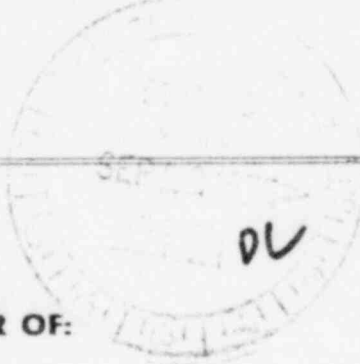


Regulatory Docket File

NUCLEAR REGULATORY COMMISSION



IN THE MATTER OF:

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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In the matter of:

TOLEDO EDISON COMPANY and Docket Nos.
CLEVELAND ELECTRIC ILLUMINATION CO. : 50-346A
(Davis-Besse Nuclear Power Station, : 50-500A
Units 1, 2 and 3) : 50-501A

and :

CLEVELAND ELECTRIC ILLUMINATING CO., :
et al., : 50-440A
(Perry Nuclear Power Plant, Units 1 : 50-441A
and 2) :

-----X

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

Thursday, 18 September 1975

The first prehearing conference in the above-entitled
matter was convened, pursuant to notice, at 10:00 a.m.

BEFORE:

- MR. DOUGLAS RIGLER, Chairman
- MR. FRYSIAK, Esq., Member
- MR. IVAN SMITH, Member

APPEARANCES:

STEVEN M. CHARNO, MELVIN G. BERGER and ANTHONY G.
AIUVALASIT, Esqs., Antitrust Division, United States
Department of Justice, Washington, D. C. 20530; on
behalf of the Department of Justice.

ro

1 APPEARANCES: (continued)

2 RICHARD M. FIRESTONE, Esq., Assistant Attorney General,
3 Antitrust Section, State Office Tower, Fifteenth Floor,
4 30 East Broad Street, Columbus, Ohio 43215; on behalf
5 of the State of Ohio.

6 ROY P. LESSY, JR., BENJAMIN H. VOGLER and JACK GOLDBERG,
7 Esqs., Nuclear Regulatory Commission, Office of the
8 Executive Legal Director, Washington, D. C.; on behalf
9 of the Nuclear Regulatory Staff.

10 GERALD CHARNOFF, BRADFORD REYNOLDS and ROBERT ZAHLER,
11 Esqs., Shaw, Pittman, Potts & Trowbridge, 910
12 Seventeenth Street, N. W., Washington, D. C.; and
13 TERRENCE H. BENBOW and A. EDWARD GRASHOF, Esqs.,
14 Winthrop, Stimson, Putnam & Roberts, 40 Wall Street,
15 New York, New York 10005; and
16 DONALD HAUSER, Cleveland Electric Illuminating Company,
17 Illuminating Building, Public Square, Cleveland,
18 Ohio 44113; on behalf of the Applicants.

19 ~~STEVEN A. BERGER, Esq., Winthrop, Stimson, Putnam &~~
20 ~~Roberts, 40 Wall Street, New York, New York 10005;~~
21 ~~on behalf of American Municipal Power-Ohio, Inc.~~

22 DAVID HJELMFELT, Esq., Suite 550, 1700 Pennsylvania
23 Avenue, N. W., Washington, D. C.; on behalf of
24 the City of Cleveland, Ohio.

P R O C E E D I N G S

1
2 CHAIRMAN RIGLER: The hearing will come to order,
3 please.

4 This is the first prehearing conference we have
5 had since consolidation, so that now what we are considering is
6 the Davis-Besse Nuclear Power Station, Units 2 and 3, and the
7 Perry Nuclear Power Plant No. 1 and 2, the anti-trust
8 proceedings.

9 Since we met last, Mr. Brebbia, unfortunately, found
10 he was unable to continue with us, but we are very pleased
11 that we have an able replacement, Mr. Ivan Smith, who has had
12 extensive anti-trust experience with the Federal Trade
13 Commission and also extensive hearing experience, as an
14 Administrative Law Judge.

15 I see some other new faces this morning, and I
16 think it might be a good idea at this point for us to go
17 around and identify the parties who are here this morning so
18 that Mr. Smith will know who you are and so that some of you
19 may meet each other.

20 We will start with Mr. Charnoff.

21 MR. CHARNO: No, no, I am Steven Charno with the
22 Department of Justice. With me are my colleagues, Melvin
23 Berger and Tony Aiuvalasit.

24 MR. FIRESTONE: I am Richard Firestone with the
25 State of Ohio.

1 MR. LESSY: I am Roy P. Lessy, Jr. on behalf of
2 the Staff. With me is Mr. Benjamin H. Vogler^{Assistant Chief} and Mr. Jack
3 Goldberg, a new member of the Staff.
Anti-Trust Counsel

4 MR. CHARNOFF: I am Gerald Charnoff of Shaw,
5 Pittman, Potts & Trowbridge.

6 Appearing with me today from the law firm, is
7 Mr. Bradford Reynolds and Mr. Robert Zahler.

8 Also with us today, representing Ohio Edison,
9 Terrence H. Benbow, and Mr. A. Edward Grashof, and a
10 gentleman not here today, but from the same law firm, who
11 will be representing Ohio Edison. In the first row is
12 Mr. Donald Hauser of Cleveland Electric Illuminating Company,
13 who is here today, too.

14 CHAIRMAN RIGLER: Is there anyone here from AMP-0
15 this morning?

16 MR. BENBOW: The other lawyer from our firm of
17 Winthrop, Stimson, will be Mr. Stephen A. Berger.

18 CHAIRMAN RIGLER: All the members of the firm
19 involved will be filing appearances soon?

20 MR. BENBOW: We will, indeed, sir.

21 CHAIRMAN RIGLER: I noticed we had an appearance
22 from Mr. Lee Rau of Reed, Smith, Shaw and McClay. Will you
23 be participating?

24 MR. CHARNO: Not yet. But he will be.

25 MR. HJELMFELT: I am Dave Hjelmfelt. I am appearing

1 for the City of Cleveland.

2 CHAIRMAN RIGLER: Is there anyone here from AMP-O?

3 The first item we were going to consider this
4 morning was the petition by AMP-O for for leave to withdraw
5 from these proceedings.

6 In the past, Mr. Hjelmfelt, you have sometimes
7 had to proxy or the authority to speak for AMP-O. Do you
8 carry such authority this morning?

9 MR. HJELMFELT: No, sir, I do not.

10 CHAIRMAN RIGLER: As we came in this morning,
11 Mr. Charnoff, you furnished us with a copy of the Applicants'
12 response to AMP-O's motion for leave to withdraw.

13 We have not had an opportunity to examine it.
14 Would you care to give us a breakdown of what is contained in
15 it?

16 MR. CHARNOFF: Yes.

17 Mr. Reynolds will address that issue.

18 MR. REYNOLDS: The filing we are making today in
19 response to the motion to withdraw by AMP-Ohio, is not
20 strictly an opposition to their motion to withdraw, but we
21 are concerned with the apparent effort by a motion to withdraw
22 to eliminate a decision by this Board at this time on
23 Applicants' motion for summary disposition with respect to
24 the issue that was put into this case by AMP-O in its
25 petition to intervene, after a hearing before this Board as to

1 the appropriateness of its intervention, which issue we
2 feel and which AMP-Ohio strongly feels is in this case,
3 whether the personality is here or not.

4 Our paper is addressed merely to the point of
5 not having that issue eliminated or side-tracked from a deter-
6 mination at this particular time by the means of a motion to
7 withdraw by AMP-Ohio.

8 . The agenda for Prehearing Conference No. 5 states
9 that that will be an item to be taken up and Applicants are
10 prepared to address their motion for summary disposition and
11 to give the argument on that at this time. We wanted to make
12 it clear on the record that we feel that is appropriate to
13 do, and it is no less appropriate to do because of the motion
14 to withdraw than it was at the time that the Board placed
15 this on the agenda.

16 CHAIRMAN RIGLER: Are there any comments from any
17 of the parties which filed opposition to the motion for
18 summary judgment?

19 MR. CHARNO: On behalf of the Department, what the
20 Applicants are seeking is merely a resolution of the issue
21 raised by AMP-O's petition to intervene.

22 In paragraph 10 of their paper this morning,
23 they add that they do not, as some parties seem to suggest,
24 ask the Board to decide other questions related to third-
25 party wheeling, and AMP-O's petition to withdraw its

1 intervention would seem to moot that issue very effectively
2 and the other issues are of no concern to the applicant, it
3 seems there is no reason to proceed any other way than to grant
4 the petition to withdraw.

5 MR. LESSY: We see the substantive issue of the
6 refusal to wheel ^{as} ~~is~~ inconsistent with the anti-trust laws,
7 and as we read Applicants' original ^{pleading} ~~proceeding~~, it looked as
8 if under the guise of the AMP-0 question as to whether or not
9 ^{applicant} ~~they~~ were a party, ^{applicants} ~~they~~ were trying to get an advance ruling
10 on the substantive issue whether that should be part of the
11 case.

12 In Staff's response, we said we are relying on
13 that or will present evidence relating to the refusal to
14 deal as part of the situation, inconsistent with the anti-
15 trust laws.

16 We are not yet at the hearing stage. Nexus takes
17 the form, or arises in the case of both pleadings and in proof
18 I think the Board has already dealt with the question of
19 pleading of nexus on the refusal.

20 The Appeal Board will deal with the issue and the
21 parties are ready to address the proof, and whether AMP-0
22 did, we don't think is a substantive issue. Their withdrawal
23 as a party doesn't affect that issue of refusing to wheel.

24 MR. HJELMFELT: The motion filed by AMP-0 moots
25 the Applicants' motion to have them dismissed from the

1 proceeding. There is no cause for this Board to render any
2 ruling upon that matter at this point. Particularly at this
3 point I would move to strike what I take to be very offensive
4 language, the bottom of page 3, and top of page 4, where
5 Applicants are making the completely unfounded assertion that
6 the City has amplified AMP-O's intervention at the part.

7 If the City was in any position to orchestrate
8 the activities of AMP-Ohio, the city would not have been
9 left in the position to intervene, file a late petition to
10 intervene in the Beaver Valley case.

11 The City of Cleveland has never controlled AMP-O
12 and has never attempted to, and the Applicants would be unable
13 to put forth any evidence that support that completely
14 unfounded allegation.

15 With respect to what issue Applicants think they
16 can have resolved by having a ruling of the Board on their
17 motion at this point, is completely unclear to me inasmuch as
18 they say the third-party wheeling issue is still in the case,
19 no matter what the Board decides here.

20 They are agreeing along with us, if Cleveland
21 did not file file any opposition to their position at the
22 time that the opposition was required to be filed, because
23 we had received the AMP-Ohio's motion to with-draw from
24 the proceeding, and therefore it appeared to us to be
25 unnecessary.

1 If this Board feels that issue is still in, I
2 would certainly ask leave now to file immediately, a post-
3 hearing brief as it were, after this hearing, on that issue.
4 I would ask the Board to wait until we had leave to file some-
5 thing before ruling. But I think that is a completely
6 unnecessary procedure in view of the fact that AMP-O has
7 asked to withdraw.

8 MR. FIRESTONE: The State's filing in opposition to
9 the Applicants' motion for summary disposition, sought to
10 draw a distinction between the presence of AMP-Ohio in the
11 pleading, and the issue raised by AMP-O and the other
12 Applicants, the Applicant parties, the Applicants seem to
13 allege if the issue remains before the board in context with
14 the positions with the parties in the case.

15 We don't see how the other parties can object to
16 the withdrawal of AMP-Ohio from the case.

17 MR. REYNOLDS: This is the second time around for
18 the motion for summary disposition, and all the parties have
19 had a full opportunity to brief it. We even had an extension
20 of time the second time, until September 12, in order to
21 give a full opportunity to respond to the renewed motion for
22 summary disposition, and I fail to see any justification for
23 not meeting the deadlines that are set by the Commission
24 rules and especially when extended by the Board on the basis
25 of filing by another party, especially if there is no

1 orchestration or coordination here the filing by another
2 party of a motion to withdraw as a party from the proceeding.

3 It seems to me that everybody but the City has
4 recognized that that motion paper does not in and of itself
5 take the issue away and there is an obligation on the parties
6 here to respond in a timely fashion.

7 So my first point would be, I think there is no
8 need, and it would be inappropriate to extend time for
9 further briefing of this issue, especially since we have
10 already had a response by the City initially when we first
11 came in on summary judgment. And it seems that all we have
12 done is renewed our summary judgment without any additional
13 allegations, so I feel --

14 CHAIRMAN RIGLER: If the issue does not disappear,
15 as you suggested just now it didn't, and as the parties claim
16 you stated in your brief, what would we accomplish by ruling
17 on the motion for summary judgment?

18 MR. REYNOLDS: The issue that does not disappear by
19 the withdrawal motion is the question of a refusal to wheel 30
20 megawatts of power from the Power Authority of the State of
21 New York, at the request of AMP-Ohio. A refusal by CEI to
22 wheel that power now to the City of Cleveland, we recognize in
23 deciding whether that issue is one that relates, has any
24 relationship to the licensed activities, we are not addressing
25 a non-unrelated issue concerning wheeling in other contexts.

1 But, what we have here is an allegation and issue
2 interjected into this proceeding that that particular
3 situation as described in the proceeding, that situation which
4 alone isolated, is a situation that is inconsistent with the
5 anti-trust laws and is one that the licensed activities will
6 maintain.

7 That issue we have addressed, and under the rules
8 we have submitted an extensive affidavit. We have also
9 submitted a statement of material facts with respect to which
10 there is no dispute. There has been no contesting of that
11 statement as required by the rules, which means those facts
12 are admitted. There has been no disputing of the affidavit,
13 and everybody has had full opportunity to do this.

14 We went through this whole exercise at an earlier
15 time and the Board at that time said, let's wait for discovery.
16 The argument was, how can we know without discovery.

17 We come back in and renew it at the end of
18 discovery as the Board urged we do, and the parties have had
19 ample opportunity to address this issue, and again we have
20 heard nothing that would put into dispute any of the
21 facts relating to that isolated issue.

22 We feel the Applicants are entitled, they have
23 followed the rules, they have moved for summary disposition,
24 they are entitled to a ruling on that.

25 I don't see now that AMP-Ohio seeks to withdraw

1 from the proceeding, removes that from the Board's ruling
2 at this time.

3 The other parties have addressed that isolated
4 issue. That issue has been treated as a situation which we
5 have been told is inconsistent with the anti-trust laws
6 and will be maintained by the licensed activities.

7 We think it has been starkly raised and starkly
8 presented, and we are entitled to have a ruling on that issue,
9 and remove it from the hearing.

10 CHAIRMAN RIGLER: If you obtained a favorable ruling
11 on that issue, would you then get into the issue of wheeling
12 of power?

13 MR. REYNOLDS: I am not sure what circumstances
14 embraced by that time. I think if it could be shown to be
15 relevant, some introduction of evidence that relates to the
16 PASNY transaction, if they can relate it to some other
17 allegation in this case, legitimately, if there is a
18 relationship, if there is enough -- I don't want to use nexus.
19 I don't want to get that term into this context, but I think
20 that then the evidence would be admissible for an evidentiary
21 purpose.

22 But it doesn't seem to me that that is the same
23 thing we are talking about when we are asking whether the issue
24 itself, as to that situation and the nexus, whether that issue
25 should be decided by the Board.

1 I don't think the decision would preclude, for
2 example, the introduction of correspondence back and forth
3 in connection with the PASNY transaction, if it can be shown
4 to be relevant to something else, some other allegation in
5 this case. But they would have to show the relevancy of it.

6 But that to me is a lot different than what the
7 issue is that has now been presented to the Board, and
8 presented in very clear terms and fully briefed by all the
9 parties.

10 CHAIRMAN RIGLER: Could you point out to the
11 Board how the elimination, how a ruling on your summary
12 judgment motion directed to AMP-0 would affect any, or which
13 one it would affect, of the issues set forth by the Board in
14 Prehearing Conference Order No. 2?

15 MR. REYNOLDS: While I am looking, if I can make one
16 comment. I hadn't had a chance to look through it; I think
17 one of the objectives here is to see if there is a way to
18 limit the issues set forth in Prehearing Conference Order
19 No. 2. Consistent with that motion, to the extent it removes
20 an alleged situation that would be involved in this case, it
21 removes that from the case.

22 That would be consistent with one of the objectives
23 here, to limit and curtail those issues even if it means
24 rewording or restructuring those issues.

25 I guess the number, the matter in Controversy

1 No. 5 would be the issue which will be most relevant. If
2 the other parties can show nothing more than the PASNY
3 transaction, it seems to me that that would eliminate the
4 whole -- would resolve the whole issue No. 5 in Applicants'
5 favor if the nexus determination under 11 were decided now
6 in our favor.

