today I have to defend
6 and cross-examine to protect my clients. I wish I were
7 in a position to say to this Board, give me time to adequately
8 prepare, the minimum amount of time necessary, and that would
9 be my protection. That protection, unfortunately -- and
10 I think Mr. Reynolds in his paper referred to as Hobson's
11 Choice, and I think it is the horns of an impossible
12 dilemma -- we have got to have that construction permit
13 on Perry 1 and 2 in the spring of this year. When I
14 say this year, I mean the one coming up, 1976. We have to
15 have that then.

16 It seems to me it will be extraordinary, Gentlemen,
17 if we are able to complete this process in time for that
18 construction permit to possibly issue by the spring of '76,
19 given the energy demand and the final pressures that I
20 think you can practically take judicial notice of.

21 Certainly gentlemen such as yourselves are
22 aware of those pressures in saying, don't begin that
23 construction. You have gone along that point and
24 committed yourselves. Don't go forward with it, because we
25 must complete the antitrust review. What is the head in the

1 sand attitude of the City and Department and NRC staff in
2 this regard? They say these things have existed for a long
3 time. We have discovered them recently. Suddenly they become
4 so pressing that they will not permit us to begin construction
5 until this review process is complete. None of us, with
6 any accuracy, can predict how long that process is to take.
7 In the face of that it is not meaningful to say to me,
8 can you protect yourself against this sever prejudice by
9 any kind of meaningful delay? Unfortunately, that
10 alternative is not available to me.

11 CHAIRMAN RIGLER: Wy would there be any delay?

12 MR. BENBOW: Why?

13 CHAIRMAN RIGLER: Assuming we permit the Department
14 to amend its interrogatory answer which would introduce
15 a new element, why couldn't you be discovering that, even
16 as the hearings commence?

17 MR. BENBOW: Because I'm supposed to respond to
18 it on November 10. Because I think I'm going to be doing a
19 lot of other things. It only goes back to September 5, in
20 light of the history that I have tried to trace sketchily
21 and using the previous advice letters to which I refer.

22 It was only on September 5 that my clients under-
23 stood that they were significant parties to this proceeding,
24 other than in the structural sense to which I previously
25 referred. It was not until September 5, other than one

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1 isolated incident that other Applicants said -- asked about
2 with respect to the Bureau of Pitcarin, and other than with
3 a policy with respect to distribution points about which
4 I'm not at all concerned, other than those two charges which
5 came only in the early part of this year from the Department
6 as part of Davis-Besse 2 and 3 advice letter, those general
7 allegations and our general participation in this conspiracy --
8 remember, Gentlemen, there hasn't been an interrogatory
9 or request for intervention or word heard from any small
10 system, in any of the territories or service areas of
11 Ohio Edison or Pennsylvania Power.

12 Having heard none of that through this whole
13 course of time, right up to today, we have never heard of
14 such a system. On November 5 we got a specification of
15 allegedly anticompetitive behavior.

16 CHAIRMAN RIGLER: Mr. Benbow, suppose in reliance
17 on previous advice letters from the Department Ohio
18 Edison had no reason to believe it was involved in any
19 situation inconsistent with the antitrust laws. But by
20 passing the instant amendment, suppose, in fact, they were
21 engaged in a creation and maintenance of a situation
22 egregiously in violation of the antitrust laws. Are you
23 saying the Department would be precluded from bringing that
24 before this agency, because they had failed to notify
25 you at some earlier stage?

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1 Suppose, putting aside the instant situation,
2 there was an actual instance of a situation inconsistent
3 with the antitrust laws that came to the Department's
4 attention at some date after the completion of discovery,
5 but before the hearings?

6 MR. BENBOW: I'm not sure I got all the ramifi-
7 cations of your question. If these are matters entirely
8 divorced from the plants here under consideration, it
9 seems to me it's clear that for reasons of the statute
10 and of the Commission's rulings thereunder, and of the
11 Board's rulings, as I understand them, it would not be
12 appropriate for the Department to come in with unrelated
13 matters as these particular charges happen to be. Note
14 the immensity of the new case that this amendment suggests.

15 The immensity of the new case involves not
16 another person or entity within the CAPCO group. This
17 would have us go outside the CAPCO group and explore
18 relationships between a competitor of Ohio Edison, the
19 Ohio Power Company, which is itself a part of the American
20 Electric Power System.

21 The Department is suggesting for us, apparently,
22 a whole different kind of case by this amendment. They are
23 the ones who, as I think Mr. Reynolds put forth, which are,
24 in effect, the prosecutors here. We are technically the
25 Applicants. This proceeding has become a full-fledged

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1 antitrust proceeding in which they are the initiating parties.
2 They have initiated in the manner they wanted to so do.
3 They said we looked and investigated. I doubt all of the
4 Davis-Besse 1 letters and Perry 1 and 2 letters were issued
5 casually by the Department. It seems there are such things
6 even in antitrust laws as a statute of limitations, and I
7 believe we are working within the civil procedures and not
8 criminal procedures.

9 Far be it for me, Mr. Chairman, to be suggesting
10 that this agency with some specific -- and it is specified --
11 antitrust authority failed to take cognizance of a charge
12 timely brought and fairly presented with adequate notice
13 against the "defendants" -- that is Ohio Edison and
14 Pennsylvania Power -- two of the Applicants in this
15 proceeding. I would not argue against that. Much of my
16 personal time is spent counseling clients in how to comply
17 with the antitrust laws.

18 Whatever charges the Department gets into
19 in this proceeding, Ohio Edison and Pennsylvania Power,
20 which I notice have tried to follow my advice in this
21 regard, will be shown not to have acted inconsistent with the
22 antitrust laws.

23 Ohio Ed and Pennsylvania Power should not be put
24 to those additional burdens at this state of this procedure.
25 We have our hands more than full, Mr. Chairman, in the new

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charges that were made less than two months ago on
September 5 of this year.

Mr. Berger and myself have been full-time engaged,
other than actual court time, in this room on another
proceeding. We have been involved trying to prepare expert
testimony, factual testimony and have been prepared to give
to this Board on November 10th, the most intelligent and
factual brief we can on this matter. We should not be
subjected to the unfairness, basic fundamental unfairness
which this amendment entails, sir.

Thank you for your patience.

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1 CHAIRMAN RIGLER: Do you have a response, Mr.
2 Charno?

3 M.R CHARNO: I think the statute of limitations
4 on a particular offense such as an agreement is really
5 irrelevant. The fact it may have occurred before the cut-
6 off date after it continued after the cut-off date would
7 being it well within the scope of discovery.

8 CHAIRMAN RIGLER: Your amendment said beginning
9 prior to March '65 and continuing thereafter. Do you con-
10 tend this is a continuing violation even today?

11 MR. CHARNO: That is correct, sir.

12 CHAIRMAN RIGLER: Is the agreement still in
13 effect?

14 MR. CHARNO: We have no indication that it is
15 no longer in effect and we would have expected that material
16 to turn up in discovery if the situation were different.
17 We have no indication it is not in effect. We have conduct we
18 believe would be explained by the agreement subsequent to the
19 time the agreement was formulated.

20 MR. BENBOW: We said this was not material asked
21 for during discovery. He now takes it through the whole
22 period of discovery and as of this morning he is deciding he
23 has a 10-year conspiracy instead of March 1965 conspiracy.
24 Will the Board permit itself to be used in this fashion?

25 MR. CHARNO: If I may continue I don't think we

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1 said the material was not asked for during discovery. I
2 did not receive any material during discovery which is a
3 small but usual distinction under the circumstances.
4 The material relating to the agreement and the formulation of
5 the agreement that we do have in our possession that we are
6 aware of is dated prior to the cut-off date for discovery.

7 Now, as Mr. Benbow probably knows, the preparation
8 of a civil or criminal antitrust case where the government
9 calls the timing and files the indictment, allows a more
10 complete preparation before the fact than an antitrust
11 review procedure where the Department is given a limited
12 amount of time to comment on every nuclear application that
13 is made and attempts to do so in the most comprehensive
14 manner possible, relying primarily on third party state-
15 ments as to the impact upon them of the activities of various
16 applicants.

17 Clearly after discovery, after being able to go
18 into it more deeply we will be able to supplement our initial
19 review of what was going on and that is exactly what has
20 occurred in this case. We found out about this material
21 very late. If it should be found to be prejudicial to the
22 applicants, we have no wish to add an additional allegation.

23 On the other hand I would commit the Department
24 to make available every document representing and referring to
25 that allegation within 24 hours of any request by the

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1 applicants should this amendment be allowed.

2 MR. BENBOW: Mr. Chairman --

3 CHAIRMAN RIGLER: Wait a minute. I have a few
4 questions of Mr. Charno.

5 During Mr. Reynolds' presentation he seemed to
6 be raising the point of the relationship between the amend-
7 ment and the issues in controversy. I don't know if you
8 have available the issues in controversy but I would be
9 interested in knowing exactly how the amendment, if permitted
10 would relate to those issues and which issues in particular.

11 MR. REYNOLDS: Mr. Rigler, if I may interrupt
12 a minute, you misunderstood or misheard my remarks. I was
13 talking about pleading requirements of 2.714 (A). My re-
14 marks were addressed to the fact that the Department of Jus-
15 tice has made no effort to meet these requirements which is
16 a threshold question this Board should look into. I did
17 not make any reference at all to the issues in controversy
18 that were placed by the Board.

19 CHAIRMAN RIGLER: You did not but it was my
20 understanding that by implication they had to be involved.
21 You were arguing --

22 MR. REYNOLDS: The relationship to the licensed
23 activities is what I was referring to. That goes to the
24 nexus requirement at the pleading stage. That was the re-
25 lationship I was talking about. I gather that you are --

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1 CHAIRMAN RIGLER: I picked up that point but I
2 thought if you were to argue that then you would simultaneous-
3 ly be arguing the relationship between these activities and
4 the issues in controversy as set by the Board, is that not
5 correct?