7 CHAIRMAN RIGLER: But in their September 5th
8 responses setting forth the dimensions of the case they
9 intend to prove, they listed a number of items under 5.
10 So how do we -- how would we compress or curtail the issue set
11 forth in No. 5 if we spun out the PASNY transaction as an
12 isolated transaction?

13 I don't see how you have curtailed issue 5 in any
14 way.

15 MR. REYNOLDS: Because that is one of the allega-
16 tions that then is removed. That doesn't need to be
17 contested.

18 CHAIRMAN RIGLER: I am not following you,
19 Mr. Reynolds.

20 MR. REYNOLDS: Well, they have alleged whatever it
21 is, however many under 5, assuming -- I have to look, but I
22 have to assume the PASNY situations would be one of those
23 under 5.

24 In the hearing they are required, under their
25 burden of proof, to come in and establish each of those. And

1 the other parties dispute each of them. And a summary
2 disposition on the AMP-Ohio issue would eliminate one of those
3 matters of controversy as to those allegations.

4 Now, it may well be that there are other ones
5 entitled to summary disposition as you work down that list.
6 Our position is, and I think rightfully so, to the extent we
7 can demonstrate to the Board that those allegations of trans-
8 actions or dealings or refusals to deal, to the extent they
9 have no relationship to the licensing activity, they have
10 nothing to do with this proceeding.

11 We have just gotten the statement and haven't
12 had an opportunity to digest all that was said, but we could
13 come in and ask for a summary disposition on all the
14 other five of them.

15 We do know AMP-Ohio because that is isolated and
16 has been before us a long time. That one lends itself
17 to summary disposition and it removes that particular contest
18 or controversy from issue No. 5.

19 And issue No. 11 is, as to each one, you have to
20 show your nexus. If you can't tie it up to licensed activity,
21 then it is out of the case.

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CHAIRMAN RIGLER: I have 2 further questions.

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The first is, how does it disappear from Number 5 since you just agreed that they could introduce evidence relating to the PASNY transaction, even if we ruled favorably on your motion for summary judgment?

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The second is, I believe one of the parties, I don't remember which one, suggested at the conclusion of their listing under 5, that we should not address ourselves to each isolated incident listed thereunder, but we should look at the incident as a ~~passage~~ ^{package}, or as a bundle of events, which together might result in a situation inconsistent with the antitrust laws.

13

Can you address both of those points?

14

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MR. REYNOLDS: I think, I guess the problem I have with the second question, I have 2 problems. One, I think it is inappropriate to have the bundle on a nexus basis. We already made ourselves clear on that.

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The real problem I have with that is the whole reason we are here on summary disposition, this is an issue that was isolated. It has been a situation that has been from the beginning of this hearing, separated out as being a separate -- in a separate context, a separate transaction, a separate matter.

24

25

It involved CEI and a refusal for PASNY power to wheel to the city. It has been discussed in that context.

1 Now, I think that its separateness is already
2 established. It was established at the time that the motion
3 was, that the intervention was sort -- and I think by virtue
4 of the intervention, it punctuated or highlighted it.

5 We have the separate identity clear enough in
6 mind as to transaction and it's appropriate to deal with it
7 as phrased, as framed. That that situation is one that has
8 no nexus to the nuclear plants.

9 MR. LESSY: Mr. Chairman --

10 CHAIRMAN RIGLER: Let him continue. I asked him
11 2 questions, Mr. Lessy.

12 MR. REYNOLDS: I think your other question went to
13 the fact that you could introduce evidence of the PASNY cor-
14 respondence and I'm not sure exactly how you are linking it
15 up, but I guess as part of a pattern of whatever else they are
16 alleging as part of an overall situation.

17 I assume that is what your question is directed
18 to. The problem I have is, if they cannot establish that any
19 of these other allegations are true, we don't have to worry
20 about the PASNY situation, and whether or not that impacts,
21 because you have already had your opportunity to decide, and
22 that is not one that is relevant to what we are talking about
23 here.

24 This is not a case where anybody is saying that
25 CEI did not refuse to wheel the 30 megawatts. We don't have

1 a contest of that sort here.

2 We are saying those are the facts, but they are
3 not appropriate for decision and ruling in this case.

4 Now, if this bundle of bad activities, whatever,
5 is trotted out and it turns out that none of this bundle,
6 none of these activities can be proved, what we are saying
7 is that the only one that would then be left that exists,
8 would be the PASNY -- the refusal to wheel the PASNY power.

9 We think that that in that context, that should
10 remove the whole issue 5 out of this case. And that is a
11 way that you can at the very outset, you can frame these
12 issues and you can decide this.

13 And it is appropriate to do it. It is here. There
14 is really no more input to be gained or to be brought to bear
15 on this issue. And I think everybody has had full oppor-
16 tunity, not once, but twice, to do it.

17 CHAIRMAN RIGLER: Mr. Lessy?

18 MR. LESSY: Thank you, sir.

19 The question of the refusal to wheel by Cleveland
20 Electric Illuminating Company, that refusal was a matter of
21 concern in this case before AMP-0 intervened. It was con-
22 tained, in my recollection, in the original advice letter.

23 Secondly, AMP-0 was not the sole presenter of
24 that question. My recollection is I know that Staff will
25 present evidence with respect to that, so will the Department,

1 and I assume that the City of Cleveland will also, so that
2 in the guise of a motion for summary disposition against one
3 party, pursuant to that the party withdraws, the question is
4 raised by that party, to my mind, logically would only fail
5 if that party were the only presenter of those claims, but
6 that is clearly not the case here.

7 For that reason, I think a substantive ruling on
8 the original motion in the face of a withdrawal is not
9 appropriate, based on the facts. In addition, other parties
10 will present evidence with respect to that. That is clear,
11 I think, from the September 5th ~~filing~~ *filings*.

12 MR. CHARMON~~X~~: Mr. Chairman, if I may, I think
13 Applicant's argument is based on a very substantial misin-
14 terpretation of the statute. We are talking about a situation
15 inconsistent with the antitrust laws. Nexus has to be shown
16 with respect to a situation.

17 Now, if you truncate any situation into enough
18 constituent activity, I am sure there are going to be activi-
19 ties for which no nexus exists in isolation. This is an
20 argument which we put forward in the past. We haven't put
21 it forward at any point in the context of our cases.

22 AMP-0 has been presenting this as an isolated
23 situation. They maintain the situation in and of itself. I
24 don't think any other party to this proceeding has maintained
25 that.

1 Certainly the Department has not. We have never
2 presented evidence; we have never made allegations with re-
3 spect to the nexus that exists between the situation which
4 includes a refusal to wheel for anticompetitive reasons and
5 the activities under the license.

6 This matter has not been briefed; it is not ripe
7 for disposition and probably won't be until after an evi-
8 dentiary hearing. Certainly it hasn't been raised directly
9 by the Applicant's motion.

10 They are seeking to eliminate one of the activi-
11 ties in the situation in the guise of this motion. I would
12 differ with their characterization of the issues to which
13 this activity is relevant.

14 I find it to be relevant in matters 4 through 7,
15 broad issues A and B. I didn't believe that this issue has
16 been isolated by any of the parties, except AMP-Ohio.
17 Certainly it has been considered, as I said, in the aggre-
18 gate as part of the situation inconsistent, and if, as the
19 Applicant suggests, no proof was made of any other activity,
20 that might comprise a situation inconsistent with the anti-
21 trust law. At the time the proof was failing, that would be
22 the proper time to determine whether a nexus exists solely
23 between this one activity, this one refusal to wheel for
24 anticompetitive reasons and the activities under the license.

25 MR. BENEOW: Mr. Chairman, I would like to be

1 heard briefly and in supplement of what Mr Reynolds has been
2 saying.

3 Not speaking to the narrow issue which I think
4 Mr. Reynolds has addressed very well and which I would sup-
5 port, but the broader issue of where this Board finds itself
6 today.

7 It seems to me coming from the experience that
8 Mr. Frysiak knows, in a case similar to this one, but
9 smaller, which has been going on since December of this year;
10 and in that case, the Department and the Staff and the Inter-
11 venors, including Mr. Hjelmfelt have failed to complete
12 putting in their case yet.

13 I don't know if this Board is yet fully aware
14 of just how monumental these cases may be. When there is
15 an issue like this, and it is not an issue that you hear
16 this morning, that my clients Ohio Edison and Pennsylvania
17 Power are in any way directly involved, but any opportunity
18 this Board finds itself with to narrow the issues here at
19 this stage, and I haven't heard anything from the Department
20 or Staff that indicates to me that this issue can't be
21 looked at separately and decided upon; it seems to me the
22 Board ought to welcome the motion and the position
23 Mr. Reynolds is taking in the interest of expediting this
24 proceeding.

25 With all these other parties involved, the case

1 I'm talking about as a single applicant, and this case with
2 the multiple applicants and the different positions being
3 taken by Staff, and Justice and the Intervenors here, it
4 seems to me you must do everything you can if we are not
5 going to be in this forever.

6 You have already lost one part-time Board member
7 and I can understand why, facing the monumental task you had.
8 This is something judges do in federal courts in antitrusts
9 every day and they welcome them. They do it in the face of
10 arguments like Mr. Charno just made. That is not a reason
11 for your not deciding this issue at this time.

12 MR. HJELMFELT: Mr. Chairman, if I might respond.

13 First, I would like to make it very clear that
14 PASNY wheeling refusal was put in issue you the City of
15 Cleveland, put in issue by the petition to intervene and we
16 have asserted it as an issue from the start.

17 Whether AMP-0 is in or out, wheeling is very much
18 a part of the activities which we have complained about. We
19 have not isolated that as a single, individual activity.
20 It is part of the pattern of activities, anticompetitive
21 activities which have created a situation inconsistent with
22 the antitrust laws.

23 Once we get to finding that there is such a
24 situation, it would be clear that there is a nexus. I would
25 certainly agree with Mr. Charno that it is not appropriate to

1 break this down to the smallest conceivable portions and
2 then see if there is some sort of nexus between that and the
3 activities under the license.

4 I am still somewhat at a lost to understand pre-
5 cisely what would be achieved if Applicants prevailed upon
6 their motion, and in any event, I think from the conversation
7 and discussions, everybody is having that same problem.

8 I think your problem is, right now we need a
9 statement of the nature of the case the Applicants intend to
10 present. We understand their motion now.

11 In any event, there is absolutely nothing that is
12 going to be gained by granting a motion now, which even the
13 Applicant can't tell us specifically what it is going to
14 achieve.

15 CHAIRMAN RIGLER: Thank you.

16 As the Board understands it, there is no opposi-
17 tion to the request to withdraw by AMP-0. The pleading the
18 Applicant filed did not oppose the withdrawal. It merely
19 questioned a ruling on summary judgment motion.

20 Accordingly, the Board will rule leave for the
21 petition of AMP-0 to withdraw from these proceedings is
22 granted.

23 With respect to the motion for summary judgment,
24 it is our feeling that it may be premature in light of
25 Mr. Reynolds' assertion there are other incidents they might

1 wish to allege could be curtailed under Item 5 of the
2 issues set forth in Hearing Order Number 2, and on the other
3 hand, if they wish to pursue their present issue, it would
4 give them leave to proceed.

5 It is not necessary to rebrief it, because we
6 understand your position clearly. That would give the other
7 parties the opportunity to file any short response they may
8 wish to, although I think we understand their position quite
9 clearly.

10 The only additional element this provided is the
11 opportunity for you to put in other incidents in addition to
12 the PASNY incident, which you say you may be able to do with
13 further study of September 5th filings of the nature of
14 the case.

15 MR. REYNOLDS: I intend to file that paper this
16 afternoon if we break early enough. If we are talking about
17 just putting in another paper, I'm not sure what we are
18 accomplishing, because we have gone through it. We have rules
19 of procedure here that have been followed and the Commission's
20 rules in terms of affidavits and answers to affidavits and
21 fact statements that aren't disputed and admitted fact in this
22 record, which everybody has had ample opportunity to respond
23 to.

24 I am a little reluctant to open the door again
25 to another whole series under the rules by filing a new

1 paper, number one. Number two, I would not want to have a
2 paper that I filed this afternoon indicate in any way that
3 I am, therefore, waiving or giving up an opportunity to file
4 for summary judgment at some later date, even after the
5 hearing commences for that matter.

6 What is was suggesting is, I am not now in a
7 position to make the judgment as to the other allegations,
8 but I think I am well within the position to make it, because
9 AMP-0 has been an isolated issue all along.

10 To the extent additional paper is necessary, I
11 will file it. But I hope we will not turn around at this
12 late date -- we have pretrial briefs and testimony and every-
13 thing else and have to go through another session after we
14 have gone through it twice now in strict compliance.

15 CHAIRMAN RIGLER: What you file is a matter of
16 your judgment, because the other parties say the issue would
17 remain alive as part of an overall pattern they intend to
18 establish, so you would have to consider whether, even if
19 you prevail with respect to an isolated incident involving
20 AMP-0 and PASNY, whether it would be worthwhile to you.

21 If you make that judgment, and you want to file
22 the motion, the Board is giving you leave to do so.

23 MR. REYNOLDS: I guess my answer is, we made that
24 judgment. I really, I guess, one of the problems that I am
25 having with what I'm hearing is, if everybody is telling me

1 it doesn't make any difference; why are they so opposed to
2 it?

3 It's been done properly. It was an issue framed
4 in a right way to the Board and it is for the Board to decide
5 in terms of what the Board's obligations are, and it has been
6 presented, it seems to me, if they are telling me they don't
7 care one way or the other, what is all the opposition for?

8 We made the judgment in our view it is appropriate
9 to file and we recognized in making that judgment that there
10 are other allegations which have been rather amorphous and
11 are somewhat clarified now, but that is something we also
12 have been aware of.

13 CHAIRMAN RIGLER: If you do, we will consider
14 those previous arguments and briefs as fully applicable. So
15 the burden we are imposing on you is de minimis. We are
16 giving you leave to proceed as you see fit. The Board has
17 ruled.

18 MR. REYNOLDS: Just for clarification, if I can
19 add one point, that is the only thing that I am a little
20 unclear on is what the effect of our filing has on our
21 affidavit and our statement of admitted facts which was not
22 disputed by anybody, and which everybody had ample opportunity
23 to do.

24 We have no counter affidavits in this hearing.
25 Are we now saying we are going to refile and open it all up

1 again? What effect does the filing have under the facts of
2 ruling on -- here we have gone through this and nobody has
3 done anything twice? Are we going to give them a third
4 chance?

5 CHAIRMAN RIGLER: To dispute --

6 MR. REYNOLDS: Yes. They haven't been disputed
7 since discovery. They asked September 12th for leave to do
8 that and you granted leave, and the only thing I got was a
9 paper received September 14th, which wasn't mailed until
10 September 11th.

11 CHAIRMAN RIGLER: Then the party can't contest it
12 then?

13 MR. REYNOLDS: That is what I am addressing my
14 remarks to. I want to make it clear.

15 MR. CHARNO: I have a problem with that. In every
16 case in which this has been brought up, the Applicant's motion
17 has been directed to AMP-0 to the allegations made by AMP-0
18 and to a very specifically limited situation established by
19 AMP-0's intervention.

20 If they are going to refile a motion directing
21 it against the case of one of the other parties, if that con-
22 cerns a refusal to wheel, we've got a different situation.

23 CHAIRMAN RIGLER: It will not be directed to a
24 refusal to wheel. It will still be directed to the specific
25 PASNY-AMP-0 incident as a situation in and of itself.

1 MR. CHARNO: But it isn't a situation in and of
2 itself for the rest of the parties.

3 CHAIRMAN RIGLER: That might be your response,
4 then?

5 MR. CHARNO: I think that isn't a simple response
6 we can rely on in prior pleadings to prove. I think we will
7 be put to a substantial burden by a newly filed motion.

8 Of course, we can take examination of the motion
9 and see exactly what they are taking. It could be there won't
10 be any more. But this could be a substantial burden.

11 CHAIRMAN RIGLER: I think you are already familiar
12 with the motion, because it is the same motion that they filed
13 against AMP-O, which has been on the record now for some time.

14 MR. CHARNO: With all respect, I don't believe that
15 that comparable motion can be filed with respect to the
16 allegations of the Department, the Staff or the City of
17 Cleveland.

18 We have not made those allegations. What they are
19 attacking by AMP-Ohio's petition to intervene, we have not
20 alleged.

21 I assume they have to change their allegation.
22 They have to change the nature of their attack in order to
23 attack our cases. If they do so, then we are going to have
24 to respond to that event.