6 MR. REYNOLDS: I guess I have lost you on what
7 you are driving at. I think maybe if you could explain it
8 we could get some clarification that maybe desperately needed
9 in this case from everybody's side. I'm not sure what it
10 is you have in mind.

11 CHAIRMAN RIGLER: Your argument was confined to a
12 failure of the Department to sepcifically allege in its
13 pleadings a connection between the Ohio Edison activities
14 and activities under the licensing --

15 MR. REYNOLDS: Ohio Edison, Ohio Power activities
16 under the license. What concerns me a bit is I would like
17 to get a little clarification of what your thinking was be-
18 cause we are having some trouble in this case apparently of
19 getting a hold on where we are in this area.

20 Now you say you are inferring some other re-
21 lationship. I'm not clear as to what that relationship is.
22 Could you tell me what the step is you have taken?

23 CHAIRMAN RIGLER: Let's put the ball back in
24 Mr. Charno's court on that.

25 MR. CHARNO: I best respond to Mr. Reynolds'

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1 nexus argument. Our argument is that the territorial agree-
2 ment is part of a situation inconsistent and it is our
3 responsibility to show a nexus between that situation in-
4 consistent and the activities under the license.

5 Further 2.714 (A) talks about the pleading re-
6 quirement for intervention. Here we are not pleading an
7 intervention but trying to provide the specificity the
8 applicants sought and the Board ordered us to provide as to
9 the nature of our case. Your question would come under mat-
10 ters of controversy 4,5, 6 which deal with the dominance
11 of the bulk power transmission facilities and the territor-
12 ial location agreement is a perpetuation of that dominance
13 to an extent beyond the boundaries of either system making
14 it and to an extent is preserving -- is enhancing its own
15 dominance in bulk power transmission facilities within its
16 own service area.

17 Let me explain that, if I may. Take utility A,
18 which has a retail service area of certain circumference.
19 To the extent its transmission facilities are the only
20 transmission facilities within that area, it has complete
21 dominance in bulk power transmission facilities. To the
22 extent there is another utility that could build or has built
23 transmission facilities into that area, utility A dominance
24 can only be secured by having an agreement with the other
25 utility not to utilize those facilities in any way which would

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1 undermine utility A's dominance.

2 We would say it was a perpetuation of dominance
3 and that it had been exercised and that would be matter of
4 controversy 4,5, 6.

5 MR. BENBOW: If I may respond to Mr. Charno's
6 remarks. I would like to point out as to 4,5,6 --

7 CHAIRMAN RIGLER: Wait a second.

8 (The Board confers.)

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1 MR. BENBOW: As to 4, 5, 6, I would like to
2 point out when they were framed on July 25, 1974 the
3 situation with respect to Ohio Edison and Pennsylvania
4 Power as I know was as follows:

5 We had had good advice letters, if I may
6 call them that, from the Department with respect to
7 Perry 1 and 2. Also with respect to Beaver Valley 2.

8 We had had no petitions to intervene from
9 any system in the territory of Ohio Edison and Pennsylvania
10 Power and that situation still prevails today.

11 WE had had only a vague charge in I believe
12 it was the city's petition -- of all people not the
13 Department's -- as to a conspiracy, so-called, among the
14 CAPCO members.

15 CHAIRMAN RIGLER: Mr. Charno is saying he didn't
16 know about that at the time.

17 MR. BENBOW: He also says that even with the
18 fact he has been giving advice letters or the Department
19 has been giving advice letters in this case since at least
20 1973 or so and going back I guess even to 1972, show that
21 the Department has been unduly rushed by giving Ohio Edison
22 and Pennsylvania Power some indication of the allegations
23 as to it on September 5, 1975.

24 I would frankly be embarrassed to make that
25 argument if I were Mr. Charno.

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1 In any case, whether he is or not, we have had
2 no notice of this newly discovered charge. Therefore, we
3 clearly have had no opportunity for discovery with respect
4 to it.

5 In view of the possible collateral estoppel
6 effects of any consideration by this Board of those matters
7 we should not be pressed. We should not be forced or
8 required contrary to fundamental fairness and due process
9 to have to go forward in the defense of such allegations in
10 this proceeding under those circumstances.

11 CHAIRMAN RIGLER: Mr. Benbow, suppose he had made
12 this allegation six months or more ago? What discovery
13 would you have taken in response to it?

14 MR. BENBOW: I would have asked for the kind
15 of material I am asking for as of yesterday and I have mailed
16 as of yesterday to the Department requests with respect to
17 his September 5, 1975 specification of charges.

18 These are additional copies. I have mailed them
19 to you gentlemen, but I brought them this morning in view of
20 the way the mail sometimes works and in view of the fact I
21 only sent them out yesterday.

22 That is a minimum of what I would have asked for.

23 First of all I would have asked for clearly a
24 specification of what is this charge. It is inadequate notice
25 of it even as it stands.

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1 Mr. Charno seems unclear as to how long it lasted
2 or when he alleges it supposedly started, continued, or
3 stopped.

4 I would try to find out what the charge was and
5 what the basis was. I would have proceeded to take the
6 deposition of every person who had any involvement allegedly
7 with respect to this.

8 We have no influence, control or means of gaining
9 access to the people or files of Ohio Power Company. I would
10 be required to treat them as I would treat any other adverse
11 party.

12 We have no mutuality of interest with Ohio Power
13 Company.

14 I would have wanted to know who it was in that
15 company who allegedly provided the basis for this charge.

16 I assume it was no one in Ohio Edison.

17 To make out this claim he would have to refer to
18 someone of Ohio Edison.

19 I would have taken the deposition of my own
20 witness to make it clear on the record, to show there was
21 no basis for this allegation.

22 This is a serious charge. This charge, as I
23 understand it, brings a third party to these proceedings and
24 an alleged violation of the antitrust laws which could well
25 be a per se violation of the antitrust laws.

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1 Given the fact this could be the basis for
2 civil and criminal charges, I would not have treated this
3 allegation lightly.

4 Of all the allegations made by the Department,
5 this is the most fundamental, sir.

6 CHAIRMAN RIGLER: This document you handed up
7 which was called Ohio Edison and Pennsylvania Power
8 motion for additional discovery, has nothing in the
9 document itself, as I have hastily leafed through it,
10 relating to this amendment today.

11 MR. BENBOW: You asked what I would do. This
12 is the minimum of what I would have done if I had had that
13 charge back in the spring of this year or even if it had
14 been included in September 5.

15 CHAIRMAN RIGLER: You would have asked questions
16 similar to the questions here. For example, state the
17 basis for your statement; correct?

18 MR. BENBOW: Having received those answers, I
19 would have proceeded to the other steps.

20 CHAIRMAN RIGLER: Those steps would be to depose
21 those individuals whom the Department identified as supplying
22 information related to the charge?

23 MR. BENBOW: I would have had a complete file,
24 certainly, of Ohio Edison files and Ohio Power files as to
25 the so-called ten documents that Mr. Charno is allegedly

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1 relying on.

2 With those in hand, I would look for anything
3 that in anyway related to them and show to the extent he
4 read some adverse inference from them they are not
5 supportable.

6 MR. LESSY: Mr. Chairman.

7 MR. SMITH: Mr. Benbow, having joined you rather
8 recently in this case, I hope you can bring me up to date
9 on it.

10 As I understand it, this is a case which is
11 not grandfathered.

12 MR. BENBOW: That's correct.

13 MR. SMITH: This proceeding must be done with
14 before you can proceed with both the operation and
15 construction as the case may be.

16 MR. BENBOW: Yes, sir.

17 MR. SMITH: What would be our situation if the
18 matters raised by Justice were to have come up somehow
19 during the course of the hearing and Justice decided it
20 did not want to pursue it but the Board decided in the
21 discharge of its duties we should inquire into it?

22 Would it be your position that even the Board
23 cannot inquire beyond the statements filed September 5
24 because we are so much under the gun?

25 MR. BENBOW: The Board is starting from those

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1 activities which relate to these proposals for licensing
2 these plants and any allegedly anticompetitive activity of
3 any of the applicants, including Ohio Edison and
4 Pennsylvania Power that may relate to those.

5 Clearly, the Board, if in its discretion, in
6 the course of the hearing, finds it comes on a matter --
7 let's say there has been an agreement between -- God
8 forbid -- Ohio Edison and Cleveland Electric Illuminating
9 that would have some direct impact on Davis Bessie 2 and 3
10 that had not previously come to the fore, that you suddenly
11 become cognizant that there might be such an arrangement
12 that you felt was anticompetitive.

13 No, I don't think I would be so unreasonable.

14 I am faced in another proceeding recently where
15 a Board -- where the Department tardily brought allegations
16 and that Board felt the matters there, even though tardily
17 brought, sufficiently related at least prima facie to the
18 issues involving the licensing of the plant question that
19 they were willing to explore and go into it.

20 That Board has not yet ruled whether they will
21 let that evidence stay in the record or not. But they have
22 undergone a full discovery with it.

23 This is not that kind of item.

24 The alleged conspiracy here that is proposed to
25 be added by amendment, Mr. Smith, Mr. Charno -- at least

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1 if I can understand anything he says -- says that this
2 comes from a period prior to the discovery time.

3 He is now vague as to whether it continued into
4 the period after discovery commenced. But he is going
5 out and he is going out to relationships clearly not
6 related to any of these plants.

7 There has been no allegation with respect to
8 that. It doesn't involve any of the company within the
9 CAPCO group as alleged partners in this arrangement. It
10 goes to an outside system entirely, Ohio Power.

11 While you might have the kind of situation
12 you are talking about and we may face it -- cases do
13 involve and under modern rules of pleadings as I under-
14 stand them there is liberality permitted, but this is way
15 beyond that.

16 If it were to be permitted as the Board did
17 in the other case, they called for a delay in the proceed-
18 ings. They allowed for adequate time for documentary
19 discovery.

20 A whole new chain of events was set off by the
21 decision to go forward on that basis. That was a situation
22 which was more at the heart of the proceeding than this kind
23 kind of peripheral charge that Justice is trying to pull
24 in two weeks before the -- approximately two weeks before the
25 hearing is to go forward.

Jon?

1 MR. SMITH: What happens in this case
2 notwithstanding what Justice wants that we think this is
3 an important issue and you need more time to address
4 yourself to it.

5 What happens to the construction permit
6 involved and the operating permit?

7 Under what kind of pressure is this Board?

8 There are problems in this case that I haven't
9 been able to resolve prior to hearing and I don't intend
10 to participate in a decision in this case unless those
11 matters are resolved.

12 If there will be an impossible situation
13 coming up in March or April which will be advanced to
14 prevent the Board from inquiring fully, I want to know now.

15 MR. BENBOW: We have tried to alert you to the
16 time situation which the Department is largely responsible
17 for. They should bear that burden. They have been at
18 this game for three or four years.

19 In looking at the question you are asking me,
20 you can't accept the cavalier way in which Mr. Charno
21 talks about catch-up ball.

22 If it is being played, the first place the
23 Board should turn to is for a full explanation from the
24 Department why this case has been so inadequately handled
25 in terms of preparing itself and preparing the Board to go

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1 forward with it.

2 MR. SMITH: This doesn't relate to my question.
3 My question is what happens to us, this case, if we
4 cannot resolve it in time for your construction and
5 operating permit?

6 From what extent is this Board precluded from
7 inquiring into matters of its own interest?

8 MR. BENBOW: This raises a fundamental question
9 that goes beyond the specifics. I would like to give
10 Mr. Charnoff opportunity to respond on it.

11 MR. SMITH: I would like these points made
12 again for my benefit.

13 MR. CHARNOFF: Certainly under the law at
14 least insofar as the Perry Plant is concerned, which is
15 not grandfathered, in the absence of a consent by all
16 of the parties, that plant would not get a construction
17 permit.

18 That is to be distinguished from the Farley
19 Case that Mr. Benbow was referring to where the construction
20 permit was grandfathered and there is a debate as to whether
21 the operating license is grandfathered.

22 The Farley Plant is not due for its operating
23 license until 1977. That Board was not operating under
24 the dilemma that you particularly set up for this particular
25 question.

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1 unusually significant in a safety standpoint.

2 It may be that there is a tighter standard
3 in this type of situation.

4 Given the Commission's emphasis on nexus
5 in all of its Waterford pleadings, rulings, I think
6 you should probably make that determination at the out-
7 set that there is sufficient nexus between this issue
8 that bothers you before you would reopen an extended
9 proceeding that might in fact have the consequences
10 that you fear and we fear.

11 It seems to me that the third thing you
12 might do is you would do all in your power to encourage
13 and direct these parties, including these protectors of
14 the public interest represented by the Regulatory Staff
15 and the Department of Justice as well as intervenors to
16 enter into exactly the kind of stipulation that the NRC
17 has said is appropriate.

18 Let the plants go on line unless there is a
19 clear showing of prejudice to somebody in the event they
20 would.

21 In these cases if nobody is opposing the
22 plants going on line for a safety reason -- indeed the
23 petitioner often stresses it wants a piece of the plant
24 so it is not opposed to letting the plant go on line,
25 why the Department of Justice or NRC Staff would oppose

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1 it is mystifying to me.

2 In that particular unusual circumstance you have
3 posed where you have come across some item of interest, you
4 would determine if it has a high probability of significance
5 that there is nexus and then you also would call all parties
6 to see if a stipulation of the sort that the Waterford
7 ruling has opened up might apply in this situation.

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1 MR. SMITH: We are faced with a problem and
2 possibility that I can see coming here -- in the last pre-
3 hearing conference, you said one of the plants hopefully will
4 be loading fuel in April of '76.

5 MR. CHARNOFF: Davis-Besse will be loading fuel in
6 the second quarter of 1976. To my knowledge it is June 1st.
7 I don't believe I said April.

8 MR. SMITH: Is there any possibility our decision
9 can be out and any appeal considerations disposed of by that
10 time?

11 MR. CHARNOFF: No, sir, I don't believe there is
12 any real possibility. As I understand how every other anti-
13 trust case before the NRC has proceeded, I don't think there
14 is a ghost of a chance that the Board will have an initial
15 decision out and there will be no chance of an Appeal Board
16 decision out by that time and no chance of any judicial re-
17 lief by that time.

18 Let me carry this forward. It is for that reason
19 that we have undertaken, without any success, to obtain the
20 kind of stipulations that the Commission has countenanced.
21 We have obtained no indication of interest by any party in
22 this proceeding to relieve that situation.

23 I might also indicate this has been behind this
24 whole process now for as long as it has gone on. We have had
25 rulings adverse to us. We have not sought to appeal them even

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1 on an interrogatory basis, because we have been confronted
2 with the situation of plant schedule.

3 We have now reached the point where the plant
4 schedules are real in terms of construction of Perry and
5 operation and fuel loading of Davis-Besse. We have now come
6 across a situation where we have added specific contentions
7 coming in in September of this year which we have never had
8 even though we requested them months and years ago.

9 I was just at an oral argument in this room last
10 week with an Appeal Board on Kansas Gas and Electric and that
11 Appeal Board said that there is no question, at least in an
12 antitrust case, even if we are careless about applying the
13 2.714 rules in the environmental and safety side, that in
14 an antitrust case where we don't have safety issues, you're
15 obliged to give that specificity required.

16 MR. SMITH: I want to get this in context. While
17 you are on this subject, could you address yourself to your
18 paper of October 21, on page 7, item 9? You say in the
19 Davis-Besse Unit 1 antitrust proceeding, for example, the NRC
20 waited a full 2 years after the filing of Applicant's response
21 on the City of Cleveland's petition to intervene. No good
22 explanation has yet been provided for this action.

23 Other delay tactics -- this to me indicates that
24 you're suggesting that the Nuclear Regulatory Commission has
25 been involved in delay tactics. Did you intend that? Are

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1 you suggesting that the Commission as a Commission is engaged
2 in a deliberate delaying effort?

3 MR. CHARNOFF: Let me recite the history of 2 years.

4 MR. SMITH: Could you answer that?

5 MR. CHARNOFF: Yes, sir. We received the petition
6 to intervene in Davis-Besse in July 1971. There followed
7 requests for time by the Regulatory Staff to answer that
8 petition. In each case there seemed to be some hope maybe
9 that something could be done about that.

10 Each one was taken in good faith. We consented
11 to a few of those delays. Finally the Staff filed its answer
12 and then said, maybe there ought to be another delay because
13 there was an ongoing FPC proceeding and therefore, hoping the
14 ongoing FPC proceeding would resolve the antitrust allegation
15 made by Cleveland.

16 That FPC proceeding found on the basis of no
17 evidence being put forth by the City of Cleveland, found no
18 evidence of an anticompetitive posture by Cleveland Electric
19 Illuminating Company.

20 We heard nothing further from the Staff. There
21 was then a meeting held 3 or 3 months later at the Staff's
22 request with the City which was then represented by other
23 counsel. As I recall that meeting took place in about
24 March of '72.

25 In March of '72 the City of Cleveland was asked to

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1 file certain papers within 3 weeks. That time period went
2 by. No paper was filed.

3 There was subsequently a change of counsel by the
4 City of Cleveland. There was allegation that somehow or other
5 the Staff concurred in the delay. The Staff told us they
6 never concurred in that delay response.

7 Then we had more delay requests by the Staff to
8 cope with these particular matters. Then finally after con-
9 siderable period of time, the Staff reaffirmed its earlier
10 recommendation that there ought to be a hearing.

11 In my view there was no recommendation in Davis-
12 Besse I by the Department of Justice.

13 MR. SMITH: I'm not concerned about the problems
14 between the adversary parties. I'm concerned about your use
15 of the words that the Nuclear Regulatory Commission waited 2
16 years to rule on a petition to intervene.

17 MR. CHARNOFF: 2-1/2 years. The ruling wasn't
18 made until March 1974.

19 MR. SMITH: By the Board.

20 MR. CHARNOFF: The Nuclear Regulatory Commission
21 didn't assign the question to an intervening board until
22 January 1974.

23 MR. SMITH: I wonder if you're making a special
24 point that we should be cognizant of that. You're charging
25 the Commissioners as Commissioners, Board as a Board, or

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1 Appeal Board as an Appeal Board of doing something here that
2 I'm not aware of. What's happening as far as the adjudicators.

3 MR. CHARNOFF: There is no allegation against the
4 Appeal board or Licensing Board in this particular paragraph.
5 We have other concerns with the Licensing Board in this case,
6 but that is not at issue here.

7 The conduct of the NRC Staff, together with the
8 the conduct of the Nuclear Regulatory Commission, which had
9 before it papers for many months before it even assigned the
10 case to an intervention board, when viewed from some perspec-
11 tive can only be described as either terribly negligent or
12 a deliberate posturing of the case so the Applicant's time
13 would have run to a point where we are now at a situation
14 where we are prejudiced in our ability to totally prepare
15 for the case in the way we would like to do, taking all the
16 time we need for it and prejudiced because that plant,
17 Davis-Besse 1, is likely to sit idle no matter what we do
18 unless the Commission determines we have the authority under
19 Section 105 C-8, that it has the authority to grandfather that
20 plant.