25 MR. REYNOLDS: I first say if Mr. Charno is willing

1 to concede that that situation is not inconsistent with the
2 antitrust laws, which it seems he is saying, he has to have
3 a whole page of 40 or 50 incidents before he can get that,
4 we will go along with that.

5 The other thing, this is something everybody is
6 telling us is a situation in this case. They are saying it
7 may be bundled together with another situation. But it
8 certainly has been isolated by the proceedings and it is
9 appropriate and ripe for summary disposition.

10 I think that is something that should be done
11 before we get into the hearing and before we get backed up
12 into prehearing briefs and the whole schedule is upon us
13 now any way, right around the corner.

14 CHAIRMAN RIGLER: We will proceed to the next
15 agenda item, curtailment of issues.

16 Do any of the parties have any proposals for the
17 curtailment of any issues or any suggestions as to how the
18 case might be compressed?

19 MR. LESSY: Before we go to that, does the Board
20 anticipate that other parties will respond in writing to
21 Applicant's response to AMP-0's motion for leave to withdraw *their*
22 petition to intervene which was handed over this morning, or
23 is a response to that still timely?

24 CHAIRMAN RIGLER: The problem I have with that is,
25 does the response move the Board to do anything?

1 MR. REYNOLDS: To the Applicant's response?

2 CHAIRMAN RIGLER: Yes. The Applicant's response
3 did not object to the withdrawal of AMP-0 from the proceeding
4 and we have ruled on that. They are out.

5 All right.

6 The Applicant has indicated that it wants to pre-
7 serve the point that an isolated incident may be eliminated
8 from the case right now, namely the PASNY power sale. We have
9 given them leave to preserve that, if they wish, by refileing
10 a motion which would apply to other parties in the case, if
11 they are intent upon having us focus our attention on that
12 single incident, then we believe that they are entitled to
13 do so. We gave them leave to do so.

14 But with respect to this particular pleading, the
15 Applicant's response filed this morning, I don't believe any-
16 thing further is required.

17 MR. LESSY: Thank you very much, sir.

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1 CHAIRMAN RIGLER: I take it no one has any
2 extensive list of suggestions as to how to curtail the
3 issues?

4 MR. HJELMFELT: Mr. Chairman, the City of
5 Cleveland made a few suggested changes with respect to
6 the matters in controversy in its statement in the nature
7 of the case, that we intend to prevent.

8 I would suggest on the basis of some of the
9 points we made there that Issue 10 could be dropped.

10 With respect to Issue 11, it is my under-
11 standing of the way the Matter in Controversy Number 11 is
12 written, is that the Board would be looking at nexus for
13 each of the separate enumerated matters in Controversy,
14 1 through 10, and, finally, if they found, for example,
15 that a Matter in Controversy Number 9, that that was
16 proved affirmatively by the City of Cleveland, that then
17 the Board would look to see if that had a nexus.

18 Then they would look to see whether Controversy 8
19 had a nexus.

20 We suggest that that is not the appropriate
21 approach, that what we should do is wait until we get
22 clear through, then the Board finds what the situation is,
23 and then look to see if that situation, the total situation,
24 not the separate matters in controversy, but the total
25 situation has a nexus.

1 I would suggest that is precisely what the
2 Board itself talked about in its ruling dated June 30,
3 ruling of the Board with respect to Applicants' proposal
4 for expediting the antitrust hearing process, and I
5 particularly invite the Board's attention to the bottom
6 of page 7 and top of page 8 where the Board states we
7 agree that the nexus to which the Commission referred
8 in its Waterford opinion is the connection between a
9 situation inconsistent with the antitrust laws and
10 activities under the license, rather than the individual
11 matters in controversy.

12 CHAIRMAN RIGLER: Tell me again why you feel
13 that Issue Number 10 is no longer a live issue or can be
14 dropped.

15 MR. HJELMFELT: Issue Number 10, as I under-
16 stand it, is to look at what the Applicants have already
17 offered, or allegedly offered, to the intervenor and the
18 other parties, if the offer extends to other parties,
19 with respect to access to nuclear facilities, and then
20 make a determination whether this would deprive other
21 electric entities from realizing the benefits of nuclear
22 power.

23 I would suggest that the decision of the
24 Appeals Board in the Wolf Creek Case in effect effected
25 that -- the effect of that decision is to say that the

1 matters which the Applicants purport to have -- the
2 offers they purport to have made do deny access, and
3 that that issue is already resolved

4 But that is not any longer anything that is
5 in contention.

6 CHAIRMAN RIGLER: Do you have a response to
7 that, Mr. Reynolds?

8 MR. REYNOLDS: I do. Most assuredly.

9 I think that Mr. Hjelmfelt has lost sight of
10 the fact that the decision that he is relying on came
11 to the Appeal Board at the pleading stage in the context
12 where the Board was required, for purposes of making its
13 decision to accept as true the allegation that the --
14 in that case -- supplementary power was in effect necessary
15 or essential to meaningful access.

16 So that the issue that came to that Appeal
17 Board was not one where there was any room for dispute
18 as to what the meaning of meaningful access or access
19 meant.

20 That was not an open question.

21 The Board had to take as true the pleadings.
22 Then the pleadings said that the conditions in that case,
23 they had some license conditions that have been accepted.

24 The pleading was that those licensing conditions
25 did not constitute meaningful access as a matter of fact.

1 On ruling on that you have to take the facts
2 as pled as being true.

3 It was in that context that the Board came
4 down with its ruling in that case.

5 That is far different from what we are
6 talking about here whee there is a very real contest
7 over what meaningful access means or consists of, and the
8 Applicants' position as to what they proposed is that
9 it is more than adequate to satisfy the meaningful aspects
10 test that is being contested.

11 That certainly is a viable issue and is in a
12 context which is quite different -- historically different
13 from what the Appeal Board addressed in the Kansas City
14 Case.

15 Mr. Charnoff just reminded me -- and it is a
16 good point -- that all that the Appeal Board said in that
17 decision was that you could inquire into what was
18 meaningful access.

19 They did not go so far in that case as to
20 say as to what was given, whether it was or was not meaning-
21 ful access.

22 They said it is legitimate to make an inquiry
23 into that and for that purpose the petition would not be
24 faulted.

25 I think that is quite a different thing.

1 The other point that was raised, I don't think that
2 the restatement of the issue that the City has suggested with
3 respect to issue No. 5, is one that the Applicants have
4 any real difficulty with.

5 On the matter of nexus, I think we get right back
6 to where we were when we started. Certainly an issue in
7 this case and a very real issue, is whether the alleged
8 situations that are said to be inconsistent with the anti-
9 trust laws, are attributable in any way to licensed activities.
10 And if the City is suggesting that in addition to that you
11 can bundle together all these activities and see if that
12 constitutes some other situation and that has a nexus, we have
13 no problem with that brief formulation of the issue.

14 But, we think that it is totally inappropriate to
15 try to do that kind of bundling together, and blanket the
16 individual situations.

17 I think that is particularly true where you are
18 dealing with allegations that concern five Applicants in dif-
19 ferent service areas on the basis of the allegations, no
20 interrelation whatsoever and no tie up. And then to come in
21 and say that if somehow we can show a couple over here, and
22 a couple there, and a couple here, we can bundle everything
23 together and we don't need to worry about nexus until we do
24 our grouping act, I think that is totally inconsistent with
25 what the statute permits under the language, and certainly

1 inconsistent with what the Commission's rulings are on the
2 nexus issue.

3 So we feel that the issue as framed, the matter
4 in Controversy No. 11 is proper as to nexus, but if they want
5 to, in addition, reformulate that issue to contemplate also a
6 nexus question with respect to tis grouping, we think that that
7 is also a very relevant question and one that would have to be
8 asked and answered before a ruling was issued in this case.

9 CHAIRMAN RIGLER: Does the Applicant have any pro-
10 posals for the elimination or curtailment of issues?

11 MR. REYNOLDS: The Applicant would propose, has
12 proposed in the response that was filed, that the issues as
13 framed in Prehearing Conference Order No. 2, be confined to
14 the specific allegations that are set forth in these
15 statements.

16 The parties have now had an opportunity to set
17 forth their allegation there is some statement that they
18 want to come back later and expand on it, that they want
19 to have that right.

20 We think this issue was specifically defined to
21 limit issues and define allegations. There has been an
22 opportunity to do that. We think everybody should be held
23 to the statements that they filed on the 5th.

24 CHAIRMAN RIGLER: Let me interrupt you for a
25 minute.

1 Bring the Board up to date with respect to any
2 late delivery of documents. I know at some point the
3 parties were encouraged by the Board to work among themselves
4 with respect to delivery schedules and so forth.

5 By September 5th, had the other parties had the
6 opportunity to examine the Applicants' latest document
7 delivery?

8 MR. REYNOLDS: The latest delivery -- Mr. Berger,
9 you will have to check me on the date.

10 MR. BERGER: September 10th. A letter written
11 September 9th, which we received September 10th.

12 MR. REYNOLDS: Which was the reports?

13 MR. BERGER: Right.

14 MR. REYNOLDS: There were, I forget how many, four
15 or five budget reports which had been requested during depo-
16 sitions. They were requested of Cleveland Electric
17 Illuminating Company, which were delivered on, I am advised,
18 September 10.

19 Apart from that, the other document discovery had
20 been completed and the documents had been delivered, I
21 believe, by the close of deposition period and made available
22 to central depository. There are the five budget reports.

23 MR. CHARNO: I think we disagree with that. We
24 received the last of the documents approximately prior to
25 the delivery we just spoke of, on the 28th or 29th of August.

1 MR. REYNOLDS: Is that Davis-Besse 2 and 3
2 documents?

3 MR. CHARNO: Yes.

4 MR. REYNOLDS: That delivery, of course, was an
5 agreed date by counsel, and it was based on, as I recall, the
6 Department's request that we have a delay in order to assist
7 in answering the interrogatories in connection with the state-
8 ment of issues, and that we were going to have an extension
9 that we agreed to in order to have that delivery at that time.

10 CHAIRMAN RIGLER: My question was not critical. I
11 am just trying to get it fixed for the Board's purposes.

12 MR. REYNOLDS: If Mr. Charno says it was August 29th
13 for the Davis-Besse 2 and 3 document delivery, I certainly
14 will agree with him. I don't have that date in hand. I think
15 the documents that were delivered at that time were minimal,
16 but certainly compared to what we had during the remaining
17 period.

18 But I think that the point that we are making is
19 that we have now had the statement of allegations and the Board
20 has made it clear both in its order and also in conference
21 calls during the period that we were talking about extending
22 this, exactly how significant this statement -- these state-
23 ments were. And we think that the parties should be held to
24 what they state specifically. And to the extent that they
25 have the broad generalization, we don't think that should be

1 permitted to sweep into this hearing some new allegation at
2 some later date.

3 CHAIRMAN RIGLER: In general I think the Board will
4 agree with you, and that we will confine ourselves during the
5 evidentiary stage, to the matters set forth in the September
6 5th filings. The one exception being good cause for
7 expansion. I am thinking of possibilities -- I suppose it
8 is remotely possible some privileged documents may appear
9 which would permit some of the parties to extend their
10 allegations.

11 MR. REYNOLDS: I guess there is that remote
12 possibility.

13 Also, let me just make reference to the point that
14 is also in our response, which goes to the City of Cleveland's
15 statement, and in that statement the City of Cleveland has
16 included allegations which are addressed to activities that
17 concern Applicants other than Cleveland Electric Illuminating
18 Company.

19 Now, the City of Cleveland has filed three petitions
20 to intervene, and in none of those filings is there a reference
21 either general or specific, to activities of anybody other than
22 the Cleveland Electric Illuminating Company.

23 And we would think that for purposes of framing
24 issues, this Board should carve out right now at the outset,
25 any evidence by the City that would go to activities by any

1 of the other Applicants in their service areas, the City does
2 not compete with those Applicants. It is not in those service
3 areas. They are all remote from the City and there is nothing
4 in the petitions -- three petitions to intervene of the
5 City, that would permit this kind of an allegation at this
6 late date for purposes of presenting the case that they want
7 to make.

8 So, we would move, or request that the Board
9 eliminate those allegations entirely from the City's case,
10 those that relate to any of the Applicants, other than CEI.

11 Apart from that, I think that I have covered
12 pretty thoroughly in my response the -- I think we have
13 touched on the vagueness point.

14 If there are a few examples in the response that the
15 Board fee can be helpful, I can give additional examples
16 by going through each of the statements where the language is
17 so vague as to be totally uninformative and we feel that type
18 of vague pleading or assertion should be confined to the
19 specifics within the paper.

20 CHAIRMAN RIGLER: Mr. Hjelmfelt did you have a
21 response with respect to Cleveland's presentation of evidence
22 against the Applicant, CEI?

23 MR. HJELMFELT: Yes, I do.

24 First, the statement that Cleveland's petitions did
25 not refer to the other Applicants is obviously false. We did

1 refer to each and every one of the other Applicants in our
2 petition, and we referred to the CAPCO group on numerous
3 occasions in our petition.

4 With respect to the type of evidence we would be
5 submitting, we would expect the evidence of, for example,
6 Toledo Edison's activities with respect to some of the
7 municipalities or co-ops within its territory, that
8 evidence we anticipate would probably come in through the
9 evidence of the Staff or the Department, and we don't antici-
10 pate presenting a great deal of evidence on that. Probably
11 none at all inasmuch as a lot has already been presented.

12 There are certain activities, however, which the
13 Applicants have taken individually with respect to munici-
14 palities within their service territories, or with respect
15 to cooperatives, which if you compare it and take it all
16 together, it does show there was a conspiracy to keep munici-
17 palities out of CAPCO, for example.

18 To the extent that any of this evidence of, for
19 example, Duquesne's activities with respect to Pitcairn,
20 indicate that there was such a conspiracy, we feel that it is
21 fairly within our petition, and we would intend to offer
22 evidence on that.

23 I also would like to make a general comment with
24 respect to what we undertook to do in the filing of the
25 nature of what we present; that is what we did.

1 We did not undertake to list in detail each and
2 every piece of evidence. I recognize the Chairman was speaking
3 of issues and limiting us to issues that are fairly raised
4 by our statement. And as long as that is what the
5 Board had in mind, I have no problem with it.

6 But, I certainly don't want to be limited to just
7 the evidence specifically mentioned here. I would like
8 to refer to a few other statements contained in the
9 Applicant's response to our statement.

10 First, they state that our definition of what
11 we believe the evidence will show the regional power exchange
12 market would be, would stretch from coast to coast.

13 Obviously, they didn't read page 2 of our state-
14 ment where we stated that we believe that the CCCF is the
15 relevant geographic market for the regional power exchange
16 market.

17 For the most part, the objections seem to be that
18 the Staff and the Department and the City of Cleveland have
19 not proved their case yet, which I think has absolutely
20 nothing to do with what is involved in this stage of the
21 proceeding.

22 I think it is very clear that all the parties,
23 the Staff, the Department and the City of Cleveland clearly
24 made a full and complete statement of the nature of the case
25 they intend to present.

1 MR. LESSY: The Staff would also like to make a
2 statement.

3 CHAIRMAN RIGLER: Addressing your self to curtail-
4 ment of, elimination of issues, hopefully?

5 MR. LESSY: Yes, and our pleading.

6 Mr. Hjelmfelt directed himself to, I believe, a
7 matter in controversy on the broad issue 10; whether
8 Applicants' policy or policies with respect to providing access
9 to the nuclear facilities if other electric entities are --
10 if they are deprived from realizing the benefits of nuclear
11 power.

12 The Staff will present evidence with respect to
13 both Cleveland Electric Illuminating Company and the Duquesne
14 Light Company, whose policies have deprived certain
15 entities --

16 CHAIRMAN RIGLER: Which ones?

17 MR. LESSY: CEI and Duquesne -- prevented them
18 from benefits of nuclear power.

19 With respect to No. 11, the nexus matter, we
20 briefed in response to Applicants Proposal ^{For Expediting The} ~~for expedited~~
21 Anti-Trust Hearing Process ~~anti-trust hearing process~~, what is the meaning of the phrase
22 "activities or situations inconsistent with the anti-trust
23 laws."

24 I think the meaning of that phrase resolves the
25 question as to whether or not you have to prove a nexus between

1 each individual activity, or the anti-competitive situation as
2 a whole, and the Board has dealt with that.

3 Now, in addition we would like to make the
4 following clarification, after having read Applicants'
5 response. It may be -- especially with respect to markets,
6 we want to make absolutely certain that they understand the
7 nature of our pleading, and to that extent I would like to
8 make the following supplement:

9 Under matter in Controversy No. 1, the matter is
10 whether the combined CAPCO ~~territories~~ ^{company territories}, CCCT, is an appro-
11 priate geographic market for analyzing the possible creation or
12 maintenance of a situation.