21 MR. SMITH: You have made an extremely serious
22 charge. I think you should consider the significance of that.

23 MR. CHARNOFF: I have no doubt about the charge as
24 to the total negligence in the posture of that case. I am
25 careful in saying I cannot necessarily charge there was

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1 willful establishment here. In the aggregate, I think if
2 one looks at the record, I don't know of another case, anti-
3 trust or anything else where the Commission has sat on a
4 petition to intervene for 2-1/2 years.

5 MR. SMITH: As a tactic of delay.

6 MR. CHARNOFF: I say to you it is negligence or a
7 tactic.

8 MR. SMITH: I wish you would address yourself to
9 your paper, look at it, read it and decide if you intend to
10 say and imply what is said there. That to me is a serious
11 concern and if there has been a thread of adjudicators of
12 this case deliberately trying to delay you and put you in
13 that situation which is what you're suggesting --

14 MR. CHARNOFF: I cannot allege willfulness in this
15 connection. I have no doubt about the negligence associated
16 with it. There was no other way to characterize what did
17 transpire when one looks back at the situation we have been
18 in.

19 It is not because I didn't ask the Staff to get
20 a decision out of that particular Commission. We called them
21 regularly to please get a decision out on whether we would go
22 to hearing or not. At that time we thought the plant would
23 be ready sooner and we were increasingly concerned.

24 I know of no other case that has a situation as
25 woeful as this. When the Joint Committee on Atomic Energy

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1 thought that the proceedings would proceed expeditiously, I
2 cannot view it objectively and say I understand what happened.

3 MR. SMITH: The one point you make is that there
4 was a conscious effort --

5 MR. CHARNOFF: I have said no explanation has
6 been provided. I am not saying there was any willful
7 deliberate ploy.

8 MR. SMITH: Then you say other delay tactics.

9 MR. CHARNOFF: There has been delaying tactics
10 in this. If you're troubled by the word "tactics" --

11 MR. SMITH: I'm troubled by other delay tactics.

12 MR. CHARNOFF: We will reword it.

13 MR. SMITH: You already explained you didn't mean
14 that.

15 MR. CHARNOFF: I meant other delay tactics follow-
16 ing the introductory portion of that sentence. In the remain-
17 der of that paragraph we view as having as part of their
18 intent the delay factor, yes, sir. I do not mean that as to
19 the first part.

20 As to the first part, I don't know why it happened.
21 I don't have a record which better demonstrates negligence
22 in the administrative process.

23 MR. SMITH: You disabused me of a wrong impression.
24 My reading is that you were accusing an adjudicator in NRC
25 of participation in a delay tactic.

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1 MR. CHARNOFF: We have not accused any adjudicator
2 in NRC of delay tactics. If that clears that up, I am pleased
3 to do so and to have the chance to do so. It is immaterial of
4 the issue before us in terms of the posture of this particular
5 situation we are all in.

6 What has mystified me, Mr. Smith, is that we
7 have regularly made requests of the other parties, including
8 the governmental staffs, for exactly a legitimate out that the
9 Commission has provided and when I have made that request on
10 the record, I'm greeted with a motion to strike it. When I
11 have made it indirectly, I get no response whatsoever.

12 That mystifies me and I must say we don't under-
13 stand how that is consistent with any public interest that
14 this or any other public agency is supposed to protect here.

15 CHAIRMAN RIGLER: Mr. Charnoff, you referred to
16 other concerns with the Licensing Board. Were those concerns
17 expressed in the pleadings filed to date. Do they relate to
18 evidentiary rulings, et cetera?

19 MR. CHARNOFF: We have objected at the outset to
20 the lack of specificity of the contentions and our record is
21 very clear with regard to our disagreement as to the way the
22 matters of controversy were defined at the outset. We ob-
23 jected strongly. We objected later as to the use of that as
24 reasonable parameters for the discovery that was conducted.

25 When one looks at what we got at the beginning in

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1 the form of the Licensing Board's prehearing conference order
2 number 2 and when one begins to compare that with the specific
3 allegations that began to come in after September 5, one sees
4 a tremendously broad chasm between the 2 parameters.

5 I can only refer you to the record of the hearing
6 last Thursday where that particular Appeal Board made it
7 clear they wanted specificity of both the allegations and
8 the relief requested from a petitioner to intervene before
9 they will grant that petition.

10 We have asked for relief here and all we got is,
11 "We will give it to you after discovery." We are still wait-
12 ing for it.

13 CHAIRMAN RIGLER: My question was concerned with
14 the Licensing Board. Your concern relates to the rulings
15 with respect to the specificity of the allegations.

16 MR. CHARNOFF: That is not the end of it. If
17 you're asking for the string, I will give you a string.

18 CHAIRMAN RIGLER: I just want a listing.

19 MR. CHARNOFF: I will give you a good listing now
20 and I will file a further list with you when I think about it
21 more.

22 This Board has determined that we neither have
23 the burden of going forward nor the burden of proof. Yet this
24 Board has insisted we put forth our expert witnesses at the
25 same time the other side puts forth their expert witnesses.

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1 The net result of that is when we get 30 days to
2 prepare for cross-examination on the other side's expert wit-
3 nesses, they get perhaps 3, 5, 6 months' time to prepare cross
4 on ours.

5 I'm concerned with the documentation that we have
6 to provide on November 10 and the way of designation of
7 documentation for the same reason.

8 CHAIRMAN RIGLER: Next.

9 MR. CHARNOFF: The designation of the witnesses
10 at that point in time. I am concerned that this Board was
11 willing to recognize -- maybe we won't say it -- the question
12 of some protection of the Staff's witnesses. We have no
13 idea how to prepare for that. We are to get that on
14 November 10 and go to hearing on November 20.

15 We will anticipate protective orders. We will
16 probably have to debate that. I don't know how to prepare
17 for cross-examination on that kind of situation.

18 CHAIRMAN RIGLER: Is that the end of the string?

19 MR. CHARNOFF: Those are the immediate areas.

20 CHAIRMAN RIGLER: These concerns relate to evi-
21 dentiary or procedural rulings of the Board as to which you
22 have expressed your position on the record and the Board has
23 subsequently ruled.

24 MR. CHARNOFF: They do not go to any allegation
25 that I have made in this particular paragraph 9, question of

Team 11

1 delay. I have not attributed that to this Board or any other
2 adjudicatory body.

3 CHAIRMAN RIGLER: My question was not in the same
4 vein as Mr. Smith's. I wanted to find out what those concerns
5 were and be sure they were concerns the Board has addressed.
6 You're saying you disagree with our rulings and our responses
7 and our position. You have had your argument and we have
8 made our rulings.

9 MR. CHARNOFF: That's correct. I want you to know
10 the net result of all of this is ordering on the abrogation of
11 our due process.

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1 CHAIRMAN RIGLER: I will take Mr. Lessy next.

2 MR. BENBOW: May I supplement? There are particu-
3 lar concerns of Ohio Edison and Pennsylvania Power that
4 go beyond what Mr. Charnoff said.

5 CHAIRMAN RIGLER: Mr. Lessy.

6 MR. LESSY: Staff is reluctant to
7 inject itself into this controversy between the Department and
8 applicant particularly Ohio Edison substantively but we would
9 like to make a few comments.

10 Firstly, the October 21 pleading of applicants
11 particularly page 7 thereof and other pages, as Mr. Smith
12 has noted makes a number of specific charges. Paragraph
13 9 indicates delay tactics. Paragraph 9 part 2, also indicates
14 intentionally conducting depositions for delay. Part 3
15 thereof recommends or refers to charges that the government
16 was repeatedly extending filing dates. Subparagraph 10
17 charges the government with concerted effort, which is, of
18 course, meaningful in antitrust and other context to push
19 the hearing back.

20 Generally we would not fall down to answering
21 these charge by charge and I'm not. I'm afraid what will
22 happen is if we don't six months from now before the Joint
23 Committee on Atomic Energy we will be charged with not
24 responding to these charges. I categorically deny any and
25 all charges on behalf of the staff. We will be pleased to

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1 address them specifically at the right time. The Board will
2 recall, especially with respect to tying the delay in with
3 the September 5 problem that the hearing schedule was com-
4 pletely disrailed in December of 1974. At a pre-hearing
5 conference in April of 1975 the schedule that was in dis-
6 railment staff moved to terminate discovery and to set a
7 date for hearing. When it came forward with that it got
8 all parties on-board but the Applicants and presented the Board
9 with a joint front.

10 In connection with that particular pre-hearing
11 conference Applicants asked for relief to be specifically
12 advised as to the nature of the case. The Board ruled that
13 on or about September 5, the parties would advise of the
14 date of relief, with specificity. They never objected to
15 that order in terms of the timeliness, to my recollection.

16 Now, in October or November they are saying that
17 there wasn't specificity or notice as to those charges.

18 I would also like to point out that Applicants --
19 that the discovery, request for discovery that went to
20 all parties including Ohio Edison went out in August of 1974.
21 Now, presumably Ohio Edison knows what is contained in the
22 documents they produced that is meaningful from an antitrust
23 standpoint.

24 CHAIRMAN RIGLER: We don't need further argument
25 on that.

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1 MR. LESSY: I would like to point out with the
2 Perry 1 and 2 discovery that went out in August 1974 sube-
3 sequent to that there was Davis-Besse 2 and 3 discovery,
4 Staff was not discovered in Davis-Besse 2 and 3. No inter-
5 rogatories were asked of staff in Davis-Besse 2 and 3.
6 No depositions were taken of staff in the Perry or Davis-
7 Besse proceedings. In the Perry proceeding staff produced
8 everything it had in its files. Some of these documents
9 which it produced related to field investigations of staff,
10 expert witnesses relating to the case in chief. No deposi-
11 tions or further discovery was taken with respect thereto.