13 It continues, we have read Applicants' response
14 and we have consulted with the economist who is going to
15 present evidence with respect to this, and Staff will demon-
16 strate by the use of expert testimony, economic testimony,
17 that the combined CAPCO ~~territories~~ ^{company territories} is a relevant
18 geographic market for anti-trust analysis.

19 In addition, the areas reached by each Applicant's
20 transmission facilities are also relevant geographic markets.
21 Saying that in terms of geographic markets -

22 CHAIRMAN RIGLER: What do you mean "reached by
23 each Applicant's transmission facility"?

24 MR. LESSY: By that we mean the territories. It is
25 a modification of the phrase "service areas."

1 A service area can be measured by a number of
2 ways. We are looking at the transmission systems as a
3 measurement of the area generally which they serve, the
4 specific area which they serve.

5 We are looking at that as a market.

6 Having said that, we have reached, ^{matter 2} are there any
7 relevant geographic submarkets, and if so, what are ~~the~~ ^{their}
8 boundaries?

9 Our position is, that there may be. But we are not
10 attempting to define any for purposes of our analysis.

11 So the first two steps are, that the geographic
12 markets, relevant geographic markets, are the CCCT, and the
13 areas reached by each Applicant's transmission facilities —
14 and we won't attempt to define any submarkets for purposes of
15 our analysis.

16 Now, the question also arose in this pleading, as
17 to the geographic extent of the product market.

18 Naturally, the geographic bounds of the product
19 market are the geographic market. The question was raised
20 as to whether or not the relevant product market was, in
21 fact, boundless.

22 Well, this comes up -- we assume when we define a
23 relevant geographic market, that that ^{limits the} ~~limited~~ product market,
24 that is ^{by} ~~our~~ definition.

25 The product market does not go from coast to coast

1 it is limited by the geographical market.

2 With respect to the matter in Controversy 3, which
3 is the description of the relevant product market, the language
4 says, whether any or all of the following are relevant product
5 markets: Regional power exchange, bulk power transactions,
6 retail power transactions.

7 We use the phrase bulk power services. Bulk
8 power transactions.

9 We want Applicants to make sure, since that is a
10 term of the art, what we generally mean by the phrase bulk
11 power services as to the relevant ^{product} ~~power~~ market. By that we
12 mean coordinated planning and development, interconnection, co-
13 ordination of reserve capacity levels, coordinated operation,
14 other power and energy exchanges, wheeling, things of that
15 nature, so that there is no confusion as to that.

16 The geographic limits of that product market is
17 the geographic market.

18 So I hope that serves to clarify our position.

19 Now, there is one other clarification I would like
20 to make. Since the time we drafted this and in lieu of the
21 Board's agreement with Applicants that this is somewhat
22 limiting as to the evidence to be presented in evidentiary
23 hearing, we would like to modify the last sentence on page 5
24 of our pleading.

25

1 CHAIRMAN RIGLER: When you say the Board's agree-
2 ment with Applicant, you mean our acceptance of their
3 position?

4 MR. LESSY: I'm sorry, yes, sir. I stand cor-
5 rected.

6 With respect to the last sentence of page 5 of our
7 pleading entitled "Nature of Case to be Presented by NRC
8 Staff," which deals with Ohio Edison Company with respect
9 to items called (d), we would like to slightly modify that
10 by saying the existing language is a policy of imposing long-
11 term capacity restrictions, would like to add, and financing
12 restrictions, and financing restrictions is added in con-
13 tracts, the existing language, we like to add for proposed
14 contracts with ^{wholesale customers} ~~wholesalers~~ "which," and we will delete the
15 word "restrictions." The rest continues.

16 So that we are looking at 2 policies. A long-term
17 capacity restriction, and financing restrictions in both con-
18 tracts or proposed contracts.

19 Since that is a new -- a slight modification of
20 that particular matter, if Applicant would like to respond to
21 that, the Staff would be receptive to that, but in light of
22 the Board's decision this morning, we would like to have that
23 one change.

24 MR. BENBOW: I would like to respond on the last
25 point.

1 CHAIRMAN RIGLER: Just a moment, Mr. Benbow.
2 Would you reread that?

3 MR. LESSY: A policy of imposing long-term capacity
4 restrictions and financing restrictions in contracts or pro-
5 posed contracts with ^{wholesale} ~~wholesaler~~ customers which have an
6 adverse effect on the operation and growth of the systems of
7 said customers in a manner inconsistent with the antitrust
8 laws.

9 We are adding 5 words and deleting one. I think
10 that will conclude what we have to say, sir.

11 CHAIRMAN RIGLER: That was read as modified.

12 MR. LESSY: Yes, sir.

13 CHAIRMAN RIGLER: Mr. Benbow, you wanted to make
14 a response?

15 MR. BENBOW: Yes, briefly.

16 I appreciate Mr. Lessy's efforts to clarify what
17 he meant by things, although I must admit his attempted
18 clarification of relevant markets left me in as much dark as
19 I was before he started.

20 As far as adding things, as he is proposing to do
21 now, to add financing restrictions and to add proposed con-
22 tracts as well as actual contracts with respect to Ohio
23 Edison, it seems to me he is ignoring this Board's order.

24 He was supposed to get this in by September 5th
25 as I understood it and now is not the time when we are heading

1 for trial, preparing our case based on what he said
2 December 5th.

3 The reason my associate isn't here this morning
4 is he is out in Akron, Ohio, getting ready to meet these
5 charges. There comes a time in a proceeding, the Staff must
6 find and I realize this is the first time this Staff
7 actively engaged in one of these cases that they must learn
8 that there comes a time when amending and adding of charges
9 must cease, so I very strenuously object to this addition
10 and we move to have this proposed addition stricken or not
11 received.

12 CHAIRMAN RIGLER: All right. We have plenty of
13 time before the hearing to take into account these new
14 changes. Neither do I find them to be so substantial that
15 they would impose any undue burden on you.

16 The objection is overruled.

17 We are going to take a 5-minute recess now. When
18 we come back -- are you finished, Mr. Lessy?

19 MR. LESSY: I may be.

20 As to responsiveness on discovery, Mr. Vogler is
21 consulting with counsel for Duquesne Light Company and we may
22 have one matter with respect not as to issues, but as to
23 turning over documents. We may or may not have something
24 to add after the break.

25 CHAIRMAN RIGLER: When we come back, I want to

1 raise the subject of any possibility of stipulations which
2 would assist in compressing the factual material which would
3 have to be introduced after an evidentiary hearing.

4 I don't know if the parties have talked among
5 themselves or not. Obviously the Board would encourage any
6 stipulations you could give us.

7 I would like to take a poll of the various
8 parties when we come back. We also, when we come back, will
9 be talking about the Department of Justice's motion to amend
10 the schedule.

11 (Recess.)

12 MR. LESSY: The Staff has nothing to add to its
13 remarks before the break, sir.

14 CHAIRMAN RIGLER: Let me go back to one other
15 point.

16 Not to open up the subject, again, but if you do
17 file a new motion for summary judgment, your moving papers
18 should request that the previous affidavits be accepted with
19 respect to the new motion rather than filing new affidavits.

20 There should be some reference back to the factual
21 materials which supported your original motion.

22 Were you about to rise, Mr. Reynolds, on another
23 point? Were you about to bring up another point before the
24 Board?

25 MR. REYNOLDS: I was going to ask what the schedule

1 is for responses, or are there no responses to be received?

2 CHAIRMAN RIGLER: Responses?

3 MR. REYNOLDS: To filing which incorporates by
4 reference the prior pleadings in order to bring to the Board
5 the issues that have been presented on summary disposition.

6 CHAIRMAN RIGLER: I did give them leave to file
7 response, it would be the usual period set forth in the rules.
8 Whether they can file factual responses I would say is
9 questionable, but since none of them seem to have indicated
10 an intent to file a factual response that may not be an issue.

11 MR. CHARNO: May I point out an ambiguity with
12 regard to the rules on response to summary disposition. This
13 ambiguity has come up a number of times recently with one
14 licensing board holding the response time is the normal 5
15 days plus mailing time and at least the Staff submittal in
16 another case, suggesting in 2749, I guess it is, which is
17 the rule dealing with motions for summary disposition, the
18 Staff while agreeing with the Board in the first case, in
19 another case has said that it may well be that the time is
20 something else other than that, because there is something
21 in suggesting that responses should come in no later than
22 2 days prior to the beginning of the hearing.

23 The Licensing Board that set the schedule on
24 that had indicated that that was just an outside date, that
25 the normal rules dealing with responses to motions under

1 2.730, I believe it is, should apply.

2 CHAIRMAN RIGLER: I think that is the 5-day re-
3 sponse period, 10 days to the Staff.

4 MR. LESSY: That is acceptable to the Staff.

5 CHAIRMAN RIGLER: In other words, we will follow
6 2.730.

7 MR. HJELMFELT: Mr. Chairman, just so the Board
8 is not misled, the City of Cleveland may want to file cer-
9 tain factual matters that we obtained on discovery, but I
10 want to look at them very closely before I do, so I can't
11 say for you I will.

12 CHAIRMAN RIGLER: I will look at what you file.
13 No need to respond, Mr. Reynolds, but I must say
14 that that would raise a question, perhaps, as to why factual
15 responses were not filed by September 12th.

16 So you think about that carefully before you do
17 it. It is possible that the Applicant would ask us not to
18 receive them and we might agree with the Applicant,
19 Mr. Hjelmfelt. It is possible we would disagree.

20 MR. HJELMFELT: I merely cite the Hauser affidavit
21 as a precedent for a late filing.

22 CHAIRMAN RIGLER: There is one other matter that
23 I think we might bring up at this point. That is a pending
24 motion to strike from the record certain policy statements
25 of the Applicants with respect to access to nuclear

1 facilities. I believe that that is currently an unresolved
2 issue.

3 We did not have it on the agenda this morning. I
4 must confess that I am not overwhelmed with the importance
5 of the issue.

6 If the Applicant states that its policy is such
7 and such, and if they adhere to that policy, I suppose that
8 that would be their policy. If the Staff is complaining
9 that that is not binding on the Board, or on any position,
10 they would take in the hearing, I would certainly agree
11 with that.

12 If you are saying, Mr. Lessy, that their policy
13 statement is untested, it may be changed in its full dimen-
14 sion and its full dimensions are not known; I would agree with
15 that.

16 At the same time, if they have a policy, they have
17 a policy that they can apply as they wish.

18 Am I missing something in the controversy?

19 MR. LESSY: Yes, sir. The question in the Staff's
20 mind, sir, is what is the policy? Is the policy an official
21 company policy, a form of conduct, a policy of offering
22 access to facilities, for example, ^{or} whether ^a ~~the~~ policy that
23 is something that counsel files and declares as a ~~policy?~~ ^{company policy?}

24 What we don't want is a presumption with respect
25 to the matter in controversy as to what the policies of

1 Applicants are.

2 A presumption on the record, or in the mind of
3 the Board, since most of the prehearing Board will be the
4 trial Board, as to what in fact the policies are. We don't
5 want our case in chief which will attempt to establish by
6 factual evidence and documentary evidence as to what the
7 policies in fact have been and whether the people in
8 Applicant's service territories have gotten offers pursuant
9 to those policies to be in the nature of a rebuttal.

10 We want the record clean. In order to get the
11 record clean as to addressing what their policies are, we
12 thought if those license conditions had been stricken from
13 the record, we start at ground zero. We don't start with
14 essentially the record clouded as to what policies have
15 been.

16 That is simply our position.

17 MR. REYNOLDS: Well, I guess I am still having
18 the same trouble that I believe the Chairman was having. The
19 policies that were set forth in the March 24th filing are the
20 policies of the company. Whether we put that filing in a
21 drawer or anyplace else, it is still going to be the policy.

22 I am not sure I understand Mr. Lessy's point that
23 somehow because the lawyer addresses the Board and states
24 what the policy is in the context of a very appropriate
25 pleading to do so, that that somehow is to be given treatment

1 such as striking the pleading.

2 I think that really the Board knows what the policy
3 statements are. It had to read the pleading of the Applicants
4 at the time it resolved the question, so that striking the
5 pleading isn't going to make any difference one way or the
6 other.

7 CHAIRMAN RIGLER: And leaving it in is not going
8 to prevent Mr. Lessy from challenging either the policy or its
9 implementation.

10 MR. REYNOLDS: I wouldn't take that position and
11 I think we would be very hard pressed to sustain it if we did.
12 It is open to challenge by Mr. Lessy or anybody else. That
13 is the policy.

14 We felt the compelled to advise the Board of the
15 policy and also the other parties and the City of Cleveland
16 and the other municipalities what our policy is. It is a well
17 known policy. There isn't any secret about it. I don't know
18 what striking it from the pleadings does for Mr. Lessy.

19 MR. LESSY: I guess the point is that you don't
20 declare a policy by fiat. Policy to me means a pattern, or
21 course of conduct; it means a commitment to do something.

22 In the process of filing a request for an expedited
23 hearing, on the basis of a motion, there were certain license
24 conditions attached ^{thereto. That} ~~there. To that~~ request and that motion
25 in the form of the motion was denied.

1 Now, the record should be clear, but it is not.
2 There is a footnote in the pleading that says, but these
3 are our policies and they will stay in the record.

4 Now, I wouldn't have a fight, or have an objection
5 in the event that when the Board goes to hearing, the question
6 as to what policies are is at issue and we start at ground
7 zero, but if we start with those license conditions as such,
8 with us attempting to refute those, or actually our direct
9 testimony, in effect, being rebuttal, then I would have a
10 problem, because I think the procedural aspects are ques-
11 tioned.

12 Whether they are left in the record or not, I would
13 like the Board to have in mind that there has been no
14 evidentiary proof, other than assertions, as to what in fact
15 the policies are.

16 CHAIRMAN RIGLER: Mr. Charno, had you joined in
17 Mr. Lessy's objection?

18 MR. CHARNO: No, the Department did not.

19 CHAIRMAN RIGLER: Was any other party affected?

20 Well, does it really require a ruling, then,
21 Mr. Lessy?

22 I hear what you say and I agree with you. I hear
23 what Mr. Reynolds said and I am still not persuaded that we
24 have any issue in real controversy here.

25 MR. LESSY: Fine.

1 CHAIRMAN RIGLER: Have any of you good news to
2 report to the Board with respect to prospective stipulations?
3 As has been discussed, I will start with you, Mr. Charno.

4 MR. CHARNO: There haven't been any discussions
5 between the Department and Applicant. We were discussing
6 something else relating to document discovery, but we cer-
7 tainly have no objection to exploring the possibility of
8 stipulation.

9 We have had some substantial difficulty, but we
10 attempted to do so at more leisure earlier in the proceeding
11 in arriving at stipulations that were acceptable to both the
12 Department and the Applicant.

13 Obviously we had no objection to his exploring
14 it. I think at the very least, we could probably establish
15 some circumstances establishing the authenticity of documents,
16 at least the Department and Applicant have discussed pre-
17 viously.

18 CHAIRMAN RIGLER: Are we going to have any problems
19 with respect to authenticity of documents?

20 MR. REYNOLDS: There are an awful lot of documents,
21 so I don't really know. I don't foresee any monumental prob-
22 lems with the authenticity of documents.

23 CHAIRMAN RIGLER: By and large, documents from
24 the Applicant's files will not be challenged for authenticity.
25 Right?

1 MR. REYNOLDS: I would say generally, that is
2 right. We would not anticipate any. There is some confusion
3 with respect to some documents because they have been moved
4 back and forth and should have fell and so on. I am not sure
5 whose files they came from or who they belong to or where they
6 came from, and there have also been some references in this
7 proceeding to files that did not clearly come from Applicant's
8 files, but were taken from proceedings in other cases before
9 this Commission.

10 I would have a lot of difficulty with any kind of
11 general statement at this stage as to no contest on authenti-
12 city, but I think as to the bulk of the document production,
13 they can be identified as such by the Applicant's document
14 section. There will not be any monumental problems with
15 respect to authenticity.

16 MR. CHARNO: I believe the agreements between the
17 Applicants and the Department is embodied in a deposition
18 transcript taken in -- taken of one of the Toledo Edison
19 witnesses.

20 MR. REYNOLDS: Cleveland Electric Illuminating
21 Company witness.

22 I take it it is essentially as I indicated. We
23 will not have a blanket objection on authenticity. There may
24 be isolated problems involved, obviously, with this number of
25 documents.

1 While I am up, do you want me to address the ques-
2 tion of stipulations? I guess that is what was on the table.

3 CHAIRMAN RIGLER: We do.

4 MR. REYNOLDS: Applicants are equally receptive
5 to exploring the possibility of stipulation. We don't really
6 see anything that we have read so far that would enable us to
7 stipulate to any matters in this case at the present time.

8 Certainly the clarification by Mr. Lessy as to
9 relevant markets leaves us pretty much as confused as before
10 and we would not be willing to stipulate to any aspect of the
11 geographic or product market question. We think that should
12 be proven and I guess that, really, where the Applicants are
13 at this stage is, we are not prepared to stipulate to any
14 matters.

15 CHAIRMAN RIGLER: How about charts and exhibits
16 on individual ~~co-territorial~~ ^{company territorial} markets as Mr. Lessy was
17 defining them? Charts or exhibits on individual ~~co-territ~~ ^{company territorial}
18 ~~itorial markets.~~

19 MR. REYNOLDS: For what purpose?

20 CHAIRMAN RIGLER: I understood Mr. Lessy to come up
21 with a submarket definition of individual ~~co-territories,~~ ^{company territories,}
22 i.e., served by transmission lines. Can that sort of thing
23 be agreed upon and the chart --

24 MR. REYNOLDS: Not as a relevant market, no, sir.

25 CHAIRMAN RIGLER: Okay. You can argue about

1 whether or not it is a relevant market.

2 MR. REYNOLDS: I guess, again, if you talk about
3 boundaries of the market, if a company has a transmission
4 line running this way, is the area the whole circle or what-
5 ever the distribution of service is of the transmission and,
6 therefore, there are separate pockets within that area which
7 are the markets that are relevant.

8 It is not an easy question. I don't think we are
9 prepared without some demonstration of proof to say that you
10 can take a central point and go to the outer limit of what-
11 ever the longest transmission line is and draw a circle and
12 say that that is a relevant market.

13 I think that is unrealistic in terms of how things
14 operate in this industry and we wouldn't be at all amenable
15 to a stipulation to that, or any kind of map drawing as to
16 that effect.

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1 MR. LESSY: With respect to maps, sir,
2 during discovery the Staff requested of Applicant to be
3 provided by the Duquesne Light Company a copy of the
4 most recent CAPCO map.

5 The most recent. What we are told was there
6 was one seven or eight years old, but that one was in
7 preparation in February.

8 What we intend to do is to rely on their own
9 maps for the proof of the geographic -- of what CAPCO
10 is in essence and also in terms of the facilities within
11 CAPCO.

12 We have been assured very recently that we
13 will be provided that map as soon as it is available.

14 If the '74 -- the most recent map -- is not
15 available, what we are going to have to do is rely on
16 the 1969 map with oral testimony adding thereto any
17 changes since '69, which would be a considerable burden.

18 So it is our hope, and we have been assured,
19 that Applicants will use due diligence to get us that
20 map as soon as they can, so it would obviate the necessity
21 for testimony that is going to be very boring to read.
22 It is going to talk about in 1970 this was added and that
23 was added. Internals. Geographic boundaries. Since we
24 are using -- intend to use, relied on their representation
25 that we could use, their own facilities map.

1 I think that will take care of that part
2 of the problem at least.

3 The individual areas reached by the
4 individual transmission systems of each individual
5 applicant, we view ^{as} ~~its~~ markets along with the CCCT.
6 Not submarkets.

7 CHAIRMAN RIGLER: How about power sales
8 in the intercompany transfer? Can you stipulate what
9 they were during any relevant year? Have you discussed
10 that at all? Exchanges between CAPCO member companies,
11 for example, that sort of thing, if that comes in?

12 MR. REYNOLDS: I am not willing to stipulate
13 on a general basis. If the other parties would like to
14 present us with something specific, we will certainly
15 explore the possibility of stipulating as to that specific
16 matter, but at the moment I would not be in any position
17 to make a stipulation either as to products or power
18 exchange markets or geographic markets or whatever this
19 coordinated department market is that suddenly is in the
20 middle of this whole thing.

21 MR. LESSY: What we are going to rely on,
22 sir, in terms of power transmitted over the lines, is
23 Applicants' report to the Federal Power Commission on
24 Forms 10 and 12.

25 It is a common industry report by all electric

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1 utilities and certain transactions and amounts of hours
2 exchanged are listed there.

3 It is a generally accepted applicant
4 prepared report.

5 I assume Applicants don't have any
6 objection to the use of FPC Forms 10 and 12.

7 MR. REYNOLDS: It depends on how you use
8 them.

9 MR. LESSY: The use of information contained
10 therein, prepared by each individual company.

11 MR. REYNOLDS: I can't answer that at this
12 time until I know what the use is.

13 MR. LESSY: I can see we are going to have
14 difficulty in arriving at any stipulations.

15 MR. CHARNOFF: I think it is obvious we are
16 willing to sit down and talk to people of all of the
17 other parties, all three parties, at a point when they
18 are ready.

19 We shouldn't be trying to stipulate to some
20 general principle.

21 CHAIRMAN RIGLER: Why are you saying they
22 should come to you with such proposals? The Board has
23 been under the opinion that the Applicant deemed time
24 to be of the essence and they want a ruling from the Board
25 as soon as possible, and yet your posture seems to be one

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1 of waiting for them to come to you.

2 Can't the parties move together on these
3 things and compress the time necessary to complete the
4 hearing?

5 MR. CHARNOFF: Time is clearly of the
6 essence.

7 Secondly, we can't do anything until we
8 know what information they propose to proceed with.

9 I have nothing to come forward with. It
10 is their burden to tell me what they intend to
11 introduce and I will be glad to do what we can to
12 expedite the receipt into evidence of these particular
13 matters by way of stipulation.

14 I have no idea what they are coming forth
15 with. All we have are these documents that we got on
16 September 5, which have certain degrees of specificity
17 in them and considerable degrees of nonspecificity in
18 them.

19 We have statements from the City of
20 Cleveland saying they are going to rely on certain
21 documents, not identified in specifics.

22 We have certain statements to the same
23 effect by the NRC Staff not identified specifically.

24 We are perfectly anxious to cooperate in
25 moving the receipt of evidence of valid evidence, and

1 we will do all we can, but I can't say anything more
2 than I am prepared to meet with them.

3 MR. HJELMFELT: If I might, I might be --
4 Mr. Charnoff is going to present certain evidence about,
5 for example, the City of Cleveland that might be
6 stipulated again, if he will come forward to us.

7 So I think it is a two-way street that
8 either party can take the initiative with.

9 It seems to me there probably are basic
10 numerous facts which could very well be the basis of a
11 stipulation.

12 That procedure was followed in the Waterford
13 Case.

14 However, working out the stipulation took
15 some time, and my particular position is that between now
16 and the scheduled date, I don't think I have a great deal
17 of time to devote to that.

18 CHAIRMAN RIGLER: As an alternative to a
19 stipulation, have the parties, other than the Applicants,
20 considered making a joint request for admission, and have
21 the Applicants considered making a request for admission
22 against any of the parties that would develop some of the
23 facts?

24 MR. HJELMFELT: The City of Cleveland is
25 considering making a request for admissions. I have not

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1 talked to the Staff or Justice about that at this
2 point.

3 MR. CHARNOFF: I might say other than the
4 admission we received today for at least one or maybe
5 all of the parties that the isolated instance may have
6 no nexus to this particular situation.

7 MR. LESSY: I object to that. The Staff
8 didn't make admission to that.

9 CHAIRMAN RIGLER: Another question for the
10 Applicant: is there any possibility that you would
11 stipulate with respect to anything contained in your
12 assumptions arguendo, which were filed before the
13 Board earlier this summer?

14 I am perfectly aware that those assumptions
15 were made in the context of a particular motion and not
16 binding and obviously the Board drew no inferences
17 from them.

18 MR. CHARNOFF: We have reviewed that and
19 reviewed it at the time, very frankly, when we made
20 the assumptions arguendo.

21 We see no way we can make those arguments
22 stick beyond the point they were made.

23 CHAIRMAN RIGLER: All right.

24 Mr. Charno, I guess that brings us to the
25 Department's request for change in hearing date.

1 I think I understand your position from
2 your pleading.

3 The first thing I would like to find out
4 is whether there is any objection to that motion.

5 Mr. Firestone, maybe I will start with you
6 this time.

7 MR. FIRESTONE: We have no objection.

8 CHAIRMAN RIGLER: Mr. Lessy?

9 MR. LESSY: Based on the extrinsic factors
10 which Mr. Charno points out, the Department's motion,
11 excuse me, certain factors beyond the control of the
12 Department, such as the lengthy and time-consuming
13 cross-examination of Dr. Wein in the Alabama proceeding,
14 making him unavailable in the Perry proceeding, Staff
15 does not oppose, or has no objection to the Department's
16 request.

17 CHAIRMAN RIGLER: Mr. Hjelmfelt?

18 MR. HJELMFELT: The City of Cleveland does
19 not object to the extension of time and, in not objecting,
20 I must say I have a great deal of sympathy for the
21 Department, and recognizing the breadth of their case is
22 greater than what I am preparing, and my back us to the
23 wall to meet the deadlines, I clearly understand how they
24 are having difficulty.

25 CHAIRMAN RIGLER: Had the Department not filed

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1 its request, would Cleveland have been prepared to
2 commence hearings at the end of October, beginning of
3 of November?

4 MR. HJELMFELT: I think we would.

5 CHAIRMAN RIGLER: Mr. Lessy, would the Staff
6 have been ready to go forward on November 1?

7 MR. LESSY: Yes, sir.

8 MR. CHARNOFF: We vigorously oppose this
9 request. The Chairman alluded to our concern with
10 regard to plant schedule. I think I should acquaint you
11 with what that schedule is.

12 First of all, with regard to the Davis-Besse
13 Unit 1 plant, it is now scheduled for fuel loading during
14 the second quarter of 1976.

15 It is perhaps questionable as to whether even
16 if we begin on time that we can complete this case and
17 reach a decision in time to permit fuel loading to
18 proceed as scheduled now on Davis-Besse Unit 1.

19 That you should recognize, of course, is
20 going to be a completed plant, with a considerable
21 investment, and a determination by this Nuclear Regulatory
22 Commission predecessor agency that that plant is needed next
23 year.

24 Secondly, with regard to the Perry Nuclear Power
25 Plants Units 1 and Number 2, we have received from the

1 Licensing Board in that case a limited work authoriza-
2 tion, Number one.

3 We have just received authority to get a
4 partial limited work authorization Number 2 which, as
5 soon as it is granted, will carry us through about
6 November of this year for on-site work.

7 We intend to ask for the remaining portion
8 of limited work authorization Number 2 which happens to
9 relate to the reactor building work within a very short
10 period of time because we need that in order to continue
11 with scheduled work, and, if granted, that will only carry
12 the construction schedule through the end of March of 1976.

13 We should recognize that that particular unit
14 was the subject of three different hearings with regard
15 to the need for power on schedule and three different
16 times the Licensing Board did not challenge the need for
17 power determinations.

18 Secondly, there are in the neighborhood of
19 500 workers working at that site, and if we don't get LWA-2
20 prime as we now call it, or if we don't get the construction
21 permit in March, there are a number of workers who are going
22 to be sent home.

23 That is apart from the need for power question.

24 It seems to me there is a strong public interest
25 in getting these cases going as quickly as we can get them

1 going, and get a decision on them as quickly as we can
2 get them resolved, so that the hardship that would be
3 involved when next March we have to lay off workers
4 is avoided and the hardship that would be involved
5 if Davis-Besse Unit 1 is sitting idle next Spring
6 because of the concept that the antitrust review must
7 be finished beforehand, it seems to me presents a very
8 substantial conflict with a lot of other public interest
9 considerations apart from antitrust review.

10 There are a lot of ways that can be avoided
11 if the parties wish to stipulate to that.

12 But short of that kind of stipulation which
13 was recognized by the Commission in the Waterford decision,
14 it seems to me that we have no choice but to proceed with
15 the schedule that we are now on.

16 It should be recognized that the case -- the
17 delays being requested by one of the parties, if not the
18 principal party, in bringing this case forward.

19 It should also be recognized that that
20 particular party, the Department of Justice, had no
21 interest in a hearing on Davis-Besse Unit Number 1 and
22 nevertheless we are proceeding with a hearing which will
23 delay that particular facility.

24 There has been abundant deposition. There has
25 been abundant discovery. And we find in looking at the

1 particular motion by the Department of Justice that the
2 principal reason they offer is apparently the unavail-
3 ability of a witness who testified for them, to my
4 knowledge, in two prior cases, in the Midland case
5 and in Alabama.

6 Now, he finished his cross-examination
7 on July 31, 1975 and yet it is at this time that we
8 are now considering a delay in the hearing schedule when
9 there were a series of discussions with regard to
10 schedule matters with the Board, and these parties
11 in conference calls at least during the month of August.

12 We submit to you that it is the Department
13 of Justice's case as well as the other Staff and City of
14 Cleveland people who caused us to be here. They brought
15 the case.

16 We have been at it for a very long time.

17 While there may be hardships on a personal
18 basis, we have no choice, given the public interest
19 considerations in getting these plants on line, to
20 proceed with the schedule unless the other parties are
21 prepared to take what the Commission itself offered as a
22 solution in the Waterford case.

23 Here we are in a situation where we are
24 going to hearing; whether we start one month or another
25 month is not going to have an absolute difference in

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1 terms of the impact on any of these three parties, but
2 these other public interest considerations are so over-
3 whelming we cannot now concur in any kind of delay
4 unless the other parties are prepared to recognize
5 those other very significant public interest considera-
6 tions.

7 CHAIRMAN RIGLER: I take it the Applicants
8 are prepared to go forward on October 30, November 1?

9 MR. CHARNOFF: Yes, sir.

10 MR. CHARNO: Mr. Chairman, I think I perhaps
11 best restate in part the grounds for our motion, since they
12 are apparently not correctly understood by the Applicant
13 and not understood as we understand them.

14 We have a combination of problems. One was
15 Dr. Wein was tied up for an extensive period in another
16 hearing.

17 The second problem was that we did not receive
18 the majority -- not the majority, but a large portion of
19 very relevant fact material comprised by the discovery
20 documents in Davis-Besse 2 and 3 until the beginning of
21 this month.

22 We have done our best to place this in
23 summary form in the filing that was due five days after
24 that.

25 As a parenthetical, let me say that I presume

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1 that our review of those documents in the five days in
2 between did not reveal something we subsequently would
3 discover, review in depth, that that would be construed
4 as good cause for adding to our stipulation of issues
5 on --

6 CHAIRMAN RIGLER: We will take good cause
7 in each individual instance. We are not going to give
8 you a ruling now on what constitutes good cause.

9 MR. CHARNO: Let me go back in the
10 digression.

11 We are talking about a massive amount of
12 documents, a large number of depositions. And I
13 certainly realize we are responsible for over half of
14 the depositions.

15 But there is a tremendous amount of material
16 involved.

17 A comment made by one of the counsel for the
18 Applicants led me to do a comparison that I would like
19 to share with the Board.

20 Mr. Benbow commented earlier the Alabama
21 proceeding was considerably smaller than this proceeding,
22 and that this is a very monumental case; this one dealt
23 with multiple applicants, Alabama dealt with a single
24 applicant.

25 In Alabama the Applicants produced 10,000

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1 documents. Here they produced 2.5 million.

2 They got it down at this point now to
3 90,000 that have bearing and that have been reviewed
4 in full.

5 They took about half as many depositions
6 in Alabama as were taken here.

7 In this case we have had less than a month
8 in the discovery production in Davis-Besse, and
9 approximately two weeks from receiving all of the
10 materials on discovery, to the date on which expert
11 testimony is due.

12 This has put a tremendous burden on our
13 expert. He is just getting the final factual input at
14 this time, and he is requiring additional information
15 that has to be developed by another expert.

16 There was a two and a half month period
17 between the end of discovery in Alabama and the filing of
18 expert testimony.

19 That was, admittedly, a smaller, less
20 complicated case.

21 In addition, discovery there has lasted a year.

22 There was a month between the end of document
23 discovery and the beginning of depositions.

24 Here they were current right up to the very end.
25 Document discovery didn't end until after depositions.

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1 In Alabama from the end of discovery to the
2 commencement of the hearing was an eight-month period
3 which was considered essential in that smaller and
4 less complicated case to be prepared.

5 I think what we have gotten into is the
6 hearing schedule in terms of the way we are preparing
7 a case, we can only regard as unreasonable, at this
8 point, one which we cannot meet on the 29th or 26th, will
9 not be able to file expert testimony on that date.