12 CHAIRMAN RIGLER: I don't think that is neces-
13 sarily germane to anything we are considering today.

14 MR. LESSY: There is a motion Mr. Benbow has
15 handed out today --

16 CHAIRMAN RIGLER: We will address that subse-
17 quently. The Board hasn't even seen it yet.

18 MR. LESSY: I would just like to point out the
19 filing was made September 5 with those charges. It is now
20 October 31 and almost two months have elapsed since the
21 request for discovery. In terms of the point Mr. Charnoff
22 made with respect to the precedent and the cases on the
23 other side of the fence here, health safety and environment
24 cases, and at what point new charges become relevant, my
25 recollection is that recently in the Indian Point Case the

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1 Appeal Board permitted intervention even after hearing because
2 of the charges being made or the questions being raised by
3 an intervenor. I don't think there is an antitrust ruling
4 with respect to this in this Commission and I don't think
5 there is as strong a precedent as he suggested with respect
6 to timeliness of filings.

7 Davis-Besse one date in terms of a request for
8 post-licensing antitrust review -- Of course, the main mean-
9 ing of the statute is pre-licensing. Waterford says if all
10 parties agree you can alter that and conduct post-licensing
11 antitrust review. Staff has taken the position that it would
12 be willing to go forward with post-licensing antitrust re-
13 view if Waterford is complied with. We have brought this
14 matter up with the Department of Justice and city of Cleve-
15 land.

16 As to the charge that there is an intentional
17 delay to push back, it is not consistent with the facts.

18 CHAIRMAN RIGLER: I think we will conclude argument
19 now on the Justice's motion to amend its interrogatory
20 answers.

21 MR. BENBOW: That does not mean we have gone on
22 to the other interests as far as Ohio Edison is concerned,
23 the peripheral charges with respect to severe deprivation of
24 due process.

25 I am concerned about some of the questions that

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1 were raised. What may happen in this procedure is the Board
2 may lose sight of the fact that after providing 300,000
3 documents or thereabouts, as I understand it -- as Ohio
4 Edison's part at a time when there were no specific charges
5 with respect to it --

6 CHAIRMAN RIGLER: The issues in controversy were
7 framed in pre-hearing conference order number 2. At the April
8 1975 pre-hearing conference the Board indicated that it
9 heard your argument, Applicant's argument about specificity
10 and it was satisfied that the issues it set forth in pre-
11 hearing conference order number 2 were sufficiently specific.

12 Nonetheless, in deference to the Applicant's
13 request for greater specificity we required the other parties
14 to take the additional step of filing interrogatory answers,
15 amendments or a statement of the case so at the conclusion of
16 discovery and after all the facts were in, the Applicant
17 could be further advised as to how discovery materials re-
18 lated back to the issues in controversy. And the statement of
19 the case was supposed to address each of the issues in
20 controversy and again we had argument as to whether or not
21 the other parties complied with that requirement. Once more
22 we were satisfied they did.

23 You have had your argument on specificity. We are
24 aware of your position. I don't find it fruitful to go
25 back into whether or not there was sufficient specificity.

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1 MR. BENBOW: I'm talking only from the viewpoint
2 of Ohio Edison and Pennsylvania Power and whether there had
3 been sufficient specificity prior to September 5 of 1975
4 for us to have notice that would permit us to pursue ade-
5 quate discovery prior to that date. As to those two
6 Applicants, Ohio Edison and Pennsylvania Power, there was
7 no basis on which to pursue discovery and with respect to
8 their proposed amendment as of October 14, that is even
9 more the case.

10 CHAIRMAN RIGLER: The next item I want to ad-
11 dress is the protective order, which the Staff may or may
12 not be filing with respect to its witnesses. If you do
13 intend to file for such protective order and we are not
14 encouraging you to do so, but we did indicate we would re-
15 ceive a request for such an order and consider it.
16 Get it in in the next couple of days. I want to get a rul-
17 ing out of the way prior to the hearing. We are contemplat-
18 ing another pre-hearing conference on, I believe, the 17th.
19 I want to have that resolved by then. I want to resolve
20 it as early as possible, particularly if the Applicant wants
21 to make response.

22 The next item is an exchange of letters between
23 Mr. Hjelmfelt and Mr. Reynolds, relating to the city of
24 Cleveland's request for materials underlying the testimony
25 of expert witnesses submitted by the Applicants and with

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1 the consent of both parties that we have agreed to treat
2 the letters as a motion for the production of those mater-
3 ials.

4 Mr. HJelmfelt.

5 MR. HJELMFELT: The matters that you have discussed
6 mentioned, raised by our letter that went to the underlying
7 documents behind the testimony of the expert witnesses, Mr.
8 Lentz and Mr. Caruso, is contained in the motion which we
9 are filing today and which I hand-delivered on the parties
10 in this room, entitled "Motion of the City of Cleveland to
11 Reopen Discovery." This motion in written form includes
12 other matters which I would not propose to address at this
13 pre-hearing conference because the other parties have just
14 seen them this morning. I would like to speak to the matters
15 covered in my letter in which I requested certain back-up
16 material for the expert testimony of Mr. Lentz and Mr.
17 Caruso. Mr. Caruso's testimony is technical testimony,
18 going to the feasibility of the city of Cleveland's con-
19 structing transmission lines of its own to Pitcarin, and I
20 believe it is Ohio Power. The argument, of course, is that
21 there is no denial of coordination if the city can con-
22 struct its own transmission lines, no monopoly power over
23 transmission if the city can make its own construction of
24 transmission lines. The reason expert testimony is filed
25 early is to permit the parties to analyze that testimony

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1 and thus be prepared to make meaningful cross-examination
2 in the shortest and most concise fashion. In order for
3 that to have any validity in this case, it is necessary for
4 the parties to have available a copy of the study and the
5 work papers, which underlie Mr. Caruso's testimony, which,
6 in effect, simply states the conclusions reached by his study.
7 Accordingly, I wrote that letter on an informal document
8 basis. That is the sort of document request, which is
9 routinely filed in other administrative agencies.

10 Certainly the Federal Power Commission, to obtain
11 back-up material for expert witnesses. They are routinely
12 complied with. I was surprised this was not. Be that as it
13 may, I think the Board would agree that certainly at the time
14 Mr. Caruso takes the stand and subject to his cross-examin-
15 ation the documents and the matters he relied on and the
16 data that is the basis for his expert testimony must be
17 made available to us. To have meaning, that information
18 must be made available now. Otherwise, we will have to have
19 a recess to study it after the hearing starts. The same
20 sort of process has been followed in the Farley case, which
21 I notice the Board is tired of hearing about, but everyone
22 is citing Farley and I will cite it.

23 Applicants in the Farley case are putting on the
24 testimony of an expert witness, Lawyer from Alabama and the
25 Board has directed the documents he relied on, background

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1 documents be furnished to the other parties 30 days prior to
2 the time he takes the stand.

3 Now the other party of Mr. Reynolds' response with
4 respect to Mr. Caruso was we had six months of discovery or
5 however many months it was, millions of documents, numerous
6 depositions and we should have been able to get all of our
7 discovery then.

8 If we tried to discover that then they would have
9 claimed work product. For all we know there wasn't any such
10 thing. When we did attempt to discover matters relating
11 to the ability of the city to construct transmission lines
12 was objected to on the grounds of relevance among other
13 things. It is getting into those other matters that shows
14 we did try to discover this sort of thing which I won't
15 address now because the Applicants have just seen it.

16 CHAIRMAN RIGLER: With the questions on the
17 depositions answered, objections posed and answer was given.
18 Is that correct or not?

19 MR. HJELMFELT: In some of the things answers were
20 given and some were not.

21 CHAIRMAN RIGLER: I'm talking about the questions
22 related to the city of Cleveland's construction of trans-
23 mission lines.

24 MR HJELMFELT: Quite frankly, I don't recall spe-
25 cifically whether on deposition answers were given in all

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1 respects on that issue.

2 CHAIRMAN RIGLER: How about Mr. Lentz?

3 MR. HJELMFELT: With respect to Mr. Lentz, Mr.
4 Lentz is an employee of ECAR and his testimony basically
5 traces the history of ECAR and CAPCO. He starts with a
6 short status report on the situation of the CAPCO Companies
7 in 1964 --

8 MR. REYNOLDS: Maybe I can shorten this a bit.
9 I haven't had a chance to read the motion, but I think that
10 Mr. Hjelmfelt's point to the effect that before the
11 expert witnesses go on the stand some opportunity should be
12 given to examine the studies a reasonable time. There have
13 been studies reference in the expert testimony that the
14 other parties filed on the Applicants.

15 I am willing to enter into an arrangement with the
16 other parties to the exchange of any back-up material refer-
17 enced in the expert testimony 30 days before the scheduled
18 witness is to take the stand. We will be willing to enter
19 that kind of an arrangement.

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1 MR. HJELMFELT: I personally have no problem with
2 that from our standpoint.

3 I would say this: I want to respond to an argument
4 that has been made that the fact that Applicants have filed
5 testimony and what not, maybe 3 or 4 months before we get
6 to their witnesses gives us some inordinate advantage.

7 Much of this time we will be tied up in trial,
8 and it will be very difficult to do long-range work preparing
9 cross-examination.

10 CHAIRMAN RIGLER: It is the Board's intention to
11 make all the information available to all the parties
12 sufficiently in advance so there will be no prejudice.

13 The fact one party comes after another conveys
14 no apparent disadvantage to the latecomer.

15 MR. HJELMFELT: As to Mr. Reynolds' statement, I
16 have no problem. On that basis, I think our problem is
17 resolved.

18 CHAIRMAN RIGLER: Does that go to the Lentz
19 material as well as the Caruso materials?

20 MR. REYNOLDS: I propose that go to all expert
21 testimony and all studies and documents referenced in the
22 expert testimony by all parties.