10 If our motion is granted it is tantamount
11 to ruling that the Department is not going to be allowed
12 to present a full case in this proceeding.

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1 CHAIRMAN RIGLER: How many Staff attorneys did the
2 Department have on Alabama prior to hearing?

3 MR. CHARNO: Prior to hearing?

4 I am not sure. I think it was two prior and three
5 at the hearing.

6 CHAIRMAN RIGLER: Five.

7 How many of the Department's attorneys are working
8 full time on the Davis-Besse--Perry proceedings now?

9 MR. CHARNO: Three, and have been for some months.

10 CHAIRMAN RIGLER: Actually, how about Mrs. Urban?

11 MR. CHARNO: No, she is not full time on the
12 proceeding.

13 CHAIRMAN RIGLER: So you will have three, plus a
14 little outside help.

15 MR. CHARNO: I would say 50 percent of her time
16 is on Davis-Besse--Perry.

17 CHAIRMAN RIGLER: Mr. Aiuvalasit, are you full time
18 now?

19 MR. AIUVALASIT: Yes, sir.

20 CHAIRMAN RIGLER: Is your expert working full time
21 on the case right now?

22 MR. CHARNO: Yes.

23 Dr. Wein is going to have a problem with classes in
24 the very near future, but at this point he is working full
25 time, as is our engineering expert on this matter.

2 We told him we didn't feel there was any possibility of
3 securing 60 days and asked him what he could come up with, and
4 he is going to have something at the end of 30 days.

5 CHAIRMAN RIGLER: Have you talked about this with
6 the Applicants at all, prior to filing your motion?

7 MR. CHARNO: Not prior to filing the motion.

8 CHAIRMAN RIGLER: Have you had any discussion
9 subsequent to filing the motion in an attempt to reach
10 any accommodations that would permit the case to go forward at
11 an earlier date?

12 MR. CHARNO: We have discussed this with them and
13 we realize under Waterford, that such an agreement would take
14 the consent of all parties, and thus far we have been unable
15 to reach an agreement that is acceptable to all parties to
16 the proceeding.

17 I have also a great deal --

18 CHAIRMAN RIGLER: Wait a minute.

19 I am talking about differences in order of
20 presentation of the evidence rather than a Waterford type
21 stipulation which would relate to physical activity at the
22 site.

23 MR. CHARNO: We had suggested such a proposal,
24 which was acceptable to the Staff. They said they would
25 oppose our request to have our expert testimony come in late,

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1 and place Dr. Wein at the end of cross-examination to give
2 the Applicants the maximum amount of time to prepare.

3 CHAIRMAN RIGLER: Have the Intervenors talked among
4 themselves about the order of presentation of evidence?

5 MR. LESSY: Yes, sir.

6 The staff will present its case-in-chief first.
7 I am not certain about the second and third parties.
8 Probably the Department of Justice and city of Cleveland.

9 CHAIRMAN RIGLER: Well, if Staff is going to go
10 first, why do you feel that there is no room for some
11 accommodation of Mr. Charno in terms of late presentation?

12 MR. LESSY: We feel, sir, that first of all, from
13 reading the issues and statements on September 5th, we feel
14 that the cases to some extent, complement each other. We have
15 an engineering expert -- two engineers, actually, an economist
16 and a number of fact witnesses.

17 There is a great risk of the Staff presenting a case
18 and in the middle of that, the Department of Justice filing
19 prepared, expert testimony in which the Staff's case would
20 lay still.

21 We think that during the time before they have
22 presented their case, and we feel that in fairness to the
23 government that the best thing to do is start as expeditiously
24 as possible, all together. We think that will contemplate a
25 forward, ongoing hearing, as quickly as possible.

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1 We don't feel that in essence direct testimony
2 of an expert filed in the midst of a presentation of a
3 case-in-chief, would be particularly helpful.

4 In addition to that, before our experts testify
5 we would also like to know what the Department's experts
6 are going to testify to.

7 We have the lead-in ^{terms} ~~times~~ of the presentation of
8 evidence in this proceeding, but just as we would like to
9 see Applicants' testimony, we would like to see the
10 Department's. If we were to file our testimony and proceed
11 along with the City of Cleveland, Applicants' experts or
12 our experts may not have the benefit of their testimony
13 before they go ahead and testify. That may present some
14 problems for us.

15 There are some distinctive differences as to
16 between the government's position in this matter.

17 MR. CHARNO: The Department would certainly regard
18 a 60-day delay in submission of expert testimony, as equal
19 to a 30-day delay in the entire schedule.

20 MR. BENDOW: I would like to be heard on a
21 subject when it is appropriate.

22 I have experienced Dr. Wein over a matter of
23 months. I know what the nature of his presentation was in
24 both the Consumers' case and in the Alabama case, intimately.

25 I know what his time availabilities have been over

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1 at least the last year, since it has been a subject of
2 concern in the Alabama proceeding.

3 I know how long he has been working for the
4 Department of Justice on these various cases, and it seems
5 to me it is completely without foundation for the Department
6 to say that they delayed hiring him for this case until
7 April 11, 1975, and that it was the Alabama case which was
8 keeping him busy during the months of May and June, if I read
9 their papers correctly.

10 I think the only way in which the Alabama case
11 took up any substantial part of his time, were the actual
12 days that he was on the stand in that case.

13 The nature of Dr. Wein's presentation is based on
14 his background as an economist. He is not heavily factually
15 oriented. He is, I am sure, prepared to speak to the issue
16 if the Board needed him today on that subject.

17 For the Department to come in and claim that they
18 need 60 days to present Dr. Wein -- Dr. Wein is -- I am sure
19 if Mr. Charno asked him, he is ready to go if need be, today.

20 CHAIRMAN RIGLER: How many days was he on the stand
21 in the Alabama proceeding?

22 MR. BENBOW: I think the Department's estimate is
23 correct, 10 days. It was spread out over a period of time.

24 The fact that he has a teaching schedule, sir, is
25 no different than it was then.

1 I think to the extent he may have been otherwise
2 busy in June, it related much more to his teaching schedule
3 than it did to any involvement in the Alabama proceeding.

4 MR. CHARNO: We will be happy to present an
5 affidavit from Dr. Wein in support of the Department's motion.
6 This is my understanding of the circumstances and I believe it
7 is a correct understanding of the circumstances.

8 We are not maintaining that Dr. Wein has generated
9 a great deal of factual material. We are saying that his
10 testimony, as an expert, is based upon somebody else's expert
11 testimony and that expert testimony is based crucially upon an
12 entire structural and practical analysis of the Applicants'
13 behavior in various structures and that the details that
14 Dr. Wein needs, he has only just communicated to the
15 engineering expert. That is where our backlog is.

16 MR. LESSY: Sir, with respect to the 60-day
17 matter which Staff ^{appealed} ~~proposed~~, I wonder if Applicants have
18 thought what if the Department of Justice filed testimony
19 60 days after everyone else did. Applicants would have to file
20 their pretrial brief and they would have to file their expert
21 testimony one week after everyone else without the benefit
22 of the Department's expert testimony.

23 MR. BENSON: Further on Dr. Wein, my partner,
24 Mr. Grashof, pointed out to me, of the time he spent on the
25 stand in the Alabama proceeding, very little was in the

1 nature of direct examination. Most of it, 90 percent of it,
2 was cross-examination.

3 CHAIRMAN RIGLER: Well, that wouldn't answer the
4 problem posed by Mr. Charno of documents being delivered
5 through August and September, depositions going on to that
6 period, so that the foundation material was not available to
7 him until recently.

8 MR. BENBOW: I think the practice Dr. Wein has
9 followed in the other two proceedings has been to receive
10 material from the Department.

11 I am sure Mr. Charno will indicate that he sent
12 material to Dr. Wein. He reviews it currently and adds as
13 he goes.

14 CHAIRMAN RIGLER: Mr. Charno said he was waiting to
15 receive materials from a separate engineering witness. That
16 accounted for the delay.

17 MR. BENBOW: That is a common part of his practice,
18 too, but he knows what he is going to get.

19 CHAIRMAN RIGLER: How can he know what he is going
20 to get?

21 MR. BENBOW: Because he outlines for them, I am
22 going to argue for so-called regional power exchange market.
23 What I want you to do for me is, draw up such interrelation-
24 ships as exist between the various entities, the kind of thing
25 Mr. Lessy was talking about before.

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1 It is not a sophisticated analysis and it doesn't
2 require the receipt of it before reaching the conclusions.

3 MR. HJELMFELT: I would like to say, after
4 gaining some familiarity with the Farley case, myself, that
5 the City of Cleveland does not draw conclusions and inter-
6 pretations with respect to Dr. Wein's testimony either with
7 respect to the factual basis that Dr. Wein gathers and
8 prepares and relies upon and is prepared to discuss during
9 cross-examination, or to the idea that Dr. Wein makes an
10 a priori argument.

11 CHAIRMAN RIGLER: On behalf of the Board, all the
12 parties are referring to Farley, let me say that Farley is of
13 limited value as a precedent for anything this Board may do in
14 terms of timing, complexity. WE are not going to play the
15 evaluation game -- there were this many documents here, and
16 that many there.

17 If we take lessons from Farley that will help us to
18 compress the time for hearing, fine. But we are not going
19 to keep referring back to other cases in terms of how many
20 witnesses there were, how many depositions, because that just
21 doesn't help anyone.

22 MR. CHARNOFF: There is -- and I won't address the
23 Farley case because I am one of the few in this room not
24 intimately familiar with it -- there is an equity issue here
25 that it seems to me is overriding, related to the public

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1 interest argument I made earlier. That is that insofar as
2 at least the Davis-Besse Unit 1 is concerned, that was a unit
3 with respect to which the Department did not recommend a
4 hearing.

5 The City of Cleveland in 1971 petitioned for a
6 hearing. Answers were filed in a timely fashion by the
7 Applicants, and then the Atomic Energy Commission took two
8 years, a little bit more than two years, to rule on whether
9 the petition should be granted.

10 Now, had that case not been held up by the Staff,
11 or by the Atomic Energy Commission, and I don't know by whom,
12 in order to wait for Beaver Valley or Perry or any other
13 subsequent case, we wouldn't be here in this situation, at
14 least with respect to Davis-Besse Unit No. 1.

15 Here is an instance where these Applicants who have
16 a considerable investment and the public they serve have a
17 considerable investment in that plant, have been very seriously
18 injured and threatened to be more seriously injured by the
19 delays imposed first by the Regulatory Commission by holding
20 up any action at all on the petition to intervene for more than
21 two years without any reason to do so that we know of, and now
22 along comes another branch of the United States government to
23 say, sorry fellows, we want a hearing, but we need more time
24 to prepare our best case.

25 In those circumstances, in the absence of any waiver

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1 by the government and the City of Cleveland permitting that
2 plant to go on the line, we think you have no choice but to
3 compel the expeditious conduct of this particular hearing
4 on the schedule that you set.

5 MR. CHARNO: If I may reply to the last point:

6 I noticed when counsel made reference to Davis-
7 Besse I, he said it was now scheduled for the second
8 quarter. It has been scheduled and it has been slipped a
9 number of times.

10 There is a possibility it will be slipped again and
11 we will never be faced with this problem.

12 There is also the possibility the stipulation could
13 be reached to eliminate the problem, should anyone actually
14 be faced with it. I am not altogether sure that the date of
15 plant going on line isn't a bit premature at this point.

16 We are not asking for a period of time anything like
17 the amount of delay caused by the Applicants concerning
18 discovery, of four months. We are asking for 30 days. I
19 don't think it is unreasonable under the circumstances.

20 I do think it is very necessary.

21 CHAIRMAN BIGLER: We will take a little recess for
22 about five or ten minutes.

23 (Recess.)

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1 CHAIRMAN RIGLER: This is a very difficult matter
2 for the Board. We are of the opinion that the parties have
3 been proceeding diligently over the last 2 or 3 months, and
4 we appreciate the fact that the Department has worked hard
5 to meet and comply with the schedule and when they come to us
6 under those circumstances and tell us they need some relief,
7 we believe they are sincere.

8 At the same time, we are impressed with at least
9 some of the equities which Mr. Charnoff urged upon us. The
10 Board consistently has tried to get the hearing schedule
11 pared down to allow us to commence the actual hearings at
12 the earliest possible date.

13 As we balance the various considerations, we are
14 taking you at your word that all the parties want the hearings
15 to commence promptly and you will work with us to enable that
16 to happen.

17 Because of that, some of the dates I am going to
18 give you now include Saturday dates. I hope there will be no
19 objection to filing on Saturdays so the schedule will continue
20 to run straight through as if Saturday were an ordinary work-
21 ing day and that will be done with the consent of all the
22 parties.

23 We will continue with our rule of requiring hand-
24 delivered, delivery by messenger, so we don't lose 3 days
25 from mail service, all in order to conserve time.

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1 The amended schedule the Board would now propose
2 and will adopt is that parties other than Applicant's direct
3 written testimony of expert witnesses, on October 18th, which
4 is a Saturday.

5 That Applicants file their direct testimony by
6 October 25th, once again a Saturday. The pretrial briefs be
7 filed by November 10th, and that the hearing commences on
8 November the 20th.

9 In doing so, Mr. Charno, we have given you the
10 lion's share of what you have asked. I realize you made a
11 good faith effort to pare it down to the very minimum that
12 you thought you could expect.

13 I wish we could go along with you all the way.
14 Some of the equities cited by Mr. Charnoff, however, are com-
15 pelling to us and we are unable to give you the complete
16 relief you asked for.

17 I hope you will be able to work within this frame-
18 work.

19 MR. CHARNO: Thank you, Mr. Chairman. We will
20 certainly do our best to comply with it.

21 CHAIRMAN RIGLER: I take it there is no objection
22 from any party as to the Saturday deadlines we have imposed.

23 Let the record so reflect.

24 Okay. That brings us to the agenda items
25 Mr. Charnoff, with respect to designation of documents and

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1 listing of witnesses, et cetera.

2 MR. CHARNOFF: Certainly, the first thing we would
3 appreciate setting a schedule for is the designation by the
4 Department, NRC and MELP of the sequence of witnesses they
5 intend to produce in terms of the presentation of their
6 respective cases.

7 We would like to know whether or not the expert
8 witnesses are going first or last. We would like to know fact
9 witnesses in terms of their identification and whether they
10 are going to be addressing Company A and then Company B and
11 Company C and Company D and in what order.

12 That is the first question.

13 I think we need early identification of that so
14 we can concentrate our preparation of the case to match their
15 intended presentation.

16 CHAIRMAN RIGLER: Okay, Mr. Lessy, are your experts
17 going first or last?

18 MR. LESSY: I'm reluctant to put it firm on the
19 record, because of the fact that this involves a number of
20 people and scheduling and we had had a designation based on
21 previous dates. We are getting --

22 So what I would like to do is state now, subject
23 to modification, that our experts will be the last witnesses.
24 I don't want -- I want to keep a caveat there based on the
25 fact we were just given these dates and we are uncertain as

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1 to their availability at that time, but our plans now are to
2 go last.

3 What I don't want to do is because of the unavail-
4 ability of a given fact witness, we will have to juggle wit-
5 nesses and will get involved in a hassle at the hearing stage.
6 That is our intention.

7 MR. CHARNOFF: Given the fact I have raised this
8 just now and I recognize that it would be most orderly if,
9 say, a week from today we received in writing from each of the
10 3 parties the identification and sequence of witnesses they
11 intend to present. That would give Mr. Lessy time to accommo-
12 date the new schedule change in his planned presentation.

13 MR. LESSY: I would like to address that.

14 I think I had at the April prehearing conference --
15 we had not planned on disclosing the names of our expert wit-
16 nesses until the direct filing of testimony. I don't think
17 there is any need to give a name of the witness.

18 Indeed, one of the witnesses has a compelling
19 reason as to why his name should not be disclosed now. It
20 involves other matters.

21 As to the fact witnesses, we will be happy to give
22 an order of presentation, that is, if we go -- the first fact
23 witness deals with Duquesne Light. The second fact witness
24 deals with CEI, but I'm not willing at this time to disclose
25 their names for the reason that these fact witnesses are --

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1 some of the fact witnesses are employees of small municipal
2 systems, they are subject to certain pressures and they also
3 have requested that their names not be disclosed in advance
4 as Mr. Charnoff requested.

5 MR. CHARNOFF: Mr. Chairman, may I suggest that if
6 I understand Mr. Lessy correctly, that he doesn't even plan to
7 tell us the names of the fact witnesses until the morning
8 they appear on the stand; that I'm going to object very
9 strongly to that. That if Mr. Lessy thinks that he needs to
10 protect certain of these witnesses, we would be glad to take
11 that under some order of confidentiality wherein he discloses
12 those names just to the lawyers for the parties and we will be
13 obliged not to disclose that to our clients.