23 CHAIRMAN RIGLER: The documents Mr. Lentz used
24 or identified will be made available.

25 MR. REYNOLDS: 30 days prior to his appearance.

1 MR. LESSY: I suggest the exchange be simultaneous.
2 The studies are in existence, and there is no reason
3 to sit on them for two or three months.

4 CHAIRMAN BIGLER: That strikes me as a reasonable
5 position. We are trying to get away from the element of
6 surprise.

7 MR. REYNOLDS: I guess we should do it for all
8 parties. In order to do that, all parties should be treated
9 fairly and in the same way with respect to its expert
10 witnesses.

11 In terms of exchanging backup material, if we
12 are to get the material 30 days before the expert witness
13 goes on for the other side and we are in trial, too, and
14 we have to prepare like they do, by the same token the
15 other side should have the same 30-day period in which to
16 review the study for our expert witnesses.

17 That is the reasonable approach.

18 CHAIRMAN BIGLER: Could you be willing to live with
19 that, Mr. Lessy?

20 MR. LESSY: Unless the Board orders us to, unless
21 it was simultaneous exchange, we won't be interested in
22 the exchange.

23 MR. CHAMBO: Certainly we have no problem with an
24 exchange. I am thinking about the timing. I am not aware of
25 any underlying studies of ours, so I am not sure it really

1 matters to our testimony.

2 MR. DE TROM: I thought Dr. Levin, as he did in
3 Alabama, refers to some studies again, the same studies I
4 recall, those at least and maybe some others.

5 MR. CHARNO: Are you talking about public or private
6 studies?

7 MR. CHARNOFF: Rather than debate the question,
8 if he refers to some studies are you prepared to enter into
9 this stipulation?

10 MR. CHARNO: To provide a large mass of documents
11 that are public record somewhere just for harassment of us?
12 No, I am not prepared to enter into that. If you are
13 talking about studies not available, you will get them.

14 MR. CHARNOFF: Studies the expert has made that
15 he refers to.

16 MR. CHARNO: We are also talking about work papers
17 and underlying documents to the studies.

18 MR. CHARNOFF: That your and our and everybody's
19 experts referred to. If they haven't referred to it, then that
20 is not involved.

21 MR. LESSY: This may get us into a problem in terms
22 of cross-examining the expert. For example, what is a study
23 and what isn't? What is communication between counsel?

24 I think there is a problem. I am willing to
25 exchange with you on a one-for-one basis, simultaneously.

1 I am not willing to engage in a wholesale
2 exchange when we are trying to get ready for trial without
3 it being simultaneously. I am willing to respond on a
4 simultaneous basis.

5 Presumably, if Dr. Hughes refers to some sort of
6 paper on page 31 of his testimony, and we get into the
7 question of moving to strike it on the grounds it wasn't
8 turned over 30 days ahead of time, we are getting into
9 an area that could cause more problems.

10 If it is simultaneous, we will do it on a one-for-
11 one basis. When we have to present our case in chief in
12 less than a month, and our witnesses are trying to be
13 scheduled in terms of Thanksgiving vacation, and we have to
14 file a list of documents and exhibits, it becomes difficult.

15 MR. CHANDOFF: Is the objection that it be
16 simultaneous or is the objection by Mr. Lessy that we are
17 asking for documents that he is unable to produce?

18 I don't understand what one-for-one exchange is.
19 To the extent any of the witnesses in the prepared expert
20 testimony refers to studies he made and including work papers
21 related thereto, we would be willing to exchange them on the
22 basis that Mr. Reynolds stated.

23 I didn't understand Mr. Hjelmfelt to have a problem
24 with that, and I don't think Mr. Charno has a problem.

25 MR. CHARNO: The Department has a problem with any

1 request not made with specificity in advance.

2 I have the same problem that Mr. Lessy has. I will
3 respond to a specific request on the basis of a specific
4 request, and I will make a specific request of you for
5 specific materials.

6 I don't want a blanket stipulation.

7 MR. LESSY: Our position is we will do that on a
8 specific basis, one-for-one basis, if it is done simul-
9 taneously.

10 MR. CHAMRO: The Department has no problem with that
11 idea at all.

12 CHAIRMAN RIGLER: The Board is going to solve it
13 for you. We will get out an order and direct you. I think
14 we understand the position of the parties.

15 Does anyone else have argument to make on the
16 exchange of underlying data for expert witnesses?

17 MR. LESSY: I want to suggest that, as usual, the
18 language in the order be specific, because we are going to
19 get into the problems I raised about what is underlying and
20 what is a study, et cetera.

21 MR. CHAPNOFF: We will support Mr. Lessy on the
22 specificity point. We are in favor of specificity, and I
23 don't care who says it.

24 MR. LESSY: Your October 21 pleading was specific
25 with respect to the charge.

6
1 MR. REYNOLDS: I have to be leaving.

2 My expectation of the pretrial brief -- the
3 Applicant and other parties are under the Board's schedule
4 to submit briefs on November 10.

5 I feel it is my responsibility to advise the
6 Board at this juncture that that seems extremely unlikely,
7 if not impossible, and Applicants really don't see any way
8 they will be able to meet that deadline.

9 CHAIRMAN RIGLER: All right.

10 I would like the Applicants to consult with me
11 five days in advance of that deadline, and give me a progress
12 report.

13 Let me just note that we have heard a lot this
14 morning about delays and who was responsible for the various
15 delays.

16 It has been the Board's impression that all the
17 parties before it have proceeded diligently, at least in the
18 last six months, to prepare for the hearings.

19 It is fair to observe that both sides have come to
20 the Board with requests for delays or extensions of time,
21 and this is an example of the Applicant's necessity to do so.

22 I am hoping to make the deadline for hearing. The
23 only response I have for now is consult with me five days
24 before the deadline.

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1 CHAIRMAN RIGLER: Mr. Reynolds, I notice you are
2 eager to leave. I promised you you could get out in time
3 to make your other appointment. I will review your earlier
4 statements with respect to specificity of allegation.
5 I believe I understood your point. I believe our disagreement,
6 if any, relates to a continuing debate about nexus and
7 whether it is the situation that must be related to the
8 activities or whether it is practices. I believe we have
9 a difference as to whether or not practices are the
10 equivalent of situation. Let's not re-argue that now.
11 We have had numerous pleadings on the record. I will look
12 again at your remarks in consideration with the motion to
13 amend.

14 MR. REYNOLDS: Thank you, sir. May I ask whether
15 we might expect a ruling from the Board with respect to
16 our motion, request for modification, any time soon?

17 CHAIRMAN RIGLER: THE Board has that under active
18 advisement. We will be talking about that more today and
19 in the next couple of days. I will not give you a time
20 commitment on the ruling.

21 MR. REYNOLDS: Thank you, sir.

22 MR. HJELMFELT: I want to address a few remarks
23 to the suggestion there may be a delay in the filing of the
24 pretrial briefs. My week is obviously scheduled around all
25 the filings that are due on the 10th. I'm juggling a lot

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1 of things to get them done. If there is going to be any
2 change, I would like to know today or Monday. It will make
3 a lot of difference as to what my week is like.

4 CHAIRMAN RIGLER: I'm sympathetic, Mr. Hjelmfelt.
5 My problem is by watching the Applicants' progress day-by-
6 day we found they were able to accelerate their schedule
7 a little bit. I don't want to make decisions that would delay
8 the preparation of that pretrial brief.

9 MR. CHARNO: I have several matters which overlap
10 the question and the date of the prehearing brief and other
11 dates. We have also hand-delivered a pleading in front of
12 you gentleman today. There are a number of them. The first
13 is a --

14 CHAIRMAN RIGLER: Are all these things being
15 served by mail?

16 MR. CHARNO: They are.

17 CHAIRMAN RIGLER: At our office?

18 MR. CHARNO: There is a supplementary response
19 to the initial Perry interrogatories which we agreed to
20 make and which agreement has been further effectuated by
21 recent exchange of correspondence. We take it there was
22 no objection to your doing so, since we have done so
23 recently.

24 The minutes of the conference call of October
25 28. In that context I would like to make an oral motion at

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1 this time to be allowed to -- that the Department be allowed
2 to wait until November 15 to respond to this new discovery
3 request on behalf of Ohio Edison and Pennsylvania Poer,
4 just as in the conference call the applicants were allowed
5 until nOVember 15, five days after the filing of the pre-
6 hearing brief to repond to the Department's new discovery
7 requestion, which is the third and fourth items, application
8 for a subpoena and the subpoena itself.

9 MR. CHARNOFF: May I comment on that?

10 CHAIRMAN RIGLER: You want additional time to
11 respond to Ohio Edison's motion for additional discovery?

12 MR. CHARNO: That is correct.

13 CHAIRMAN RIGLER: When you say "respond," do
14 you mean respond or object?

15 MR. BENBOW: We object to that. We are supposed
16 to go to hearing on November 20 with respect to these
17 charges, which we have only had since September 5. If they
18 are to be of any use to us in the preparation of our defense -

19 CHAIRMAN RIGLER: That schedule was established
20 months and months in advance: It is Ohio Edison that is
21 moving to reopen discovery. We are moving to get adequate
22 discovery, sir.

23 MR. CHARNO: We have had no discovery on these
24 issues. The Department's position is identical to that
25 of the Applicant. We are preparing a prehearing brief that

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1 has to be filed November 10. They didn't see a way to
2 brief definitely in opposition, not in compliance with
3 our request for additional documents. I don't see
4 any way we can do what the Applicants couldn't do. That
5 is the basis of our motion.

6 CHAIRMAN RIGLER: What is your specific request
7 for relief?

8 MR. CHARNO: That we be allowed to November 15
9 to object or respond to the motion hand-served today by
10 Ohio Edison and Pennsylvania Power.

11 CHAIRMAN RIGLER: We will grant that.

12 MR. BENBOW: It does open the door it seems
13 to me to pressing that hearing date back.

14 CHAIRMAN RIGLER: Mr. Benbow, you are the one
15 who filed the late -- I will not say "untimely," because
16 it may be justified on its merit -- but you are the one
17 who filed the late request for additional discovery. It
18 seems Mr. Charno is asking for no more than the relief the
19 Applicants themselves asked for just three days previously.

20 MR. CHARNOFF: There is a fundamental difference,
21 I might participate in this discussion. The one thing
22 is that what the Department has asked for relates to their
23 ongoing inquiry into this particular proceeding. There is
24 not anything particularly new that we did that stimulated
25 their new request for discovery. What Mr. Benbow objected to

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1 as consistent with our general position, is that we didn't
2 know what the issues were. On September 5 Ohio Edison was
3 told they were 24 or 26 specific allegations against them.
4 It is to those matters that Ohio Edison was pressing for
5 discovery. It is a fundamentally different posture.

6 CHAIRMAN RIGLER: That does not change the
7 element of the preparation of the pretrial brief. If
8 all parties are engaged full-time in the preparation of
9 that brief that was due on the 10th, that would be the
10 governing factor.

11 MR. BENBOW: Mr. Charno is not asking for the
12 opportunity to respond by November 15. But when the
13 Chairman got him to make it clear he wants to keep open the
14 possibility of objecting, this is clearly material we
15 need in the defense of our case.

16 CHAIRMAN RIGLER: Mr. Benbow, assuming he filed
17 his objection right now, by the time we got it resolved,
18 we would be impinging on the November 20 date. We may come
19 to a situation where some discovery is permitted, even after
20 the commencement of the hearings. I hope not. You should
21 all be alert to that possibility.

22 I have been counting the number of lawyers that
23 the respective parties have available. It is not unusual to
24 have continuing discovery on a limited basis for good cause
25 shown, while a hearing is in progress, and we may come to

bw6 1 that here.

2 MR. LESSY: With respect to the possibility
3 of Applicants feeling that the public interest in getting
4 the hearing on and getting the Applicants licensed must
5 suffer, because they can't meet the November date for the
6 filing of pretrial brief, we would hope if the Board would
7 permit additional time for the Applicants that the filing
8 of pretrial brief remain simultaneous.

9 Secondly, staff would hope that the ten-day
10 hiatus between the filing of the pretrial brief and the
11 beginning of the evidentiary hearings would also be
12 preserved. Obviously, that is something that would be
13 very desirable.

14 CHAIRMAN RIGLER: Lets explore that for a
15 minute. The burden of proof rests on the staff, among
16 others, in these proceedings. It was my understanding that
17 the game plan was for the staff to go first with the
18 presentation of evidence, at least during the initial stages
19 of the hearing, so that I would think as of November 10 the
20 staff would already know how it intended to proceed at
21 the commencement of the hearing. I don't really see
22 any justification for maintaining the ten-day hiatus. You should
23 be ready to go on the 20th. I understood the staff was prepared
24 to start the actual hearing earlier than November 20.

25 MR. LESSY: We are ready. We thought, knowing

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1 their legal position, but we are sympathetic to the Board's
2 desire to move forward. We will assume then because we
3 are scheduling around Thanksgiving week, which everyone
4 knows is rough in terms of planes, we will assume we
5 will start on the 20th and in that respect I have one further
6 question. In that Thanksgiving will be a holiday and the
7 Friday following Thanksgiving will also be a holiday --

8 CHAIRMAN RIGLER: Friday after Thanksgiving
9 will be a holiday. Wednesday afternoon before Thanksgiving
10 we may adjourn early. Thanksgiving Day is also a no hearing
11 date.

12 MR. LESSY: Our problem is transportation of
13 out-of-town witnesses on Thanksgiving. With counsel having
14 to go to New York, those planes are really booked.
15 We can address ourselves to this at the November 17
16 scheduled prehearing conference, but we would like to know,
17 since the first witness will be ours and our sequence of
18 witnesses, whether he will be needed the first day. That
19 impacts on the expected length of opening statements. I don't
20 want to take anybody's hand, but I would like to know
21 whether or not opening statements or preliminary matters
22 will eat up the first day.

23 CHAIRMAN RIGLER: We do want to tie your hands.
24 We intend to have a limited period for opening statements,
25 no more than one hour per side, hopefully, less.

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1 CHAIRMAN RIGLER: I count the Applicant on one
2 side, and even though the position of various Intervenors
3 or government agencies may vary, I count them as a side
4 that intends to put license restrictions on these plants.

5 MR. LESSY: Presumably other than any matters
6 the Board has, other than the opening statements,
7 approximately two hours thereafter, the first witness
8 would be available.

9 CHAIRMAN RIGLER: That is correct. At our
10 prehearing conference on the 17th I hope to cover with the
11 parties, marking of documents to find out how you are
12 doing on stipulations as to authenticity, and resolve
13 any problems that would enable us to get the evidence in
14 more quickly.

15 MR. BENBOW: Could we inquire now if the
16 first witness is to be a witness against Ohio Edison and
17 Pennsylvania Power?

18 MR. CHARNOFF: Can we enlarge the question?
19 The question ought to be to accommodate all of counsel
20 not all of whom wish to be here at all times. We understand
21 the staff is coming forward with staff witnesses at the
22 outset. Could you give us the sequence and number of
23 witnesses, at least, if not the identities today of those
24 witnesses, so we can advise the counsel for other Applicants
25 who may be involved in the cross-examination what the

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1 likely schedule would be.

2 MR. LESSY: Well, the Board has ordered us to
3 do that on November 10. What I will say, in addition to that,
4 is that the first staff witness will be a witness, in
5 essence, against all the CAPCO companies, including Ohio
6 Edision.

7 MR. CHARNOFF: Do you have a problem in telling
8 us more than that today?

9 MR. LESSY: Yes, I do, sir.

10 MR. CHARNOFF: May I ask whether you might ask the
11 staff to oblige us to tell us the sequence of their
12 witnesses today, to make suitable plans?

13 CHAIRMAN RIGLER: I would like to oblige
14 you, Mr. Charnoff, but we have the problem of possibility
15 of protective order.

16 MR. CHARNOFF: I'm not asking for identities.
17 Is the first witness against all the companies; is the
18 second one against Ohio, Cleveland, Duquesne? That is
19 all I want to know.

20 CHAIRMAN RIGLER: Mr. Lessy?

21 MR. LESSY: The only thing I can say right
22 now is that the first witness will be CAPCO -- witness
23 against all the companies. As to any further specificity
24 thereafter, I'm not prepared to go into that now, because of
25 scheduling. We are talking about Thanksgiving time. I may

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1 have to juggle the third and fourth or second and third.

2 I will not commit myself now, because your
3 people will be relying on that in terms of the same
4 schedules I'm speaking of. If we start on Thursday,
5 his direct examination may take half a day. He is
6 against all the CAPCO companies.

7 Chances are that first week of hearing that they
8 all need be there. That is the best I can see.

9 MR. CHARNOFF: You can't give us a clue for the
10 following week?

11 MR. LESSY: Not yet.

12 MR. CHARNOFF: Could you call me on it on
13 Monday or Tuesday?

14 MR. LESSY: I'm afraid I can't, sir.

15 MR. CHARNOFF: It doesn't matter if I had asked
16 you before today or not?

17 MR. LESSY: In a spirit of cooperation it would
18 have been helpful.

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1 MR. CHARNOFF: Mr. Chairman, referring to what
2 Mr. Charno said in reference to the discovery he had filed
3 today. In his comments he indicated there were no objections
4 to it. I'm objecting to not objecting. I am not familiar
5 with the arrangement he made with Mr. Reynolds. His observa-
6 tion that there is no objection is that we didn't make any,
7 but there may be or may not be at this point.

8 We will have to discuss it with Mr. Reynolds and
9 Mr. Charno.

10 Mr. Lessy indicated if our pretrial brief is put
11 off whatever number of days it is, he too would like the
12 same number of days to have simultaneity. I would like the
13 record to stand on that.

14 The only question I would like to relate to that is
15 if we put it off five or six days presumably and if the
16 hearing stays to start on the 20th, we have had that much less
17 time to know what the Staff intend to put forth from the
18 knowledge we would otherwise gain by reading their pretrial
19 brief earlier and also because associated with the pretrial
20 briefs is the designation of documents and witnesses and so on.

21 I would be strained not to object to getting pretrial
22 briefs four, five, six days later than the November 10th date
23 even if it's your motion that requested the date. Then to
24 start on the 20th. With all due respect to the principle of
25 simultaneity, that seems to govern if we are to proceed on the

1 20th we need to know the Staff's trial brief ahead of time so
2 that we have some knowledge of what we will face on the 20th.

3 Therefore, while it may well be that the City of
4 Cleveland Justice should have the additional time because
5 their witnesses are not proceeding at the opening, we urge
6 the Board direct the Staff which has long been ready to file
7 its pretrial brief on the 10th along with the information we
8 need to so prepare during the 10th and 20th of November.

9 MR. LESSY: And so their pretrial brief can have
10 rebuttal legal arguments.

11 MR. CHARNO: On behalf of the Department not
12 because of an attachment to the principle of simultaneity,
13 but we would like to receive the same consideration from the
14 Board that the Applicants receive. We are having some of the
15 same problems they are.

16 MR. CHARNOFF: I have no objection to that or the
17 principle of simultaneity. I raise the request with respect
18 to the Staff's trial brief because the Staff does intend to
19 open with the first evidentiary witnesses.

20 CHAIRMAN RIGLER: What is the current status of
21 our trial brief?

22 MR. CHARNOFF: In rough outline form. It's
23 going to be that long. I'm seriously afraid we will not make
24 the 10th. Mr. Reynolds' concern here is substantially more
25 brave than even appeared with the expert witnesses.

cmw3

1 Where going through 20-hour days, he was able to
2 generate that particular expert witness. We are talking about
3 a more complicated piece.