14 In certain specific cases that would be fine,
15 but on the other hand, in general, it seems to me that in
16 terms of orderly presentation and orderly preparation, there
17 is no reason why the identification of witnesses cannot be
18 normally made, and ought to be made as early as practicable.

19 MR. LESSY: If we say we have a witness that is
20 going to testify against the Duquesne Light Company, why do
21 you need his name?

22 MR. CHARNOFF: We don't know if you are going to
23 present one witness talking about Duquesne Light and the
24 Pitcarin and talking about other situations and so on. I
25 think in our orderly preparation of the case, we ought to

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1 know ahead of time so we can reasonably prepare ourselves for
2 cross-examination.

3 In this particular case, as I recall, it was your
4 suggestion that the fact witnesses present testimony not in
5 writing, but orally. We are prepared to proceed that way.
6 But in order to get a record that avoids surprises, which
7 do nothing for the benefit of the record, that you and each
8 of the parties, including myself, give an identification of
9 the witness and what he is going to talk about.

10 Simply it is going to be a witness that is going
11 to tell us some things about Duquesne Light Company doesn't
12 help me. Maybe it would another type lawyer, but not me.
13 If your agency is involved in having a record, full record
14 for deciding, then it seems to me you are obliged to tell us
15 as quickly as possible.

16 This is not a criminal case. Not a case where
17 anybody is coercing witnesses. If you have any evidence of
18 that, tell us about it.

19 MR. LESSY: Actually we do. It doesn't involve
20 an Applicant. It involves a potential witness for the Staff
21 and that fact being known to a utility other than Applicant.

22 And there is a problem there. There has been no
23 requirement by the Board for the disclosing of names in ad-
24 vance other than expert witnesses. We have gone on that
25 assumption. We have relied on it. And we have been fully

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1 ready to give our expert witnesses to you at the time of
2 filing the testimony.

3 I think that there is no need to know the name
4 of the witness if you know against whom he is going to
5 testify. As to the nature of his testimony, you already said
6 you are relying on and holding us to the statements in our
7 statement of the case filed with the Board on September 5th.

8 Now, what I see is a trend here of the government
9 giving us all of its case and all of its witnesses and you
10 do nothing. If you are going to require more and more of
11 us, we are joining Mr. Hjelmfelt in requiring that Appli-
12 cant --

13 MR. CHARNOFF: Whatever allegation of coercion
14 did not occur from the Applicant. We should not be preju-
15 diced by that.

16 Secondly, the Board has never determined whether
17 or not fact witnesses should or should not be identified.
18 If I need to make a motion, I will so make that motion right
19 now.

20 It seems to me obvious on its face that the better
21 procedure is to identify the witnesses and tell us the nature
22 of the subject matter that each of these witnesses are going
23 to be discussing, in some reasonable sequence.

24 There are an awful lot of allegations made
25 against each of the parties. It is unreasonable to compel

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1 the attorneys who have the defensive posture here to prepare
2 the entire case, because somebody is going to come in and
3 talk about Duquesne out of a whole series of perhaps 20
4 allegations.

5 It seems to me that this is not new to AEC prac-
6 tice. It's not new to most judicial practice. I think all
7 fairness compels the Board to direct the Staff to play this
8 game on as straight a basis as possible so that we are all
9 fully prepared, so that you have before you the best possible
10 record for you to make the kind of decision you want to make.

11 We are not going to be helped by the game of sur-
12 prise. If there is an isolated case involving potential
13 coercion, we are willing to take that with certain other
14 types of restrictions, but it seems to me we ought to
15 address that question now.

16 MR. BENBOW: Mr. Chairman, I find this a perfectly
17 extraordinary procedure which the Staff has suggested. It is
18 unprecedented in the other cases which have been tried before
19 the Nuclear Regulatory Commission.

20 There we not only had advance notice of who the
21 witnesses were going to be, in many cases, factual witnesses
22 as well as expert witnesses, we had their prepared testimony
23 in advance.

24 Obviously it is impossible with a case of this
25 magnitude to prepare appropriate cross-examination to seek

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1 prior inconsistent statements and other matters which would
2 bear importantly on the credibility, reliability of the wit-
3 nesses, if we are not to be notified as far in advance as
4 possible who the witnesses are going to be.

5 So I think there is no substance to the suggestion
6 by the Staff at all that we play some kind of mystery game
7 here. This is something that the Board needs to know and that
8 we need to know in terms of orderly proceeding here.

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1 CHAIRMAN RIGLER: You don't contend there is any
2 rule which would require them to give you the names in
3 advance, do you?

4 MR. BENBOW: I am not relying on any rule in that
5 regard. I am relying on the common sense and the past
6 practice of the Commission.

7 MR. CHARNOFF: In Appendix A, Part 2, which is
8 not addressed specifically to antitrust proceedings,
9 ordinarily direct testimony is introduced in writing ahead
10 of time.

11 That is not a mandatory rule in all cases. We
12 are willing to forego that here. But we do think we ought
13 to play this game as straight as we can so that you have a
14 complete and a good record, not a record that is compiled
15 by virtue of the game of surprise.

16 If the Staff has to rely upon surprise, then it
17 has a weak case, indeed.

18 MR. LESSY: I think these are unfair characteriza-
19 tions, sir.

20 We argued this at the prehearing ^{conference} ~~case~~ in April.
21 It is the exact same argument. The reason it was agreed to,
22 was to get away from the problems that exist in other pro-
23 ceedings and I don't want to go into it.

24 We want an expeditious hearing.

25 MR. CHARNOFF: That didn't happen in April.

1 Mr. Lessy said in April he didn't want to have
2 the extended time of situation.

3 MR. LESSY: Sir, you are interrupting.

4 MR. CHARNOFF: There was no discussion whatsoever
5 of identification.

6 MR. LESSY: I would like an opportunity to
7 continue.

8 At that time, at the April prehearing conference
9 that was held in the U.S. District Court the understanding
10 was, and the order of the Board was, in Prehearing Conference
11 Order No. 4, that the requirement was to file expert
12 testimony whether, as the Board will recall the discussion,
13 the experts be in-house or out-house.

14 We are going forward on that basis. We have ~~his~~ ^{dis-}
15 ~~close~~ ^{closed} the nature of our case. We don't want -- we have
16 told you there is substantial risk with unpaid witnesses,
17 employees of small systems coming forward. They are subject
18 to the exercise of market power that we are complaining
19 about. We are not accusing anybody of anything.

20 For those reasons we are willing to give 24 hours
21 notice of their names. We are willing to go to the Board
22 for an application for subpoena, but we feel our case will be
23 jeopardized if we have to disclose their names advance of
24 hearing.

25 In terms of preparation of their case, as I

1 understand, each Applicant company is preparing its own
2 defense. They are familiar with their facts in their service
3 area.

4 We have disclosed the nature of our allegations.
5 We think the procedure of due process requires no less.
6 Obviously, if we gave up all the names and the scope of
7 testimony, Applicants would have something to hold us to. If
8 something developed that we didn't disclose, we would be in
9 trouble.

10 If that man, all of a sudden, couldn't testify
11 because of personal or family reasons, when the hearing
12 starts around Thanksgiving or Christmastime, we would be in
13 trouble as to the nature of our case.

14 It was not mentioned in any of the scheduling and
15 we feel it untimely and unequitable for it to be done now.

16 CHAIRMAN RIGLER: You say each Applicant is pre-
17 paring its own defense?

18 MR. CHARNOFF: Mr. Lessy made that representation.

19 We are tentatively planning on the fact testimony
20 being given by each of the Applicants. We have made no
21 directions beyond that under our general coordination,
22 however.

23 I fail, I must say, to see how that is particularly
24 material to his argument that he nevertheless has to maintain
25 some private --

1 CHAIRMAN RIGLER: I wasn't suggesting it was.
2 I was just curious.

3 Mr. Charno, what are your plans with respect
4 to listing of witnesses and identification thereof?

5 MR. CHARNO: I think we have one situation where
6 we have had a witness request that he not be identified in
7 general to the personnel for the company prior to his
8 testimony.

9 Certainly, with exception to that, counsel's
10 suggestion is acceptable, and we have no other objection
11 to providing a list of witnesses and the order they are going
12 to appear in and which companies they are going to be
13 directing their testimony to.

14 I think I do have a substantial problem with
15 one week, that we would be expected in one week to come up
16 with that list of witnesses.

17 CHAIRMAN RIGLER: When would you propose to do it?

18 MR. CHARNO: At the latest possible date, sir.

19 CHAIRMAN RIGLER: While you are reflecting,
20 maybe I will hear from Mr. Hjelmfelt.

21 MR. HJELMFELT: The City has no problem with
22 revealing the names of its witnesses, or a tentative order.

23 But, by the time we get to us, which is way down
24 the line, several months from now, I certainly would want
25 some freedom to adjust my witness order.

1 MR. CHARNOFF: I think we recognize that.

2 MR. HJELMFELT: Just so it is understood.

3 I do think it would be helpful at some point for us
4 also to have the names of the Applicants' witnesses, perhaps
5 a week or so after we file our witnesses.

6 I also think that it might very well help us narrow
7 the scope of the evidence that we ultimately present if we
8 have a statement of the nature of the case that Applicants
9 are going to be putting in.

10 CHAIRMAN RIGLER: You didn't propose a time when you
11 might suggest making available your list.

12 MR. HJELMFELT: I would like two weeks, but that is
13 not a particular problem with me.

14 MR. LESSY: I would like to point out, sir; one,
15 there is no requirement in the Commission's rules that an
16 antitrust proceeding, how it is to be done. Antitrust is
17 different because you have complaints from different parties.

18 You don't have the environmentalists running in
19 about claims about detriment to the environment.

20 Secondly, Applicants have cited no real reason,
21 except it could help them. It is really an untimely request.
22 This should have properly come before the board in April when
23 the matter of the expert testimony came up. There was a de-
24 barkation then. It wasn't considered.

25 I claim surprise right now. I have told my

1 witnesses that we will keep confidentiality. I relied on it,
2 and so did they.

3 We will give an orderly presentation as to which
4 companies we will direct our factual case to. We have
5 already stated that our expert witnesses will come at the end.

6 But, I see no necessity to put names on that
7 order because they have the contentions in the statement and
8 nature of our case.

9 I think it would be very detrimental to our
10 potential case.

11 CHAIRMAN RIGLER: I just asked Mr. Benbow if he
12 could cite any rule which would require the parties to list
13 names and he confessed that he could not.

14 I will turn the question around now. You can't
15 tell me any rule that prevents us from doing so, can you?

16 MR. LESSY: Absolutely not.

17 CHAIRMAN RIGLER: How many witnesses do you have,
18 Mr. Lessy?

19 MR. LESSY: Right now, sir, we have six fact
20 witnesses and three experts.

21 CHAIRMAN RIGLER: Are all six fact witnesses, what
22 might be called sensitive in terms of their present employment,
23 or as to what the effect of the case might be?

24 MR. LESSY: They are all either public employees, or
25 retained by public employees, by public agencies. They are all

1 public employees of one form or another.

2 CHAIRMAN RICLER: Well, that maybe isn't completely
3 responsive to my question, which is: Are they all in sensitive
4 positions where revelation of the name would run the hazard
5 fo creating a problem for them?

6 MR. LESSY: Absolutely.

7 MR. BENBOW: It seems to me the fact that they
8 are public employees makes it even harder for me to understand
9 Mr. Lessy's request.

10 Although I didn't try to cite you a rule,
11 Mr. Chairman, I have been through court proceedings in anti-
12 trust, civil and criminal, Federal Trade Commission proceedings
13 relating to antitrust and before this Commission, and that
14 is over a 20-year period of time, and I have never heard of
15 a case where the names of the witnesses were not revealed
16 well before the case went to hearing.

17 MR. CHARNO: I was going to refer to Section 2.74,
18 which says the party shall direct testimony of witnesses in
19 written form unless otherwise ordered by the presiding officer
20 on the basis --

21 MR. LESSY: That is Prehearing Conference order
22 No. 4.

23 MR. CHARNO: That shows the disposition of the
24 Commission to get the information out in the open early. We
25 are not talking about the written testimony. We are only

1 talking here about making a sensible process that would
2 reflect the Commission's intention to have a complete record
3 before the Licensing Board.

4 CHAIRMAN RIGLER: I agree with you, Mr. Charnoff,
5 and I think surprise should not play a role in these
6 proceedings.

7 On the other hand, I am not convinced right now
8 how much surprise is involved in the procedure that Mr. Lessy
9 has proposed. But I certainly agree with you that you are
10 entitled to know the general order of presentation.

11 I think your questions so far about procedures,
12 have been helpful. I agree with you philosophically, it is
13 just a question of where we are going to draw that line.

14 Having said that, let me go back to Mr. Charno.

15 MR. CHARNO: I would at this point suggest October
16 18th, which was set for the filing of expert testimony. At
17 that point --

18 CHAIRMAN RIGLER: That would give them a little
19 over a month -- by them I mean the Applicants.

20 MR. CHARNO: Yes.

21 CHAIRMAN RIGLER: Okay.

22 Mr. Hjelmfelt had made a suggestion that the
23 Applicants furnish a statement of the nature of their case,
24 and you haven't responded to that yet, Mr. Charnoff.

25 MR. CHARNOFF: Obviously a good part of our case,

1 sir, is going to be in the form of rebuttal testimony.

2 Nevertheless, on the basis of the information that
3 we have been able to glean from the September 5 documents,
4 we are preparing fact testimony and we would propose to
5 provide a list, shortly after we receive the lists from the
6 other parties, of the names of witnesses we would intend to
7 call.

8 It may be we would never put those witnesses on,
9 if it turns out that the case of the Plaintiff in this
10 proceeding doesn't add up to anything. But in any event,
11 that would be our -- we would be glad to provide that.

12 I would hope it would not preclude the calling of
13 specific rebuttal witnesses when we get more information with
14 regard to the direct case.

15 We are, of course, going to provide the expert
16 testimony in accordance with the schedule that has been set.

17 I must say in terms of facts, that our witnesses
18 are going to appear well after the other parties' witnesses.
19 We are, by accommodating this schedule, giving each of the
20 other parties far more time with regard to our expert testi-
21 mony than we are getting with respect to any of theirs, and
22 we would be giving them far more time to prepare with regard
23 to any of our identified witnesses, than we would be getting.

24 As I reflect on it, I think it would be appropriate
25 that we should have more time to identify those witnesses and

1 put our expert testimony in.

2 I am prepared to show our intention with regard to
3 specific fact witnesses sometime after we receive theirs.
4 But I would think that the Board should take into account that
5 we are under the fence here and whatever we give them, will
6 be giving them far more time than we would be getting by any
7 schedules, if you put our time for doing any of these
8 things roughly in the same month as their obligation to
9 provide these things.

10 MR. LESSY: If someone comes forth and testifies
11 about dealing with Duquesne Light Company, an employee of a
12 small system, they will rebut with somebody from the Duquesne
13 Light Company. It is a much different kind of interest here.

14 We are talking about, if the Board will review,
15 will recall our pleadings, a situation where a municipal
16 electric system and other entities in the relevant markets,
17 have been dropping off like flies.

18 Talking about the exercise of market power;
19 talking about people who are willing to come up and talk
20 about it.

21 Now, I sense in talking with them, the Staff
22 witnesses, real jeopardy in terms of our ability to present
23 those witnesses if their names are going to be thrown out way
24 ahead of time.

25 MR. CHARNOFF: I responded by indicating we would

1 be glad to take it under the circumstances Mr. Charno
2 finds acceptable.

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1 CHAIRMAN RIGLER: How do you respond to
2 the suggestion that a protective order be entered?

3 MR. LESSY: What would be the nature of
4 it? Mr. Charnoff used general terms.

5 CHAIRMAN RIGLER: He would be estopped
6 to provide that name to any employe of any of the
7 Applicants.

8 MR. CHARNOFF: That would be too
9 restrictive.

10 CHAIRMAN RIGLER: I was going to ask about
11 Mr. Hauser.

12 MR. CHARNOFF: Yes. To prepare our case
13 we have to talk about the general circumstances. We
14 could take a protective order that would have
15 restriction as to produce publicity at the outside of the
16 Applicants or outside of a group within the Applicant.

17 MR. CHARNO: I find that different from what
18 was originally stated.

19 I have a problem about that.

20 MR. LESSY: Our case would be seriously
21 jeopardized if we disclosed names.

22 MR. BENBOW: It was a representation
23 Mr. Lessy made. The onus should be on him to show
24 a need to keep confidential, and if he thinks a
25 protective order would help him, it is up to him to

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1 propose it.

2 But normally we should have open access
3 to the names of these witnesses, so quite frankly we
4 can talk to our client about them and find out as
5 much as we can, as I am sure the Board wants, as to
6 their background and not be getting the testimony
7 in a vacuum.

8 MR. CHARNOFF: I must say I can't under-
9 stand the logic, because some of his witnesses are
10 employees of small entities and ours may be employed
11 by large entities, but one has greater job insecurity
12 than others.

13 I don't understand that at all.

14 MR. LESSY: I claim surprise. Mr. Benbow
15 has told us of his great experience in district courts
16 and other courts. I have been in those courts myself.

17 There has been a 24-hour rule applicable
18 there and in a lot of other places.

19 I am saying I feel a great need of protection
20 here for these witnesses.

21 CHAIRMAN RIGLER: All right. The Board
22 will be entering a preconference order that will solve
23 this issue.

24 How about admissibility, or rather a listing
25 of documents?

1 MR. CHARNOFF: That was the next item.

2 It seems to me we ought to receive from
3 the other parties an identification or designation
4 of the documents they propose to produce.

5 Following up your earlier suggestion
6 perhaps there could be some stipulations we may be
7 able to arrive at that, at my initiative or their
8 initiative, but certainly together.

9 That might help considerably.

10 In any event, if we are unable to reach
11 a stipulation with regard to some of those documents,
12 we should have advance notice of the documents they
13 intend to introduce and when they propose to do that
14 or with whose testimony they intend to do that, so
15 that would enable all of us to expedite the receipt
16 into evidence of the documents or the objections so we
17 would not waste time in the hearing.

18 I would suggest it would be timely with
19 the list of witnesses that we would hope to obtain,
20 pursuant to your forthcoming order, that at the same
21 time we get a list of intended documents.

22 CHAIRMAN RIGLER: Mr. Lessy?

23 MR. LESSY: The Staff does not intend to
24 disclose the names of any witnesses unless it was ordered
25 to. It would exercise its appellant rights with respect

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1 to that order and claim confidentiality with regard
2 to those documents.

3 As to a list of documents, perhaps that
4 could be given on November 10th, which would be ten
5 days before hearing.

6 Most of the documents were produced by
7 documents ~~the~~ ^{on} discovery and there shouldn't be too
8 much surprise if they are familiar with their positions.

9 MR. CHARNO: I think the Department would
10 go along with the November 10 date, for a similar
11 reason to that -- in fact, all of the documents that
12 the Department is in a position to use and produce to
13 the Applicants in the various discovery or they were
14 produced by the Applicants to the Department.

15 It is not a question of any surprise here
16 at all. It is a question of how long it is going to
17 take us to organize those materials.

18 I think probably we should be in a position
19 to attempt to reach a stipulation concerning those
20 documents before we have to identify the point in the
21 proceeding at which they are going to be produced.

22 Certainly a large number of documents may be
23 introduced pursuant to stipulation.

24 Then, again, if no stipulation is possible,
25 they may be produced, sponsored by different witnesses.

1 I think that a later date is considerably

2 better here and won't be prejudicial.

3 CHAIRMAN RIGLER: Mr. Hjeltnelt?

4 MR. HJELTNELT: I really have nothing to

5 add to what Mr. Charno said.

6 CHAIRMAN RIGLER: Mr. Firestone, I take it

7 you have had no comments throughout this discussion.

8 MR. FIRESTONE: No statement, Mr. Chair-

9 man indicated we would not be presenting any direct

10 witnesses ourselves, evidence or witnesses, witnesses or

11 documents.

12 MR. CHARNOFF: I heard mentioned by

13 Mr. Charno that there are 90,000 documents of interest

14 here. If we were to get a list like that on November 10,

15 that would be a little difficult for us, even if they are

16 our documents.

17 I think given the state of readiness of the

18 parties, at least the other two parties other than

19 Justice, that they are prepared to proceed on the earlier

20 schedule -- I would think as to those two parties there

21 is no reason why they should have to wait until November 10

22 to tell us which documents they intend to produce.

23 With respect to the Department of Justice, to

24 the extent that I read their motion for more time, it was

25 related solely to the proposed expert testimony of

1 Dr. Wein, and I take it they have other witnesses as
2 to those they are apparently prepared to proceed with
3 on the earlier schedule.

4 We should have the documents related to
5 that testimony and the documents they were going to
6 introduce without any witnesses.

7 It seems to me considerable time has gone
8 by and we really should have that much earlier than
9 November 10, if we are to know how we are supposed
10 to be rebutting each of those documents.

11 Or should we be looking at our documents
12 and guess which ones are coming up in?

13 MR. LESSY: With respect to documents lists,
14 the claim of confidentiality might also apply.

15 For example, if all of the documents --
16 let's say hypothetically the Duquesne situation -- are
17 back and forth between one person and the Light Company,
18 one person on the outside and the Light Company, it is
19 going to be clear who that is.

20 We wouldn't want to disclose the name of
21 that witness by disclosing the documents and would claim
22 confidentiality.

23 MR. CHARNOFF: I will include by ditto
24 marks what I said before, to that remark.

25 MR. CHARNO: You know what the documents are.

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1 We have marked them at your request, so
2 you will know what documents you have given us and,
3 further, you know which ones you got from us, I
4 presume.

5 It is going to take a while to determine
6 whether or not we can reach a stipulation.

7 I don't think this is unreasonable. I
8 don't see any precedent. And I don't think Applicants
9 have mentioned it.

10 MR. CHARNOFF: The particular reference
11 I had was to the 90,000 documents which we gave Justice
12 and other parties.

13 CHAIRMAN RIGLER: Justice copied 90,000
14 documents?

15 MR. CHARNOFF: That is what Mr. Charno said
16 he took and to the best of my knowledge the other parties
17 have also, and we are looking at a lot of potential
18 relevant documents that one or the other party wishes to
19 produce.

20 MR. CHARNO: We are really not in a position
21 to state it. We just got it last week.

22 MR. CHARNOFF: I am not trying to make it
23 difficult for anybody, but I am trying to set up a
24 procedure so all of us can proceed on some sort of timely
25 basis which provides the best record for you and allows

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1 us to move once we get to the hearing stage.

2 If we are not going to cooperate now,
3 we are going to have a particularly onerous time at
4 the hearing stage.

5 MR. BENBOW: I do claim we would be
6 prejudiced, Mr. Chairman, if we don't receive a
7 document list well in advance.

8 I and my firm have just been retained in
9 this matter. I haven't asked for an extension of time.
10 We can get prepared. But I can't possibly read 90,000
11 documents that the Department or anybody else may use,
12 and I certainly can't read a million documents or whatever
13 it is, and I think it is inappropriate for the parties
14 not to say what they are going to rely on.

15 They should make a good attempt to say what
16 is it in these documents they think means anything from
17 an antitrust point of view when we are this close to
18 the hearing stage.

19 CHAIRMAN RIGLER: I do appreciate the fact
20 of your coming in at this time and I do accept your
21 representation you are going to do all you can to
22 prepare immediately.

23 I do note for the record your clients have
24 had the very able representation of Messrs. Charnoff
25 and Reynolds, so they are not starting exactly from

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1 ground zero here.

2 I am sure their collective expertise would
3 be invaluable to you as you meet the schedules which
4 you have assured us you will do.

5 MR. BENBOW: We are going to need it,
6 Mr. Chairman, and we appreciate it.

7 Thank you.

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1 CHAIRMAN RIGLER: Any other items, Mr. Charnoff?

2 MR. CHARNOFF: No. I don't think so at the moment.
3 I think those are the important items that have to be
4 established at the outset.

5 CHAIRMAN RIGLER: Oh, there was one other question
6 I wanted to raise. If the Board were to require a listing of
7 documents by a particular date, and if during the course of
8 the hearing an attempt were made to introduce documents not
9 on that list, would there be any objection or claim that such
10 documents should be excluded because they have not been
11 previously listed?

12 MR. CHARNOFF: It seems to me, Mr. Chairman, the
13 correct approach with regard to that ought to be a standard
14 good cause ought to apply. We ought to be all free to
15 recognize circumstances may change either a new document or
16 one of the old documents to be certainly pertinent, but I
17 think in general, the listing should be a listing that is,
18 in effect, limited.

19 CHAIRMAN RIGLER: I agree with you. I did want
20 to raise that in advance, however, because in a few select
21 cases we will not sustain an objection based on the use of
22 a document which was not on that list.

23 If, for example, if it were a rebuttal document
24 which some previous event had required, suddenly this would
25 be introduced.

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1 MR. CHARNOFF: I think that is right.

2 MR. BENBOW: I think the key, Mr. Chairman, if
3 they know of documents now, they are not to independently
4 decide for themselves they just don't want to tell about
5 them. If they are planning to use them, absent direction
6 from this Board to the contrary, it seems to me they should
7 have an obligation to bring those forward.

8 If in the course of the proceeding, they discover
9 additional documents or whatever, I think that would consti-
10 tute good cause.

11 CHAIRMAN RIGLER: I think they have all proceeded
12 in good faith up to this point. There is no inference they
13 would do otherwise.

14 Anything else?

15 MR. LESSY: You mentioned place of hearings.

16 CHAIRMAN RIGLER: I want to go off the record on
17 that.

18 (Discussion off the record.)

19 CHAIRMAN RIGLER: Back on the record.

20 We just had a discussion off the record with
21 respect to site availability for a hearing room, and --
22 Mr. Lessy, did you have something to bring up?

23 MR. LESSY: One supplemental matter, sir, and I'm
24 sorry I didn't bring it up previously.

25 That is since we first learned today, or got the

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1 the indication today that indeed each Applicant will present
2 factual testimony, with respect to -- each Applicant will
3 present factual testimony and that at least the one Applicant
4 has retained its own antitrust counsel, in terms of preparing
5 our witnesses, special expert witnesses for cross-examination,
6 is it still anticipated that Mr. Charnoff and Mr. Reynolds
7 will conduct cross-examination of those witnesses?

8 CHAIRMAN RICLER: That is an interesting question,
9 and one which had occurred to me. As a matter of fact, the
10 second Applicant has its own counsel, Reed, Smith, Shaw &
11 McClay.

12 MR. CHARNOFF: That is not new. We have had
13 individual counsel here for the company attending most of
14 the hearings and formally or informally making an appearance
15 so the new appearance by the gentleman from Reed-Smith is
16 not a departure.

17 MR. LESSY: Mr. Benbow's an appearance.

18 MR. CHARNOFF: Yes. But we have had people
19 participating or appearing at these conferences all the way.

20 The specific answer to the question is we have not
21 yet faced up to that question.

22 MR. LESSY: Is it anticipated the Board will permit
23 one cross-examination of perhaps, for example, Staff's econo-
24 mists on behalf of Applicants, or will the Board subject the
25 witness to 4 or 5 different cross-examinations?

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1 That obviously would be a problem. If there is,
2 there would be a difference in preparing a witness. Each
3 attorney has a different orientation. I have read some of
4 Mr. Benbow's cross-examination and Mr. Charnoff's presenta-
5 tion is different.

6 CHAIRMAN RIGLER: That problem cuts both ways,
7 which also had occurred to me. As you are presenting inter-
8 venor witnesses, the question will arise as to how many of
9 the separate parties will participate in that either direct
10 or cross-examination.

11 MR. LESSY: Intervenor witnesses?

12 CHAIRMAN RIGLER: Yes, or Staff or Justice wit-
13 nesses.

14 MR. CHARNOFF: Similarly, when the Applicant wit-
15 nesses are on, there is a great deal of overlap between the
16 3 cases. I'm not quite clear whether there is room for the
17 consolidation or not, but there is the same fundamental
18 question we ought to approach.

19 CHAIRMAN RIGLER: Without making this a ruling of
20 the Board, but just to give you a preliminary indication, my
21 thought is whoever presents the witness probably will take
22 the major responsibility.

23 Any questions by associated parties will be
24 limited to areas not covered by the original interrogator and
25 when the opposition parties have their turn, I would expect

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1 them to agree on who will take the primary responsibility
2 for the cross-examination, and any additional cross-examina-
3 tion by an associated party would have to be very, very
4 limited.

5 We are not going to have a complete examination by
6 3 or 4 different parties and the complete cross-examination
7 by 3 or 4 different parties. I am simply not going to permit
8 that.

9 That doesn't specifically answer you question, but
10 I think you can see the direction we are heading.

11 MR. BENSON: Mr. Chairman, if I understand it, a
12 conspiracy is being suggested or alleged here; it seems to
13 me each of the parties, and I certainly feel on behalf of
14 Ohio Edison and Pennsylvania Power must, under those circum-
15 stances must retain the right to urge that we have such right
16 to cross-examination, and if that means full right to cross-
17 examination of particular witnesses, we want to certainly
18 preserve that right.

19 I think that is fundamental. I hope that that will
20 not mean that there will be any duplication, or that occasion
21 will arise, but if it should, it seems to me we ought to be
22 entitled under appropriate process to have full right of
23 cross-examination, if we feel it is in our client's interest
24 to do so.

25

1 CHAIRMAN RIGLER: Let's see what happens
2 then.

3 I certainly wouldn't want to cut off any
4 party. As a matter of fact, I would not cut off any
5 party from proper cross-examination.

6 But I don't intend to permit excessive
7 duplication, either.

8 So we will have to face that as the
9 situation arises.

10 MR. BENBOW: That is perfectly satisfactory
11 to us.

12 MR. HJELMFELT: I have a comment I would
13 like to make with respect to the date selected for
14 identifying of designated documents.

15 CHAIRMAN RIGLER: We haven't set that date
16 yet.

17 MR. HJELMFELT: I recognize that. That is
18 why I want to get my word in now.

19 There are some documents that I have not
20 yet degested and obviously with respect to those I am
21 not yet in a positon to designate, and I would therefore
22 ask for several weeks prior to having to designate
23 documents.

24 CHAIRMAN RIGLER: Are there any other items
25 on the agenda or not on the agenda that any party wishes

1 to raise?

2 MR. CHARNOFF: May we anticipate an order
3 on these matters within a few days, sir, so we know
4 what schedule we can anticipate in terms of the
5 receipt of the identification of witnesses and so
6 forth?

7 CHAIRMAN RIGLER: Yes. We will issue a
8 decision timely on it.

9 However, in view of the schedule extension
10 which we felt compelled to grant today, I don't see it
11 as a problem of such urgency that a day or two is going
12 to make any difference.

13 MR. CHARNOFF: I understand that.

14 Will your order address the so-called contrary
15 issues, might it identify the matters in the various
16 filings that came in on the 5th or --

17 CHAIRMAN RIGLER: No. We don't feel inclined
18 to do that.

19 The Board did in measuring the criteria
20 against the Wolf Creek proceedings. And while we might
21 agree with some of your assertions as to areas where they
22 could have been even more specific, or where they were
23 vague, nonetheless I feel you are well prepared to go
24 ahead with the preparation of your case.

25 I do not anticipate having anything in the

1 order relating to the September 5 nature of the case.

2 MR. CHARNOFF: Then the issues in controversy
3 were those set forth in Prehearing Conference Number 2?

4 CHAIRMAN RIGLER: We will consider as we
5 meet some of the arguments made today with respect to
6 Issue Number 10 -- that is not to say that there
7 necessarily will be any change.

8 We will review the transcript to see if
9 there are any changes or amendments that should be made.

10 However, I don't know how the other Board
11 members felt. I did not feel that substantial progress
12 had been made toward curtailment of many of the issues.

13 MR. CHARNOFF: We have the September 5 filing,
14 a motion to strike, or preclude the City of Cleveland,
15 for example, from putting in testimony with respect
16 to conduct of the other Applicants, other than CEI, with
17 respect to certain municipalities or coops in certain
18 territories.

19 That motion is still pending.

20 CHAIRMAN RIGLER: Yes.

21 Are there any other outstanding motions that
22 the Board may have overlooked temporarily?

23 We hadnot overlooked that one, Mr. Charnoff.

24 Let the record show that no one has remembered
25 any other outstanding motions.

1 Hearing no further business, we will
2 adjourn.

3 Wait. Let me ask one thing else.

4 Is there any need for another prehearing
5 conference a few days before we get together for the
6 actual hearing?

7 MR. CHARNOFF: There may be. I would
8 think we ought to try to remain flexible on that.

9 CHAIRMAN RIGLER: All right. The Board
10 will be alert to any request for a prehearing
11 conference by any of the parties if the need arises.

12 Thank you.

13 (Whereupon, at 1:40 p.m., hearing in the
14 above entitled matter was concluded.)

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