4 Frankly, based on the other remarks that I won't
5 enlarge on now, if we had our druthers and didn't have the
6 plant scheduled we would be asking for a three or four month
7 delay in this case.

8 We don't know how we can do that in light of train
9 schedule but we are looking at the possibility of a few weeks'
10 delay past the 10th.

11 We will try out darndest and the effort has been
12 there to make the attempt.

13 CHAIRMAN RIGLER: You say weeks.

14 MR. CHARNOFF: We will ask for two weeks' delay,
15 I think. We are laboring under tremendous difficulties in
16 terms of logistics, which is getting everything done and
17 freeing ourselves from the other plethora of papers that
18 plagues all of us.

19 CHAIRMAN RIGLER: You see the problem. This
20 Board has attempted to respond to your request for expedition.
21 Now, you're coming in and asking for additional discovery --

22 MR. CHARNOFF: There is no one more acutely aware
23 of the dilemma we have been put upon because of the combined
24 effect of the need to prepare a case, a complicated case
25 whose issues enlarge as we get closest together with the

1 fact it's our plant we need to get on that line.

2 We are acutely aware of it. We have refrained from
3 asking for delays up until now for that reason. We are under
4 clear instructions from our management to get that hearing
5 going soon as we can.

6 On the other hand, we are also mindful of our
7 obligations to provide the best possible defense to the
8 numerous allegations involved here.

9 This case has ramifications beyond the decision of
10 this particular Board. How do we do both of these things
11 without injuring ourselves one way or the other? It's a
12 difficult exercise. I'm serious when I say to you had we not
13 had the impending schedule problem we would be seriously in
14 here asking for several months.

15 We are not going to do that. We do want to put
16 forward a trial brief that informs you and the other side what
17 this case is all about as we see it.

18 Until September 25th, we really had none of the
19 specifics that we had as of the 5th.

20 CHAIRMAN RIGLER: On that the Board may rule
21 against you in that surely you were aware from the issues in
22 controversy and from the course of discovery and from the
23 interrogatories that were asked as to the nature of the case
24 that was being made against you.

25 MR. CHARNOFF: That may be an issue on appeal.

1 There is no way you can recognize by examining the statements
2 at issue, the merits in controversy to relate them to the
3 Ohio Edison allegations that came up September 5th. They
4 were not there. There is no way you can reasonably view the
5 record and say you should have know that.

6 All of us have worked hard in this particular case
7 since the pretrial conferences started. There is no way to
8 look at that specific document and prehearing conference order
9 we now have because we did not. We didn't know of one coming
10 forward on October 14th. There is no way we could have done
11 or that you could infer we could have done it.

12 We are sensitive to the schedule problem. It has
13 governed us all the way and it will continue to do so. Sin-
14 cerely, we may, I may need more time and it may amount to that
15 period of a couple weeks.

16 MR. HJELMFELT: Mr. Chairman, I would like to
17 address first a remark as to whether or not Applicants are
18 really in a situation where they are facing the dilemma they
19 purport to face. Earlier Mr. Charnoff stated that there was
20 no way a decision could be reached here in this case in time
21 to let the Perry construction go ahead because and he didn't
22 just cite your decision, he cited the Appeal Board's decision
23 and he cited a judicial review.

24 My familiarity and limited experience with the
25 CADC is that that is two or three years by itself. Even if we

1 had gone two years ago to trial, Mr. Chairman, office problems
2 wouldn't have been solved. With respect to the proposal for
3 a week delay or whatever Mr. Charnoff might ask, the City of
4 Cleveland wishes to be on record as opposing the delay.

5 MR. LESSY: Mr. Chairman, I would just like to
6 recall the first and only prehearing conference in the Davis-
7 Besse 2 and 3 proceeding in which Mr. Charnoff agreed to be
8 bound by the Perry prehearing conference No. 2 issues which
9 are the same issues in the consolidated proceeding. At that
10 point he raised a general caveat as to specificity.

11 He agreed to be bound by them. We are making this
12 argument when it has been ruled on, it seems to me, a little
13 late. I wonder if we can flush out the fact of whether
14 Applicant needs more time and if they do, let's accommodate
15 our schedules.

16 Mr. Reynolds said there was a possibility they
17 couldn't make the date. The Board said keep us advised as
18 as soon as you can. Mr. Charnoff said the brief is all over
19 the place. They have a tremendous responsibility and there
20 is a good chance it may slip.

21 If there is a good chance you might slip, can we
22 reschedule things now? We are talking about scheduling dates.
23 I wonder if we can be open about it and voice what the possi-
24 bilities are so we are all not in a jam in terms of scheduling
25 around the Thanksgiving holiday.

cmw7

1 Certainly, if a little bit extra time would permit
2 the parties to present a more orderly hearing, better prepared
3 hearing, whether it be a week or two it would be in the public
4 interest to all agree to that.

5 The third point I would like to introduce to the
6 Board, Mr. Jack Goldberg, recently admitted to the Pennsylvania
7 bar and who has been working on the pretrial brief and he
8 would like to make a point.

9 MR. GOLDBERG: Staff strongly objects to anything
10 but simultaneous exchange of the briefs. If there is
11 anything but simultaneous exchange of the briefs, we insist
12 on the right to file a reply brief to the Applicant's brief.
13 This may delay the hearing. We would insist there must be
14 simultaneous exchange of the briefs.

15 If that means we exchange them five days after
16 the 10th, then we would rather do that than have non-simulta-
17 neous filing.

18 MR. CHARNO: Mr. Chairman, with respect to Mr.
19 Lessy's suggestion, I think it's probably a good one and I
20 obviously have a vested interest in it. If the Applicant
21 wants additional time of a reasonable period of a week or two
22 weeks, the Department has no serious objection in granting
23 them that time.

24 We wish we had known back when we needed it, but
25 we can still use it at this point, so we have no objection.

1 CHAIRMAN RIGLER: You haven't asked for additional
2 time, have you, Mr. Charnoff? If Mr. Lessy's reference is to my
3 agreement to the statement of issues, I want to make it very
4 clear that that agreement was one of those many agreements
5 that was over an over an objection that was ruled on. The
6 record will speak for itself on that.

7 MR. CHARNOFF: I want to be clear that was
8 precisely the kind of situation where we were in that we had to
9 go along with what was ordained by the Board because of the
10 schedule problems.

11 CHAIRMAN RIGLER: On that you're saying the Appli-
12 cants made a decision to go along for internal reasons?

13 MR. CHARNOFF: We did go along. We objected. We
14 did not take interrogatory appeals and try to stall the
15 process. We did not go along in the sense those are great
16 issues. We indicated clearly that the issues were nondescript
17 and nonspecific as far as those are concerned.

18 CHAIRMAN RIGLER: The record will speak for itself.

19 MR. CHARNOFF: Yes, it will. In regard to need
20 for more time, I have no confidence we can make the 10th. I
21 will go on the proposal of Board Chairman that we discuss it
22 with you on the 5th and see how we are doing. Maybe we can do
23 it in less than two weeks' time.

24 CHAIRMAN RIGLER: How do you know that the hearing
25 commencement can be put off for another week?

cmw9

1 MR. LESSY: December 1st is Monday. Out of the
2 holiday season. You could file the pretrial brief on the 20th,
3 that is the Thursday and if you got into a bind perhaps we could
4 waive hand delivery and let you hand deliver Monday and start
5 Monday, December 1st. We would like to know now for obvious
6 scheduling reasons.

7 MR. CHARNOFF: I think that is more realistic.

8 MR. VOGLER: Our witnesses are third parties.

9 MR. CHARNOFF: Mr. Reynolds indicated his position
10 to Mr. Rigler. He has indicated he had a problem. We are
11 prepared to do that or arrange another date. It's unrealistic
12 to assume the 10th will be met. I gather other people are
13 having the same difficulty.

14 CHAIRMAN RIGLER: I will defer that to the 5th.
15 It would be the Board's preference to go on the 20th. If
16 it's impossible if the the parties jointly come to us for
17 additional time, I expect you get it. This goes back to the
18 continuing cross of who's for various delays. It's evident
19 that all parties have come to us with requests for additional
20 time and commencement of time and postponements of dates.

21 The Board is prepared to go on the 20th. If the
22 parties feel they need more time we will give you a moderate
23 to small amount of time. That would be on the joint request
24 of all the parties.

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25 MR. LESSY: I would like to make the record clear

1 in light of charges of the conspiracy of delay on behalf of
2 the government, we are prepared to file our brief on the 10th
3 and we are prepared to present evidentiary witnesses beginning
4 on the 20th, but we would not oppose a joint request to go
5 forward to accommodate at the last moment the parties' pre-
6 trial preparation.

7 MR. HJELMFELT: Can a decision be made Monday
8 instead of Wednesday, which is the 5th?

9 CHAIRMAN RIGLER: You could ask but you will not
10 get far.

11 MR. HJELMFELT: Let me go on the record that a --
12 I find it very burdensome to be laboring next week attempting
13 to meet a deadline of what is a week from next Monday only to
14 have a deadline removed later, which would radically alter
15 the source of my preparation.

16 CHAIRMAN RIGLER: I am empathetic.

17 MR. CHARNO: Mr. Chairman, just to keep the record
18 straight, the Department will meet the November 10th filing
19 date unless it is postponed. We have no objection to the
20 postponement if requested by the Applicants, but we are not
21 joining in such a request.

22 CHAIRMAN RIGLER: This report that Applicant makes
23 on the 5th perhaps should be done in a telephone conversation
24 call.

25 MR. CHARNOFF: Okay.

cmwll

1 CHAIRMAN RIGLER: Thank you. We are adjourned.

e 10

2 (Whereupon, the hearing was adjourned.)

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